REPRINT

OF

OHIO CASES PUBLISHED

IN THE

WEEKLY LAW BULLETIN

VOLUMES I-IV.

REPRINTED FOR

THE OHIO DECISIONS SERIES

OF OHIO CASE LAW BOOKS.

This book should be cited as
7 OHIO DECISIONS, REPRINTS,
or, abbreviated, 7 DEC. R.

NORWALK, OHIO
THE LANING PRINTING COMPANY
1898.

TABLE OF CASES

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

	Orig. Vol.	Pg.	This Book.
A. & G. W. R. R. Co. v. Phillips	4,	95	591
Abbott v. Bosworth	2,	92	300
Adae & Co. v. Moses	2,	338	419
Afsprung v. Althoff	3,	890	550
Amazon Ins. Co. v. McIntyre	4,	21	577
American Ex. Co. v. Epply	1,	79	44
——— v. Tri. Ex. Co.	1,	85	51
Ammen v. Morris	2,	94	304
Anderson v. Pack	4,	596	643
Andes Ins. Co. v. Waters	1,	172	152
Andrews v. Cook	2,	65	283
Anonymous	1,	186	158
Arneel v. Knox	3,	787	531
Atkins v. Veach	1,	234	176
Aurora F. & M. Ins. Co. v. Bldg. Assn.	3,	429	469
Avery v. Royer	4,	441	633
B. & O. R. R. Co. v. Bellaire	4,	201	607
Badgely v. Badgely	2,	247	375
——— v. Chambers	1,	85	53
Bank v. Dondna	3,	789	532
——— v. Moore & Co.	4,	291	620
——— v. Robinson	3,	453	474
Banning v. Pendery	4,	912	677
——— v. Trustees of So. R. R.	3,	965	560
Bascom v. Shillito	2,	265	378
Bates v. Smith	3,	344	454
Bauer v. Avondale	4,	12	577
Becroft v. Dossman	2,	110	322
Beebe v. Thomas	2,	107	319
Benedict v. Cincinnati	2,	33	261
——— v. Deckand	1,	354	231
Benninger v. Fuchs	4,	270	613
Berne v. Britton	2,	239	373
Biedinger v. Goebel	2,	245	375
Bisack v. Pape	1,	126	115
Bishop v. Cin. Gazette Co.	4,	1082	711
Blackburn v. Gano	3,	939	557
Bloch v. Koch	1,	91	54
Board of Ed. v. Eversman	3,	1122	571
——— v. O'Hara	2,	96	312

	Orig. Vol.	Pg.	This Book.
Bohaslav v. Standard Oil Co.	4,	932	677
Bohm Bros. & Co. v. Cunningham	2,	274	382
Bonner v. Life Ins. Co.	1,	293	207
Borntraeger v. Borntraeger	3,	891	551
Brewer v. Maurer	4,	309	623
Brigel v. Starbuck	4,	83	587
Broadwell v. Cody	3,	855	539
Brock v. Becher	2,	299	405
——— v. ———	2,	261	377
Brown v. Hunkin	4,	678	650
Buck v. Huntley	1,	186	155
Buckheimer v. Ashcraft	2,	266	379
Buckwalter v. Klein	1,	100	73
Building Assn. v. Henderson	3,	386	461
——— v. Leyden	1,	126	115
Burge v. Miner	1,	186	156
Burkhardt v. Burkhardt	2,	22	258
Burner v. Burner	1,	164	140
Burns v. Luckett	3,	517	483
——— v. Seep	4,	1067	708
Buschhausen v. Schlick	2,	95	307
Bussing & Co. v. Scott	2,	18	252
——— v. Union Mut. Life Ins. Co.	3,	144	442
Butler v. Hughes	1,	104	90
C. & S. R. R. Co. v. Ward	1,	332	230
C., C., C. & I. Ry. v. Walrath	4,	11	577
Cady v. Barnesville	4,	101	596
Caldwell v. Devinney	4,	117	599
Callahan v. Rose	2,	281	384
Campbell v. Shotwell	3,	433	473
Cappellar, In re	2,	297	399
Carr v. Carr	1,	151	136
Carter, In re	2,	103	317
Case v. Kinney	1,	277	178
Casey v. Kimball	4,	78	584
Catholic Institute v. Gibbons	3,	581	516
Challen v. Clay	2,	22	259
Charter Oak Life Ins. Co. v. Smith	3,	607	521
Chase v. Chambers	2,	263	377
Chatfield & Woods v. Cincinnati	1,	125	111
Cilley v. ———	3,	761	527
Cilly v. Cincinnati	2,	135	344
Cincinnati v. Board of Ed.	2,	184	362
——— v. Busche	3,	556	500
——— v. Cameron	4,	75	584
——— v. Corry	2,	337	415
——— v. Crowley	4,	102	596
——— v. Diekmeyer	2,	253	376
——— v. Dodson	3,	560	504
——— v. ———	3,	541	494
——— v. Hopple	1,	104	91

	Orig. Vol.	Pg.	This Book.
Cincinnati v. Keating	3,	341	454
——— v. Kemper	2,	5	245
——— v. ———	2,	17	251
——— v. Mathers	4,	273	616
——— v. McDermott	2,	240	374
——— v. McErlane	3,	843	535
——— v. McNeeley	1,	302	216
——— v. Monforth	3,	451	474
——— v. Richards	2,	85	295
——— v. St. R. R. Co.	2,	17	249
——— v. Shaw	3,	556	500
——— v. Schoenberger	2,	128	342
——— v. Wright	1,	387	234
Cincinnati & Springfield R. R. Co. v. Ward	1,	332	230
Cincinnati So. Ry. v. O'Meara	2,	142	346
——— v. Banning	2,	287	396
Cin. Sav. Society v. Jones	4,	475	634
Cincinnati & Warsaw Turn. v. Cin.	2,	126	337
Cincinnati Ice Co. v. Higdon	2,	3	239
Cincinnati, C. S. R. R. Co. v. Cin.	1,	134	125
Clark v. Delorac	2,	113	325
Cleveland v. Beaumont	4,	345	627
Clifton v. Cincinnati	3,	272	448
Cochran v. Amazon Ins. Co.	2,	54	276
Coffin v. Marrata	2,	272	379
Collier v. Steamboat Assn.	1,	18	10
Collins v. Nugent	3,	519	485
Colwell v. Aitchison	1,	111	101
Commissioners v. Eckstein	4,	989	690
——— v. Wood	3,	841	533
Cook v. Floyd	1,	79	44
——— v. Gilpin	2,	82	291
——— v. Scheid	4,	1123	713
——— v. Spencer	1,	73	35
Conley v. Creighton	2,	4	241
——— v. ———	1,	364	233
Consolidated St. R. R. Co. v. Barlage	4,	910	675
Cooper v. West	3,	431	470
Coppen v. Greenless	3,	1123	571
Corbit v. Corbit	4,	1006	692
Cornell v. Durkee	4,	31	580
Cozad v. Shannon	3,	865	542
Cracraft v. Roach	2,	101	316
Crawford v. Hartzell	1,	94	63
——— v. R. R. Co.	1,	133	122
Crist v. Langhorst	1,	111	99
Critchell v. Cook	2,	97	314
Crofton v. Board of Ed.	1,	133	121
Crumb v. Treiber	4,	616	645
Cullen v. Bimm	2,	283	388
Cummings v. Fitch	1,	77	36
Cunningham v. Simpson	1,	173	154

	Orig. Vol.	Pg.	This Book.
Dater v. Simon	1,	301	215
Davis v. Cincinnati	1,	104	89
Davis, Gould & Co. v. Adae	4,	295	620
Deuble v. Kolbe	1,	234	177
Devereaux v. Thornton	4,	355	627
——— v. Buckley	3,	275	448
Devinney v. Smith	1,	43	31
Dewey v. Iron & Steel Works	2,	261	377
Dick v. R. R. Co.	1,	93	59
Diehl v. Diehl	3,	298	452
Domeier v. Wagner	4,	1036	701
Dougherty v. Cummings	1,	283	184
Dowell v. Guion	3,	737	525
Doyle v. Younglove	1,	134	124
Dreher v. Sick	4,	23	579
Dreyfuss v. Adae & Co.	4,	671	648
Droege v. Ipsharding	2,	277	384
Dudley Land Cases	4,	277	616
Dugan v. O'Neil	2,	75	288
Dulgar v. Hartmeyer	4,	540	642
Dunn & Co. v. Springmeier	2,	127	339
Dye v. Giou	3,	521	486
Earle v. Matheney	3,	385	461
Eilers v. National Life Ins. Co.	2,	333	407
Elder v. Taylor	2,	81	291
Ellis v. R. R. Co.	2,	249	375
Evans v. Cincinnati	3,	856	540
Ex parte Moore	2,	42	272
Fallis v. Keys	1,	11	8
Farmers Ins. Co. v. Frick	2,	16	247
Feldner v. Voight	1,	116	109
Fitzgerald v. L. S. & T. Ry. Co.	1,	226	173
——— v. Sweet	2,	94	305
Fitzgibbon v. Green	1,	110	99
First Nat'l Bank v. Moore & Co.	4,	291	620
Fisher v. McMahon	3,	52	435
——— v. ———	3,	51	435
Filberl v. Davis	4,	629	645
Finch v. Finch	4,	908	673
Foley v. Peters	2,	263	378
Foote v. Worthington	4,	645	646
Forbus v. Collier	2,	122	331
Foreman v. Compton	4,	489	634
Foster v. Fenton	2,	54	276
Fowler v. Zimmerman	3,	785	530
Freeman v. Muth	3,	914	555
Friend v. Brown	4,	851	668
Friend & Fox Paper Co. v. Public Works	1,	92	56
Fruett v. Gallup	3,	405	462
Fry v. Franklin Ins. Co.	3,	161	442

	Orig. Vol.	Pg.	This Book.
Furniture Co. v. Runk	3,	538	491
——— v. Rowland	3,	480	477
Gamble v. Wise	3,	430	469
Gates v. Life Ins. Co.	1,	78	40
Gaughan v. Squires	2,	76	289
——— v. Squares	1,	164	142
Gaylord v. Case	1,	382	233
Gazlay v. Humphreys	1,	114	102
Gessel v. Life Ins. Co.	1,	189	159
Ghiradelli v. Leverone	2,	240	373
Gibbons v. Catholic Institute	3,	887	548
Gilmour v. Pelton	2,	158	359
Glaser v. Hellsman	1,	140	134
Gockel v. Averment	3,	894	554
Goepper v. Heckle	2,	246	375
——— v. Herold	2,	246	375
Goodin v. McArthur	4,	215	611
Goslin v. Campbell	3,	369	456
Great West. Des. Co. v. Harmony Lodge	3,	345	455
Great West. Stock Co. v. Cin.	1,	84	47
Greenless v. Shinnick	2,	282	385
Grieve v. Freytag	2,	93	304
Guardian Mut. Life Ins. Co. v. Sandal	3,	559	503
Hageny v. Cohnen	1,	104	88
Hahner v. Kaufman	1,	364	233
Halliday v. Fire & Marine Ins. Co.	1,	286	193
Hamilton v. Leaman	4,	911	675
Handley v. Sandau	4,	323	626
Hannon v. Tallman	1,	79	45
Harker v. Smith	3,	54	435
Harmon v. Whittemore	1,	109	92
Harmonia Lodge v. Schaffer	1,	79	44
Harrison v. Craighead	4,	500	634
——— v. Pike's Heirs	4,	156	603
Hartman v. White	1,	79	45
Hartwell v. Bldg. Assn.	2,	287	397
Haskins v. Railroad Co.	4,	951	679
——— v. St. Ry.	4,	1126	713
Haswell v. Henley & Co.	3,	325	453
Heck v. Heck	3,	363	456
Heister v. Enterprise Ins. Co.	2,	304	405
Hellebusch v. Richter	2,	127	341
——— v. ———	2,	155	355
Henderson v. Hogan	1,	227	173
Hengehold & Co. v. Gardner	4,	1062	705
——— v. ———	4,	958	685
Hepworth v. Pendleton	4,	120	601
——— v. ———	1,	300	215
Herbst v. Mauss	4,	1038	701
Hicks v. M. E. Church	3,	57	435

	Orig. Vol.	Pg.	This Book.
Higgins v. Pelton	4,	751	661
Hildebrand v. Windisch	4,	289	620
Hine v. Morris	3,	515	482
Hinman v. Williams	4,	1079	709
Hogan v. Carbery	4,	113	599
Holmes v. Spinning	3,	297	451
Hood v. Nichols	1,	227	174
——— v. ———	1,	186	157
Hord & Co. v. W. U. Tel. Co.	3,	147	442
Horr v. Hawkhurst	1,	225	168
Hoyt v. Heister	2, B.	Supl. 5	420
Hubbard v. Riley	3,	434	473
——— v. Harris	4,	994	691
Hughes v. Ry. Co.	3,	558	502
Hulbert v. Cist	3,	868	545
——— v. Nolte	2,	294	398
Hulse v. Copeland	4,	241	611
Hummel v. Hummel	1,	153	138
Humphreys v. Safe Deposit Co.	2,	91	299
——— v. Little Sisters of the Poor	1,	286	194
Hunt v. Daggett	2,	22	260
Hunter v. Hunter	1,	101	79
Huntington v. Fire Ins. Co.	2,	223	372
Huston v. King	3,	1142	575
Indianapolis Rolling Mill Co. v. Addy & Co.	3,	293	448
——— v. Bldg. Assn.	3,	429	469
Insurance Co. v. Cheever	2,	19	254
——— v. Ehrman	2,	3	237
——— v. Flesher	3,	574	510
——— v. Frank	2,	93	302
——— v. Frick	2,	16	247
——— v. La Boiteaux	1,	278	182
——— v. Life Ins. Co.	2,	269	379
——— v. McIntyre	4,	21	577
——— v. Packet Co.	1,	379	233
——— v. Reif	1,	290	200
——— v. Sandal	3,	559	503
——— v. Smith	3,	607	521
——— v. Waters	1,	172	152
Ives v. Strickland	4,	852	668
Jacob v. First National Bank	3,	274	448
Jacoby v. State	3,	1145	575
Jaeger v. Herancourt	1,	10	1
Jenz v. Gugel	1,	103	85
Johnson v. Ammons	4,	189	606
——— v. Corrington	3,	1139	572
——— v. Railroad	3,	410	466
Joslyn v. Sedam	2,	147	350
Juegling v. Arbeiter Bund	4,	463	633

	Orig. Vol.	Pg.	This Book.
Kanawha Valley Bank v. Robinson	3,	453	474
Kaufman v. McNutt	1,	94	60
Keith v. Fairchild	1,	227	176
——— v. ———	1,	190	162
Kelley v. Cincinnati	1,	132	119
Kelly v. Ingersoll	3,	673	521
Kennedy v. Keating	3,	555	500
Kennett v. Rebholz & Carr	4,	959	685
Kepler v. Reeves	1,	58	34
Keys v. Cox & Follett	1,	92	57
Kienborth v. Bernard	2,	171	359
Kilbreath v. Fosdick	3,	523	486
——— v. Gaylord	3,	887	548
——— v. ———	3,	525	487
Kilbreth v. Bates	1,	84	50
——— v. Wright	1,	1	1
Kirkup v. Stickney	2,	264	378
Kirland v. Wolf	3,	114	436
Knapp v. Springmeier	3,	1122	570
Knauber v. Fritz	1,	362	232
——— v. Wunder	2,	261	377
Kriege v. Cincinnati	2,	333	405
Kruse v. Kruse	1, B. Suppl.	7	427
Kruze v. Hehemann	2,	93	303
Kurtz v. Murray	2,	122	330
Kusworm v. Hess	1,	315	224
L. E. A. & W. R. R. Co. v. A. & G. W. R. R. Co.	2,	187	364
Land & Bldg. Assn. v. Robb	1,	116	107
Langhorst v. Shuttledryer	2,	125	333
Latham v. Life Ins. Co.	1,	127	117
Laws v. Scales	1,	314	220
Lefkowitch v. Harper	2,	197	369
Levi v. Groves	3,	563	508
Levy v. B'Nai B'Rith	1,	369	232
Lewis v. Inc. Pl. Ry.	3,	1007	566
Lilliland, Ex parte	4,	733	659
Lipen v. Lipen	1,	164	141
Lippelman v. Boning	3,	296	450
Long v. Hoban	4,	986	688
Love v. Railroad Co.	4,	990	690
Lowry v. Cincinnati	1,	102	81
Ludlow v. O'Neil	1,	284	186
Lyons v. Fidelity Lodge	2,	97	313
M. & A. Packet Co. v. Ins. Co.	1,	42	30
Mack v. Schlotman	3,	737	525
——— v. Stephens	1,	104	92
——— v. Wright	1,	109	93
Mack & Verity v. Cincinnati	1,	84	49
MacNeale v. Fackler	3,	11	431
Mallannee v. Hills	2,	61	281

	Orig. Vol.	Pg.	This Book.
Malone v. Cincinnati	3,	578	513
Manck & Bauer v. Fratz	4,	1043	704
Manning & Longley v. Ludington	3,	589	519
Manyard v. Manyard	1,	164	141
Marks v. Goldmeyer	3,	328	454
Marthens v. Dudley	1,	302	215
Mason v. Stacey	3,	1100	567
Mathers v. Cincinnati	3,	551	496
——— v. ———	3,	709	521
Matoon v. Wentworth	4,	515	639
Matthews v. Briggs	1,	31	23
Maurr v. Parrish	1,	85	54
Mawicke v. Wolf	2,	86	299
Mawiecke v. ———	3,	458	476
Mayer v. Mayer	2,	47	276
Mazza v. Heister	1,	375	233
McCartin v. Sullivan	1,	303	218
McCown v. Weiskittle	4,	803	668
McCoy v. Hornbrook	1,	170	143
McFarlan v. Mills	4,	1064	706
McFarland v. Norton	3,	368	456
McKinzie v. Bailie	4,	209	607
McMillan v. Burkham	1,	111	100
McMurray v. Williams	2,	266	378
Meader Furni. Co. v. Rowland	3,	480	477
Meier v. Weber	3,	387	461
Memphis & Arkansas River Packet Co. v. Peabody Ins. Co.	1,	42	30
Metzger v. Wiechers	4,	549	642
Meyer v. Meyer	4,	368	627
——— v. ———	3,	985	561
Miller v. Bengart	1,	126	115
——— v. Cincinnati	2,	156	357
——— v. Creighton	4,	139	602
——— v. Directors	4,	690	650
——— v. Erdhouse	2,	84	294
——— v. Truman	2,	241	374
Miller Bros. v. Laws & Co.	4,	123	602
Mills v. Life Assn. of N. A.	4,	935	677
Millville Ins. Co. v. Flesher	3,	574	510
Mitchell v. Cincinnati	2,	96	310
——— v. Exrs.	4,	294	620
——— v. Railroad Co.	2,	240	373
——— v. Runk	3,	538	491
Montgomery v. Goepper	4,	67	581
Moore, Ex parte	2,	42	272
Moore v. Feldwisch	3,	427	467
——— v. Feldswich	3,	557	501
——— v. Moulton	2,	323	405
——— v. Rees	4,	475	633
Mortley v. Taylor	3,	788	531
Moses v. Life Ins. Co.	4,	214	609

	Orig. Vol.	Pg.	This Book.
Moulding v. Moulding	1,	153	139
Muller v. Fratz	4,	850	668
Murdock & Co. v. Tube Works	3,	409	465
Murray v. Murray	1,	299	215
Myers v. Smith	1,	83	46
N. Y. Life Ins. Co. v. La Boiteaux	1,	278	182
Nagle v. Brown	2,	98	316
Neff v. Turkle	3,	788	531
Nenbrand v. Myres	2,	97	315
Newhall, Gale & Co. v. Langdon & Son	3,	269	448
Newton v. Comrs.	1,	46	32
Nez Percis Mining Co. v. Winsor & Randall	1,	23	16
Nishiotz v. Ulmer	4,	393	630
Noble Co. Nat. Bank v. Dondna	3,	789	532
Nolte v. Hill	2,	86	297
Nolze v. Wilcox	3,	192	446
Nordeck v. Loeffler	2,	258	376
Norris v. Clark	3,	994	564
Northwestern Cen. Bldg. Assn. v. Henderson	3,	386	461
Nushuler, Ex parte	3,	739	527
O. & M. R. R. Co. v. Short	3,	1143	575
Oesterkamp v. Overbeck	1,	92	58
O'Ferrall v. Chase's Heirs	2,	4	242
Ohio Build. Assn. v. Leyden	1,	126	115
Old Dominion Ins. Co. v. Frank	2,	93	302
P., C. & St. L. Ry. Co. v. Wernsing	3,	592	520
Packet Co. v. Ins. Co.	1,	42	30
Paper Co. v. Public Works	1,	92	56
Parker v. Parker	3,	738	525
Patrick v. Littell	1,	310	219
Payne, In re	2,	76	288
Peabody Ins. Co. v. Packet Co.	1,	379	233
Penniston v. U. C. Life Ins. Co.	4,	935	678
Peoples Sav. & L. Assn. v. Stevens	3,	113	435
Peyton v. Mullins	4,	137	701
Phelps v. Cousins	1,	226	172
Piatt v. Sinton	2,	273	381
Pickering v. Chase	1,	186	156
Plant v. Murphy	2,	277	384
Poll v. Murr	3,	1141	574
Pomeroy v. Pearce	2,	264	378
Porter v. Laws	3,	384	461
Post & Co. v. Kinney	3,	118	439
Quinn v. Nolan	4,	81	585
Railroad Co. v. Banning	2,	287	396
——— v. Bellaire	4,	201	607
——— v. Cronin	1,	215	224

	Orig. Vol.	Pg.	This Book.
Railroad Co. v. O'Meara	2,	142	346
——— v. Phillips	4,	95	591
——— v. Railroad Co.	2,	187	364
——— v. Short	3,	1143	575
——— v. Walwrath	4,	11	577
——— v. Ward	1,	332	230
——— v. Wernsing	3,	592	520
Ratcliff v. Scott	4,	194	606
Ray v. Brown	3,	545	494
——— v. Quinn	1,	314	221
Reeder's Exrs. v. Stephenson's Exrs.	3,	1120	568
Rehak v. Wilcox	4,	79	585
Renner v. Bird	2,	76	290
Reynolds v. R. R. Co.	2,	83	293
Richardson v. Mining Co.	1,	140	133
Richter v. Schoenfeldt	1,	133	120
Riggs v. Hulbert	2,	95	306
Rothert v. Westmeier	3,	432	472
Rowland v. Griffiths	3,	590	519
Ruffner v. R. R. Co.	3,	267	448
Runyan v. Vandyke	3,	367	456
Rutherford & Co. v. R. R. Co.	3,	326	454
Ryan v. Cincinnati	2,	251	376
——— v. Kirkpatrick	1,	303	219
S. L. R. R. v. Barlage	4,	910	675
Sand v. Sirl	4,	834	668
Sargent v. Life Ins. Assn.	4,	659	646
Sax v. Laws	1,	78	41
Schleif v. Hart	1,	526	170
Schneider v. Buckley	4,	909	675
Scheurer v. Scheurer	3,	689	521
Schultz v. Home Life Ins. Co.	4,	848	668
Scioto Valley Ry. Co. v. Cronin	1,	315	224
Scott v. Perlee	4,	275	616
——— v. Reedy	1,	331	230
Scully v. Krucker	3,	547	495
Shattler v. Taft	4,	419	631
Shelton v. R. R. Co.	1,	590	161
——— v. ———	1,	227	175
Sherlock v. Globe Ins. Co.	1,	26	17
Shreve v. Hynod	1,	140	132
——— v. Parrot	4,	39	581
Sibley v. Elliott	4,	885	668
Sieving v. Seidelmeyer	4,	213	609
Simmons v. Sav. Soc.	2,	283	388
Sims, In re	4,	457	633
Sinton v. Bd. of Ed.	4,	192	690
——— v. Butler	3,	529	489
——— v. Ezekiel	4,	1060	705
Slocumb v. Seymour	3,	991	563
Smith v. Life Ins. Co.	1,	284	188

	Orig. Vol.	Pg.	This Book.
Smith v. Block	1,	298	212
Snyder v. Cincinnati	1,	79	44
Souther v. Stoeckle	3,	575	511
Sprague v. Linwood	1,	133	123
Springmeier v. Blackwell	3,	1160	577
Squair v. Shea	1,	99	71
Stapleton v. Reynolds	1,	115	107
Starbuck v. Brigel	3,	501	477
——— v. Hynod	1,	140	132
——— v. R. R. Co.	1,	110	97
State v. Adin	1,	38	25
——— v. Allgemeiner Deutcher Baecher Gewerre Verein	3,	295	449
State v. Bd. of Ed.	1,	139	129
——— v. ———	2,	114	326
——— v. Bd. of Police Comrs.	2,	114	326
——— v. Bd. of Public Works	4,	293	620
——— v. Block	3,	792	532
——— v. Bowsher	3,	187	442
——— v. Brown	4,	174	605
——— v. Burkhardt	3,	845	537
——— v. Cappeller	3,	1118	568
——— v. ———	3,	853	537
——— v. Comrs.	2,	155	356
——— v. ———	2,	156	357
——— v. Finney	1,	30	22
——— v. Fratz	4,	320	623
——— v. Goodale	4,	1065	707
——— v. Harmeyer	3,	570	509
——— v. Humphreys	1,	140	131
——— v. Linn	3,	428	468
——— v. McClymon	1,	116	109
——— v. Nuttles	4,	963	686
——— v. Public Works	3,	265	446
——— v. Relief Soc.	2,	125	334
——— v. Sutton	4,	614	644
——— v. Williamson	4,	279	618
Steifel v. Metz	2,	95	308
Stein v. Crosley	2,	254	376
——— v. ———	3,	563	506
Stephens v. Stock Yards	1,	84	50
Stephenson v. Reeder	2,	335	411
Stevenson v. Seymour	3,	325	453
Stewart v. Ins. Co.	1,	103	86
Stites v. Weidmer	1,	140	134
Stone v. Davenport	1,	322	229
——— v. ———	1,	102	83
Stoppel v. Woolner	4,	576	643
Straub v. Wilson	2,	158	358
Street R. R. Co. v. Cin.	1,	134	125
Striker v. Beattie	4,	956	683
Strobridge v. Winchell	4,	408	631

	Orig. Vol.	Pg.	This Book.
Strong v. Hope	4,	1034	700
Sturm v. Ritz	1,	150	135
Swan, Rose & Co. v. Railroad Co.	4,	898	669
Swing and Mellen v. Gatch	3,	571	509
Sykora v. Mut. Ins. Co.	2,	223	372
Taphorn v. Railroad Co.	4,	988	690
Tauszky v. Blatchford	1,	110	99
Taylor v. Wallace	2,	115	328
Telegraph Co. v. Railroad Co.	2,	152	355
——— v. Telegraph Co.	1,	201	163
——— v. ———	1,	309	219
——— v. ———	2,	74	284
Thacker v. Newell	3,	1159	576
Tressel v. Longworth	4,	961	685
Trustees of So. R. R. Co. v. Banning	2,	287	396
Turpin v. McGill	4,	294	620
Undercliff Land & Bldg. Assn. v. Robb	1,	115	107
Union Cent. Life Ins. Co. v. Cheever	2,	19	254
——— v. Ehrman	2,	3	237
——— v. Life Ins. Co.	2,	269	379
Union Mut. Life Ins. Co. v. Reif	1,	290	200
Utter v. Hudnell	3,	543	494
Van Tine v. Short	4,	1149	720
Van Vleck, Ex parte	3,	763	529
Veldman v. Lindeman	4,	911	676
Vilas Natl. Bank v. Chambers	1,	85	53
Vine v. Munson	2,	293	398
Wagenfuhr v. Wagenfuhr	1,	164	142
Wahle v. Cin. Gazette Co.	4,	61	581
Wall v. Amazon Ins. Co.	2,	333	408
——— v. Ins. Co.	2,	113	323
Waring & Co. v. Railroad Co.	3,	893	553
Wayne v. Minor	3,	365	456
Weber v. Bishop	4,	775	661
Weilman v. Wright	1,	127	118
Welte v. Faller	3,	347	456
Werk & Co. v. Armburst	3,	866	544
West v. Allison	2, B. Suppl.	8	428
Western Union Tel. Co. v. A. & P. Tel. Co.	1,	309	219
——— v. ———	1,	201	163
——— v. B. & O. R. R. Co.	2,	152	355
——— v. Tel. Co.	2,	74	284
Wheat & Sons v. Cooper, Stevens & Co.	3,	383	460
White v. Natl. Bank	4,	791	666
Whitney v. Denton	3,	870	547
Whitney v. Ott	1,	353	231
Wiesenberger, In re	3,	766	529
Wiggins, Ex parte	4,	1066	708

	Orig. Vol.	Pg.	This Book.
Williams v. Holcomb	4,	1147	719
——— v. Macready	2,	272	381
——— v. Pultze	2,	253	376
Wilson v. Lead & Spar Co.	1,	314	223
Wise v. Kromberg	3,	863	541
Wolfert v. Wolfert	1,	153	138
Ziegler v. Ziegler	1,	163	139

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

OHIO COURTS OF RECORD

PUBLISHED IN

THE WEEKLY LAW BULLETIN

[Superior Court of Cincinnati, General Term, January, 1876.]

JAS. P. KILBRETH, TRUSTEE, v. JOHN W. WRIGHT.

For opinion in this case, see 5 Dec., R. 321; s. c., 4 Am. Law. Rec. 449.

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*PARTNERSHIP. 10

[Superior Court of Cincinnati, General Term, January, 1876.]

FREDERICK AND LOUISE P. JAEGER v. GEORGE M. HERANCOURT.

Yaple, O'Connor and Tilden, JJ.

H. in the year 1836, became the owner of the one undivided fourth interest in a brewery property and business, which was always managed and operated by his co-partner, he being engaged in other business. In 1840 he married the sister of his co-partner's wife, with whom he obtained, in money, from $1,000.00 to $1,500.00, which became his in right of marriage. In 1842, H. and wife had born to them a daughter, L. P. H., and the mother died. In 1843, H., being unmarried, and having no other child than L. P., became embarrassed in business, and, in consideration of the money he received from his said wife, conveyed his interest in the brewery property and business, valued at $1,650.00, to his co-partner in trust for his said daughter, such conveyance being intended to prevent his creditors from reaching such property, and no creditor ever attempted to reach it. The daughter lived with the trustee about four years, until her father remarried, which he did, and removed to another city, where he has ever since continued to reside, raising a family of seven children; the daughter continued to live with her father as a member of his family until her marriage in 1869, or until she was twenty-seven years old. From time to time, between May, 1847, and September 10th, 1860, the trustee paid to the father and the father received for the daughter, as dividends upon the brewery investments, monies amounting to $15,514.87, on which last day, she being then of full age, she executed to her trustee a release from liability on account of such payments.

In 1861, she deeded her interest in the brewery property and business to her father, he giving her therefor his note for $1,650.00, and she at the same time releasing him, by an instrument under seal, from all liability to account for any part of such sum of $15,514.87. The nature of this transaction and the contents of all the papers were fairly explained to her by her father's attorney, in the father's absence, before consummating the same.

Afterwards thinking the property would thereby sell for more to the former trustee and co-partner, the father gave up this deed to his daughter, and she gave him up his note, and in 1864, she, her father being present and assenting thereto, sold and conveyed the property to the original trustee for $9,000.00; $2,000.00 cash, and the residue upon seven equal payments of $1,000.00 each, for which the purchaser gave her his notes. The father got from her, at that time, the $2,000.00 cash, which he promised, in writing, to pay her on demand, with interest. He, also, on October 5, 1853, received from such trustee $400.00, for dividend, from October 1, 1862, to October 1, 1863, which he receipted for as having received in his own right.

In January, 1869, after the father learned that the daughter was engaged to be married, he got her to release him from liability for the $2,000.00 and to give him the last three $1,000.00 notes.

The daughter was married in March, 1869, and in April, 1869, suit was brought by her and her husband against the father, to recover the said sum of $5,000.00 with interest from the time the father received the same, for the $400.00, dividend and interest, and for an account of the $15,514.87. *Held:*

1. That the right to an account for the $15,514.87 was barred by lapse of time, eight years after the daughter came of age, and the statute of limitation prescribed by the Code: Secs. 14, 15, 19.

2. That while the grantee of property fraudulently conveyed to hinder and delay creditors, is, as between the parties, under a moral but not a legal obligation to recovery to the grantor, yet in this case, the grantor might make a settlement upon his wife's heir, in consideration of what he received from the wife, creditors not objecting, and the transactions between the father and daughter, after she came of age, make a gift of the same from him to her independently of the original transaction.

The daughter is, therefore, entitled to recover the $5,000.00 and the $400.00, as prayed for, and relief is denied her as to all the residue of her claims.

3. The plaintiff is entitled to recover the costs of the action.

YAPLE, J.

This cause was reserved in Special Term upon the evidence, and in that manner is now presented to us for decision upon the law and the testimony. The action was brought on the 13th day of April, 1869. The main facts, not disputed or fairly established by the evidence, are that, in the year 1836, the defendant, George M. Herancourt, took a fourth interest in a certain brewery property and business in the city of Columbus, Ohio, with one Silvernagle, who owned a fourth, and Lewis Hoster, who owned the half thereof. The sum put in by Herancourt was $1,650. He took no part in carrying on the business, that being conducted by his co-partners, he being engaged in the business of a jeweler. In the year 1840 Herancourt married the mother of the plaintiff, Louisa, she being the sister of the wife of the partner, Lewis Hoster. The wife had a small personal estate amounting to between $1,000 and $1,500, in money, which Herancourt received and employed as his own in the jewelry business, apparently with the consent of his wife. This, by the law of Ohio at that time and until the year 1861, made such money the husband's, at least to the extent of his creditors' rights against him, and to the extent that he might see fit to claim it in right of his marriage. The plaintiff, Louisa, was the only child of the marriage, she having been born in the year 1842, her mother having died in a few hours thereafter. The defendant subsequently married again, his second wife and several children of the second marriage being still alive.

In 1843, Herancourt, being then unmarried, and his only child the plaintiff, Louisa, became embarrassed in business, to prevent his property from being reached and sacrificed by his creditors, on February 7, 1843, entered a deed of trust to Hoster, reciting that he had intermarried with Louisa Ambos, by whom he received the sum of $1,650; that she had

deceased, leaving one daughter, Louisa Philippine Herancourt, her only child and heir at law, and that he was desirous of appropriating the said sum of $1,650, so by him received, to the use of the said Louisa, where upon it was witnessed that he had given, granted, bargained and sold, etc., to Lewis Hoster, the distillery property, describing it, it being the one undivided fourth thereof, and also the undivided fourth part of the stock on hand, tools, materials, and other fixtures connected with the said brewery business, etc., supposed to be equal in value, at the time, to the sum of $1,650. The conveyance was expressed to be in trust: "That the said Lewis Hoster shall carry on, or cause to be carried on, the business of brewing in said establishment as heretofore, and that he apply the profits arising from the interest heretofore conveyed, from time to time, to the nurture, education, maintenance and support of the said Louisa Philipine Herancourt, as the same may become necessary, * * until the said Louisa Philipine shall attain to the age of eighteen years, then the said Lewis Hoster is to convey to her, her heirs and assigns, the above-mentioned property, * * * with any unexpended profits that may remain in his hands unappropriated as aforesaid. And should the said Louisa Philipine depart this life before she attains the age of eighteen years, without leaving heirs of her body, then the above-mentioned property, with the unexpended proceeds, * * * if any, is to revert to and to be reconveyed to the said George M. Herancourt and his heirs in fee simple," etc.

Louisa remained for some years in the family of Hoster, in Columbus, but her father, the defendant, having married again and removed to Cincinnati, where he has ever since resided, and engaged in business, came to live with him, and did reside with him as a member of his family until her marriage with Frederick Jaeger, on the 4th day of March, 1869, when she was about twenty-seven years old. Until she became of age her health was not robust, and she received only an ordinary education, and such care and attention as were suitable to one in her rank and condition in life.

From May 13, 1847, to September 10, 1860, Hoster, out of the profits of the business, paid to the defendant, for her, nineteen (19) several sums of money, amounting, in all, to $15,514.87.

On September 13, 1860, Louisa—being at Hoster's, in Columbus, and to whom his acts as such trustee were fully explained by him to her, she being then of full age—gave him a receipt, specifying every and all such several sums of money, and releasing him therefrom. This paper, signed by her, specified, after referring to the deed of trust of February, 1843, that Hoster "has paid over for my use and benefit, according to the tenor of said instrument of writing to my said father, G. M. Herancourt, at divers times, the following sums of money, being the dividends and profits which have arisen from the brewing business carried on by said Lewis Hoster, in which said business my said father had invested the sum of sixteen hundred and fifty dollars, according to said instrument of writing, for my use and benefit and until my maturity, viz." (specifying the several sums, etc., the last being by note, dated September 10, 1860, for $858.25). "Now, be it known to all it may concern that I, Louisa Philipine Herancourt have this day had and received, at divers times as aforesaid, from my said trustee, Lewis Hoster, through my father, G. M. Herancourt, the said sum of fifteen thousand five hundred and fourteen

dollars and eighty-seven cents, being the amount owing, payable and belonging to me up to the 10th day of September, 1860, from the trusteeship as aforesaid; and while having arrived at maturity, do, by these presents, release, acquit, and forever discharge the said Lewis Hoster as such trustee, his heirs, executors, and administrators, of and from the said share, interest, or dividends of said trusteeship as aforesaid, and from all actions." All these receipts were given by Herancourt to Hoster, and, up to that of February 14, 1859, were expressed to be for the nurture, education and support of Louisa, afterwards, "for Louisa Herancourt," except the receipt for the note of $858.25, dated September 10, 1860, and a receipt for $54.12 of that date, which were worded as the first receipts above mentioned. The $858.25 note was endorsed by Louisa to her father, to whom it was paid.

Between September 10, 1860, and August 18, 1864, when the Herancourt interest in the brewery was conveyed to Hoster, the latter paid to Louisa and her father together the further sum of $927.19. There is a receipt of Herancourt's to Hoster, dated October 5, 1863, for $400, for dividends of the brewery business from October 1, 1862, to October 1, 1863, which purports to be paid to him absolutely, no trust being mentioned. Subsequently on January 11, 1861, the defendant and his daughter, the plaintiff, went to the office of Judge Stallo, a lawyer of high character and ability in his profession, and there had him prepare a deed from the daughter to her father for her said interest in the brewery property, etc., which she duly executed, acknowledged, and delivered, the consideration expressed being $1,650; and the father executed to her a promissory note for $1,650 for such interest. This recognized and admitted the fact that such interest belonged to her, and not to him. At the same time and bearing the same date, Louisa executed and delivered to her father's release, which stated, among other things, that, "from said sixth day of February, 1843, and up to the present time, principally during the minority of said Louisa Philipine Herancourt, said George M. Herancourt has received the rents, proceeds, avails, and dividends of said property in Columbus, and, whereas, during said period said George M. Herancourt has provided, out of the funds so received by him as aforesaid, for the maintenance and education of the said Louisa Philipine Herancourt; and has otherwise paid out and expended money for her and on her behalf. Now, therefore, this is to witness that a full settlement of all the accounts and claims referring to and growing out of the premises has this day been had by and between the said George M. Herancourt and the undersigned, Louisa Philipine Herancourt, and the said Louisa Philipine Herancourt has received full satisfaction of all her claims and demands on account of any money or other property hitherto received for her and on her account by said George M. Herancourt; and that she hereby releases and discharges him from all claim or liability by reason thereof."

Signed and sealed and witnessed by J. B. Stallo.

There is no doubt but that Judge Stallo, before she executed any of the papers or took the note, in the absence of her father, fully explained to her their contents and legal effect, and that she informed him that she understood the same, that she and her father had talked the same over, agreed, and that she consented to the transaction. From this on we feel satisfied, and find that she understood that her father claimed to keep

and hold, in his own right, all the dividends and profits he had received from Hoster on account of her interest in the brewery property and business, which he had not actually expended for her. We are also satisfied that the arrangement was made at the instance of the father, that he selected the counsel, who drew the papers and advised her of her rights and of what was being done, and that he fixed and settled the terms of the arrangement, to which she assented, while residing with him in his family as his child.

Subsequently Hoster purchased the undivided fourth interest of Silvernagle in the brewery property and business for the sum of $9,000, and had offered or partly agreed to take this interest at $8,000, when, with the view of getting $9,000, as much as had been paid for Silvernagle's interest, believing that Hoster could be induced to pay his own niece as much as a stranger, Silvernagle, Herancourt, after consulting with his wife, who approved of it, induced his daughter to give him up his note to her for $1,650, and he gave up to her the deed from her to him for which the note had been executed, they supposing that that would reconvey the property to her. A negotiation was then made with Hoster for the sale of the property, which resulted in his purchasing it from her for $9,000, of which he paid $2,000 in cash, and gave his seven notes, of $1,000 each, to her for the residue, he being in ignorance of the conveyance of January 11, 1861, and supposing the legal title to be in her, she executed a deed to Hoster. This was on August 18, 1864. The defendant was present, and the $2,000 cash was paid to him, he giving his daughter an accountable receipt therefor, specifying that he had received that sum of her and promising to repay it to her upon the first demand, with interest. This paper is also dated August 18, 1864. The matter then remained without anything further being done until the latter part of the year 1868, and the early part of the year 1869, the daughter still, and until her marriage on March 4, 1869, residing with her father as a member of his family.

On October 24, 1868, the daughter and her own husband, Frederick Jaeger, became engaged to be married of which her father became advised on the 8th or 12th of December following. Shortly after this he advised her that he was old, that he desired to take a trip to Louisville, Ky., and wished to make a will, but that he could not do so without hers and his business growing out of the brewery matter was settled up. He proposed that she should have four of the Hoster notes, and the $2,000 he had collected, and the other three notes. She hesitated, claiming that she was then engaged to be married, and that her intended husband ought to know about it; but she finally signed the following:

"This is to certify that the five thousand dollars and interest which my father, G. M. Herancourt, has for me received, and paid by L. Hoster, of Columbus, O., for the one-fourth interest of the brewery sold to him for nine thousand dollars; the last four notes, of one thousand dollars each, he has returned to me for collection, and for the above-named five thousand dollars and interest, I hereby release him for the same and give him a receipt in full up to this date.

$4,000. Cincinnati, Jan. 18, 1869.

Signed, etc.

{ 2 ct. Rev. stamp. }
{ cancelled. }

The daughter collected and has held the $4,000 due on the four $1,000 notes. The father has collected and holds the $5,000—$2,000 cash, and the amount of the first three of the seven $1,000 notes.

He advised his daughter, after she came of age, of the reason for making the trust deed to Hoster, in 1843, that it was to keep the property from his creditors, so that he might be able to pay his debts and still keep on in business.

As to the plaintiff's right to compel the defendant to account for the $15,514.87, received by him at divers times, between May, 1847, and September 10, 1860, we hold that the same must be denied by reason of lapse of time, the statute of limitations, for we are satisfied that the daughter, after arriving at full age and at least as early as January 11, 1861, knew all the facts, which, in law entitled her to such account, and that her father then and afterwards claimed to hold what was in his hands in his own right. Concede that he was her agent or trustee in the receipt of the money, yet the statute begins to run in favor of a trustee from the time he claims the trust fund or property in his own right—adversely—and his beneficiary is advised of such claim (2 Perry on Trusts, sec. 864). Concede that the release, at that time executed by the daughter to the father, was, in law, fraudulent, yet, as she knew she gave it and the facts out of which it grew, the statute of limitations, prescribed by the Code, required her to bring suit to set aside within four years thereafter.

Code, section 15: "Within *four* years: * * An action for *relief* on the ground of fraud. The cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." This provision of our statute of limitations, we have held in Combs v. Watson, 2 Supreme Court Report, p. 525, is in effect the same as the following provisions of the New York Code: "Within *six* years an action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the Court of Chancery; the cause of action in such cases not be deemed to have accrued until the discovery by the aggrieved party *of the facts constituting* the fraud." The consideration of law, which determines such a release to be fraudulent, to-wit: That the party executing it was not emancipated from parental control, and that such control, and not the free will of the party, is to be deemed the cause of such execution, can not stop the running of the statute.

Code, section 19: "If a person entitled to bring any action mentioned in this chapter, except for a penalty or forfeiture, be, at the time the cause of action accrued, within the age of twenty-one years, a married woman, insane or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter, after *such* disability shall be removed."

Being under parental influence by intendment of law will not prevent the running of the statute. Knowing that her father claimed the right to retain as his own all such dividends as were unexpended from January 11, 1861, until this suit was brought, April 23, 1869, a period of more than eight years, we feel justified in holding that the plaintiff is barred of her remedy as to this part of her case. Accounts, in such cases, after so great a lapse of time, are liable to operate hardly upon those obliged to render them. The sums of money received and times of such receipt are easily ascertained, and all not shown to have been expended according to the terms and requirements of the trust, must be accounted for

with interest from the time of receipt. Yet, in this case, who can tell how much this daughter's condition may, by her father's use and employment of such monies, have been bettered—how much better she was clothed and housed and fed, how much less labor she was thereby required to perform, how much better her health was guarded, and her standing and associations in society advanced? All these considerations are important, but seldom, if ever, figure in a master's account taken in cases of this kind, we, therefore, after so long a lapse of time, leave this branch of the case as the parties themselves fixed it.

In relation to the arrangement of January, 1869, it is claimed by the defendant that the original deed of trust was made to hinder and delay his creditors, the property being his; that there is a duty, as between grantor and grantee, to reconvey property so conveyed, and if done, courts will sustain it on the ground that it was but a performance of such duty. This principle we do not question; and it seems to apply to the claim for the $15,514.87; but, while by the law in force in 1843, this interest was the husband's, so far as his and his creditors' legal rights were concerned, he could, and perhaps ought, their rights being out of the way, have made a settlement upon his wife for the amount of money he received by her, creditors never did question the transaction. Then, in 1861, when the daughter released him, under seal, from all liability for the dividend monies, he had theretofore received, an amount greater than is usually realized by men from investments of like sums to which they add neither labor nor attention, and enough to beggar most men, who, like him, had the care and expenses of a large family, he expressly acknowledging the estate to be hers, by agreeing to pay her for it what it cost—$1,650; and when it was sold by her to Hoster, he being present and assenting to the sale, he again admitted the property to be hers, by promising to pay her on demand, with interest, the $2,000 cash payment, which he received from her upon its payment by Hoster; and all the notes he allowed her to take payable to herself. This, surely, made a gift by him to her, if the property was not previously hers in equity.

The gift, then, by her to him, and her release in 1869, were surely obtained without any consideration. By them he obtained $5,000, and interest for nothing. We think that this last transaction was fraudulent by intendment of law, upon well settled principles of equity. See Hoghton v. Hoghton, 15 Beav., 278; Long v. Mulford, 17 O. S., 485; Badger v. Badger, 2 Wal. 87. The presumption is that it was executed before emancipation from parental influence, which presumption the evidence does not rebut.

The arrangement of 1869, must, therefore, be set aside, and the plaintiff, Louisa, be held entitled to recover the $2,000 and the proceeds of the three $1,000 notes, received by the defendant, with interest from the respective times of receiving each sum. The $400 paid by Hoster to the defendant on October 5, 1863, apparently upon his claim of right, the plaintiff, Louisa, is also entitled to recover with interest. It was money had and received by him for her use, and it was received within six years before suit was brought.

Judgment accordingly.

Rothe & Glidden and Mathews, Ramsey & Mathews, for plaintiffs.

Stallo & Kittredge, for defendant.

11 *HUSBAND AND WIFE.

[Superior Court of Cincinnati, General Term, January, 1876.]

†D. J. FALLIS v. JULIA B. KEYS.

A married woman, having no separate estate, can not, by contract, charge separate estate thereafter to be acquired.

O'CONNOR, J.

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

It appears by the petition at special term, that Sylvester Ruffner conveyed to Samuel B. Keys, husband of Julia B. Keys, a piece of real estate, situated in Cincinnati, and received from Samuel B. Keys certain promissory notes amounting to $15,836 secured by mortgage on the property for the balance of the purchase money. That afterward, on the 4th day of November, 1859, Samuel B. Keys and Julia, his wife, conveyed this property to D. J. Fallis, the plaintiff in error, who was also plaintiff below, who paid to Samuel B. Keys the full consideration therefor, $18,000, and received from Samuel B. Keys, and Julia, his wife, an obligation signed by said Keys, and Julia, his wife, wherein they bound themselves to pay the said promissory notes given by Samuel B. Keys to Sylvester Ruffner, as the same became due, and thus discharge the mortgage of Keys to Ruffner. The last of said notes became due in 1866, and their amount was all paid by Samuel B. Keys, except the sum of about $4,500, which in 1874, D. J. Fallis was obliged to pay to discharge the mortgage.

The petition does not allege that at the time Julia B. Keys signed and delivered this obligation or contract in 1859, that she was possessed of any separate estate or of any estate whatever, but it does allege that in 1868 and in 1874, Julia Keys became seized of a certain described real estate by inheritance, and avers that by the making of said written agreement in 1859, she promised to charge her said estate acquired in 1868 and 1874, with the amount that Fallis might be compelled to pay on said notes. And the petition prays that the amount that may be found due to Fallis, may be charged upon the separate estate of said Julia B. Keys, as her husband has no property subject to execution.

To this petition a demurrer was filed by Mrs. Keys, which demurrer was overruled.

Therefore, an answer was filed for Mrs. Keys, setting up substantially the allegations of the petition, and denying what the petition did not charge, that she was possessed of any estate, separate or personal, at the time of signing the contract and denying that she intended thereby to charge her separate estate, and averring that she had no interest in the property conveyed to Fallis, and joined in the deed solely for the purpose of relinquishing her expectancy of dower. She further answers that her husband, Samuel B. Keys, up to the year 1873, was wholly solvent and fully able to pay said notes had they been presented, and that she had no reason to believe that said notes had not been paid at maturity.

To this answer the plaintiff filed a demurrer which was overruled, and the plaintiff, not desiring to amend his petition or to reply, judgment was entered for the defendant.

It is now claimed that the court below erred in overruling the demurrer to the answer, and in rendering judgment for the defendant.

The demurrer to the answer reaches back to the petition, and makes it necessary to ascertain whether the petition sets out a cause of action. And the sole question raised by the petition or the answer is, whether a married woman having no separate estate, can, by any agreement she may enter into, charge separate estate which she may thereafter acquire.

The estate now possessed by Mrs. Keys came to her by inheritance in 1868 and 1874, part of it nine years after she had signed the contract with her husband, and part of it fifteen years thereafter. Had she possessed this real estate in 1859, at the time she signed the contract, it could not have been charged for any breach of the contract, because it would have been her general property or estate, subject to the marital rights of her husband, and not her separate estate.

But it is claimed by the counsel for the plaintiff in error, that by virtue of the act of 1861 (Ohio Laws, Vol. 58, p. 54), "Concerning the rights and liabilities of mar-

†This decision was affirmed by the supreme court. See opinion, 35 O. S., 265.

ried women," as amended in 1866 (Ohio Laws, Vol. 63, p. 47), both acts being passed before the real estate in question became vested in Julia Keys, the said real estate is in contemplation of law and equity and by force of the statutes separate estate, and may now be charged in equity for the liability incurred by the contract of 1859. Admitting that the estate is now separate estate, the question still remains whether a married woman having no separate estate, can by any promise or agreement so to do charge separate estate thereafter to be acquired. We think it is manifest that she can not.

Equity as well as the common law regards a married woman as incapable of entering into a contract that will bind her estate. But equity to the extent of her separate estate, regards a married woman as a *femme sole,* with power to charge such estate where she expresses an intention to do so, or where such intention can be clearly implied. But she can not be regarded as a *femme sole* in the absence of a separate estate. In other words, a separate estate is necessary to her equitable existence or recognition. There being no separate estate, there can be no *femme sole* to make a promise to charge a separate estate thereafter to be acquired. So that the case made in the petition is that of a married woman promising to charge her separate estate when, if ever, she becomes an equitable *femme sole.* The promise is that of a married woman, and not of a *femme sole* as known in equity, and therefore can not be enforced.

This conclusion is sustained by the cases of Logan v. Thrift and Wife, 20 Ohio St., 62; Clark v. Clark, 20 Ohio St., 128; and Phillips v. Graves, 20 Ohio St., 371; and Vaughn v. Vanderstegen, 2 Drewry, 165.

The counsel for the plaintiff in error cited the case of Maxon v. Scott, 55 N. Y., 247, which holds that "the charge of a debt contracted by a married woman upon her separate estate, is not a specific lien, but is enforceable against all such property as she may have at the time satisfaction is demanded," and it is argued that as satisfaction in this case was not demanded until 1874, after Julia Keys acquired her estate, that it is liable to be charged, under the above decision to the payment of her contract. But it appears from the case cited that at the time the debt was contracted the married woman had separate estate and expressly agreed to charge the same, and that the separate estate involved in the suit was the proceeds of the separate estate she possessed at the time she made the contract. In equity, therefore, she was a *femme sole.*

We have stated that a demurrer was filed to the petition in this case and that the same was overruled. This was an inadvertence as it should have been sustained. No exception was taken, however, but an answer was filed, to which there was also a demurrer. This demurrer was properly overruled and judgment entered for the defendant, which judgment is affirmed.

Judgment affirmed.

Dodds & Wilson, for plaintiff in error.

King, Thompson & Longworth, contra.

18 *BENEVOLENT INSURANCE.

[Superior Court of Cincinnati, General Term, January, 1876.]

DANIEL COLLIER ET AL. V. STEAMBOAT CAPTAINS' ASSN.

Yaple, O'Connor, and Tilden, JJ.

The Steamboat Captain's Benevolent Association of Cincinnati, was incorporated for the purpose of raising and maintaining a fund, from initiation fees, dues, etc., to support its members in sickness, pay the funeral expenses of themselves and wives, and a sum of fifteen dollars ($15) per month to the widow of every member in good standing at the time of his death, during her widowhood and good deportment, in the judgment of the board of directors. By its certificate of incorporation the Association could be dissolved at any time by a vote of a certain number of its members greater than a majority, when its affairs should be wound up and its funds distributed by commissioners appointed at the time of such dissolution.

The corporation was duly dissolved, having a fund of about $8,000, and such commissioners were appointed. Before and at the time of the dissolution there were several widows of deceased members entitled to such payments of $15 per month each, which sums were paid up to the time of dissolution, *Held:*

1. On petition of members to ascertain the value of the widows' annuities and to distribute, that the age of every such widow should be ascertained at the date of the dissolution, and the probable duration of her life, and the present value, at the date of such dissolution, of such annuity ascertained by the annuity tables, and the amount paid to her, the possibility of her marrying again, or not properly conducting herself, not to be taken into consideration.
2. When, in such case, such commissioners bring suit against such widows and the dissolved corporation, stating the facts, and that all such widows are so entitled, and praying the direction of the court in the premises, but do not make the individual stockholders parties, so that a final distribution can be made; and the court decrees that such commissioners shall invest the fund and pay to certain of the widows named as defendants their $15 per month, and makes no mention of the other widows, whose rights are mentioned and admitted in the petition; and when all the members are afterward brought into court, and all the widows then insist upon their rights in the fund, and it appears that one of the widows, who was paid according to the decree of the court during her widowhood, re-married, and is again a widow, her second husband having died; also, that members in good standing at the time of the dissolution have since died, leaving widows; and also that the commissioners have continued to pay, as ordered, such sum of $15 per month to every widow, not again marrying, in pursuance of such decree of the court.
3. That the basis of the parties' rights and of distribution is the same as first above stated; but that if any such widow has been paid, under such former decree, more than the present value of her annuity, ascertainable as above stated, she shall receive no more of the fund, nor be compelled to repay any part of the excess received by her; that every such widow at the time of the dissolution, who has been paid nothing since, shall receive the present value of her annuity, reckoned at the time of the dissolution, unless the amount in hand, after paying the costs of the suit, etc., shall not be sufficient to pay every such widow, in which event, such widows shall abate from their annuities their respective proportions of such deficiency. If the fund for distribution be more than sufficient to pay all the annuities, the remainder shall be divided equally among the members in good standing at the time of the dissolution, or the personal representatives of such as may be dead, *Held:*
4. That widows of members who have become such since the dissolution, are not entitled as such to participate in the funds, but their rights must be worked out through the estates of their deceased husbands.
5. That the rights of the widow who re-married ceased upon such marriage, and did not re-invest in her on the death of her second husband, she being his widow, and not the widow of the first husband, who was such member of the Association.

Matthews, Ramsey and Matthews, for Plaintiff.

J. H. Clemmer for Mrs. Phillips, widow.

Hoadly, Johnson and Colston, for Mrs. Herron, widow.

Thos. J. Henderson, for Mrs. Reily, widow.

Jordan, Jordan and Williams, for Mrs. Mann, widow.

Matthews, Ramsey and Matthews, and Hoadly, Jordan and Colston, for other widows, who became such after dissolution of the corporation.

Donham and Foraker, for stockholders, and for Mrs. Ketchum, now Mrs. Clark.

YAPLE, J.

This case comes here upon motion to distribute to the parties entitled thereto funds in the hands of the plaintiffs, as commissioners of the Steamboat Captains' Benevolent Association, appointed by it at its dissolution as a corporation, which motion was reserved in special for decision in general term.

On April 1, 1865, the plaintiffs, as such commissioners, filed their petition in this court against the said corporation and Ellen V. Reily, Kesia Ketchum, E. A. Herron, Adeline E. Mann, and Almira Phillips, alleging, among other things, that there was a large fund in their hands for distribution, the manner of doing which was not prescribed by the certificate of incorporation, or the rules and by-laws of the same, and praying the direction of the court in the premises.

The association was incorporated, according to the provisions of the laws of the state, in 1860, for the purpose of creating a fund, in the several ways specified in the certificate of incorporation, for the benefit of the members, collectively and individually, and of the widows of such of them as should die in good standing as members. In relation to such widows, it was provided: "The widow of any member in good standing at the time of his death shall be entitled to the sum of fifteen (15) dollars per month during widowhood, provided her deportment is such as to warrant the board of directors in allowing the same."

The association was duly dissolved on the 13th day of April, 1864, having then on hand a fund of about $8,000, and the plaintiffs were, at the time of such dissolution, duly appointed commissioners to settle the affairs of the association as provided for in the certificate of incorporation.

Before and at the time of the dissolution, Mrs. Phillips, Mrs. Herron, Mrs. Mann, Mrs. Ketchum, and Mrs. Reily were widows of deceased members in good standing and entitled to the sum of fifteen dollars per month for their support. Since and after the first decree rendered herein in general term, Mrs. Ketchum married again to a Mr. Clark, and her second husband has since died, and she is now again a widow. Also since the dissolution, some of the members in good standing at the time of such dissolution have died, leaving widows, who, had the corporation continued in existence, would have been entitled to their respective fifteen dollars per month.

The petition averred, "That several members in good standing up to the time of their decease, have died leaving widows, who are the defendants above named (except said association)," *i. e.*, Mrs. Phillips, Mrs. Herron, Mrs. Ketchum, Mrs. Mann and Mrs. Reily, and then prays "the direction of the court as to the disposition of said fund, *and especially as to the rights of the widows aforesaid,*" etc.

Neither Mrs. Ketchum, nor Mrs. Mann appears, though both were served with a summons, to have asserted any claims or rights in the premises, but to have remained passive, while Mrs. Phillips, Mrs. Herron, and Mrs. Reily did appear and assert their claims and rights.

On January 29, 1866, the court entered a decree in the premises, which determined, that, only widows of members in good standing at their deaths and who died prior to the dissolution of the corporation, were entitled to share in the fund.

The court also found, especially, that "the defendants, Almira Phillips, Ellen V. Reily and E. A. Herron are widows of persons who died prior to the dissolution, and who, at the dates of their respective deaths, were members of the association in good standing;" but is entirely silent as to Mrs. Ketchum and Mrs. Mann. It was then found, that "the *said* widows of deceased members have not been paid anything as an allowance from the association, or its commissioners, since the 14th day of April, A. D., 1864, but were regularly paid their monthly installments to that date." Also: That "the amounts due to *the* widows, if entitled to a continuance of their allowance, notwithstanding the dissolution of the association, would be the sum of three hundred and fifteen dollars ($315), each, up to the 14th day of January, A. D. 1865."

The court then further held as conclusions of law, "that *the* widows of members of the association, in good standing at the time of their decease, provided that such decease took place before the dissolution of the association, are entitled to have the allowance provided for * * * regularly paid to them *during their widowhood and good behavior;* and that, after the payment of *these* allowances, all the members of the association, in good standing at the date of its dissolution, are entitled to an equal share of the funds remaining for distribution without reference to the source from which the funds were derived."

The court then ordered the said commissioners—the plaintiffs—to pay to Mrs. Phillips, Mrs. Reily and Mrs. Herron, each, the sum so found due to her; "and that they then securely invest the funds in their hands as trustees, and, from time to time, pay *to the widows aforesaid* the allowance aforesaid during their widowhood and good behavior, and that when *the said* widows are no longer entitled to such allowances, the plaintiffs shall divide the funds remaining in hand equally among the members of the association in good standing at the date of its dissolution."

Subsequently, Mrs. Ætna Barker, a widow of a member in good standing at the time of the dissolution, and who died after such dissolution, filed her petition in the cause against the said trustees and commissioners, and the other widows praying to be allowed the said sum of $15 per month from the decease of her husband; and the trustees or commissioners having failed to pay to Mrs. Phillips and Mrs. Herron their allowance of $15 per month, from July 14, 1872, on account of the claim made by Mrs. Barker and other widows in the same class, they moved the court for an order to compel such payment to them. Thereupon, James S. Fisher, and several of the members in good standing at the time of such dissolution, filed an answer and cross-petition seeking to have the rights of all parties determined *in presenti,* the fund distributed accordingly, and the trust finally closed up and ended, in which effort the commissioners or trustees joined. The case was reserved to general term, where it was determined that Ætna Barker and all others who

have become widows since the dissolution of the association are not entitled to participate as widows in the fund, but that their rights therein depended upon the rights their husbands may have had therein at the date of such dissolution, and which would come to them as parts of the distributive shares of their estates.

The commissioners were then ordered to pay Mrs. Phillips and Mrs. Herron, each, $15 per month from July 14, 1872, and it was held that the fund could not then be distributed to the respective parties entitled to it, and the trust wound up and finally ended and concluded, owing to a want of parties. The cause was remanded to special term to have such parties made. All were brought into court; and Mrs. Mann asked to be allowed and paid her $15 per month from the dissolution of the corporation; and thereupon the entire cause was again reserved for decision here, and is now to be finally determined. All the members claim that the widows at the time of the dissolution are only entitled to the annuity value of their respective monthly allowances, to be estimated as of the date of such dissolution.

If the case, when in general term in 1866, had been as it is now presented, with all parties interested properly before the court, and the object of the suit had been as now, to distribute the entire fund to the respective parties entitled thereto, as prayed for by the members; and to finally close up the business and put an end to the trust, we think the true method to pursue would have been:

1. To ascertain who were widows of members in good standing at their deaths, when the corporation was dissolved on April 13, 1864, and who then remained the widows of such deceased members and of good deportment.

2. The age of every such widow.

3. The values on April 13, 1864, of the annuities of fifteen dollars, each, per month of every such widow, recorded by the annuity tables, according to the probable duration of their life.

4. If the fund was sufficient or more than sufficient to pay the costs, first to be deducted, and the aggregate amount of all such valued annuities, than her valued annuity should have been paid to every such widow; if not sufficient to pay such estimated values of such annuities, after paying the costs of the action, each had her suitable portion of the deficiency.

5. If more than sufficient for the above payments, the residue should have been divided equally among all who were members of the association in good standing at the time of its dissolution, or, to their personal representatives if dead.

As this corporation had the right to dissolve and go into liquidation, there is no power in a court of chancery thereafter to administer its funds in perpetuity as if it had not dissolved; for, the continued collection of dues and funds would be necessary to carry out the purposes of the original organization, and to give all its members and their widows the benefits contemplated in and by its formation. And there is clearly no power to compel the payment of such dues, for that would be to enforce its perpetuity. Then, how, in view of the payments to certain widows in pursuance of decrees of this court, shall distribution now be made, and the affairs of the corporation finally settled up and its business ended?

When such decrees were made, the trustees and commissioners so far represented the corporation and all its members, and the individual widows were parties to the action with full right to object to anything and everything that was done. They did not do so, nor did the trustees, while they excepted to the first decree, take any steps to obtain its reversal. None, therefore, can complain now of any violation of their rights caused by previous partial distributions of the fund under such decrees. But, subject to such previous distributions, all have their original interests in and rights to the fund now in the hands of the commissioners. The widows, who were such before and at the time of the dissolution, and who have never married since, will be entitled to have their annuities reckoned according to the probable length of the duration of their lives, without considering the possibility of their marrying again. No chance of want of good conduct by any of the widows is to be considered. The judges of that were the board of directors of the corporation. It is doubtful whether their judgment and discretion upon such matter passed to and vested in the commissioners; but the law presumes they will all continue to deport themselves properly.

The widow, Mrs. Ketchum, now Clark, who received her fifteen dollars per month up to her marriage, will be entitled to that and to no more. She is now the widow of her second husband, not of Mr. Ketchum, a member of the corporation at the time of his death. Such sum can be ascertained and subtracted from the fund as though it had no connection with it.

Then, the age of every widow, other than Mrs. Ketchum, of every deceased member in good standing at his death, who was such widow prior to and at the time of such dissolution should be ascertained as of the date of such dissolution, April 13, 1864, and the present value of an annuity at fifteen dollars per month ascertained, recorded during the probable continuance of the life of every such widow from that time. If the payments already made, under the decrees of this court, to any such widow, be equal to or greater than such present value of her annuity, she shall not be entitled to any further portion of the fund in hand for distribution but shall be barred and excluded therefrom; but, if such payments amount to less than such present value of such annuity, she shall be entitled to as much money and to no more out of the fund in the hands of the trustees for distribution as will make up the full amount of such present value of such annuity.

If the payments so made shall, in any case, be greater in amount than such annuity, no part of the same shall be refunded to the commissioners, nor shall such commissioners or any of them be liable to account to anybody for the same, or for any part thereof.

Every such widow, who has never, since the dissolution, received any payments of monthly allowances from the said commissioners, shall be entitled to receive out of such fund such present value of her annuity, provided there be of the fund for distribution sufficient to pay all such annuities, and if not, then, such widows shall each receive her proper proportion thereof, to be ascertained by taking the amount of her ascertained annuity, the fund for distribution, and the aggregate amount of all such annuities.

If the fund be more than sufficient to so satisfy all the claims of all such widows, the same shall be equally divided among all the members of said corporation in good standing at the date of such dissolution.

All the costs incurred and taxed or to be taxed in this action, including the attorney and counsel fees paid and incurred by such commissioners or trustees in this action and in administering their trust, and a reasonable compensation to each of them, if they charge anything therefor, are first to be deducted from the fund, which is to be distributed according to the foregoing principles and upon the above mentioned basis.

We regard the former decrees of the court in this cause, which has all the time been pending here, as simply providing for the payment of some of the widows, who asked it, *in advance of the final distribution of the fund,* doubtless taking it for granted, on the representation of counsel, that the fund was more than ample to satisfy the claims of all the widows, which claims would be greater than such payments. No attempt was made to take away from any widow her rights in the fund, which the petition expressly admitted, such widows simply not asking part payments in advance of final distribution. If it shall turn out that there is not enough of the fund remaining for distribution to pay all the widows, and some have been overpaid, the effect of such decrees and payments simply, is to stop such unpaid widows and all other parties, equally, from objecting to such over payments. The rights of none in the fund still for distribution are thereby affected.

Counsel can prepare a decree in accordance with the foregoing holdings.

NOTES. Since announcing the foregoing opinion, it has been ascertained that the fund is more than sufficient to pay all the annuities of all the widows; and that the commissioners, by investing it, have caused the fund to accumulate. Therefore, an account should be taken of the *net* amount of such accumulations and every widow, including Mrs. Mann, should be allowed and paid the portion of such *net* accumulations as the amount of her annuity so invested produced. Thus, if an annuity invested even *one-fifth* of the fund and the fund had earned $500 *net,* the share of such annunitant's accumulation would be $100. This *net* accumulation will make a per cent., greater or less per annum, for the whole time on the aggregate investment; and in the case of widows, who have been paid $15 per month, let their annuities be calculated at such average *net* per cent. for the *whole* time, and charge each payment to them, with such *net* per cent. added thereto from the dates of payment. It may fairly be presumed that, if invested by the commissioners as the balance of the fund was, such sums would have accumulated at the same *net* rate; and the *wholly* annunity being allowed interest at that rate for the whole time, payments should be charged with it from the dates of payment.

Take average amount invested and average time producing the *net* gain to get the share of gain of each annuity.

23

USURY.

[Cuyahoga Common Pleas Court, February Term, 1876.]

NEZ PERCIS MINING CO. v. WINSOR & RANDALL, ET AL.

A rate of interest stipulated in a promissory note, made at a place where such rate is legal, will not be held usurious in Ohio, though larger than legal rate in Ohio, and note made payable in Ohio

CADWELL, J.

The cause of action in this case is a promissory note which reads as follows:

BINGHAM, UTAH, December 26, 1874.

$4,000. For value received, we promise to pay E. Holden, or his order, four thousand dollars sixty days from date, with interest, at the rate of two per cent. per month, at the Second National Bank, Cleveland, Ohio.

(Signed) WINSOR & RANDALL,
HINMAN & WINSOR.

There are no credits on the note, which was, at some time afterward, assigned to the plaintiff, in this case, by endorsing it as follows:

"For a valuable consideration, I hereby assign and sell to the Nez Percis Silver Mining Company, the within note without recourse to me."

L. E. HOLDEN.

The petition further alleges that the said note was executed and delivered to the said L. E. Holden, in the territory of Utah, and that two per cent. per month is a legal rate of interest in said territory.

The plaintiff claims to be entitled to $4,000 and interest thereon, at the rate of two per cent. per month, from December 26, 1874, and asks judgment accordingly.

The answer admits the execution and delivery of the note to L. E. Holden, in the territory of Utah, and admits the assignment of the note to the plaintiff in this case, but it denies that the plaintiff is entitled to interest on the sum of $4,000 at the rate of two per cent. per month, from the date of said note. The defendants say that the note is made payable at the Second National Bank of Cleveland, Ohio, which bank is without the limits of the territory of Utah, and is in the state of Ohio. Defendants admit that the rate of interest at two per cent. per month was legal in the territory of Utah at the time of the execution of the said note, but that the same, by its terms, was to be performed, satisfied and discharged within the state of Ohio, and that the plaintiff is only entitled to recover on said note, interest at the legal rate in Ohio, to-wit: six per cent. per annum and no more.

Plaintiff demurs to this answer, on the ground that it does not contain facts sufficient to constitute a defense, counter claim or set off.

Judge Caldwell sustained the demurrer, holding that the *lex loci contractus* determines the legal right of the parties, and it being admitted that the rate of interest of two per cent. per month was legal at the place where the note was executed and delivered, the plaintiff was entitled to recover interest at that rate at the place where the note is made payable, though that rate of interest is higher than allowed by the laws of Ohio.

The decision of the court rested on the following authorities: 2 Parsons on contracts, 582 and 588; 2 Kent, 12 Ed., p. 460, 421, and note *a*; 6 Paige, p. 627; 20 Martin, La., Depan v. Humphreis; 38 Barbour, 352.

Critchfield & McFarland for plaintiff.

E. Sowers for defendant.

FIRE INSURANCE—EVIDENCE. 26

[Superior Court of Cincinnati, Special Term, 1876.]

*THOMAS SHERLOCK, ET AL., v. GLOBE INSURANCE CO.

1. The testimony of an insane witness on a former trial cannot be proved by reading a bill of exceptions, prepared by the attorneys, purporting to contain all the evidence.
2. A witness can read his notes of the former testimony of an insane witness, if from such notes he can swear to the substance of all that the witness said, and will swear that he took full and accurate notes. But if part of the testimony was not taken in notes, they cannot be read.
3. An act of congress which prescribes a penalty for carrying vitriol, which is merely a penal statute, does not render the voyage illegal as to a policy, not on the cargo, but on the hull, where the vitriol carried by the boat does not render her unseaworthy, nor is the cause of the loss.
4. Where a boat is destroyed in specie, by collision and fire, the basis of ascertaining the liability of each insurer for the fire loss, is to deduct from her original agreed value, the damage caused by collision, or a sum necessary to bring her to port and repair her, being the damage not insured against. The value of the wreck as it existed at the port of repairs should be deducted, and the remainder divided by the proportion the amount of the policy bears to the agreed value of the boat.
5. If the boat remained in specie, and was repaired by the owners, the cost of recovering and bringing her to the port of repairs, caused by the collision, but not the increase of cost of so doing caused by the fire, and all proper items in the repairs account, would be added together, and one-third new for old deducted, and the proportion of such loss which the policy bears to the original value is the liability.
6. A repair means where the boat can be restored substantially to what it was before the injury. If it would become substantially a different boat, so that the policies would reattach for the unexpired time, it is not a repair, and the rule of one-third new for old would not apply. Whether the boat was capable of repair, is a question for the jury, and the opinions of experts are not conclusive.
7. Under a clause that, on loss greater than half the agreed value of the boat, the owner might abandon her and claim total loss, an abandonment vests the wreck in the insurers. But if the owners make use of the wreck this waives any abandonment that had been made.

YAPLE, J., AND A JURY.

This was an action upon a policy of insurance against loss by *fire only*, upon the steamer United States, one of the mail companies' boats, carrying passengers and freight upon the Ohio River between Cincinnati and Louisville.

On the night of December 4, 1868, while making a down trip from Cincinnati to Louisville, the United States was run into by another of the plaintiff's boats, the America, on a trip from Louisville to Cincinnati.

*This decision of the superior court in a former trial, 1 C. S. C. R., 193, was reversed by the supreme court. See opinion, 25 O. S., 50. This decision was rendered upon a rehearing of the case.

The collision cut off the bow of the United States and cut a hole in her hull diagonally some thirty-five or forty feet, running clear through the boat, and from which she must have sunk, and did sink in a few minutes. Immediately after the collision, the United States took fire and was burned down to the water, in which she had sunk. The wreck was raised by the plaintiffs and brought to Cincinnati, but was not abandoned to the underwriters, though the plaintiffs claimed from them a total loss, and they denied all liability for the loss or any part of it. The plaintiffs made use of the wreck in constructing the present boat, United States, laying out in so doing about $100,000, and in her cabin, arrangements and appearance, the present boat is very unlike the old boat.

The amount of insurance upon the old boat was $105,000, and her agreed value $140,000, three-fourths only of which was insured or permitted to be insured. The boat cost, some two years and six months before her loss, about $206,000.

The Globe Insurance Company, on May 1, 1868, took for one year, a risk upon the boat against fire only for $10,000. The case was once before tried in the superior court and resulted in a verdict for the plaintiffs for about $9,000, was taken by the defendant to the supreme court on error, where the judgment was reversed, coming on again for trial, it was agreed that the verdict and judgment rendered in the case should settle all the cases upon the basis of such verdict and judgment. The case was on trial over two weeks, and resulted in a verdict for the plaintiffs of $8,125, principal, and $3,381, interest.

The court submitted to the jury three interrogatories to be answered and returned with their verdict:

1. Was the loss of the boat an actual total loss, the plaintiffs to account for what they saved of her after the fire, *i. e.*, was the boat, by her injuries, destroyed in specie?

2. Was the loss partial only, *i. e.*, did the boat remain in specie, and did the plaintiffs, instead of repairing her, take what was left of her and construct with the same and new materials another and a different boat, substantially from the old one?

3. Did the boat remain in specie and did the plaintiffs repair her?

The jury answered the *second* interrogatory "Yes," and the other two "No."

Many important legal questions arose during the trial.

First—Since the last trial one of the plaintiff's most important witnesses became and continues insane. The case had been taken to the supreme court upon a bill of exceptions, embodying all the evidence, which was prepared by the attorneys of the defendant, who claimed at that time that they embodied therein the testimony of this witness fully and correctly. The plaintiffs offered to read such testimony embodied in such bill of exceptions as the former evidence of the insane witness. The defendant objected to its competency.

The court excluded the evidence, holding that such bill of exceptions was prepared but for a single purpose, viz.: to review the verdict and judgment upon error; and that the attorneys could make no admissions binding their client, except, for the purpose of such error proceedings; and it did not appear that any of the officers of the insurance company had ever admitted that such bill of exceptions contained the full evidence of such witness as given on the former trial.

Second—The full notes taken by a phonographic reporter of the testimony of such witnesses at the former trial were lost, and the notes of the same taken by the counsel for the plaintiffs, were deficient in not containing what the witness testified upon being once recalled in chief, and no witness recollected what it was, in substance. The court held, that, when a witness, who took notes, by refreshing his memory from them, can swear that he can state the substance of *all* the witness sworn to, in chief and upon cross-examination, and substantially in the order the testimony was given he might prove such testimony of such witness at the former trial, or if such witness would swear that he took accurate and full notes of all such witness testified on such former trial, and that he was satisfied of the correctness and fullness of such notes, they might be read as such former evidence, though the taker of such notes be unable to recollect such testimony even by the aid of his notes. But, as a part of such testimony was not contained in such notes and not remembered by any witness, the evidence of such notes must be excluded.

Third—The policy contained a clause, that if the boat should sustain a loss by fire equal to or greater than half her agreed value, the owners might abandon her to the insurers and recover for a total loss.

The plaintiffs claimed that they claimed from the insurers for a total loss and that the latter denied all liability for any part of the loss, and that this was an abandonment, the actual loss by fire being more than $70,000; but they admitted that they kept and made use of the wreck for their own purposes, and that the insurers did not agree that they might do so without prejudice to their abandonment if one had been made.

The court held that an abandonment vested the title of the property abandoned in the insurer, which was not done in this case; for the plaintiffs converted the wreck to their own use, which would be a waiver of an abandonment had one been made.

Fourth—The court also held that the insured could not convert a partial loss into a total loss without abandonment; that, repair being possible, there could be no total loss without an abandonment, though the cost of repairing would be more than the boat would be worth when repaired.

Fifth—If what the plaintiffs did with the wreck, that is, using it in getting up the present boat, was a repair, within the reason of the law of marine insurance, then, by such law, and the terms of the policy, the defendant would have the right to have one-third of the cost of such repair deducted, because the repair would be of new materials, and worth one-third more than the old destroyed materials.

Sixth—If the boat by the collision and the fire was destroyed in specie, or as the individual boat, United States, the basis of ascertaining the amount of the plaintiffs' recovery was, to take as her original value, $140,000, and from this deduct the damage, estimated in money, caused by the collision, or what sum it would have taken to repair such injuries, taking into account, in estimating such damage, the fact that she must have sunk when and where she did and would have to be raised and brought to Cincinnati for repair, the expenses of all of which would be due to the collision, damages from which were not insured against; then the value of the wreck should be ascertained as it existed on arrival at Cincinnati, and these sums subtracted from $140,000, the remainder to be divided by fourteen, which would give the amount to be paid by the de-

fendant, which insured only to the extent of $10,000, or one-fourteenth of the agreed value of the boat. Interest on that sum from March 1, 1869, up to the first day of the term was to be calculated.

Seventh—If the boat, by the collision and the fire, was not destroyed in specie, but remained the individual boat, United States, and was not repaired within the meaning of such term in the law of marine insurance, but what remained of her was used by the plaintiffs in constructing another and different boat, substantially, repair of the former boat being impracticable on account of the cost thereof, the defendant would only be liable for the partial loss "by fire only," whether that loss amounted to half- three-fourths, or more of the value of the boat. Upon this basis, the damage by fire only to the boat, as compared with its agreed value, $140,000, was to be ascertained, and the amount of such damage estimated in money, divided by fourteen, which would give the amount recoverable against this defendant, upon which interest was to be calculated.

Eighth—If the boat, after the collision and the fire, remained in specie as the individual boat, United States, and the plaintiffs elected to and did repair her, all that it would have required to recover the boat and bring her to Cincinnati and to repair her had no fire, but only the collision taken place, would have to be deducted, but not the increased cost, if any, of recovering the boat and bringing her to Cincinnati, caused by the fire, and then all proper items in such repair account would be added together, and one-third deducted therefrom, that being the legal difference, under the policy, between new material and old. One-fourteenth of such two-thirds, with interest, would be the measure of the defendant's liability.

(a). In reference to applying the rule of "one-third new for old in case of repair," the term "repair," can only apply where the boat damaged has been restored, substantially, to the boat, or to what it was before receiving its injuries; for the reason for making such deduction is, that the owner has got again the vessel he formerly had, and a better one by one-third, as that was old, whereas the parts repaired are now new. There may be a repair, however, though the repairs be of plainer and less costly work and material, and less finely finished or highly polished than the work upon the same before the loss. That a boat might have been repaired does not, however, prove that it was, in an insurance sense, in fact, repaired.

In this case, if, owing to the great cost thereof, it was not practicable to repair this boat, the defendant was liable for the damage to her caused by fire only, and the plaintiffs were not bound to repair nor to abandon the wreck to the insurers, they might keep the damaged boat and do what they thought best with her, for anything they could do, could not increase the amount of the liability of such insurers, which would be for the amount of the partial loss by fire only; this was clearly so, if the plaintiffs claimed of the insurers a total loss and the insurers denied all liability for any loss, saying, in effect: "It is all yours, we have no interest in what remains, and you can do what you please with your own, in which we have no concern. You may do what is best to be done."

Thus, the question is raised, what is a repair within the reason and justice of the rule requiring a third to be deducted because new is substantiated for old?

If the insured boat was repaired within the year the insurance run, the policy would attach to the repaired boat the same as if never injured, and at the same agreed value, $140,000, and if burned the next day and totally lost, the insurers would have been liable for the full amount of their policies. If substantially, a different boat, the policies could not re-attach. The plaintiffs claim that to have restored the boat, substantially, to what it was, would have cost $150,000, or $160,000, and then it would not have been worth more than $140,000, so that they constructed, instead, another and different boat, at a cost of only $100,000, from which there would be neither reason nor justice in permitting the defendant to deduct one-third, "new for old."

Ninth—The court refused to instruct the jury, that, if the hull remaining capable of repair, so that the former boat, substantially, might have been replaced upon it, that the boat existed in specie, or in kind, or that the hull of the steamboat navigating our western rivers is as essential to the identity of the vessel as the hull of a ship navigating the ocean where there are tide and waves; or that if it was in such a condition that it could not float in the water, its seams being open, its butts sprung, its "hog chains" burned away, its rudder gone, cabins, furniture and all destroyed, its boilers injured and its machinery a mere heap of scrap-iron, etc., it did not exist in specie. Neither would the court say to the jury, that if it took $22,000 to put the hull in order, when an entirely new hull for a boat of the same size and kind, would only have cost $24,000; that the hull was lengthened four feet; that, but a single cabin, with rooms very differently arranged from those of the double cabin of the injured boat, was made, and of inferior style, workmanship and finish, containing many fewer state-rooms, and with less furniture and less fine and costly, the job was or was not in fact a repair of the old boat, or the making of another and a different boat. All these were matters of fact to be determined by the jury, who from all the evidence and circumstances in evidence, were to make such determination under the guidance of their own honest common sense and experience.

Tenth—The testimony of experts upon both sides was given, as to whether or not, in their opinion, as such experts, the present steamer, United States is the insured United States repaired or another and different boat.

The court held that such opinions could only be considered when based upon facts stated by such witnesses, or facts stated, hypothetically, and afterwards proved to be facts and so found by the jury. Then such opinions were not conclusive upon the jury, but were to be considered by them with all the other evidence in the case; and such weight given to them as the jury might think them fairly entitled to.

Eleventh—The defendant set up a defense going to the plaintiffs' right to recover at all in the action. The United States was a steamboat engaged in carrying passengers upon the Ohio river, and, at the time of her loss, had no board, carrying as part of her cargo, under a custom house permit, a number of carboys of oil of vitriol. The defendant admitted that such vitriol did not occasion the loss or any part of it, or in fact render the boat unseaworthy, but did claim that the boat was not provided with the means of carrying it safely as prescribed by the act of congress, which prescribes a penalty for carrying such oil of vitriol in the method it was claimed this was carried upon this boat. The claim

was that the boat, when lost, was upon an illegal voyage, and no recovery could be had for her loss from any cause.

The court held, that this insurance was upon the boat itself and not upon any part of the cargo; that the act of congress did not forbid the navigation of the vessel with oil of vitriol so on board, and that the trip she was making was, therefore, not illegal. This is the holding in England upon such merely penal statutes; and even where a vessel is forbidden to sail, with an interdicted cargo on board, it is settled, that if the master sails, without the knowledge, connivance or consent of the owner, the owner may recover for a loss happening on such voyage. If he knows of and consents to the sailing, with such prohibited cargo, of his vessel, when the statute forbids such voyage, he can not recover for any loss to his vessel happening on such voyage.

So the oil of vitriol carriage can be no defense in this case.

Lincoln, Smith & Stevens; Matthews, Ramsey & Mathews, and Hoadly, Johnson & Colston, for plaintiffs.

Geo. E. Pugh, Geo. H. Pendleton, and Follett & Cochran, for the defendants.

30

DEPOSITIONS.

[Lorain Common Pleas Court, 1876.]

STATE OF OHIO v. JNO. A. FINNEY.

1. In depositions taken on behalf of a defendant in a criminal case, on interrogatories, matter in an answer entirely irresponsive to a question must be excluded.
2. On a trial for obtaining property by false pretenses, in order to show fraudulent intent, the state may show similar fraudulent representations made to third persons by defendant.

BOYNTON, J.

In this case depositions of witnesses for the defendant had been taken under a commission and upon interrogatories thereto attached under section 144 of the criminal code.

The questions put to all the witnesses were the same; the third and fourth being as follows:

3. "Do you know the defendant in this cause and if so how long and how well have you known him?"

4. "Have you the means of knowing his character and general reputation with regard to integrity, and if so what is that character and reputation?"

In response to the third interrogatory the witness had stated matters irresponsive to the question, as that the defendant paid promptly for goods sold him by the witness—the amount of rent paid by defendant to witness and that the rent was paid promptly—the amount of defendant's account in a bank of which the witness was an officer—that the bank discounted his paper—that the defendant had been entrusted with large sums of money and had conducted himself honestly concerning it, etc.

Exceptions to the answers were filed by the state on the ground that they were not responsive to the inquiry, and thereupon the court (Boynton, J.) *held:* That the irresponsive matter was not only inadmissible upon the subject to which the interrogatory was directed but that it could not be used in evidence even though the facts stated should become material at a later stage of the trial, upon the ground that the state could not anticipate that such statements would be made in answer to

such a question and so could not frame cross-interrogatories to test their truth. Greenman v. O'Connor, 25 Mich., 30.

Defendant was indicted for obtaining property under false pretenses under the statute of February 21, 1873, (70 O. L., 39), and the state offered to prove for the purpose of showing a fraudulent intent that the defendant made to others than the prosecuting witness, representations similar to those made to the prosecuting witness, and by which it was claimed the goods were obtained in the case on trial.

Held: That the testimony was admissible—following the analogy of Edwards v. Owen, 15 Ohio, 500.

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31 **SALES—OPTION—COMMISSIONS.**

[Hamilton Common Pleas Court, 1876.]

B. F. MATTHEWS v. BRIGGS, SWIFT & CO.

1. One who was employed to buy a certain quantity of pork at a specified figure cannot object that his employed furnish part of the pork from his own stock.
2. If the employer gave the agent bonds and cash as a margin, and a subsequent amicable settlement was made. The former cannot afterwards claim that the settlement was by duress, because the agent held his bonds and cash.
3. A custom in the pork trade, that the year closes on October 31, and that dealers on commission, carrying stock over to another year, charge additional commission, is not unreasonable.

AVERY, J.

This was a suit growing out of a transaction in clear rib bulk sides in 1873. The plaintiff, a resident of Americus, Georgia, alleged that in June, 1873, he made a contract with the defendants by which the defendants were to purchase and hold for his account 400,000 pounds of clear rib bulk sides of pork, at the plaintiff's option, August 1873—100,000 pounds at 9⅛ cents, and the balance at 9¼ cents, for which the plaintiff was to deposit a margin of $10,000 in bonds and $1,400 in money. The pork was purchased and the margin deposited. Of this amount the defendants purchased 100,000 pounds from themselves, setting it aside from their stock, as the property of the plaintiff; the balance was purchased from other dealers in the city. The pork was held from August, 1873, to April, 1874. In December, 1873, the defendants rendered an account, showing that 10 per cent. interest had been charged upon the advances made for the purchase, and 2½ per cent. commission. In December, 1873, at the request of the plaintiff, a second account was rendered, showing 5 per cent. commission for sales, and a letter, accompanying the account, informed the plaintiff that such would be the rate of commission. In April, 1874, the meat was sold by order of the plaintiff and an account rendered him showing 10 per cent. interest upon all advances made by the defendant in the course of this transaction, and 5 per cent. commission on sales. The plaintiff, by his agent, wrote a letter suggesting that some of the charges in the account were erroneous. He did not object to the interest account, but especially to the commission of 5 per cent. The defendants explaining that by the custom in Cincinnati, the year closes October 31, and when meat is carried over from one year to another, it becomes subject to an additional charge of 2½ per cent., and that consequently this meat was subject to a double commission. In response to this latter, the plaintiff called for the bal-

ance in the hands of the defendants, as shown by the statements of account, and for the bonds which had been deposited as margins, and the defendants remitted accordingly. Nothing further was heard of the plaintiff for more than a year, when his attorneys presented their claim for the repayment of extra commission and the excess of interest over the legal rate.

The defendants admitted the facts alleged and answered that the account had been closed and paid by defendants, with full knowledge of plaintiff, and could not now be reopened.

The court held that whatever differences there were between the parties were ended when the defendants paid over the amount due from them to plaintiff. If that transaction was not a settlement, the point, so far as the court could gather it from the argument of counsel, was that it was made under duress, because the bonds remained in the hands of the defendant, and the balance, which the defendant admitted was due the plaintiff, would only be paid over on an adjustment of the account. If an objection of that kind could be fatal to the adjustment of the account in this case, it would be fatal in every case, because wherever there is a settlement between parties, the balance is on one side or the other, and, if payment depends upon that adjustment, and that fact is to destroy the settlement, the settlement in every case would be destroyed, and accord and satisfaction as known in the law would disappear.

There were no differences between the parties as to the item of interest. It appeared that the plaintiff was notified in the first account rendered by the defendants that the pork was held subject to a charge of 2½ per cent. commission on sales. The letter containing that account was sent the plaintiff in August, 1873. In December the following account was rendered, in which the rate of commission was put at 5 per cent. It was the custom of pork dealers selling on commission, to charge commissions at the regular rate for each successive season, the pork season opening in November and closing at the end of the following October. If the pork is carried over to an additional season an additional charge is made. The custom is not an unreasonable one. It seems to be notorious so far as the trade is concerned, and upon the basis of that custom the defendants in their letter of December, 1873, notified the plaintiff that the rate of commission would be 5 per cent. No objection was made to that by plaintiff. Other money was furnished by the plaintiff to defendants as a margin, and the transactions between the parties continued until the sale of the pork, when the plaintiff requested an account, which was subsequently furnished, in which the commission was 5 per cent., showing a balance due the plaintiff of some $400.

At this time first appeared any complaint by plaintiff, urged in a mild form. Letters passed between the parties, which resulted in defendants forwarding plaintiff his bond and a check for the balance due him. Now, after more than a year had elapsed, this action was brought for the purpose of falsifying the account—deducting from the charges for commission 2½ per cent., and from the charges for interest enough to leave the rate the legal rate.

So far as the interest was concerned, interest voluntarily paid, except where it is between parties to negotiable paper, is like every other voluntary payment, and cannot be recovered. So far as the commissions were concerned, if they were in dispute, that dispute was determined by this account and this payment, if that was a settlement. It was made

with a full knowledge of the facts. There was no pretense of fraud or misrepresentation, and the only objection that could be urged was that it was made while the defendants had in their hands bonds which had been deposited as a margin, and while they had also a balance due the plaintiff. An objection of that kind, as said before, if fatal in this case, would be fatal in every case where the parties adjust their accounts.

The suggestion that 100,000 pounds of this pork had been stock of defendants would be of weight where the merchant undertakes to purchase for his correspondent at the best prices. In such a case he would be both buyer and seller. In this case, however, the transaction was an option furnished by defendants to plaintiff, under which they were bound to deliver to plaintiff, at his option, until August, a certain amount of pork at a certain price. And if it would have been competent for them to furnish the money and the pork, it would have been equally competent for them to furnish the pork, doing directliy in the first instance what they might have done indirectly by making the purchase. Of course they could not charge a commission upon the purchase, and none was charged. It appeared in the evidence that the fact that the defendants were to furnish 130,000 pounds of the pork out of their own stock was known to the plaintiff or his agents.

Judgment for the defendants.

S. L. Crawford, for the plaintiff.

Sage & Hinkle and Mr. Thomas, contra.

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38 CRIMINAL LAW—EVIDENCE.

[Cuyahoga Common Pleas Court, March, 1876.]

STATE OF OHIO v. WM. ADIN.

1. A person without the light of reason is not capable of committing a crime.
2. The accused in a criminal case is not entitled to an acquittal on the ground of insanity, if, at the time of the alleged offense, he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understood the nature of his act, and his relation to the party injured.
3. As the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime, the burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury, on the trial of a criminal case, rests upon the defense. It is not necessary, however, that this defense be established beyond a reasonable doubt; it is sufficient if the jury is reasonably satisfied, by weight of preponderance of the evidence, that the accused was insane at the time of the commission of the act.
4. Good-character may be shown, by the defense, as a circumstance rendering it more probable that if sane he would not have committed the crime.
5. Killing having been proven, the presumption is that it was done without premeditation, and is murder in the second degree. To convict of murder in the first degree the state must show affirmatively premeditation and deliberation. To reduce it to manslaughter the accused must show matters in extenuation.

Charge: Murder in the first degree. The jury, after twelve hours' deliberation, returned a verdict of guilty of murder in the first degree.

The defense admitted the homicide, but pleaded insanity of the prisoner.

HAMILTON, J.

Gentlemen of the Jury:

The defendant, William Adin, has been indicted and placed upon trial before you on the charge that he unlawfully, feloniously, purposely,

and of his deliberated and premediated malice, did kill and murder Hattie McKay, on the 4th of December last, and within the body of this county. It is further averred that the death of the deceased was caused from the blows upon her head then and there inflicted by the defendant with a hammer at that time in his hands. The defendant denies by his plea of "not guilty," all the material averments in the indictment contained. This charge by the state, and its denial by the defendant, constitutes the issue which you have sworn to try.

The indictment is based on the first section of the crimes act of 1835, which, so far as it is applicable to the offense charged in this case, provides as follows: That if any person shall purposely, and of deliberate and premeditated malice, kill another, every such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death. Under this indictment you are at liberty, and it becomes your duty, either to acquit the defendant or to find him guilty of murder in the first or second degree, or of manslaughter, as the evidence and the law may require you to do. And this is so upon the principle that the charge of murder in the first degree contained in the indictment necessarily includes the two lower grades of criminal homicide. I therefore direct your attention to the two remaining sections of the law of this state in relation to homicide. Section 2 of the act above named provides that if any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree, and, on conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor during life. And section 3 of said act provides that if any person shall unlawfully kill another without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of manslaughter, and, upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor not more than ten years, nor less than one year.

Given, then, the indictment, and applying the law to the evidence adduced, of what offense, if any, is the defendant guilty? The questions are: First, is Hattie McKay dead? Second, did she come to her death by means of a blow or blows given by the defendant, William Adin, on or about the 4th day of December last, with a hammer, in his hand, in this county? On both these propositions there is, perhaps, no dispute and no conflict in evidence. Third, was the prisoner, William Adin, when the blow or blows were thus given by him, of sane mind? It is urged on behalf of the prisoner that satisfactory proof has been given that when these blows were given he was not of sane mind.

It is sought to establish the derangement of the mind of the defendant: First, by the proof of the insanity and death in an "insane spell," as termed by the witness, of the defendant's maternal grandfather. It was competent for the defense to make the proof, as showing an hereditary tendency in his family to insanity, and thereby to increase the probability that his plea of insanity is true. It is, however, no proof of the actual insanity of the accused to prove that one of his ancestors was insane.

Second, it is further urged that the proof shows the accused to have been a monomaniac upon the question of his domestic or family troubles, and, if I correctly understand, that he was either acting under an insane delusion in respect thereto, and was therefore irresponsible for the homi-

cidal act, which was but an outgrowth and culmination of that delusion, or these troubles were real, and that by constant friction for a number of years upon a sanguine, nervous temperament, aggravated by the publicity of the litigation of the last year, he was finally compelled, by a morbid and uncontrollable impulse, to do the particular act in question. Now, I have to say, if the defendant was laboring under a partial delusion only, and was sane upon other subjects, I think he must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real. That is to say, applying the principle to this case, if the defendant's delusion pertained only to the loss of money, or the squandering of his means through the instrumentality of the deceased, this alone would furnish no adequate cause or justification, if true, for the taking of her life by the defendant. As to irresistible impulse, I desire to say that it is a valid defense only when the party offering it is mentally deranged, and may be defined to be a special propensity impelling to a particular bad act, and it is not moral insanity, supposing this latter term to be a supposed insanity of the moral system, co-existing with mental sanity. Moral insanity, as thus defined, has no legal recognition. Nor is irresistible impulse convertible with passionate propensity, no matter how strong, in persons not insane. In other words, the irresistible impulse of the lunatic which confers responsibility, is essentially different from the passion, however violent, of the sane, and which does not confer irresponsibility. It is further said that the defendant was afflicted with indigestion, which ailment, it is claimed, is one of the predisposing causes of insanity. It is further said, in the evidence of his sister, that he wandered about the house at night, was troubled with the loss of appetite, etc.

On the other hand, the state claims to have shown, by the cross-examination of some of the defendant's witnesses, and by the testimony of doctors as experts, that there was no insanity about the defendant at the time of the perpetration of this act. It is proper for you, gentlemen of the jury, to weight all these facts, and if they satisfy you that when the blows were given the defendant was laboring under insanity or such estrangement of mind as left him without discretion to discern the difference between good and evil, unconscious that he was doing wrong, and incapable of recognizing the relation which he sustained to the deceased, he should be acquitted altogether. But, on the other hand, if his mind was such that he retained the power of discriminating, or to leave him unconscious he was doing wrong, a state of mind in which at the time of the deed, he was free to forbear or to do the act, he is responsible as a sane man.

Insanity is described as being unsound in mind, deranged, diseased or unnatural in intellect. By the same authority insanity is also distinguished as general and partial, extending to all subjects, or confined to one or a few subjects. You will therefore observe that the law on this subject regards it, whether general or special, as a derangement of the mind, the intellect, the reasoning and appreciating principle. To constitute a complete defense, insanity, if partial, as monomania, must rest in such a degree as to so far deprive the accused of the guide of reason in regard to the act with which he is charged as that he is unable to distinguish right from wrong, in reference to the particular act, or understand his relation to the parties thereto. If, in view of all these facts, you come to the conclusion that Hattie McKay came to her death by blows given by the prisoner while in sane mind, you will then ask: Whether the

death blow was given purposely, of deliberate or premeditated malice? Does the evidence satisfy you that the blow or blows were given with a design to kill the deceased? The design or purpose to kill you may gather from the circumstances attending the transaction, the instrument employed, the place of the blow, and the manner of inflicting it, all the circumstances, and their natural and ordinary tendency to destroy life. You may also deduce the purpose of the prisoner from his declaration at the time of the transaction and before, and his admission after. But the declaration of prisoners detailed by witnesses should be received with great caution. Declarations made by a prisoner when agitated either by excited passion or depressed spirits, are to be cautiously received. If however you are satisfied the blows given in this case were palpably calculated to destroy life, the law presumes the perpetrator intended to produce that effect, and holds him responsible for it.

Inasmuch as the subject has undergone some discussion among counsel, and because it is pertinent to the issue, I say to you that the fact of killing having been proven, the presumption of the law in Ohio is that it was done with malice, but without deliberation or premeditation, and consequently that it is murder in the second degree. To convict of murder in the first degree, premeditation and deliberation should be established by affirmative evidence. And if the prisoner would reduce the crime to manslaughter, it rests upon him to show matters of extenuation. In this connection I may add that deliberation and premeditation may be established by circumstantial evidence. In every case of murder in the first degree there must have been a concurrence of purpose or intent to kill another, together with premeditated or deliberate malice in the slayer, except only that the latter element of premeditated and deliberate malice is not made requisite by our statute defining this offense, where the killing is done in the perpetration of or attempt to perpetrate rape, arson, robbery or burglary, or by administering poison, or causing the same to be done. In common parlance, we are apt to associate the idea of malice with the passions of anger, hatred and revenge; but malice, in contemplation of law, may exist without the presence of either of these passions. Indeed, the fact of suddenly excited anger often rebuts the presumption of malice. Malice may be said to be a willfully formed design to do another an unlawful injury, whether such designs be prompted by deliberate hatred or revenge, or by the hope of gain, or springs from the wantonness of a depraved heart. It is evident by an act which proceeds from a wicked and corrupt motive, and is implied where the act done necessarily shows a depraved heart.

To constitute deliberate and premeditated malice, the intention to do the injury must have been deliberated upon, and the design to do it formed before the act was done, though it is not required that either should have been for any considerable time before. This supposes that the slayer, by reflection, understood what he was about to do; that he coolly reflected upon it, and intended to do the act in order to do harm.

Upon this subject of premeditation and deliberation I deem it proper to say to you, further, that if you find the defendant in any manner affected by insanity, partial or temporary, or general, so as to interfere with, or in any affect his power of deliberation and premeditation at the time of the commission of the act, then it will be your duty to give it such consideration as it may be entitled to, upon the determination of the degree of crime for which he may be responsible, if you shall have first determined him to be responsible at all.

It is always the privilege of the accused to put his character in issue or not, as he may choose. He has done so in this case, and has offered evidence tending to show a reputation for former good conduct in the community where he has lived. This he has a right to do to raise the presumption of innocence as evidenced by his general character, since it is not probable that a person of known probity and humanity would commit an outrageous act in the particular instance. But as in this case, counsel for defense, as we understand, admit the perpetration, by the defendant, of the act of homicide, the good character of the defendant is urged as rendering more probable that the defendant was insane. I can only add the general rule that as against guilt clearly proved, good character will not avail to acquit. Evidence of this kind is to go to the jury, and its weight and effect is to be determined by them in connection with all the other proofs and circumstances of the case in arriving at the solution of the question of the guilt or innocence of the accused.

And now, gentlemen, you will carefully scrutinize and examine the evidence, and therefrom elicit the truth of this issue. It is your province to determine and give to the testimony such weight as you may think under the circumstances of the case it is entitled, judging from the acts and appearance of the witnesses, the probability of their statements, and the interest they may have in the determination of this issue, and further, gentlemen, to the somewhat uncertain and conflicting theories of medical jurisprudence as stated and read to you by counsel, apply the strong common sense of practical business men. Test those acts, feelings, and conditions that are relied upon as disproving or establishing the insanity of the defendant, by the simple, plain rules of every-day business life. Take to your assistance the judgments and opinions of the professional witnesses and others, together with the facts to which they have testified in your hearing. And, in view of all the facts in the case, what do you say as to whether this homicide was the act of a man so insane, applying the rules heretofore given, as to be irresponsible for its commission, or was it the direct result of full play given to the evil passions of a man of sane mind, but a depraved heart. You will hold the prisoner innocent of every particular of the charge against him until his guilt be made manifest by the testimony beyond a reasonable doubt. This term, "reasonable doubt," is not easily defined, though often used. It is not mere possible doubt because everything relating to human affairs, and depending on moral evidence is open to some *possible doubt*. It is that state of the case, which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in such a condition, that they can not say they feel an abiding conviction to a moral certainty of the truth of the charge. The burden of proof is upon the state. All the presumptions of law independent of evidence are in favor of innocence. By this I do not mean to controvert the proposition already laid down, that every person that has arrived at the age of discretion is presumed to be sane, and he who depends upon the ground of insanity has the burden of proof as before stated.

If the proof fail to satisfy you of the prisoner's guilt, or leaves you in doubt of it, or satisfies you that the blows which produced the death of Hattie McKay were given by the prisoner while his mind was so deranged as to leave him without discretion to discriminate between right and wrong, or unconscious of the crime, you will return a verdict of not guilty, and no more.

42 **MARINE INSURANCE.**

[Superior Court of Cincinnati, Special Term, 1876.]

*MEMPHIS AND ARKANSAS RIVER PACKET CO. v. PEABODY INS. CO.

When the expense of repairs on a boat damaged by accident will be equal to more than half the value of the vessel when repaired, it is not practical to repair, and she may be abandoned.

YAPLE J., AND A JURY.

The defendant insured the plaintiff for one year in the sum of $2,000 upon the steamboat "Celeste," valued in the policy at $12,000, at a premium of 20 per cent., or $400, against the perils of navigation. The plaintiff was, by the policy, given the right to insure the boat for an amount not exceeding, in all, $8,000, which was effected in three other insurance companies. The policy provided that in no case whatever should the insured have the right to abandon the boat to the insurers as a total loss, in case of loss or damage accruing to her from the perils insured against if repair was *practicable;* and also that the insured should not have the right so to abandon unless such loss or damage should be equivalent to fifty per cent. of the agreed value of the boat.

During the year, the boat having on board a cargo of cotton and hides, was "snagged" and sunk. The insured duly notified the insurers that the boat was abandoned to them as a total loss. The insurers, by an agent, raised the boat and took her to the nearest port of repair, at a net cost of about $2,500, after the general average of about $1,800 was paid by the cargo as its part of such expense. At the port of repair, the agent of the underwriters had the boat surveyed and repaired according to the directions of such surveyors. The cost of raising and taking to port of repairs and of repairing the boat, exclusive of the amount paid by the cargo upon the general average adjustment, was between $5,600 and $5,700.

The underwriters paid what they claimed was their full portion of the cost of repairs and tendered the boat to plaintiffs, the latter to pay its portion of the cost of such repairs. The plaintiff declined to have anything to do with the boat, claiming that they had rightfully abandoned her to the underwriters, she having been a *constructive* total loss, which was rendered an *actual* loss by such abandonment.

For the repair account unpaid, the boat was libeled in a court of admiralty and sold for $2,500, which paid such repair account in full and the costs.

The defendant admitted that the actual value of the boat, at the time of the happening of the accident causing her loss, and after being repaired, was less than $10,000; but claimed that a *constructive* total loss, by the terms of the policy, and under the rule of law governing the case, entitling the insured to abandon, must amount to the sum of $6,000, after deducting one-third of the repair account, that being the amount the insured is to allow on account of new for old, upon which basis, it was claimed, the expense of repairs was not *equivalent* to one-half of the agreed value of the boat.

It was conceded by both plaintiff and defendant that the English rule of law is, that when the cost of repairs will exceed the value of the vessel after repair, the insured may abandon; and the American rule is, that there may be such abandonment when the value of the vessel after the repair will not be worth double the cost of repairs.

The court held, and so charged the jury, that neither under the English nor American rule to ascertain the value of the boat after repair, could a deduction of one-third "new for old" be made, nor, for such purpose, was the value as agreed upon in the policy to be looked to as the basis, but the actual value. The court in this followed the rule of law as laid down by the supreme court of the United States, in the cases of Patapsco Insurance Co. v. Southgate, 5 Pet., 604; Bradlie v. Maryland Insurance Co., 1 D., Pet., 378, and the decisions of the various state courts when the questions have since arisen and been decided. The court, apart from the reason of the rule, felt constrained to so hold because the supreme court of Ohio, (11 O. R., 147, Perrin v. The Pro. Ins. Co.) upon a question of marine insurance law, reversed its own former decisions upon that question, to make the rule conform to that decided by the supreme court of the U. S. in the case of Waters v. Ins. Co., 11 Pet.,

*For decision of this case by superior court in general term, affirming this decision, see 5 Dec. R. 417.

220. The principle settled by the supreme court of the United States has also been settled in the same way by the House of Lords in England, after having been in doubt for thirty years: Irving v. Manning, 6 C. B., 391-422; S. C., 2 C. B., 784; 1 C. B., 168.

The rule in Massachusetts is as claimed by the defendant; and the early cases decided by the court of errors in New York are the same, but both Mr. Parsons, in his work upon Marine Insurance, and Mr. Phillips, in his work upon Insurance, claim that the rule is as has been decided by the supreme court of the United States, where there is nothing in the policy or local usage making a different provision.

The court held that no term of the policy in this case changed the rule of law. When the expense of repairs will be equal to or more than one-half the value of the vessel when repaired, repair is not "practicable," and a damage destroying, in fact, half the vessel is a loss "equivalent" to half the agreed value thereof, the damaged parts having to be estimated by the same assumed standard of value as the entire vessel and the parts not injured. Suppose the actual value of the boat was only $6,000, while the agreed value was $12,000, and she had been injured to the actual extent of $5,000, her remaining hull, etc., being worth but $1,000; in fact five-sixths destroyed, would it not be a very violent construction to put upon this policy to hold that there could be no constructive total loss entitling the insured to abandon, but that the insurers would have the right to repair, which repairs would cost much more than half what the boat would be worth when repaired?

The jury rendered a verdict for the plaintiff for the full amount of the policy, $2,000, with interest, deducting the premium note with interest. The same disposition was made of the other three cases. The defendant excepted.

Lincoln, Smith & Stevens, for plaintiff.

Matthews, Ramsey & Matthews, for defendant.

ATTACHMENT. 43

[Hamilton Common Pleas Court, March, 1876.]

*Lafayette Devinney v. Smith & McAlpin.

What is a debt fraudulently contracted under the attachment law of Ohio.

Avery, J.

This was a motion to dissolve an attachment. The plaintiff put in the hands of the defendant a lot of butter, to be sold for his account on commission. The defendants sold the butter, and refused to account. Thereupon the plaintiff brought this action to recover the proceeds of the sale, and obtained an attachment upon the ground that the debt was fraudulently contracted.

The court, in deciding the case, said it appeared that the butter was shipped to New Orleans for sale and that the defendants drew a draft against the shipment. It was necessary that the butter should be shipped to New Orleans to find a market. It was not an unusual circumstance that where merchandise is shipped drafts should be drawn against the shipment. By the contract the butter was to be sold for the account of the plaintiff; but this meant simply that the butter should be sold and the proceeds accounted for to him. It did not mean that the butter should be sold in his name, and even if it could bear such a construction, the sale, as made by the defendants, would be simply a breach of contract. The attachment was obtained upon the ground that the debt was fraudulently contracted, and the words "fraudulently contracted," as used in the attachment law, require that fraud should have given rise to the debt. The same sense was to be applied to the words "obligation fraudulently incurred," in the attachment law. The obligation in this case was incurred when the merchandise was put into the hands of the defendants for sale, and the debt arose when they had sold it. But there was no fraud or deceit by which the plaintiff was induced to put the property in their hand for sale and there was no fraud on their part in selling their property.

It is a misdemeanor for a commission merchant to appropriate the proceeds and refuse to pay them over. But this did not make the debt fraudulent. It was a fraud upon the consignor to refuse payment, but the fraud did not consist in the debt or obligation, but in the breach. There was a wrong done to this plaintiff by

*This decision was affirmed by the district court. See opinion, 5 Dec. R., 353.

the refusal to pay over the proceeds of the sale, but the same wrong was done when any debt was refused. The statute, besides making the refusal to pay a misdemeanor, subjects the party who refuses to damages in double the amount. The attachment law extended to liabilities criminally incurred, as well as to those fraudulently incurred. But this attachment was not upon the ground that the liability was incurred criminally, but simply upon the ground that the debt was fraudulently contracted or the obligation fraudulently incurred. The words "fraudulently" and "criminally" were not synonymous, the supreme court had held, in 22d O. O., 114; nor were they convertible. The liability for which the plaintiff sought to recover was a liability, as he claimed by contract between himself and the defendants. The liability created by the statute making the appropriation of the proceeds of the consignment a misdemeanor was a liability limited to damages to double the amount. But it stood upon the statute only, and had no reference to the contract liability. The statute creating it a misdemeanor to appropriate the proceeds of the consignment had no application in this case to support the ground upon which the attachment was brought, and that ground failing, the attachment would be dissolved.

W. S. Taylor, for plaintiff.

Edward Colston, contra.

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46 COUNTY SEAT—INJUNCTION.

[Mahoning Common Pleas Court, April, 1876.]

*EBEN NEWTON, ET AL., v. COMMISSIONERS OF MAHONING CO.

Application for an injunction to restrain defendants from removing the records and public offices from Canfield to Youngstown, will be refused on the ground that the county seat was located to suit the will of the people, and their will, expressed in the proper way, can re-locate it, and therefore plaintiffs' damage is too remote and consequential to be ascertained in a court of justice, and falls within the rule—*damnum absque injuria.*

CONANT, J.

Act of 1846 created the County of Mahoning, "with the county-seat at Canfield." The 8th section provided that "before the seat of justice shall be considered permanently established at Canfield, the proprietors and citizens thereof shall give bond, with good and sufficient security, payable to the commissioners of said county, hereafter to be elected, for the sum of five thousand dollars, to be applied in erecting public buildings for said county, and that citizens of Canfield shall also donate a suitable lot of ground on which to erect public buildings."

The conditions of this section were complied with.

In 1874 the Legislature passed an act providing for the removal of the county-seat from Canfield to Youngstown, of which the following is the

1st SEC. *Be it enacted, etc.,* That from and after the taking effect of this section of this act, as hereinafter provided, the seat of justice in the county of Mahoning shall be removed from the town of Canfield, and shall be fixed, until otherwise provided by law, at the city of Youngstown, in said county.

2d SEC. That the foregoing section of this act shall take effect and be in force when and so soon as the same shall be adopted by a majority of all the electors of said Mahoning county, voting at the next general election after the passage thereof, and when suitable buildings shall have been erected, as hereinafter provided.

The 5th section provides that before said seat of justice shall be removed, the citizens of Youngstown shall donate a lot or lots for the public buildings, and contribute sufficient funds to erect thereon a courthouse, jail, etc., at a cost of not less than $100,000.

Injunction sought on these grounds.

1st. The 8th section of the act of 1846, by reason of its acceptance by the citizens of Canfield, became an executed contract, and a right vested thereby in the citizens, which could not be taken away by subsequent legislation.

2d. That the act of 1874 is in violation of the 26th and 30th sections of article

*The decision in this case was affirmed by the supreme court. See opinion, 26 O. S., 618.

2d of the constitution, for the reason that the first section is to take effect upon the approval of some other authority than the General Assembly.

3d. That the provisions of the 5th section of the act of 1874 have not been complied with.

As to the second ground:

That section 30 is one of the exceptions mentioned in section 26; that it was intended to prohibit the Legislature from delegating its power to make a law. But when a law is passed by a legislative body, it may, in the law itself, be provided that it shall go into execution for the purpose of accomplishing its purpose upon a contingency, and such a contingency may be the exercise of a discretion of some other body than the Legislature. The act of 1874 should be construed together. We think the first section takes effect, so far as to become a law, on its passage, but it cannot take effect, so as to accomplish a change of county-seat, until adopted by the people, and the provisions of the fifth section are complied with. The whole act took effect so as to become a law on its passage, but the time when it is to go into execution is contingent.

As to the third ground:

That the donation by councils of lots belonging to the city for the purpose of providing a site and raising funds for the erection of the buildings, was a compliance with the fifth section of the act of 1874.

As to the first ground:

That the eighth section of the act of 1846 did not constitute such an executed contract, as permanently located the county-seat at Canfield, without the power of subsequent legislature to remove it, nor was a vested right created thereby. There is no doubt that the state of Ohio, by its Legislature, can make a contract either with an individual or a corporation; but such contract, to be beyond the control of subsequent legislation, must not be one affecting the machinery of government, or diminishing the police power of the state.

The Legislature had no right, by the act of 1846, to contract away the right of removal of the seat of justice; no such power was lodged in them. All that the legislature said to Canfield in that act was: "If you will donate $5,000 and a lot of ground, the seat of justice shall remain at Canfield during the pleasure of the General Assembly of the state." This was all that they could do.

The right to have the county-seat at Canfield was not a private right vested in the citizens of the town. By the act of the legislature, it was a public right. Every citizen in the county of Mahoning had a right to have a county-seat in this town. And now the public convenience and welfare demanded a change, and can it be denied on the ground that a portion of the public have a private right to forbid the change?

We cannot compel our judgment to yield to such a proposition. It is said in argument that though the counties are public corporations, and the right to have a seat of justice somewhere in the county is a public right, yet the *particular place* where in the county, is not a public, but a private right. We are unable to adopt this view of the subject. The Legislature of 1846 could not permanently fix the seat of justice of this county, beyond the power of another General Assembly to change it.

It is the private rights that are protected by the Constitution, and they cannot be violated or impaired by legislation. We think the plaintiffs had no right to look upon the language of the eighth section of this act of 1846 as a grant of private rights from the General Assembly, but should have considered it only as legislation for the public good, and subject to future revision and repeal. The Legislature may sell all that is the subject of bargains, but it cannot dispose of the right to re-locate a county-seat when the public demands it. The seat of justice, in this case, was located to suit the will of the people, and their will, expressed in a proper way, can re-locate it. It may be true that the plaintiffs will be damaged by the change, but their damage is too remote and consequential to be ascertained in a court of justice, and falls within the rule—*damnun absque injuria.*

The injunction must be refused.

Hon. Geo. M. Tuttle and T. G. Servis, attorneys for plaintiff.

Thos. W. Sanderson and Asa W. Jones, attorneys for defendants.

58 DEED—HUSBAND AND WIFE.

[Hamilton Common Pleas Court, 1876.]

FRANCIS M. KEPLER v. EMELINE REEVES ET AL.

Under a deed to a husband and his wife, and the survivor of them for life, with remainder to the heirs at law of the wife forever, the wife has, after the death of the husband, by the rule in Shelley's case, an estate of inheritance, and a deed by her in fee, then conveys the whole estate as against her heirs.

AVERY, J.

This is an action for partition of a lot on the south side of Fourth St., in this city, 151 1-3 ft. west of Central avenue. One of the defendants, Caroline Erwin, is in possession, and claims the entire ownership. The question is upon a deed of the lot, made in 1844 by Harvey Hall to William West and Mary Ann West, his wife. If under this deed Mary Ann West took an estate of inheritance, it passed by her last will and testament to Caroline Erwin, her niece. If she did not, the plaintiff is entitled to share in the property. The deed was in these terms: "To William West and to the said Mary Ann West, his wife, and the survivor of them for life, and the remainder therein to the heirs at law of the said Mary Ann West forever." Mary Ann West survived her husband, and at her death, left the plaintiff, who was a niece, and the other defendants her heirs at law.

The "Rule in Shelley's case" prevails in Ohio, 5 O. R. 465. It has been abolished as to wills, (S. & C. 1626) but, as to deeds, still remains. It requires, that, where the ancestor takes a free hold, and by the same conveyance there is a limitation either mediately or immediately to his heirs, the word heirs shall be a word of limitation and not of purchase, and the fees shall rest in the ancestor; 5 O. R. 465. The rule is not a rule of construction, but of property; 15 O. R. 562. It is not a means of ascertaining the intention of the grantor in a conveyance: it presupposes that intention to be ascertained. 70 Penn St. 73.

By the operation of this rule, Mary Ann West took an estate of inheritance. Whether it was executed in possession as an immediate estate, or remained distinct until, upon the death of her husband, there was a merger, the authorities differ. Fearne 36 1 Prest. Est. 336-337. But in either event, she took the entirety, 1 Prest. Est. 336. Whether her estate after her life estate was present or future in either event it was an estate of inheritance, 2 Prest. Est. 439. It was described as a remainder, but it was to her heirs, and was therefor in her. It was to her heirs at law forever; no particular persons were intended, except as they took by descent from her.

The estate for life was to her husband and herself, and the survivor, and was a joint estate for life, 11 O. 352. The remainder was not to the heirs of the husband and wife, but to the general heirs of the wife. It is said by a distinguished writer "that the limitations must be to the heirs who would take the entire estate, limited to the first taker," 1 Washb. Real Prop. 93. "For instance," he says, "if the first estate be limited to A. and B., and the limitation over be to the heirs of B., it turns the estate of A. and B. at once into a joint life estate, and the heirs of B. would take as purchasers or remainder men, for they could not take by descent, being heirs only of one." He cites for this, 2 Prest. Est. 441-

442. But the reference on p. 442 of Preston is to the case where either, husband or wife singly, has an estate for life, and the subsequent limitation is to the heirs of the two, which is widely different from where the life estate is in the two, with a limitation singly to the heirs of one. No person can be supposed to include in himself the heirs of himself and some other person, and yet may so far be supposed to carry his own heirs in himself during life, that a limitation to them, where he takes a preceding freehold, will vest in him. That the preceding freehold may be taken jointly by himself, with others, seems, according to the authorities, not to make a difference. It is laid down that the subsequent limitation to the heirs must be confined to those of the ancestor who takes a particular estate, but at the same time, that, if the heirs be confined to those of the persons taking a particular estate, it matters not whether the estates of the ancestors be several, (so they all take) or joint, nor whether the remainder over be to the heirs of all, or only of some of such ancestor. Watkins on Descents p. 162; Fearne 36, 1 Prest. Est. 315-320; 2 Prest. Est. 442; 9 Mod. 292; 2 Rep. 61. In "Fuller v. Chamier," L. R. 2 Eq. 682, it was held, that to A. B. and C. in equal shares during life, and after decease unto the next lawful heir of A. forever, was a limitation within the rule of Shelley's case, and that A. took an estate in fee simple. In "Bullard v. Goffe," 20 Pick, 252, upon a conveyance to the use of husband and wife for their lives, and the life of the survivor, and after their decease to the use of H. for life, and after decease of H. to the use of the heirs of the wife forever, it was held that a fee simple in the land vested in the wife in the case of her surviving her husband and H.

This last case furnishes a precedent precisely in point and will be followed. Judgment may be taken accordingly for the defendant, Caroline Erwin.

[Hamilton District Court, April Term, 1876] 73

COOK V. SPENCER ET AL.

For opinion in this case see 5 Dec. R., 331. [s. c. 4 Am. Law Rec. 665.]

77 TAXES AND TAXATION—CONSTITUTIONAL LAW.

[Lucas District Court, 1876.]

*ROBERT CUMMINGS, TREAS., v. JOHN FITCH ET AL.

1. A petition by a county treasurer for unpaid taxes and assessments in an action under an act of February 18, 1875, need not allege what these taxes and assessments were for. It is sufficient if the petition contains no more than is required by that act.
2. Assessments assessed upon real estate, special assessments, are a personal obligation and liability, for which the owner of the property may be sued personally.
3. The act of February 18, 1875, imposes no new obligations and creates no new liabilities but merely provides a remedy for inforcing liabilities already existing, and it therefore does not conflict with section 28 of article 2, of the constitution.

The opinion of the case was announced by CADWELL, J., (of Cleveland.)

CADWELL, J.

The case of Robert Cummings, Treasurer of Lucas county, against John Fitch and others, is of considerable importance, and involves quite a large amount; and further, it presents a question which, so far as I know, is entirely a new one, arising out of a statute which was passed in 1875, consequently there has not been but little investigation of the matter, and probably no judicial decisions. There is none that we are aware of construing that statute.

This case arises in this way: The Treasurer, Robt. Cummings, commenced an action in the court of common pleas and filed his petition against John Fitch and others. All, except John Fitch, are made parties for the purpose of enabling them (or calling upon them) to assert any liens that they may have in the premises described in the petition. As against the defendant, John Fitch, the object of the petition is only to obtain a personal judgment against him, but also to enforce the statutory lien for the payment of the taxes and assessments described in the petition. The plaintiff says in his petition that the defendant, John Fitch, is the owner and possesses in fee simple the premises described, describing a large number of pieces of land; that John Fitch has been such owner for upwards of fifteen years last past; that the defendant, John Fitch, stands charged upon the tax duplicate of said county for the year 1874 with taxes and assessments levied and assessed upon and against said several lands and parcels of real estate, giving each particular lot and parcel, the description and amount levied and assessed upon each lot or parcel of land; and avers that said taxes and assessments levied and assessed upon said several lots and parcels of land upon said duplicate amounting in the aggregate to $21,622, and that the said taxes and assessments are now long past due, and are unpaid, and that said defendant, John Fitch, is indebted to the said plaintiff, treasurer of said county in said several sums, being the amount appearing to be due therefrom upon said tax duplicate of said county, and the penalty thereof of five per cent. on said several sums.

The plaintiff then speaks of the other defendants, that they have some claims on the premises, and asks that the said defendants be made

*The judgment in this case was affirmed by the supreme court. See opinion, 40 O. S., 56.

parties to this action; that they may be required to state all their several claims and liens upon the premises, if any they have, and in default be barred therefrom hereafter; and also asks that the several sums appearing to be due upon the tax duplicate of the county from the defendant, John Fitch, charged against the several lots and lands and parcels of lands thereon, together with the penalty of five per cent., be declared the first lien on the several lands and parcels of land; and he further asks that the premises be sold to pay the several liens. The plaintiff also asks for a personal judgment against said John Fitch for said several sums and interest from June 20, 1875, and the penalty on said several sums of five per cent., and such other and further relief as he may be entitled to.

CLAIM OF THE DEFENDANT.

To that petition the defendant, John Fitch, filed a general demurrer, and upon that demurrer the case came on to be heard, in the court of common pleas, and after consideration that court sustained the demurrer; and that is the error complained of by the plaintiff below, who is also plaintiff here. The court sustained the demurrer and dismissed the petition, so far as the plaintiff is concerned, retaining it, however, for the purpose of adjusting any liens as between the co-defendants, Fitch and others, and claims upon these several pieces and parcels of land or some portion of them.

THE QUESTIONS RAISED.

The questions raised in the case divide themselves into two branches proper and the first which we propose to consider is the claim that independent of the constitutional questions, the petition does not state facts sufficient to constitute a cause of action. To consider that question it is necessary to refer to this law which was passed on the 18th of February, 1875. This, by the way, is amendatory to the act passed April 16, 1834. Perhaps the only amendment to the law of 1874 consists in a single word; at all events, so far as it is necessary to consider it. The law of 1874 left out the word "assessments." It now reads, "that when any taxes or assessments shall stand charged against any person or corporation upon the tax duplicate, or special duplicate of any county of this state, * * * or said amount for any other purpose authorized by law, and the same shall not be paid within the time prescribed for the payment of taxes and assessments, the treasurer of said county, in addition to any other remedy provided by law for the collection of such taxes and assessments, is hereby authorized to commence a civil action, in the name of the treasurer of such county, against such persons or corporations for the recovery of such unpaid taxes or assessments, in any courts of this state having jurisdiction of the subject matter;" and then it goes on to set forth the requisites of the petition, "and it shall be sufficient for such treasurer to allege in his petition * * * that the same was due and unpaid, and that such person or corporation is indebted in the amount appearing to be due for the property, without setting forth * * * special matter relating thereto; and if in the trial it shall be found that said person or corporation is so indebted, judgment shall be rendered in favor of said treasurer * * * of any such judgment."

Now, it is claimed that this petition ought to have set forth such a state of facts as would show what these assessments and taxes were for.

Perhaps it is not claimed that it should be averred that it was for state, for county, or for municipal purposes. But that it should show such a state of facts that would show such taxes or assessments were such as were authorized by law.

We think that

THIS PETITION COMPLIES STRICTLY WITH ALL THE REQUIREMENTS OF THIS ACT,

and that to require the plaintiff to state more specifically than he has done any special matter relating thereto, would be to do what we would have no right to, the legislature having declared that it shall be sufficient that he should not be required to say anything more than exactly what the plaintiff has said in this case.

It is said further that this statute does not give the particular remedy asked for in one part of the prayer in the petition; that is for the enforcement of the lien laws on these several pieces of property; that it gives no remedy against the land, because there was no right to pursue any equity remedy to enforce the lien for taxes or for special assessments; and if authority has been shown for the purpose of establishing that proposition, that the treasurer is not authorized by the terms of the statute to do anything more than to sue for a judgment and that judgment be rendered as in other cases.

Now, then, our opinion in regard to that matter is, that it is not necessary for us to determine that question. So far as I am concerned (I speak for nobody else, for I do not undertake to pass upon it) it seems to me that the statutes are already ample for that purpose. But it is not material in the view that we take of this case, for us to determine that question.

CONSIDERATION OF THE PETITION.

We are to consider, in the first place, whether this petition states facts, which entitle the plaintiff to any relief or to any judgment, no matter whether he is entitled to all that he prays for. It is not necessary that he should be, in order to make a good petition. There may be improper things in the petition; there may be things which are improper or indefinite, and that which may be surplusage. But where the demurrer is a general one to the entire petition, the first question is whether there is sufficient facts stated in the petition to entitle the plaintiff to any relief which he asks; if so, he is entitled to any relief or judgment whatever, either in law or equity. This being a general demurrer to the entire petition, would have to be overruled; so that it brings up back to the main question in the case, whether the claim made on the part of the defendant, Fitch, that this law of 1875 is unconstitutional. It is claimed that it is retroactive; that it interferes, if not directly with the vested rights, it interposes new obligations in regard to liabilties already existing; that it creates new liabilities, imposes new obligations, when a party had a right to stand where he stood at the time that the obligation was incurred, and controvenes the 28th section of article 2d of the constitution of the state of Ohio.

Now it seems to be conceded—at least, we thing it must be conceded—that if this statute purely imposes no new liabilities, but merely provides a remedy for enforcing liabilities already existing, that it does not conflict with section 28 of article 2d of the constitution.

ARE TAXES A PERSONAL PROPERTY.

That brings us directly to the consideration of the question. Is it not necessary for us to determine, whether taxes proper—although the statutes of the state which have been in existence for a long time, and the decision of the supreme court in the third Ohio state—would seem to indicate that all taxes properly levied, and assessments are a personal liability, because circulating to the extent of all the personal property that can be reached by the treasurer and without any exemption, are a personal liability. The law passed in 1844 says that, "when any person is charged with default, * * * payment on such chattel or personal property shall not release it * * * for the payment of taxes." * * * Another section of the statute provides, "if the county treasurer shall not be enabled to collect by distress or otherwise the taxes." * * * The case in the third Ohio state, as regards this personal question, was not made, it does not arise to the case, precisely like this. The court say there that it is an individual debt, a personal liability. But we need not consider that question or pass upon it definitely. Prior to the passage of this act, prior to the levy and assessment and closing of the duplicate of these taxes and assessments, the legislature passed a law in 1869 of the municipal code; section 545 reads as follows: "All special assessments shall be payable by the owner or owners of the property."

Now, the averment in this petition is that this amount, thus placed upon the duplicates, was taxes and assessments. If assessments are included in his petition, or in these amounts, is makes no difference to what extent, we are not called upon to require the party to specify or to be more definite and certain in his petition—to state what part are assessments and what part are taxes; but if there are assessments embraced in the amount charged upon the duplicate, or amount upon the duplicate with which the defendant, Fitch, stands charged—if they are there—why, then, we think they were within the terms of the statute of 1875.

Now what new liabilities are created by the statute of 1875? In 1869 the legislature declared that all special assessments shall be payable by the owner or owners of the property assessed personally, and by the time stipulated in the orders, and if he does not pay, then the measurer of the corporation may sue and recover. It is wholly immaterial whether we consider assessments a debt or not. They are certainly a personal liability, a personal obligation; assessments assessed upon real estate, special assessments, are a personal obligation and liability. It grows out of that fact, for which the owner of the property may be sued personally.

THE STATUTE OF 1875.

Now this statute of 1875 does nothing more than to give to the county treasurer, when the taxes and assessments have passed to the duplicate of the county, the same right to proceed to recover a personal judgment against the person in whose name that amount stands for tax and assessment that the treasurer of a corporation has already had while it stands, and before it comes on the county duplicate.

NO NEW OBLIGATIONS INCURRED.

We are unable to see how there is any new obligation incurred; how there is any new liability created, so far as these special assessments are concerned, and so far as they be embraced in this petition.

OBJECTIONS CONSIDERED.

Another objection is raised that this act, by its terms deprives the owner of the property of any right or benefit of stay of execution or exemption or of any other property in the formation of such judgment. That question is not before us now; it does not properly arise, and it could not properly be considered by us at this stage of the proceedings. If the judgment should be obtained on this petition, and the defendant's last cow, the household furniture, or any article exempt by the statute, should be levied upon, then the question would arise whether that portion of this law of 1875 was constitutional or unconstitutional. But if that part of it, so far as it being the property which was exempt from execution, by the general laws of the state, should be held to be unconstitutional, it would not necessarily go to the entire act and render the balance of it so far as it relates to the personal judgment against the defendant, unconstitutional. For if there are several clauses that relate to persons and things which can be sustained as constitutional in one part of an act, although it may be unconstitutional or void so far as it affects some other persons or things, yet the law would not be declared unconstitutional as a whole, but would be sustained, so far as it is consistent with the constitution of this state.

So we have no difficulty in coming to the conclusion that

THE COURT OF COMMON PLEAS ERRED

in sustaining the demurrer to this petition; and the judgment of the court of common pleas is reversed, and the demurrer is overruled and the case remanded.

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78 LIFE INSURANCE—DAMAGES.

[Superior Court of Cincinnati, Special Term.]

*GATES v. HOME LIFE INSURANCE CO.

Life insurance, rule of damages for failure to issue paid up endowment policy.

YAPLE, J., AND A JURY.

The plaintiff sued the defendant to recover the value of a paid-up policy of life insurance, which the defendant declined to issue on the ground that two premiums had not been paid, but that the policy had become forfeited for non-payment of the premium before the demand of a paid-up policy was made. The original policy was one for $2,000.00, to be paid the insured in ten years, or at his death if he died within the ten years. Two full premiums paid, entitled the person insured to a paid-up policy for $400.00, payable the same as the original policy. The annual premium was $175.84.

The defendant claimed that, less the chance of the insured's dying, which chance the jury should allow for in assessing the plaintiff's damages, the rule of damages was, if two full premiums were paid, to find the present worth of $400.00 due in eight years, and interest upon the amount from the time of the company's refusal to give the paid-up policy

*For opinion in this case by superior court in general term, granting a new trial, see 5 Dec. R., 313 [s. c. 4 Am. Law Rec. 395.]

to the first day of the trial term. The court refused to so charge the jury, but charged that the plaintiff, if entitled to recover, was entitled to recover such sum as would at the time of such refusal, have purchased him a like paid-up policy for $400.00 in another solvent company, having the same terms and conditions of payment as the defendant company, with interest on that amount from the date of such refusal until the first day of the trial term.

The jury found a verdict for the plaintiff for $351.68 and interest as instructed, that being as great amount as the plaintiff claimed in his petition.

C. D. Robertson, for plaintiff.

Matthews, Ramsey & Matthews, for defendant.

MALICIOUS PROSECUTION—DAMAGES.

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

JULIUS SAX v. JAMES AND WM. H. LAWS.

An action can not be maintained for damages for the malicious institution and prosecution of a civil suit, without cause, such suit being unaccompaned by an arrest of the defendant or the seizure of his property.

O'CONNOR, J.

The plaintiff in error, who was plaintiff below, set out in his petition at special term, that the defendants, J. & Wm. H. Laws, falsely and maliciously, wrongfully, vexatiously and without any reasonable or probable cause, commenced in July, 1869, an action against the plaintiff and others, in the Davidson county chancery court at Nashville, state of Tennessee, to extort and obtain from the plaintiff divers moneys, and that such proceedings were had in said action, that in December, 1873, judgment was rendered in favor of the present plaintiffs, then defendant for his costs.

That the said defendants, then plaintiffs, took an appeal from the said judgment to the supreme court of errors and appeals of Tennessee, and that in April, 1875, the said judgment was affirmed, and said action became and was wholly ended.

The plaintiff says he was put to great expense in defending said action, and was compelled to employ counsel to defend said action, at an expense of $550.00; and also to expend the sum of $300.00 in preparing for the trial of said action and hunting and preparing the testimony for trial of the same, to his damage $3,850.00, for which he asks judgment.

To this petition the defendants filed a general demurrer, that the petition did not contain facts sufficient to constitute a cause of action, because it did not aver that the plaintiff had been arrested, nor that his property had been seized in attachment or otherwise.

The demurrer was sustained and judgment entered for the defendants, to reverse which this proceeding in error was brought.

The question to be determined is whether an action can be maintained for damages for the malicious institution and prosecution of a civil suit without cause, unaccompanied by an arrest of the defendant, or the seizure of his property.

In the case of Tomlinson and Sperry v. Warner, 9 Ohio, 104, the court say: "At common law it seems well settled, that no action will lie for a *malicious* prosecution of a *civil* suit *without* cause, where there is no arrest; 1 Sak., 14. The costs allowed in all other cases are supposed to be a sufficient compensation for the injury, however malicious. The rule itself may perhaps be admitted, but *the reason* on which it is said to be founded, cannot be so readily admitted, for at common law *no costs were allowed.* If the plaintiff failed, he was amerced for his *false claimor,* and if he succeeded, the defendant was at the mercy of the king. But at common law, whenever there was an arrest, holding to bail, or imprisonment, where *no debt was due,* or for a greater sum than was due, with a malicious intention to injure, the action lay for a malicious arrest; 1 Saund., 228. The action for a malicious prosecution of criminal complaints, lies as well where there is not, as where there is an arrest; and the grounds of the action are the *malice* of the defendant, want of *probable cause,* and injury to the plaintiff's person by imprisonment, his reputation by scandal, or his property by expense."

In Addison on torts, p. 599, it is said: "If one man prosecutes a civil action against another maliciously, and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action. Thus, if one man slanders another in an action, in a proper court no action will lie for it. There is great difference between the bringing of an action and indicting maliciously and without cause. When a man brings an action he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a cause of action, he may sue and put forward his claim, however false and unfounded it may be. The common law, in order to hinder malicious and frivolous, and vexatious suits, provided that every plaintiff should find pledges, which were amerced if the claim was false. But that method became disused, and then to supply it, the statutes gave costs to the successful defendants. But there was no amercement upon indictments, and the party had not any remedy to reimburse himself but by action."

In Vol. 1 American Leading Cases, note, p. 210, the author says: "An action will not lie for the mere institution of a civil suit in a court of competent jurisdiction, where the person is not arrested or held to bail, or his property attached, or other grievance occasioned because the costs are considered a sufficient compensation. And though in some instances the general principle has been asserted, that case will lie for any civil suit maliciously and groundlessly instituted; see Whipple v. Fuller, 11 Connecticut, 582; Paugburn v. Beele, 1 Wendell, 354, yet excepting where the person or property has been specifically injured, as by arrest, holding to bail, or attachment, all the cases seem to be, not for malicious institution of the suit, but for malicious abuse of the process of law, which is a different action.

In the case of Potts v. Imlay, 1 Southard, N. J., 330, which was an action for damages for maliciously instituting two suits for the same debt, each of the suits being abandoned before trial, the court say: "The books have been searched for four hundred years back, and upon that search it is conceded even by the counsel for the plaintiff himself, that no case can be found in which this action has been maintained, in circumstances similar to the present." * * *

The court further say: "If we go to the very equity of the thing which seems to be the ground of argument here taken, the same reason-

ing which is here used to prove that the defendant ought to have damages for a false claim, would also prove that the plaintiff ought to have damages upon a false plea. He is put to all the expense of a trial upon such plea, and yet he can recover nothing therefor but his lawful costs. Though surely all experience teaches us, that the plea of the defendant is not less frequently false than the claim of the plaintiff. But to what excesses would this lead us? Where would litigation end? The truth is, that merely for the expenses of a civil suit, however malicious and however groundless, this action does not lie, nor ever did, so far as I can find, at any period of our jurisdicial history. It must be attended, besides ordinary expenses, with other special grievance or damage not necessarily incident to a defense, but superadded to it by the malice and contrivance of the plaintiff; and of these an arrest seems to be the only one spoken of in our books."

This decision was rendered in 1816, and since that time, as was decided in 9 Ohio 104, Tomlinson & Sperry v. Warner, before cited, an attachment of the defendants properly will also lay the foundation for an action. And in Fortman v. Rottier & Hoenig, 8 Ohio St., 548, it was held, that an action may be maintained for maliciously, and without probable cause, procuring by affidavit and employing the statutory aid of an attachment as auxiliary to a civil action. An action, however, might lie for this as being a malicious abuse of the process of the court.

In the case of Springer & Fries v. Wise et al., 2 Disney, 391, a case decided in special term by Judge Spencer, it was held thus: "An action will not lie for the recovery of damages, alleged to have occurred in consequence of a malicious civil suit, unaccompanied by arrest of the person or a seizure of property. The costs of the action in which he recovers, are supposed to compensate him for his loss."

To the same effect Sec. 1 Bosanquet and Puller's Rep., 205; 1 Lord Raymond's Rep., 379; 8 Louisiana Annual, 477; 5 Barbour, 267; 1 Peter's Circuit Court, Rep., 207; 73 Eng. Com. Law. Rep., 712.

On the other hand it is held in Whipple v. Fuller, 11 Conn., 582, that "an action on the case at common law, is sustainable for a vexatious civil suit, in which there was no arrest, or holding to bail," and we may infer from the decision even in cases where there was no seizure of the property.

So also in Closson v. Staples, 42 Vermont 209, it was held, that to maintain an action for damages when a civil suit is commenced and prosecuted maliciously, and without reasonable or probable cause, "it is not material whether the malicious suit was commenced by process of attachment, or by summons only."

These cases also decide that "in England, since the statute which gives costs to defendant, no action for malicious prosecution would lie, unless the body of the party was arrested and imprisoned, or held to bail." "But," it is said, "this does not seem to be in accordance with the principles and analogies of the text writers and early decisions of the English courts." That "in England, before the statute of *Marlbridge*," which was passed in the 52nd year of Henry III, 1268, "no costs were recoverable in civil actions." "This statute, and others subsequently enacted, gave costs to the successful defendants, as it is said, by way of damages against the plaintiff, *pro falso clamore*." "Before the statutes, entitling defendants to cost, existed, they had a remedy at common law, for injuries sustained by reason of suits, which were mali-

cious and without probable cause." And in each of these cases the court cited Co. Litt 161, 3 Levin 210; 2 Wilson 305; Styles 379; Hobart, 266; 4 Mod. 13; 3 Chitt Bla. 125.

From these authorities we infer it is not strictly accurate to say, that at common law an action could not be maintained for the prosecution of a malicious civil suit, unaccompanied by an arrest. Such an action could be maintained at common law, before the statute of *Marlbridge*, but could not be maintained at common law since that statute, the period known as of the common law embracing time, after the statute as well as time before.

In Marboury v. Smith, 11 Kansas 554, it was held: "An action for malicious prosecution may be maintained in any case where a malicious prosecution, without probable cause, has in fact been had and terminated, and the defendant in such prosecution has sustained damage over and above his taxable costs in the case."

From a review of the cases cited, we think the great weight and current of authority is against the maintaining of an action such as that now under consideration. Upon grounds of public policy, we think that where the process of the law is not used wrongfully to arrest the person or to seize his property, every one should be free, without enquiry into his motive, to present any case of which the court has jurisdiction for adjudication. Otherwise the poor man or the timid man might be deterred from presenting a meritorious claim to a court of justice, through fear that in addition to the expense consequent upon losing his case, he might be subjected to a suit for damages, for having brought it. Besides, when is such litigation to end? If A. sues B. and fails, B. may sue A. for malicious prosecution, and if B. fails, A. may again sue B. and so on. The freedom to speak one's mind in open court, either by litigant or counsel, like the freedom of debate in legislative bodies, far outweighs any consideration of possible abuse of the privilege.

We think the demurrer to the plaintiff's petition was properly sustained, and the judgment must be affirmed.

Judgment affirmed.

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79 [Hamilton District Court.]

AMERICAN EXPRESS CO. v. EPPLY.

For opinion in this case, see 5 Dec. R. 337 [s. c. 4 Am. Law Rec. 672.]

[Hamilton District Court.]

LIZZIE SNYDER v. CITY OF CINCINNATI.

For opinion in this case, see 5 Dec. Rec. 332 [s. c. 4 Am. Law. Rec. 667.]

[Hamilton District Court.]

HARMONIA LODGE v. J. R. SCHAFFER.

For opinion in this case, see 5 Dec. Rec. 335 [s. c. 4 Am. Law Rec. 670.]

[Hamilton District Court.]

LOUIS COOK v. THOMAS FLOYD.

For opinion in this case, see 5 Dec. R. 333 [s. c. 4 Am. Law. Rec. 667.]

APPEALS—JUDGMENT.

[Cuyahoga District Court, April Term, 1876.]

Rouss, McClure and Lemmon, JJ.

ELIZABETH HANNON v. LEWIS TALLMAN.

Where, on appeal from a justice's judgment, items are added in the petition not appearing in the bill of particulars, without leave, judgment by default for the full amount is erroneous.

ERROR to the Court of Common Pleas.

This was a suit originally brought before a justice of the peace of the city of Cleveland, for the collection of an account; the items of the same being particularly set forth in a bill of particulars. A judgment was recovered by the plaintiff below for the full amount claimed. From this judgment the defendant in the court below appealed. To the account, attached to the petition filed in court of common pleas, were added certain items which did not appear in the bill of particulars filed with the justice. It does not appear that any leave of court was obtained to add them. No answer was filed, and a judgment by default was rendered by the court of common pleas for the full amount claimed in the petition.

Held, the addition of the items to the petition and the rendition of the judgment for the full amount claimed therein was erroneous, and the judgment of the court of common pleas is reversed.

L. J. Rider, attorney for plaintiff in error.

Barrett, attorney for defendant in error.

JUSTICE OF THE PEACE.

[Cuyahoga District Court.]

Rouss, McClure and Lemmon, JJ.

HENRY HARTMAN ET AL. v. JOHN S. WHITE.

1. In an action begun before a justice, taken to the common pleas on error, and thence to the district, a transcript filed, but not attached to the petition in error, or in any way made a part of the record, will not be considered.
2. A justice is not obliged to separately state his conclusions of law and of fact.

ERROR to the Court of Common Pleas.

This was a suit, originally commenced before a justice of the peace. From there it was taken on error to the court of common pleas, and from there it came into this court on a petition in error. There is a transcript also filed in this court, but it is not attached to the petition in error, nor made part of the record in any way.

It is alleged as ground of error, that on the trial before the justice, the court was requested by the plaintiff in error to state separately his findings of law and fact. This the justice refused to do, and the court of common pleas sustained him.

Held, 1st. That this court cannot look into the transcript for the purpose of discovering error, it not being attached to the petition in error, nor made part of the record.

2nd. The justice was right in refusing to separately state his findings of law and of fact, section 280 of the Code not applying to proceedings before justices of the peace.

J. W. Heisley, for plaintiff in error.

John S. White, in person, for defendant in error.

83 GARNISHMENT.

[Superior Court of Cincinnati, General Term, April 1876.]

Yaple, O'Connor and Tilden, JJ.

*GEORGE H. MYERS v. THOMAS R. SMITH ET AL.

Where an action is brought against a defendant, who is a non-resident of the state, and, in aid of such action, an attachment is sued out and a person is garnisheed, who owes or holds property of a non-resident co-partnership, of which firm the attachment defendant is a member, the *interest* of such attachment defendant in such partnership property, or chose in action, may be garnisheed in the hands of such person, in whose possession or under whose control the same may be.

YAPLE, J.

This is a petition in error, prosecuted here to reverse the proceedings in this court at special term, overruling a motion made by the plaintiff in error, Meyers, to dismiss an order of attachment sued out against him by Smith and others, in this court, in an action by them against him, upon a foreign judgment rendered in their favor against Myers. The ground of the attachment was, that Myers was a non-resident of this state; and the trustees of the Cincinnati Southern Railroad were garnisheed. They answered that they were not indebted to Myers individually, but did owe the firm of Myers & DeHan. Thereupon Myers moved to dismiss the attachment, and the court overruled the motion and continued the attachment. The sole ground of error assigned, is, that in an action against an individual partner, his interest in the property and effects of the co-partnership can not be attached. The code, section 194, provides that "The order of attachment shall be directed and delivered to the sheriff. It shall require him to attach the lands, tenements, goods, chattels, stocks, *rights,* credits, moneys and effects of the defendant in his county," etc.

And section 214 provides, that, "The garnishee shall appear as follows: * * * He shall appear and answer, under oath, all questions put to him touching the property of every description and credits of the defendant in his possession or under his control," etc.

From these provisions it will be seen, that the process of attachment is made much broader and more ample than a writ of execution, under which writ choses in action and equities cannot be levied upon, but they may be taken in attachment. They are broad enough to permit the attachment of one partner's "rights" or interest in the property, or effects of his firm. Such interest will be what is coming to such partner after all the liabilities of his firm to its creditors are discharged, and after his co-partner's claims against him, growing out of this partnership business and transactions are satisfied. That is what these defendants in error attached, and what alone they had the right to attach.

It can be ascertained, because the interest attached is here, and the co-partner, who is also a non-resident of the state, may be brought in by publication to assert his own and the rights of the partnership creditors. Were it not for the all embracing language of the code relating to the attachments, were such provisions as limited as the law relating to executions, the arguments of the plaintiff in error would have great force, and we might be required to dismiss the attachment; but upon a fair construction of such provisions, we think, such interest was subject to attachment, and that the motion to dismiss was properly overruled.

The proceedings of the court below will, therefore, be affirmed.

Judges O'CONNOR and TILDEN, concur.

W. S. Porter, for plaintiff in error.

J. R. Murdoch, for defendant in error.

*The decision in this case was reversed by the supreme court. See opinion, 29 O. S., 120.

PAVING ASSESSMENT. 84

[Superior Court of Cincinnati, General Term, 1876.]

Yaple, O'Connor and Tilden, JJ.

GREAT WESTERN STOCK CO. ET AL. V. CITY OF CINCINNATI.

Where the city of Cincinnati enters into a contract for the grading and paving of a part only of a certain street which the common council of the city by ordinance in accordance with the resolution of the board of city improvements has declared shall be improved by grading and paving between certain termini, and that the cost of the whole of such improvement shall be charged upon the abutting property, and the part so contracted for is completed and accepted by the city, and an ordinance of assessment passed by the council upon the abutting property for the part so improved, *Held:*

That such ordinance of assessment is premature and unauthorized, because the work done is not substantially the same as that contemplated by the resolution of the board of city improvements and the ordinance of council in pursuance thereof.

O'CONNOR, J.

ERROR to judgment rendered at special term.

The action at special term was to enforce an assessment for grading and paving west Front street from Carr street to Sixth street. Judgment was rendered for the plaintiffs below which the plaintiffs in error now seek to reverse upon several grounds, one only of which is necessary to consider, it being conclusive of the right of the plaintiffs in error to a reversal.

It appears by the petition of the plaintiffs below that on the 3d day of June, 1872, the board of city improvements of the city of Cincinnati, declared by resolution that it was necessary to improve West Front street, in the city of Cincinnati, from Fifth street to Sixth street (not from Carr street to Sixth street) by grading and paving, etc. That on the 8th day of June, 1872, the board of councilmen of said city and on the 14th day of June, 1872, the board of aldermen of said city declared by resolution that it was necessary to improve said West Front street from Fifth street to Sixth street, by grading and paving, etc., and that the expense of said improvement be assessed per front foot on the property abutting thereon. That on the 18th day of October, 1872, the common council of said city, two-thirds of all the members in each of the boards composing the same concurring, passed an ordinance that West Front street from Fifth street to Sixth street be improved by grading and paving, etc., in accordance with the resolution of said council adopted as above set forth. That on the 16th day of December, 1872, the city having previously caused advertisements for bids to be made for the improvement of said West Front street from Carr street to Sixth street, (not from Fifth street to Sixth street) the said board of city improvements reported to the common council that said O'Connor & Enright were the lowest bidders for said improvement from Carr street to Sixth street, and recommended the passage by said council of a resolution to contract with said parties for said improvement, which the city council did, and afterward, on the 19th day of January, 1873, the city of Cincinnati acting by its city auditor entered into said contract with said parties for said improvement. That on the 21st day of July, 1873, W. H. Bristol, street commissioner of said city certified that said West Front street from Carr street to Sixth street

had been improved according to the said contract, and thereupon the city council, in presence of the recommendation of the board of city improvements passed the ordinance of assessment for the work so done from Carr street to Sixth street.

It will be seen from these proceedings that the resolution of the board of city improvements, without which council could take no step in the matter, and also the resolution and ordinance of council were for the improvement of West Front street from Fifth street to Sixth street, while the advertisement for bids, and the contract, and the work done, and the assessment, embraced only a part of the distance from Fifth street to Sixth street, to-wit from Carr street to Sixth street. And it is admitted no other contract was made and no other work done for that part of West Front street between Carr street and Sixth street.

These proceedings present the question whether the work done for which the assessment has been made, is substantially the work contemplated by the resolution of the board of city improvements and the resolution and ordinance of the city council, and if not, whether an assessment can be lawfully made for the part performed while the improvement originally contemplated remains uncompleted. We think it is clear it is not substantially the work originally contemplated by the resolutions and ordinances and therefore the work done has not been authorized by any resolution of the board of city improvements, nor by any resolution of the common council, nor by any ordinance of the common council, and as these resolutions and the ordinance in pursuance of them are preliminary requisites to the jurisdiction of the common council to make an assessment upon abutting property for an improvement, it follows that the ordinance of assessment for the work done is without authority and void.

It is within the discretion of council, in pursuance of the resolution and of the ordinance, to let the work in different sections, and for different prices, but until the whole improvement originally contemplated by the resolutions and by the ordinance is substantially completed an assessment for a part is premature; and when such improvement is completed the assessment must be uniform along the whole line of improvement for the average cost of the separate sections. In the present case the plaintiffs in error complain that the assessment is one dollar per front foot more than it would have been had the whole improvement contemplated been completed, and the cost of the whole work averaged. But whether this be so or not is immaterial, the question being not whether the assessment is too much or too little, but whether the common council, as to the work done, have taken the necessary steps to acquire jurisdiction to make any assessments whatever.

It was decided at the present term of the supreme court, in the case of The City for the use of Wirth v. The Spring Grove Avenue Co. et al. affirming the decision of the general term of this court, that where a contract was entered into by the city for the improvement of Johnson street from a certain point to Spring Grove avenue, in accordance with the resolution of the board of city improvements and the resolution and ordinance of the common council, and the work was completed to within about 200 feet of said avenue and then abandoned, and the city accepted the work done and the council passed an ordinance of assessment for the cost of the work done upon the abutting property, that the assessment was premature and that the plaintiff could not recover.

In that case the contract was for the whole work contemplated by the resolutions and ordinances to improve but a part only of the work was done and accepted.

In the present case the contract was for only a part of the work contemplated by the resolutions and ordinance, and all the work contracted for was done; but in both cases the work done and accepted, and for which the ordinance of assessment was passed, was not substantially the work which the resolutions declared necessary and which the ordinance declared should be performed, and therefore in neither case had the common council acquired the jurisdiction to pass an ordinance of assessment.

When the present case was heard at special term the supreme court had not decided the case of the city for the use of Wirth and the attention of the judge at the special term was not called to the question now considered, although it was one of the defenses set up in the answer.

For the reasons stated we must hold that the assessment in the present case was prematurely made and unauthorized, and therefore the judgment must be reversed.

It may be proper to add that the city may yet go on and complete the work originally contemplated by the resolutions and by the ordinance of council, and so make a valid assessment when the whole improvement is completed.

Judgment reversed.

YAPLE and TILDEN, JJ. concur.

Wulsin & Perkins, for plaintiffs in error.

John C. Healy, for defendants in error.

STREET ASSESSMENTS. 84

[Superior Court of Cincinnati, General Term, 1876.]

Yaple, O'Connor and Tilden, JJ.

MACK & VERITY v. CITY OF CINCINNATI.

1. Owners of assessed lots can not be permitted to prove that, by mistake and unskillfulness of the contractor, work was done in excess of the original amount, and more paving than would otherwise have been required.
2. If lot owners gave the contractor a license to enter their premises to dig for materials for the improvement, damage for abuse of the privilege cannot be set up in an action upon the assessment.

ERROR.

YAPLE, J.

1. Where the pleadings admit, that all the proceedings, authorizing the improvement of a street and assessing the costs upon the abutting property, have been regular, the owners of assessed lots, in the absence of fraud or collusion between the contractor and the city authorities, cannot be permitted in order to defeat or reduce the assessment, to prove that, by mistake and unskillfulness of the contractor, more excavations and filling was done than need to have been, and in excess of the original estimated amount.

2. Nor can he show, that in consequence, more paving, etc., was done, than otherwise would have been required.

3. If such lot owners gave the contractor license to enter their premises to dig for materials to construct such improvements, and the contractor abused the license by digging deeper and taking more material than authorized by the license, damages for such abuse of license cannot be set up and recovered for in an action upon the assessments, the same being neither a set-off nor counter claim, but an independent right of action for which such injured party must sue the contractor.

Affirmed.

Snow & Kumler, for plaintiffs.

McGuffy, Morrill & Strunk, for defendant.

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84 **CORPORATIONS—USURY.**

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

*JAMES P. KILBRETH, RECEIVER, v. ISAAC BATES.

Where a corporation whose charter provided that if it demanded and received a greater rate of interest than seven per cent, its charter should be thereby forfeited, took a note payable to it in twelve months after date, with interest *after* maturity at ten per cent per annum, in an action on the note, *Held:* 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 authorized. As the exorbitant interest could be avoided at the option of the maker by prompt payment, the note was not usurious in its inception, and no subsequent event could make it *ultra vires*, and the plaintiff was entitled to recover the unpaid principal with six per cent.

YAPLE, J.

Full opinion at special term (5 Dec. R., 320)—Adopted in its conclusions, viz., that the note sued on embraces interest at a usurious rate reserved as part of the contract of loan, that the defendant, Bates, was a mere accommodation party to the paper, as the bank well knew, getting none of the moneys, that the charter of the bank forbid it to reserve usury, and that, therefore, the case is governed by the case of The Bank of Chillicothe v. Swayne, 8 O. 257.

Judgment affirmed.

Hoadley, Johnson & Colston, for plaintiff.

Kebler & Whitman, for defendant.

[Hamilton District Court.]

84 HENRY STEPHENS v. UNITED R. R. STOCK YARDS ET AL.

For opinion in this case see 5 Dec. R. 334 (s. c. 4 Am. Law Rec. 669). The decision was affirmed by the supreme court. See opinion 29, O. S. 227.

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*For opinion at special term adopted in this case see 5 Dec. R. 320. The case was affirmed by supreme court, see opinion 38, O. S. 187.

WAIVER. 85

[Hamilton District Court, 1876.]

Cox, Force, Murdock and Avery, JJ.

AMERICAN EXPRESS CO. v. TRIUMPH EXPRESS CO.

1. Waiver is a thing of intention, and there can be no intention to waive, where there is no knowledge.
2. Where a party has an election to adopt one of two inconsistent courses, and takes decisive action with knowledge of his right and the fact, his election is determined and he is estopped.
3. The question of waiver is a mixed one of law and of fact, and it does not become a question of law, except where the facts and circumstances bearing upon it, are all admitted.

AVERY, J.

The American Express Co. was insured to the extent of $10,000 against loss by fire upon all goods in transit between March 4, 1872, and March 4, 1873. Fires occurred in 1872, by which there were losses, September 29, November 7 and November 25. A condition of the policy required that notice of the loss should be given forthwith, and the proofs should be furnished as soon thereafter as possible. Notices were given forthwith in each case, but proofs were not furnished for nearly a year; the first, September 18, 1873; the second, October 16, 1873; and the third, October 24, 1873. At the time the proofs were presented, no demand of payment was made, because the policy allowed sixty days after proof for payment. But another clause of the policy provided, that no suit should be brought after one year from the occurrence of loss, and that the lapse of a year should be deemed conclusive against the validity of the claim. Accordingly, when the Express Company afterward made demand of payment, they were informed that the year had elapsed. This suit was then brought, and, upon the evidence, the court of common pleas rendered judgment for the defendant.

It is contended that the time, within which proofs were furnished, was reasonable, because the number and variety of consignments, and the difficulty of obtaining information from the consignees, and that, as this time, together with the sixty days, allowed for payment, exceeded one year from the time of the loss, that, therefore, the one-year clause was gone. Upon the other hand, for the Insurance Company it is contended, that the one-year clause affected the time, within which proofs were to be made, so far, that such proofs could not be delayed, until the year would elapse before the expiration of the sixty days. But whether taking the condition as to the time, within which proofs were to be furnished, by itself, there was a compliance with the condition, is the question first to be determined.

The Insurance Company made its defense upon that ground, as well as upon the lapse of one year, and, unless the judgment of the court was against the evidence in respect to time, it must be sustained. The evidence was, that the Express Company was in a position to make proofs of loss, previous to August 20, 1873. The agent of the Express Company, who is the only witness, does not say how long previous to the 20th of August vouchers had been received from the various consignees, and they had been settled and the proofs had been furnished to other Insur-

ance Companies, having risks, and it was not until one month afterward that proofs of the first loss were furnished to the Triumph Insurance Company, and not until two months afterward were the proofs of the other losses furnished. The proof of the first loss was sent from New York by letter. The other proofs were delivered here by the company's agent. They were handed to the treasurer of the Insurance Company, with the remark that here are the proofs of loss, and the treasurer responded: "All right, I will hand them to the president." At that time the Insurance Company had suspended business, because of financial embarrassment, and losses were referred to a loss committee. Afterward the president met the Express Company's agent and told him that this loss had been referred, and there was a conversation about certain proceedings in bankruptcy that had been commenced against the company, but nothing was stated about payment or refusal to pay.

It was said that this was a waiver on part of the company, but while there are many cases upon the point, that time may be waived, there are none which go so far as to hold, that simply receiving proofs without objection, is waiver in a case of this kind, where the policy required proofs to be furnished as soon as possible, leaving the limit of time uncertain. The examination of proofs might be necessary in order to determine whether the condition had been complied with. If, however, in any case, receipt of proofs without objection might be waiver, it could only be in cases, where there was knowledge of the facts which, as a breach of the condition, would relieve the company.

In this case, although the company were charged with notice, that the time between the loss and the presentation of the proof had elapsed, it did not know that the Express Company had been in a position to furnish proofs for one and two months before they actually furnished them.

Waiver is a thing of intention, and there could be no intention to waive where there is no knowledge. Where a party has an election to adopt one of two inconsistent courses and takes decisive action with knowledge of his right and the fact, his election is determined and he is estopped.

But the facts and circumstances are not sufficient to make the conduct of the Insurance Company an estoppel, because there is nothing to show that they had the requisite knowledge. Indeed, as the question of waiver is a mixed one, and it does not become a question of law, except where the facts and circumstances, bearing upon it, are all admitted, this question was properly a question of fact, to be determined by the court of common pleas, and in its determination we do not think the judgment was against the weight of the evidence.

Being supported, therefore, upon that point, it will be enough, and it is not necessary that the question, with respect to the one-year clause, should be discussed.

Judgment affirmed.

Collins & Herron, attorneys for plaintiff.

Moulton, Johnson & Blinn, attorneys for defendant.

USURY. 85

[Cuyahoga District Court.]

*VILAS NATIONAL BANK OF PLATTSBURGH v. D. B. CHAMBERS ET AL.

The only penalty for usury to which a national bank is subject is forfeiture of double the amount of interest.

ERROR to Superior Court of Cleveland.

This is an action brought by the Vilas National Bank of Pittsburgh, a corporation duly organized under the United States National Banking Law, against D. B. Chambers and A. G. P. Dodge seeking to recover a judgment against them individually on their notes amounting in all to $11,000.00 signed by D. B. Chambers and Co., these two persons composing that firm, as it is alleged, the bank having discounted them for value and before maturity. Only D. B. Chambers was served with process. The defendant, Chambers, in his answer denies the partnership and alleges that although the style of the firm was D. B. Chambers & Co., he had no real interest in it and that the firm name was assumed merely for convenience. He also alleged that the notes upon which the suit was brought were accommodation papers and that White & Co., the payees, and the plaintiffs who discounted it for them the parties through whose hands they passed, were fully aware of that fact at the time they discounted them. He further says that the paper was made in the state of New York and there transferred. That the legal rate of interest is seven per cent. in that state, New York. "Hence if you should find that the notes in this case, were accommodation paper in the hands of White & Co., and they were transferred to this plaintiff for a usurious consideration, the transaction would be a misdemeanor under the law of that state, and no action can be maintained by the plaintiff on these notes. In that case your verdict should be for the defendant."

Plaintiff insists that the court erred in its charge as above stated.

MCCLURE, J.

When a state court is called upon to interpret United States statutes, it must follow the decision of the court of last resort of the United States construing the same. Following this rule as laid down in the case of the Farmers and Mechanics' National Bank of Buffalo v. Dearing, decided by the U. S. Supreme Court at its October term 1875 and reported in the Law and Equity Reporter of January 12, 1876, and in which this whole question of usury is decided, we must hold that the only penalty to which the Bank is subjected is that created by the law under which it is incorporated and that is, the forfeiture of double the amount of interest.

The judgment below must be reversed.

S. Burke, for plaintiff.

J. C. Hutchins, for defendant.

*See also decision of district court, 3 Dec. R., 486 (s. c. 2 Clev. Law Rep., 235.)

85

SALE OF WARD'S LANDS.

[Lawrence District Court, 1876.]

*MAURR v. PARRISH.

1. A petition by a guardian to obtain sale of his ward's lands, is defective if the lot is described by the wrong number, and the purchaser obtains no title.
2. The proceedings may be attacked collaterally.

Parish filed petition in Lawrence county common pleas to recover real estate namely: Lot 173 in, etc. Maurr answered: That while plaintiff was a minor aged 15, her guardian, Dills, applied to the probate court by petition to sell his ward's real estate. A complete record of the proceedings in the probate court is made part of the answer. The record shows a proceeding regular in all respects except that the guardian's petition describes the lot as lot numbered 73 in, etc., instead of lot No. 173, etc. The order of appraisement, the order of sale, the return and confirmation, order for deed and the deed itself describes the lot as No. 173. From this sale Maurr derived title. This answer was demurred to and demurrer petition sustained. The case comes up now on petition for error.

BRADBURY, J.

The error in the guardian's petition in describing the lot by a wrong number was fatal. In consequence thereof, the probate court obtained no jurisdiction, its order, and the sale under it was void, and the purchaser obtained no title, and the proceedings can be attacked collaterally.

USURY—BILLS AND NOTES—PLEADING.

[Cuyahoga District Court, 1876.]

91

†S. H. BLOCH ET AL. v. S. KOCH.

1. Where a payee of a note in which usurious interest has been included, makes a bona fide transfer of it before maturity, and judgment thereon is rendered against accommodation makers, which they have been obliged to, such makers may maintain an action to recover the usury, against the person who exacted it.
2. Where a pleader has mistaken the relief to which he is entitled, as where a surety is entitled to be subrogated to the rights of his principal, but has not asked for subrogation, the petition may be amended to that effect, and the maker of the note may be made a party if necessary.

MCCLURE, J.

ERROR to the Court of Common Pleas.

Petition alleged that, in 1871, one S. Bloch borrowed of defendant, $2,500.00, giving his note as six months with plaintiffs as accommodation makers. At the end of the six months S. Bloch paid twenty per cent. interest, and gave a new note at six months for the same amount. When that note matured he paid sixteen per cent. interest on $2,500 and $500 on the principal, and gave a new note for $2,000, at one year, with plaintiffs as accommodation makers, specifying in the note interest at the rate of eight per cent., but agreeing to pay sixteen per cent. When the note fell due he paid sixteen per cent. interest and gave another note for $2,000 with plaintiffs as accommodation makers. This same proceeding was subsequently repeated, plaintiffs each time signing the note as accommodation makers and S. Bloch paying sixteen per cent., until the usurious interest he paid amounted to $892.80. In December, 1870, S. Bloch was adjudged a bankrupt and an assignee appointed. Before the maturity of the note then outstanding, defendant endorsed

*The judgment in this case was reversed by the supreme court. See opinion 26 O. S. 636.

†The decision in this case was affirmed by the supreme court. See opinion 29 O. S. 565.

said note to Koch and Goodhart. On the 2nd day of December, 1874, and before the maturity of said note, Koch and Goodhart indorsed and delivered it to Henry Wick and Co., bankers, for a valuable consideration. On the 9th of December, 1874, the assignee of S. Bloch paid Wick and Co., $260.26. Plaintiffs received no consideration for their signatures to the notes. Wick & Co. sued on said note in the superior court of Cleveland, the present plaintiffs and also S. Bloch the present defendant, and Koch and Goodhart. On the trial the court found all these facts to be true and rendered judgment in favor of Wick & Co., against S. Bloch, as principal, these plaintiffs as sureties and against Koch and Goodhart and the present defendant. Petition further alleges that these plaintiffs were obliged to and did pay the whole of said judgment; that S. Bloch is entirely irresponsible; that by the wrongful act of defendant in transferring said note, plaintiffs were obliged to and did pay usurious interest on said note to the amount before stated and praying judgment against defendant as the person who exacted the usurious interest which plaintiffs were so obliged to pay. To this petition defendant filed a demurrer, on the ground that it did not "state facts sufficient to constitute a cause of action." The court of common pleas sustained the demurrer, to which plaintiffs excepted, and the court rendered judgment on the demurrer in favor of the defendant. To reverse this judgment, plaintiffs filed their petition in error in this court.

The defendant in error claimed that S. Bloch was the person who paid the usurious interest and the only one who could maintain this action, and that he having been declared a bankrupt, the most that plaintiffs could do, would be, after the assignee had sued the defendant, and recovered the amount so paid, to prove their debt in bankruptcy and share in the dividend therein declared, in common with the other creditors of S. Bloch. The plaintiffs in error claimed that under the statute, 1 S. & C. 744, all payments of usurious interest paid by S. Bloch were in fact payments on the principal. That after such payments, a note being given for a sum which included this usurious interest, this interest became thereby incorporated into the new note, and defendant having paid the new note paid this usurious interest. That the object of the law was to enable persons who were shut off from the defense of usury by the fact that a plaintiff was an innocent indorsee of negotiable paper before maturity to place themselves in as good a position against the person extorting the usury as though such person had brought the suit upon the note. That had defendant brought the suit in the superior court, plaintiff would not have had to pay this usurious interest. Selser v. Broek, 3 O. S. 302. The defendant's wrongful act having prevented the interposition of this defense, the court should put the plaintiffs in as good a position as against this defendant as though he had not committed this fraud upon the law.

They furthermore alleged that S. Bloch could not maintain an action to receive back this money, he, although the person previously bound, not having paid enough to satisfy the principal of the debt with legal interest, and suggested that the holding contended for by defendant, would result in a multiplicity of suits, in cases where usurious interest was paid one year by one party to the instrument, and another year by another party to the instrument. To avoid this, the person finally paying the note without reduction, should be regarded as the person paying the usurious interest.

Held: This case is one of first impression. So far as we know the exact question here presented has not been decided here, or elsewhere. It is one of great difficulty, and the members of the court have not come to a decision in relation to it, without feeling many doubts.

After much consideration we have unanimously concluded to reverse the judgment below. Were we forced to decide the question under the old system of pleading, under which the pleader was restricted to the relief prayed for in his petition, our doubts might not have been sufficiently resolved to enable us to decide the question in favor of plaintiffs in error. The facts disclosed in plaintiff's petition unquestionably show a moral right to relief against defendant in error. But the question is, can this moral right be enforced under the provisions of law? There certainly have been great extortion and oppression practiced by defendant in error upon plaintiff in error and S. Bloch, and if the court can afford relief they should. We do not express any opinion as to whether plaintiffs in error are entitled to recover under the statute, on the ground that they themselves have paid the usurious interest, as we have found another ground on which to base our decision, in which we all concur, and which is free from the difficulties attending the other question. Under our present system of practice,

law and equity are administered in the same court in the same proceeding. It is well settled in this state that the prayer forms no part of the petition. That although the pleader is mistaken in the relief which he asks, yet if the facts stated show the party entitled to relief, the court will give such as the case may require. It is equally well settled, both by practice and by statute, that a surety is entitled to be subrogated to the rights of his principal. The statutes 2 S. & C. 1083, 1084, S. & S. 744, 68 O. L. pp. 17, 18, do not in their terms cover the present case, but we think that the reason of these statutes is applicable here. Either the present plaintiff in error or S. Bloch are entitled to maintain this action against defendant. If S. Bloch is entitled to bring suit, he is principal and these plaintiffs are his sureties, and they having paid the debt we think they are entitled to be subrogated to his right of action, expressing, however, no opinion as to whether these plaintiffs could or could not maintain this action without subrogation. If it be necessary, plaintiffs may amend their prayer for relief in their petition. We express no opinion as to the effect of the bankruptcy of S. Bloch on the sureties' right of subrogation. The assignee of S. Bloch has never asserted, so far as appears, any right against defendant. Whenever he does it will be time enough to determine whether he is entitled to relief against this defendant. In other states it has been held that an assignee in bankruptcy can not go back of a judgment against a bankrupt, to assert usury. Whether this is so under our statute we do not decide. We reverse the decision of the court below. Plaintiff, if he sees fit, may then amend the prayer to his petition, and the assignee of S. Bloch if he thinks proper may apply to be made a party, and resist a claim to recover against defendant. Whether this application should be granted, and whether the assignee can successfully assert such a claim is not before us.

Mix, Noble and White, attorneys for plaintiffs in error.

J. W. Heisley, attorney for defendant in error.

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92 STATUTES—OFFICE AND OFFICER.

[Hamilton District Court, April, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

FRIEND & FOX PAPER CO. v. LESSEES OF PUBLIC WORKS.

A statute which provides that certain "officers" shall be abolished, in effect abolishes their offices.

AVERY, J.

The plaintiff claimed a right to a certain supply of water in a mill at Lockland from the Miami canal, and complained of the defendants, the lessees of the public works, and Charles Smith, for that they entered upon their premises and cut off a certain portion of the supply of water. A motion was made by the plaintiff that the board of public works of the state of Ohio should be made a party defendant, upon the ground that the facts complained of were done under their authority.

Held: It was impossible to grant the motion. The board of public works is an agency of the government of the state of Ohio, established by the constitution for the superintendency of the public works. It acts under the name of the state and by the authority of the state, and if its action is complained of the complaint must be against the state. The state may appear in its courts as a suitor; but no suits can be brought against the state by a citizen without some special legislative act. The court had been referred to no such legislative act authorizing a suit against the board, and, upon examination, had not been able to find any.

The application would therefore be overruled.

Matthews & Ramsey, for the plaintiff.

Forest, Cramer & Mayor, contra.

AGENCY. 92

[Hamilton District Court, April, 1876]

Cox, Force, Murdock, Burnet and Avery, JJ.

*SAMUEL B. KEYS v. COX & FOLLETT.

1. Where an agent, of the absent owner of a note or mortgage, in the hands of attorneys for collection, obtains money by representing himself as the owner of the note or mortgage, and giving an order in his own name on the attorneys to pay the lender the proceeds, and the attorneys accept the order so drawn, the acceptors are liable.
2. The failure of the lender to examine the records of the suit on the note and mortgage was not negligence, for that the mortgage and decree were in favor of the principal would not have proved that such agent was not owner, and he had a right to rely on the attorneys' representations made by accepting such order, that it was the agent's property.
3. A suit against the acceptors is not premature, on the ground that they have not yet collected the judgment, where they have renounced all liability to the payee of the order.

FORCE, J.

This was a petition in error to reverse the judgment of the court below in sustaining a demurrer to the petition filed in the case, and dismissing the suit. The plaintiff was the assignee of Keys & Co. He averred that Keys & Co. had transactions with R. W. Richey, and that Richey being largely in their debt, they required him to furnish collateral before they would carry on further the transactions for him. To satisfy them and to induce them to give him further credit, Richey represented that he had in the hands of his attorneys a mortgage and note worth $11,000; and that he would give Keys & Co. an order on his attorneys to pay them the proceeds, which he subsequently did. Richey's attorney, the defendants, accepted the order, and subsequently Keys & Co., on the faith of that acceptance, gave Richey further credit to the extent that Richey created an indebtedness with them of over $47,000. Richey subsequently became insolvent, and thereupon Keys & Co. demanded payment from Cox & Follett out of his fund. Cox & Follett refused to recognize any liability to Keys & Co. While this note and mortgage were the property of Mrs. Davenport, who was in Europe, Richey, who was her brother, was her agent, and Cox & Follett had possession of the note and mortgage in carrying on a suit for Mrs. Davenport, and when they found that the order was given for the payment of Richey's personal debt, and not to meet the obligation of Mrs. Davenport, they declined to recognize the acceptance as binding upon them. Thereupon this action was brought. It appeared that the money had not been collected on the note and mortgage.

The allegations of the petition were very distinct that Keys & Co. paid out large sums of money on the faith of his acceptance, and, although Cox & Follett received no benefit therefrom, yet, as Keys & Co. parted with things of value on the faith of it, that was a sufficient consideration to support the undertaking implied in the acceptance of the order by defendants.

The point which was most litigated was whether or not the defendants could be bound by this acceptance, the order being not for the benefit of Mrs. Davenport, but Richey; Richey had no personal interest in this claim. It did not appear that Keys & Co. were aware of this fact. On the contrary, they supposed that he owned the judgment. There was nothing upon the face of the order to indicate that he was acting in any other capacity with reference to the fund than as the owner of it. It was upon its face a personal order disposing of his own property, and if the defendants, when they accepted it, supposed it was an order drawn by Richey in his capacity as agent, and an order intended by Richey for the benefit of Mrs. Davenport, yet the order which the defendants did accept was not an order drawn as Mrs. Davenport's agent or trustee, but was an order which Keys & Co. had a right to levy upon as an order directing the appropriation of Richey's own property. As between Keys & Co. on the one hand and Cox &

*The decision in this case was affirmed by the supreme court commission. See opinion 41 O. S. 535.

Follett on the other, if there were any misunderstanding, the correction of that misunderstanding should have been by those who had the knowledge, not by those who had not the knowledge. Under the circumstances, the majority of the court were of the opinion that this was an acceptance of an order which bound Cox & Follett to appropriate the proceeds of the note and mortgage to the payment of the order.

The next consideration was, supposing that was the effect of the order, did Keys & Co. act in good faith, or were they guilty of negligence? From the allegations of the petition it appeared that they did act in good faith. If Keys & Co. had gone to the courthouse and found that the mortgage was given to Mrs. Davenport, and that the decree on it was in her favor, that would not have been, of course, proof that it was still her property. It would put Keys & Co. upon inquiry as to whether it was her property or not; but where would they go but to Mrs. Davenport's agent or her attorney for this information? Those persons are the very persons to whom as a matter of fact Keys & Co. did go, and was by one expressly assured that the note and mortgage belonged to Richey, and by the acceptance of Richey's order by Cox & Follett it was an implication upon their part to the same effect.

Inasmuch as the property had not been sold to satisfy the mortgage, the question arose whether or not this suit was not immature. The allegations of the petition amounted to this, that the fund which the defendants had in their possession, and which they had agreed to turn over to the plaintiff, was a fund as yet a mere judgment, which they had wholly refused to hold for the benefit of the plaintiff, but were now holding for the benefit of another person, Mrs. Davenport. It was true that the fund should always have been held for her, but, as between the defendants and this plaintiff, if the defendants bound themselves to the payment of the fund to the plaintiff, then their renouncing that liability, and holding it for another person, is tantamount, as between these persons, to a conversation of the fund, and if the defendants converted to other purposes a fund which they agreed to pay to the plaintiff, a liability and a right to sue accrued.

The majority of the court therefore held that the demurrer to the petition should have been overruled, and for that reason the judgment was reversed, and the case remanded for further proceedings.

Matthews & Ramsey, for the plaintiff.

Judge Hoadly, contra.

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92 INTOXICATING LIQUORS—DAMAGES.

[Hamilton District Court, April, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

*JOHN OESTERKAMP v. MARY OVERBECK.

In action for damages under the Adair law, the jury must be satisfied beyond a reasonable doubt that the sales of liquor were unlawful.

Cox, J.

This was a proceeding under the Adair Liquor Law. Quite a number of exceptions were taken during the progress of the trial below to the ruling of the court in receiving testimony, and in reference to the charge.

It was only necessary to refer to one of the exceptions in determining the questions arising on the petition in error. The court below was asked to charge that before the jury could find for the plaintiff, they must be satisfied beyond a reasonable doubt that the sales of liquor complained of were unlawful. The court refused the charge. It was claimed on the part of the defendant in error, that there was a difference in the degree of proof required in a case where the crime charged is a felony, and where it only amounts to a misdemeanor, the felony being punishable by imprisonment in the penitentiary, and the misdemeanor by fine and imprisonment in jail, and that the rule that the jury should be satisfied beyond a reasonable doubt of the violation of the law, extends only to the case where the party is punishable for a felony. There were some decisions

*The supreme court in the case of Lyon v. Fleahmann, 34 O. S., 151, established a contrary doctrine, which necessarily overrules that established in this case.

which went to that extent, and possibly one or two in this state within the last year or two, which might lean in that direction, but this court had heretofore held as the supreme court had held, that the ruling applied generally to crimes, and, until this court was overruled by the supreme court, where the question was pending now, it would adhere to the ruling formerly made, requiring in all cases of this kind, that the jury should be satisfied beyond a reasonable doubt, that the sales of liquor were unlawful.

Judgment reversed.

Blackburn & Shay, for the plaintiff.

C. Hilts, contra.

MASTER AND SERVANT 93

[Hamilton District Court, April, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

*ROSINA DICK, ADMINISTRATRIX, v. INDIANAPOLIS, CINCINNATI & LAFAYETTE R. R. Co.

A railroad company is not liable for injuries caused to one of its employes by a co-employe.

This was a petition in error, to reverse a judgment in favor of the defendants in error. The exceptions below were taken to certain rulings made upon the evidence, and also to the charge of the court directing the jury to return a verdict for the defendants below. It appeared that the plaintiff's intestate, Martin Dick, was a section boss on the defendant's road and was engaged in repairing the track of the road, when an engine on the road came along and, striking him, produced injuries, from which he died. The plaintiff brought her action, claiming that the death was caused by the negligence of the railroad company to its employe. It appeared that the deceased was in the employment of the same company that was running the train, and whether the negligence that caused the death was the negligence of the conductor, or the engineer, or other employe of the company, it was the negligence of a fellow servant working with the deceased. No employer is liable to his employe for the negligence of his co-employe. The evidence of the case only tended to make out a case of negligence of a fellow servant; it did not tend to make out a cause of action, for which the company would be liable. Therefore, the court was warranted in directing the jury to return a verdict for the defendant.

Judgment affirmed.

Wm. Disney, for plaintiff.

Edward Colston, contra.

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*The judgment in this case was reversed by the supreme court. See opinion, 38 O. S., 389. The latter case was cited in Railway Co. v. Murphy, 50 O. S., 135, 143. Denied in Railroad Co. v. Hambly, 154 U. S. 349, 356.

94 REMOVAL OF CAUSE TO U. S. COURT.

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

JACOB KAUFMAN v. SAMUEL MCNUTT AND WILLIAM ROSS.

1. Article 3, section 2, of the federal constitution, expressly extends the judicial power of the United States to all cases in law or in equity, arising between citizens of different states; and while this provision of the constitution can not execute itself, but requires congressional legislation to enable such litigants to obtain the benefit of the provision, yet, when such legislation has been had, the right of any such litigant to avail himself of it, is an expressly granted constitutional right of such person. After such legislation, it is simply the duty of all courts, state and federal, called upon to determine the existence of such right and the question of its exercise, to ascertain the provisions of such legislation, to construe them fairly and to obey and enforce them, treating with indifference all considerations of the desirableness of retaining or acquiring jurisdiction of the parties and the cause.
2. The act of March 3, 1875 (18 U. S. Stats. at L., chap. 137, p. 470), providing for the removal to the U. S. circuit court, of causes, brought and pending in a state court, between citizens of different states, repeals the 12th section of the act of September 24, 1789 (1 St. at L. 73), and the act of March 2, 1867 (14 Stats. at L. 588), both of which were re-enacted by the revised statutes of 1874, p. 113; and for the classes of cases, to which these statutes relate, the act of 1875 takes the place of all preceding statutes upon the subject.
3. Where no application for removal had been made under such statutes prior to March 3, 1875, the right of removal under such acts was waived; but the act of 1875 created and gave an original, independent right of removal in all such cases pending at its passage, or such as might thereafter be brought if the proper steps should be taken to obtain such removal at or during the first term thereafter, at which a trial could be had, and before a trial.
4. When, before the passage of the act of 1875, a cause had been, and was thereafter pending upon a motion for a new trial, which was overruled and judgment rendered, and upon error to reverse such judgment, which judgment was finally reversed and the cause remanded for re-trial about one year after the passage of the act of 1875, and a petition was, at the time the cause was so remanded, and before its re-trial, filed for its removal to the circuit court of the United States, and all the requirements of the act of 1875 complied with, by the party seeking such removal: *Held*, that such application for removal was in time, and such removal should be granted.
5. While such application has been pending the first day of the next succeeding term of the United States circuit court has passed: *Held*, that it was the party's duty to file his transcript in that court before or on the first day of such term of such federal court, next following such application, irrespective of what may have been done in the state court upon such application; and that before granting it, the state court should be satisfied that such transcript, etc., has been properly filed in the circuit court. If that has not been done, the party will have waived the right of removal, and have elected to try his cause in the state court.

YAPLE, J.

This case comes before us on motion of the defendants, made in special term to remove this cause to the circuit court of the United States within and for the southern district of Ohio, which motion was reserved for decision here.

The petition for removal was filed in this court on the 20th day of January, 1876, sworn to by both of the defendants. It states, that on December 23, 1870, the plaintiff, then and ever since, a resident and citizen of the state of Ohio, brought his action in this court against them,

they then and ever since being residents and citizens of the state of Illinois, and obtained due service upon them, to recover a money judgment against them in a civil action for $5,000.00, inclusive of costs and interest; that on the 9th day of February, 1875, at the February term of this court, at special term, the cause was tried to a jury, and the plaintiff obtained a verdict against them for $2,717, whereupon they moved to set the same aside and for a new trial, which motion at the March term, to-wit: March 16, 1875, was overruled, and, on the same day, judgment was rendered upon the verdict; that, on March 31, 1875, they filed a petition in error in the general term of this court, to reverse such judgment; that, at the November term, 1875, such petition in error was heard and the judgment at special term affirmed with costs; that, thereupon, they filed, upon leave granted, a petition in error in the supreme court of Ohio, to reverse such judgments of this court, which judgments were, at the same term of December, 1875, to-wit: on January 13, 1876, by the supreme court reversed, and the cause, on the 14th day of January, 1876, remanded to this court, and such mandate duly entered upon its journal; that such January term, 1876, was the first term at which such cause could have been tried, since the passage of the act of congress, of March 3, 1875 (18 Stats. at Large, p. 470), entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes," being chapter 137 of the laws of the United States; that the petitioners therewith offered and filed a bond, with good and sufficient surety, for their entering in the circuit court of the United States for the sixth circuit and southern district of Ohio, on the first day of its next session, of a copy of the record in said suit, with copy of all process, pleadings, depositions, testimony and other proceedings therein, and for paying all costs that may be awarded by the said circuit court, if said court shall hold, that such suit was wrongfully or improperly removed thereto, and prayed that the said suit be removed to the said circuit court, etc., there to be dealt with and proceeded in, according to law. The petition also averred that, "these petitioners further state, that they have reason to believe and do believe, that, from prejudice and also from local influence, they will not be able to obtain justice in this court."

This last averment was made upon the assumption that the act of March 2, 1867 (14 Stats. at Large, p. 558, chapt. 196), was still in force and not repealed by the act of March 3, 1875.

Article III, section 2, of the constitution of the United States, provides that the judicial power of the United States "shall extend to all cases in law and equity, arising * * * between citizens of different states." Congress has, therefore, the constitutional power to determine, by law, how and under what circumstances, jurisdiction in actions at law or equity between citizens of different states shall be acquired and judicially exercised by the established courts of the United States. As the doors of all courts, state as well as federal, must necessarily be, at all times, open to litigants; and as state courts of general jurisdiction must take jurisdiction of cases at law in equity, where the defendant is served with process within the territorial limits of such court, it is inevitable that a citizen of one state will often be there sued and served with process by a citizen of another state, and this renders appropriate congressional legislation, necessary to enable the party sued, to obtain the right, given him by the federal constitution, if he so elects.

When congress has so legislated, it is the duty of all courts, when required to act under such legislation, to ascertain the provisions of such statutes, to construe them fairly, and to obey and enforce them. A state court is not to insist, contrary to such requirements, upon retaining any cause, nor in a federal court to strive to obtain jurisdiction, where no statute has conferred it.

The whole matter depends upon the positive legislation of congress, without which the court, in which an action is properly brought, will retain jurisdiction of it; for this provision of the constitution does not execute itself. Upon an examination of the twelfth section of the act of September 24, 1789 (1 Stat. at Large 73); and the above cited act of 1867, which was additional to the first act, and both of which were reenacted, substantially, by the revised statutes of 1873, p. 113, and of the act of March 3, 1875, we are satisfied that the act of 1875 repealed both the former acts; and as held by the court, in the case of Eppinger v. Missouri Valley Life Ins. Co., recently decided in the circuit court of the United States, northern district of Ohio, reported in 4 Amer. Law Rec. 585, we hold, that the act of 1875 "takes the place of all preceding statutes on this subject."

The United States courts in the seventh circuit have settled the law for that circuit, that the act of 1875 repealed the act of 1867. Judge Nelson, a disrict judge in another circuit, has also held the same way.

The right to remove this cause then was waived under the provisions of the acts of 1789 and 1867 [Rev. Statutes, 113], and the question to be determined is, whether the act of March 3, 1875, created an independent right to removal of such causes as were pending when it took effect, if its provisions were complied with during the first term thereafter that a trial could be had, and before a trial at that term?

The second section provides, that "any suit of a civil nature, at law or in equity, now pending, or hereafter brought in any state court," etc., may be removed. And section three provides, that, whenever any party, entitled [that it has the constitutional right to remove the cause from the state to the federal court] to remove a suit, shall desire to do so, he "may make and file a petition in such suit in such state court before or at the term at which said cause could be first tried, and before the trial thereof, for removal," etc. We think, this act conferred and extended the right of removal of all causes, pending when it took effect, at the same time, that it repealed pre-existing acts, under which such right of removal had never been exercised, and was, therefore, waived. This case, after the passage of the act of 1875 and until the January term 1876, of this court, was not so pending as that the parties could have exercised their right of removal; and the motion was made at the first term after the passage of that act, that the cause could have been tried, and before the trial thereof. Upon being satisfied, that the transcript, etc., has been duly filed in the circuit court of the United States, as required by the act of congress, the motion will be granted.

Judges O'Connor and Tilden concur.

J. R. Challen and W. F. Forrest, for plaintiff.

Hoadley, Johnson & Colston, for defendants.

CONVERSION. 94

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

CRAWFORD & CO. v. THOMAS HARTZELL.

1. Where the owner of a mill, containing machinery belonging to plaintiff, is sued for conversion by having used it, the plaintiff having acquired title by purchase under foreclosure of a chattel mortgage on part of the machinery, in which suit the person having a second mortgage on this and other machinery in the mill came in as party and requested that all the machinery be sold; but the order of sale only described that part of the machinery covered by the first mortgage, so that the plaintiff is not the owner of all the machinery, a finding of court that defendant has been guilty of conversion of the machinery in the mill, and finding against him for the value of all the machinery in the mill is erroneous.
2. Where the purchaser of a mill, in which the machinery of a third person is, sublets the mill, but not such machinery, such purchaser can not be held liable for conversion of the machinery of such third person, by reason of his lessee's using the machinery.

O'CONNOR, J.

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

Prior to May 1st, 1873, Shroyer & Co., consisting of J. S. Shroyer and his two sons, were carrying on a milling business, grinding material for druggists, in Pennock alley in the city of Cincinnati. While so engaged, Geo. Crawford, doing business under the name of Geo. Crawford & Co., the plaintiff in error, was one of their customers, and had advanced to them about $6,700, to secure the payment of which he received from them a chattel mortgage upon all the machinery used in their business. This chattel mortgage and the promissory notes secured by it were by Crawford assigned to Geo. McCammon & Co., and on the 4th day of January, 1873, Shroyer & Co. gave to McCammon a renewal mortgage for the same consideration ($6,700.00) upon the same machinery. About May 1st, 1873, Shroyer & Co. removed their place of business and the machinery to the northeast corner of Broadway and Eighth streets, in Cincinnati, to the premises of Andrew Erkenbrecker, from whom they leased for a term of years. While doing business there, and prior thereto and before the 16th of December, 1873, Geo. Crawford again loaned to them the sum of $6,000.00, to secure the payment of which they gave him a chattel mortgage on all the machinery they then had in Erkenbrecker's premises consisting of new machinery lately added and including that on which McCammon already had a mortgage.

Early in 1874 Shroyer & Co., being in arrear for rent, Erkenbrecker recovered possession of the premises by legal proceedings. About the same time McCammon obtained an order for the sale of the chattels described in his mortgage for the payment of Shroyer & Co.'s debt to him, and just before the sale of the chattels by the sheriff McCammon sold his interest in them to Thomas Hartzell, the defendant in error, for the sum of $3,000.00, it being understood that McCammon should bid them in at the sale, which he did, on the 24th of February, 1874, for the sum of $1,073.00.

Some ten days thereafter Hartzell having failed to come to an agreement with Erkenbrecker for the renting of the premises in which the

machinery then was, Erkenbrecker rented the premises and the water-power and the use of a boiler to Geo. Crawford, who on the same day sublet the same, that is, the premises, the water power and the boiler, to J. S. Shroyer, who on the 1st of January, 1874, had dissolved partnership with his sons and was then carrying on business under the name of Shroyer & Co. Shroyer immediately took possession of the premises and commenced operating the machinery, which he found in the same condition it was at the time when he was ejected by Erkenbrecker, the new machinery not embraced in McCammon's mortgage being so connected with that which was so embraced, that the one portion could not be used without the other.

On the 17th day of March, 1874, Thomas Hartzell, the defendant in error, commenced an action against Andrew Erkenbrecker and Geo. Crawford & Co., for damages in the sum of $4,000.00. He set out in his petition that on the 24th day of February, 1874, he purchased and was the owner of the property before mentioned, and that before he made the purchase he called on Andrew Erkenbrecker, who assured him that if he would purchase said machinery he, Erkenbrecker, would rent to him so much of the building as had been occupied by Shroyer & Co., upon his giving two good sureties for the prompt payment of the rent. That relying on said assurance he bought said property for the sum of $3,000; that it was worth that sum and more if Erkenbrecker had complied with his promise, but that its chief value was in the fact that said machinery should remain in the building, and that if removed it would not be worth more than $1,000. That Erkenbrecker, violating his agreement, early in March, 1874, leased and gave possession of said building and the said machinery to George Crawford & Co., who were cognizant of all the facts, and that said machinery was the property of said Hartzell, and who with the knowledge, consent and connivance of Andrew Erkenbrecker was using said machinery and occupying said building. That he has demanded possession of the said building and machinery of said Erkenbrecker, and tendered to him good and responsible sureties for the rent, and that possession was refused. That by reason of the deceit which has been practiced upon him by Andrew Erkenbrecker and the tortious act of the said Geo. Crawford & Co. in appropriating his property to their own use he has been damaged in the sum of $4,000 for which he asks judgment.

Andrew Erkenbrecker for answer to this petition admits that before the purchase of said chattels by Hartzell he told Hartzell that if he would purchase all the machinery in the premises, pay the back rent due by Shroyer, and furnish two good sureties for the payment of future rent, then he would rent the premises to Hartzell, but that Hartzell failed to comply with any one of these conditions, and that after waiting a reasonable time, he rented the premises to Geo. Crawford & Co. He denies that demand was ever made on him for the chattel property, or that he ever refused to deliver up the same, or that he has ever converted any part thereof to his own use.

Geo. Crawford & Co. recite in their answer the history of the two mortgages before spoken of, and say that on the 6th day of March, 1874, they rented from Erkenbrecker the real estate described in the petition and the water wheel and privilege forming a part thereof, and nothing more. They deny that they ever rented from him or anybody else the machinery, etc., claimed by Hartzell, or ever took it into their possession

or control, or used it, or converted any part of it to their own use. They neither rented nor leased anything but the realty and said water power, and have never used anything else or designed to. That the new machinery owned by Shroyer & Co. and mortgaged to them by Shroyer & Co. remained in said mill when they rented from Erkenbrecker, and has ever since so remained. As soon as they rented from Erkenbrecker they commenced negotiations with Hartzell to purchase his said machinery, but that terms could not be agreed upon, and thereupon they notified Hartzell repeatedly to take away his machinery from said premises, but he refused and neglected so to do. That Hartzell refusing to either sell on terms deemed reasonable, or to remove his stuff, they sublet the premises to Shroyer & Co., and abandoned their own plans. That Shroyer & Co. then commenced operations and have ever since run the mill as their tenants as to the mill house and water-power, and nothing more, so rented by them, Crawford & Co., from Erkenbrecker. They deny all connivance with Erkenbrecker. They deny that they have ever held, used or detained or converted plaintiff's property or had anything whatever to do with it. They say that Shroyer & Co., if anybody, are the persons to whom plaintiff should look, and that they are necessary parties hereto, and ask that they be made defendants and required to answer, and that as to them and said plaintiff their answer be deemed a cross-petition.

Shroyer & Co. were not made parties defendant, and the case was submitted to the court, without a jury, which found from the testimony that no case had been made against Erkenbrecker, and dismissed him from the action, and that Crawford & Co. were guilty of a conversion of all the machinery, fixtures, etc., that were in the Erkenbrecker mill at the time of the taking possession thereof by Geo. Crawford & Co., from Erkenbrecker, and gave judgment for Hartzell, the plaintiff, in the sum of $2,541.50, being the value thereof as found by the court.

This judgment the plaintiffs in error seek to reverse mainly on two grounds:

1. That the testimony fails to show any conversion on the part of Crawford & Co.

2. That if the testimony in any way tends to establish a conversion, it can only be for that part of the machinery which is described in the plaintiffs' petition, and not for all the machinery in the mill at the time Crawford & Co. rented from Erkenbrecker.

We will examine these propositions in their order, premising that it is not the function of a court of errors to weigh the testimony, but that unless the finding of the court below, or the verdict of a jury is manifestly against the weight of the testimony, the reviewing court cannot reverse.

1. Does the testimony show or tend to show a conversion of any part of the property described in the plaintiffs' petition?

If a conversion of any part took place, it must have been by the acts of Geo. Crawford & Co., or of his agents. These agents must have been Erkenbrecker, or Shroyer & Co., or John S. Crawford, who is the only other person who by the record could have been an agent.

Did Geo. Crawford, who is Geo. Crawford & Co., personally do any act which can be construed into a conversion? He rented from Erkenbrecker the premises and the water-power and wheel—nothing more. Erkenbrecker gave him possession of these and nothing more, so found

by the judgment of the court which dismissed Erkenbrecker from the action. The court necessarily found that Erkenbrecker had the legal right so to put Crawford in possession, notwithstanding the machinery of the plaintiff was in the mill at the time, in position to be immediately operated. The evidence tends to show that at the time Erkenbrecker gave Crawford possession there was machinery in the mill covered by McCammon's mortgage, which machinery had been sold to the plaintiff, Hartzell, and also machinery covered by Crawford's mortgage, and which belonged to Shroyer & Co., who were the mortgagors. But there is no evidence tending to show that Crawford claimed to own any of this machinery either before or after the time Erkenbrecker put him in possession of the mill. It was no more Crawford's than it was Erkenbrecker's. Although Crawford had a mortgage upon a portion of it, the condition of the mortgage had not been broken. Crawford sublet to Shroyer & Co. the same premises and water-power which Erkenbrecker had let to him, and put Shroyer & Co. in possession. But Crawford no more gave Shroyer & Co. possession of the machinery when he sublet to them, than Erkenbrecker gave possession of the machinery to Crawford when he put him in possession. Neither Erkenbrecker nor Crawford ever had or took possession of the machinery, except in so far as the mill covered the same. Nor was it the duty of either of them to remove it before renting the premises. The judgment in favor of Erkenbrecker necessarily admits that it was not his duty to remove it before renting to Crawford, and therefore it was not Crawford's duty to remove it before renting to Shroyer & Co. Nor was it the duty of either to notify Hartzell to remove before renting. This also follows from the judgment in favor of Erkenbrecker. Neither was it the duty of Erkenbrecker to concern himself as to what Crawford did with the machinery after being put in possession of the mill, nor was it Crawford's duty to ascertain what Shroyer & Co. did with it. It was the right of Crawford, as it was the right of Erkenbrecker, to rent what he controlled, and the tenant was responsible for his own acts. Nothing then can be inferred as against Geo. Crawford from the fact of his renting the premises containing the machinery to Shroyer & Co.

Did Crawford exercise any act of control over the machinery after he rented to Shroyer & Co.?

The only evidence on this subject is first, that of the plaintiff Hartzell, who says in chief: "Saw Crawford & Co. using the mortise wheel, and pulleys, marble dust elevators and everything in the building." On cross examination he says: "Shroyer used the machinery. Do not know that Crawford & Co. personally ever used it—but it was used for that firm."

Jacob Stifle says: "Shroyer & Co. used the machinery. Only heard of Crawford & Co. using the machinery."

Geo. Friese, also a witness for the plaintiff, and who worked in the mill, says: "The Shroyers used the machinery—saw it in motion—saw young Shroyer working with it. Did not see the Crawfords using it. Never saw John S. Crawford at the mill." On cross examination he says: "Never saw any one but Shroyer and sons using the machinery."

On behalf of the defendants, J. S. Shroyer testified: "Geo. Crawford & Co. never used the machinery."

John S. Crawford, the agent of Crawford, testifies: "Crawford & Co. have had no control over the machinery in the mill."

It is apparent from this testimony, which is all there is on the subject, that Crawford & Co. exercised no control in the management of the machinery.

What other acts did Crawford & Co. do from which a conversion could in any way be inferred?

There was evidence showing that Crawford & Co. were in the habit of sending material to Shroyer & Co. to be ground—that this material was sent directly to Shroyer & Co., without passing through the house of Crawford & Co., and that after being ground Crawford & Co. shipped it directly from the mill of Shroyer & Co., thus saving the cost of carriage to and from the house of Crawford & Co. This seems to have been a reasonable and economical way of doing business, and it is difficult to see how any inference can be drawn from it prejudicial to Crawford & Co.

It does not appear, then, that Crawford & Co., personally, did any act manifesting an interest in or control over the machinery in the mill or business of Shroyer & Co.

Does the record show any acts of others by which Crawford & Co. are bound?

An effort seems to have been made at the trial to show that Crawford & Co. and Shroyer & Co. were engaged in a joint enterprise in operating the machinery, and that Crawford & Co. were responsible for the acts of Shroyer & Co.

Geo. McCammon testifies in chief for the plaintiff, that he "always regarded Shroyer & Co. and Crawford & Co. as being the same," but he does not state why he thought so, and says nothing more on the subject. And this is all the evidence on the subject for the plaintiff.

J. S. Shroyer, for the defendants, testified that "neither of the Crawfords were ever partners of his, nor was he their agent. They had no interest in the mill."

John S. Crawford, the agent for Crawford & Co., testified that "Crawford & Co.'s name was never put up on the mill. Shroyer & Co.'s was. Shroyer & Co. had no authority at any time to act for Crawford & Co."

This was all the evidence on the subject of partnership, and is clearly in favor of Crawford & Co. No doubt it was for the interest of Crawford & Co. to have Shroyer & Co. enabled to do work for them, as they were creditors of Shroyer & Co. and held a chattel mortgage on the portion of machinery owned by Shroyer & Co.; and it was also the interest of Shroyer & Co. to have Crawford & Co.'s custom, as it enabled them in part to discharge their debt to Crawford & Co. But these mutual interests did not constitute a joint interest so as to make the acts of one binding on the other. Crawford & Co. paid Shroyer & Co. the same price as others paid them, and dealt with Shroyer & Co. in the same way that others did.

Besides the above testimony the court, against the objection of the defendants, admitted the introduction of two unsigned agreements purporting to be propositions from Hartzell and Crawford & Co. for the sale and purchase of the machinery. In reference to this matter Hartzell, the plaintiff, says: "John Crawford [that is the agent of Crawford & Co.] and Shroyer came to me to buy the machinery for Crawford & Co. for $1,500.00. Said I wanted $3,000.00. Then Shroyer came and offered 2,000 barrels of marble dust at $1.25 per barrel for the machinery." J.

S. Shroyer testified that he offered Hartzell 2,000 barrels of marble dust, at $1.25 per barrel for the machinery, but he required Crawford & Co. as security, and it was not consummated. John S. Crawford says: "We knew nothing of the negotiations with Mr. Forrest, and had nothing to do with them, except that Shroyer came with the small paper shown me in Forrest's handwriting and submitted it to me, and I wrote for him, not for nor in behalf of Crawford & Co., what is stated on the back of the paper, and never saw it again till now, and never did anything further about it."

This testimony shows that Shroyer, not Crawford & Co., offered to give marble dust for the machinery, although Crawford & Co., in their answer, admitted that they commenced negotiations with Hartzell with a view to the purchase of his machinery. The written propositions, however, were admitted as tending to show the value of the machinery only. It may very well be that Crawford & Co., already having a mortgage on part of the property, should desire to purchase the balance, if the terms could be agreed on, but no inference to their prejudice can be drawn from this circumstance.

This is all the evidence from which it is claimed Crawford & Co. were guilty of a conversion of Hartzell's machinery.

But in addition to this there is the further evidence showing how Hartzell, the plaintiff, treated the property.

Hartzell testifies: "Never asked for the machinery from any one. Defendants never notified me to take the machinery away. The machinery is worth in the building $5,000.00 or $6,000.00—and to remove it from $2,000.00 to $2,500.00. Never went to the mill to get the machinery, and never demanded it from Crawford & Co."

J. S. Shroyer testified: "When Hartzell came to me with the mortgage and said he had bought the machinery I told him to go with me and see what he had bought and also to go and see what he had not bought. He refused. He had the original chattel mortgage in his hands which he held up and said he knew just what he had bought. Overtures were had from Hartzell for sale. He said his purchase was conditional, for if he could not get the mill he would not want the property. Did not request Hartzell to take away the machinery. Never refused that to him. Mr. John Crawford and I went to Hartzell and asked him to remove the articles of machinery, etc., from the mill at the time of negotiations for the purchase alluded to. The property in the mill at the time of the sale was worth $1,000.00 to me, having the drug grinding business of the city—to one not having it, was worth the price of old iron only."

John S. Crawford testified: "Hartzell told me the purchase was conditional and he could surrender. I sent postal cards by mail twice to Hartzell requesting him to remove his machinery—never received any reply."

Hartzell being called in rebuttal testified: "Had never been requested by Crawford & Co. to remove his said machinery by medium of postal cards; that he had received one postal card from them to call and see them about the matter, but not requesting its removal."

From this testimony it appears that Hartzell never demanded his machinery, that he even declined, when invited, to go and look at it and see what he had bought, and that he had been requested to remove it, which he omitted to do. It is evident that Hartzell did not desire to

remove the machinery, does not desire to do so now, and for the reason he himself gives, that the machinery in the mill is worth three times as much as if it was removed. He seems therefore to have been anxious either to sell it in position or that some responsible person should convert it to his own use. Had Shroyer & Co. been responsible and solvent there can be no doubt he would have sued them for the conversion, and their known insolvency must be taken as the reason why they were not made parties defendants at the request of Crawford & Co.

A majority of the court are of opinion that this testimony, and it is all the testimony in the case bearing on the subject, wholly fails to make out a conversion against Crawford & Co. They exercised no acts of ownership or control over the machinery themselves, nor does the testimony show that they are in any way responsible for the acts of Shroyer & Co.

If there can be any doubt as to the correctness of this conclusion, there is another reason which entitles the plaintiffs in error to a reversal of the judgment.

It appears from the record that E. Shroyer was examined as a witness, and that after he had given the values of the articles embraced in McCammon's mortgage, estimating the total value of the same at $975.00, and also the values of the articles embraced in the mortgage of Crawford & Co., estimating the total value of the same at $1,123.05, the "court ruled and held that it was immaterial and useless for the defendants, Crawford & Co., to separate said two lots of machinery or to show the separate values thereof. That by filing their answer in case No. 30254 of this court, to-wit, McCammon & Co. v. Shroyer & Co., and consenting therein to a sale of all the machinery in said case by the plaintiff, they were estopped to deny that all thereof was not sold, and that said answer and order for sale before named and attached thereto [by copy] were conclusive against them, and the only question before the court in that behalf is, the value of all the machinery in the mill at the time of the sale, and leasing to Crawford & Co.," and said testimony as to values of the separate lots of machinery was excluded, to all of which construction of said documents and to the ruling of the court as to same and exclusion of said testimony the defendants excepted.

The answer of Geo. Crawford & Co., above mentioned, recites that Crawford & Co. have a chattel mortgage of later date than that of the plaintiff McCammon, on the same chattels, and also on new machinery, not covered by McCammon's mortgage, setting out in the answer all the items of new machinery, and stating that it would be very advantageous to have the same sold at the same time with the property embraced in McCammon's mortgage—that their mortgage is in full force and effect—and they join in the prayer of said plaintiff, McCammon, for the sale of said property and including that covered by their mortgage, that their lien be paid out of the proceeds of said property according to its priority and for all other and proper relief.

Judgment being given for the plaintiff in the case, an order of sale issued to the sheriff commanding him to sell the property described in McCammon's mortgage, each item being set out, with the addition that "said property being in the building N. E. corner Eighth and Broadway, Cincinnati, and known as the Phoenix Spice and Drug Mills." No mention is made of the property described in the mortgage of Crawford & Co.,

nor is the sheriff commanded to sell all the machinery in said building, but only that specifically mentioned. The sheriff's return is that he advertised and sold the property "wthin described" in the writ, no mention being made of any other property than that described in McCammon's mortgage.

It would seem then from the order of sale, the advertisement, the sale, and the sheriff's return, that the sheriff sold and the purchaser at the sale acquired title to that property only which was set out in McCammon's mortgage. Why the offer of Crawford & Co., in their answer was not accepted and acted upon to sell the property described in both mortgages and to advertise both does not appear. It was not the duty of either McCammon or of the court to accept it, and we only know that no action was taken on it. The property bought at this sale, and no more, was the property which Hartzell claims to have been converted by Crawford & Co. If converted, the value of this property, and no more, was the subject of enquiry before the court. But the court held that the only question before it, as to value, was the value of all the machinery in the mill at the time of the sale and the leasing to Crawford & Co., in other words of all the property remaining and embraced in the two mortgages, instead of that in McCammon's mortgage alone. And in accordance with this ruling the court found that as to "Geo. Crawford & Co., the plaintiff, Hartzell, ought to recover the value of all the machinery, fixtures, etc., that were in the Erkenbrecker mill at the time of the taking possession thereof by Geo. Crawford & Co., from Erkenbrecker, and held that their action in the premises amounted to a conversion of said property, and the court granted judgment against defendants, Geo. Crawford & Co., for the sum of $2,541.50 and costs," and the defendants excepted. etc.

The finding and judgment of the court then was that Crawford & Co. should pay to Hartzell not only the value of the property contained in McCammon's mortgage, and which alone was advertised and sold, and bought by Hartzell, but also the value of all the property contained in Crawford & Co.'s mortgage, in which Hartzell claimed no interest, and which was not advertised, nor sold, nor returned by the sheriff, nor embraced in the bill of sale to Hartzell.

In this we think the court erred, and that the request of Crawford & Co., to have all the property sold together, not being acted on did not by implication add to the property mentioned in the order of sale, nor given to the purchaser at that sale title to any other property than that advertised, sold and returned by the sheriff.

For the reasons given the judgment will be reversed.

Judgment reversed.

O'Connor & Yaple, JJ., concur.

Judge Tilden, dissents.

E. P. Bradstreet, for plaintiffs in error.

W. T. Forrest for defendant in error.

ATTACHMENT. 99

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

*HUGH SQUAIR AND THOS. MCDONALD V. MURTEY SHEA.

1. Where an action is brought against a garnishee under section 218 of the code, the plaintiff may obtain an attachment against such garnishee as in other cases, he being subrogated to the rights which the attachment debtor had against the garnishee.
2. Only debts, claims or demands sounding in contract, or settled by the judgment or decree of a court can be garnisheed, not rights to damages against such garnishee for torts, committed by him against the rights of the attachment debtor.
3. An affidavit for an attachment, which states that the action in which the attachment is sought to be sued out, is one brought against the defendant under section 218 of the code, and that the liability of such garnishee defendant arises upon a judgment of the court, and that he is a non-resident of the state, is sufficient to sustain an order of attachment, it sufficiently appearing that the liability arises upon a claim, founded in contract, or upon a judgment; and a motion to dismiss such attachment on the sole ground of the insufficiency of the affidavit, therefor, should be overruled.

YAPLE, J.

This is a petition in error, prosecuted here to reverse an order of this court rendered in special term, overruling a motion to dismiss an attachment issued in an action then pending, wherein Murtey Shea, is plaintiff, and Squair & McDonald are defendants. The ground of the motion was, and the question raised by the petition in error, is, that the affidavit for the attachment is insufficient in law.

The affidavit among other things, avers that Shea had commenced a civil action against Squair and McDonald to recover money under the 218th section of the code, and that his claim rose upon a judgment. The cause alleged as entitling the plaintiff to an order of attachment was that the defendants were both non-residents of the state of Ohio.

Section 218 of the code provides, that: "If the garnishee fails to appear and answer, or if he appear and answer, and his disclosure is not satisfactory to the plaintiff; or if he fail to comply with the order of the court to deliver the property and pay the money owing into court or give the undertaking required in the preceding section, the plaintiff may proceed against him in an action, by filing a petition in his own name, as in other cases, and causing a summons to be issued upon it; and thereupon such proceedings may be had as in other actions," etc.

"Section 219: Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment has been determined," etc.

The 191st section of the code, part 9, enacts, among other things: "But 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."

It being the settled rule of practice in Ohio, that the sufficiency or insufficiency of an affidavit for an attachment is to be determined upon the facts stated in it alone, and that the allegation in the pleadings can not be looked at to aid it in any way, the plaintiffs in error claim, that, while it may be inferred from the affidavit that the defendant had sued some person and obtained an order of attachment against him and garnisheed them, and then sued them, because their answer was not satisfactory, or because they had disobeyed the order of the court in such action to deliver the property, or pay the money owing by such garnishees to Shea's attachment debtor, yet, it does not appear from the affidavit that these

*The decision in this case was affirmed by the supreme court. See opinion, 26 O. S. 645.

plaintiffs in error were indebted to the attachment debtor upon matter of contract and were garnisheed therefore by the defendant in error, or that such attachment debtor had a judgment or decree against them.

By section 194 of the code, it will be seen that no attachment can be had in any case of a debtors rights or claims against others for damages arising out of torts. The order of attachment can only issue against "the lands, tenements, goods, chattels, stocks or interest in stocks, rights, credits, moneys and effects of the defendant," etc., and section 214 only requires the garnishee to answer as follows: "He shall appear and answer under oath, all questions put to him touching the property of every description and credits of the defendant, in his possession or under his control, and he shall disclose, truly, the amount owing by him to the defendant, whether due or not," etc.

The failure to make such answer, satisfactorily, was what the affidavit in this case alleges the action was brought for, and in aid of which action an order of attachment was sought, based upon such affidavit, the ground to authorize the same being the non-residence of the defendants.

This being so, the liability of the plaintiffs in error to the attachment debtor so sued by the defendant in error, could only have been for a claim, or debt or demand, arising upon contract, judgment, or decree.

But the affidavit expressly avers, that the liability of the plaintiffs in error "arises upon a judgment of the court," which can only mean that the plaintiffs in error were liable to such attachment debtor, in whose case they were garnisheed upon a judgment.

The statute, authorizing the attachment creditor to sue, in certain cases, the garnishee debtor, expressly subrogates such creditor to the latter's rights against the garnishee debtor.

In an action against a garnishee, under section 218 of the code, there can be no doubt that the plaintiff may have an attachment against such garnishee, if the requisite ground therefor exists, to the same extent as against ordinary defendant debtors. He may file a petition "in his own name, as in other cases;" and "thereupon such proceedings may be had as in other actions." He may sue the garnishee failing to answer satisfactorily, before he obtains a judgment against the attachment debtor, but can not have judgment against him until he obtains judgment against the attachment debtor. Had the plaintiffs in error, in their motion to dismiss the attachment, denied that they were liable to such attachment debtor upon a judgment or upon any claim, or debt or demand arising upon contract, and had they, by affidavit, sworn to such denial, the attachment would have been dismissed, unless the plaintiff could have satisfied the court by proper proofs that they were so liable.

While the facts stated in the affidavit are meagre, and it is not to be recommended as a precedent, we think it sufficient as against a mere motion to dismiss the attachment upon the sole ground of its insufficiency.

The proceedings of the court below will be affirmed.

Judges O'Connor and Tilden concur.

W. T. Porter, for plaintiffs in error.

E. G. Hewitt, for defendant in error.

DEVISE—CONVERSION IN EQUITY. 100

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

*MORRIS L. BUCKWALTER, ADMR. v. GEORGE KLEIN, ADMR., ET AL.

R. leased certain real estate, with the privilege of purchase to the lessee within the term, and afterward made his will, in which he devised "all his real estate of whatever description, whether in the city of Cincinnati, Ohio, or elsewhere, that he might own at the time of his death," to his wife for life, remainder in fee to their children, and all his personal estate absolutely to his wife. After the death of R. the lessee elected within the term to purchase the devised premises, and the purchase money was by the order of court paid over to G. W. R., the administrator of R., deceased. The administrator paid the purchase money over to the widow. Upon an action upon the bond of the administrator. *Held*: That where a devise is made of real estate, after a contract for the optional purchase of said real estate, and such devise is not of the specific real estate to which the contract relates, but is general in its terms, embracing several parcels, that said real estate becomes converted into personalty from the date of the exercise of the option to purchase, and that such personalty is not subject to the limitations contained in the will of the purchased estate, but in the case stated, goes to the wife absolutely.

O'CONNOR, J.

This is a proceeding in error to reverse a judgment rendered at special term, the plaintiff in error having been the plaintiff below.

The action at special term was upon the bond of Geo. W. Runyon, dec'd, given as administrator *de bonis non* with the will annexed of Daniel Ruffner, dec'd, brought by Morris L. Buckwalter, administrator *de bonis non* with the will annexed of Daniel Ruffner, dec'd.

The petition sets out, that Daniel Ruffner, on the 14th day of July, 1857, leased to the "Ohio Farina Company," for the term of ten years, certain real estate on the corner of Elm street and Canal, in the city of Cincinnati, with the privilege to said company or its assigns, to purchase said real estate during said term for such sum of money as said property might be appraised at by three appraisers, to be selected in the manner provided in said lease.

That afterward, on the 3rd day of September, 1860, the said Daniel Ruffner executed his last will and testament, a copy of which is attached to the petition.

That afterward, on the 31st day of July, 1863, Daniel Ruffner died, leaving his widow, Elizabeth Ruffner and certain children, named in the will, surviving him. In accordance with the will, his widow, Elizabeth Ruffner, was duly appointed executrix.

That at the time of the death of Daniel Ruffner neither the said Ohio Farina Company nor their assigns had elected to purchase said real estate. But that afterward, on the 13th day of March, 1866, Geo. Henshaw filed his petition in the superior court of Cincinnati, in case No. 19588, and as the assignee of said lease and agreements, claimed the right to purchase said premises according to the terms of said lease, and that such proceedings were had in said cause as to authorize said Henshaw to make said purchase by paying into court the sum of about $16,000, whereby by the act of said Daniel Ruffner, in executing said

*See also case with same title, 5 Dec. R. 55, (s. c. 2 Am. Law Rec., 347.)

lease, said premises were after his death, but during said term of years, converted into money.

That afterward, on the 3rd day of April, 1869, Elizabeth Ruffner, having resigned her trust as executrix of said will, and having intermarried with Geo. W. Runyon, he, Runyon, was duly appointed and qualified as the administrator *de bonis non* with the will annexed of the estate of said Daniel Ruffner, dec'd, and as such administrator entered into bond unto the state of Ohio for the faithful performance of his duties in the sum of $32,500, with William Dunn, Daniel Stickey and Mollie Phillips as sureties. That on the same day, in pursuance of an order of the superior court, the clerk of the court paid to said Geo. W. Runyon, as such administrator, the sum of $14,230 in United States bonds, then at a premium and of the market value of $15,834, the said sum being the net proceeds of the sale of said real estate.

That said Geo. W. Runyon wholly violated his said trust, that he did not render an account of his administration at any time, but on the contrary the said moneys were by him squandered and wasted and converted to his own use and lost to the estate.

That George W. Runyon on the 7th day of August, 1871, died intestate and insolvent, and that Geo. Klein, one of the defendants, was qualified as his administrator.

The petition further avers, that the demand was made on said Klein for the amount due the estate of said Ruffner by said Runyon, and by Klein refused, and that the plaintiff, Buckwalter, then obtained from the probate court, an order to bring suit on the bond of said Runyon to recover said money.

William Dunn and Daniel Stickney, being the only defendants served in the action, the others being returned "not found," filed their answer, which is in substance, that they deny that the said Geo. W. Runyon ever converted to his own use or squandered the fund arising from the sale of said real estate, and they aver that said Geo. W. Runyon paid over all the said fund, less the costs of the probate court, to the widow and children of the said Daniel Ruffner under the will of said Ruffner. To this answer there is a specific and general denial.

The case was submitted to the court, without a jury, and the court found that the matters and things contained in the answer were true, and gave judgment for the defendants, to reverse which this proceeding in error has been prosecuted.

The grounds of error are two:

1st. That the evidence did not warrant the court in finding that said Runyon had paid said money to the widow of said Daniel Ruffner.

2nd. That even if he did so pay it, such payment was in violation of his trust and of the law as applicable to the will of said Daniel Ruffner, deceased, and that therefore the court erred in giving judgment for the defendants.

As to the first ground of error, we think the evidence clearly shows that Geo. W. Runyon, with the consent of and for his wife, formerly Mrs. Ruffner, invested $10,000 of the $16,000 received as administrator, in the purchase of a roofing business in Cincinnati, which he carried on as his wife's agent assisted by one of her sons. As to the remaining $6,000 the evidence shows that he deposited it in the name of Geo. W. Runyon, agent of Mrs. Elizabeth Runyon, his wife, and checked it out from time to time as Geo. W. Runyon, agent. Mrs. Runyon testifies, in effect,

that Mr. Runyon was insolvent when they were married, and that he remained so to the time of his death. That he was her general agent in the transaction of her business and in the collection of the rents of the real estate left her by the will of her former husband, Daniel Ruffner; that she did not know where the money came from, but that when she wanted money for household expenses, she asked him for it and he gave it to her; that she mortgaged her farm in Kentucky, worth $25,000, for the sum of $6,000, which she gave to Mr. Runyon, but that she did not know what he did with it. She expected it to be paid back when the money was got from the sale of the Henshaw property, but there is no evidence that she ever requested Runyon to have the mortgage cancelled, or asked him for the money. There is also evidence, that on the occasion of her daughter's marriage, she and Mr. Runyon went together and made purchases at various stores, amounting to over $500, and that all the bills were paid by the checks of Geo. W. Runyon, agent. As to the disposition of the $6,000, the evidence is not so clear as that in relation to the purchase of the roofing business for $10,000, but we think it warranted the court in finding that it was expended by Mr. Runyon with the consent of his wife in the roofing business and for the support of the family. The evidence shows that she entrusted everything to him, never called him to account, apparently sanctioned everything he did, and when she wanted money she asked him for it and got it.

We think the evidence then sustains the findings of the court, that the money in question was paid to Mrs. Runyon, or expended with her approval, certainly the finding is not so against the weight of the evidence as to authorize a reviewing court to set the finding aside.

2nd. Was such payment to Mrs. Runyon authorized by the terms of the will of Daniel Ruffner, when legally sustained in view of the facts before and after its execution?

The third and fourth claims of the will are as follows:

3. "I give, will and bequeath to my wife Elizabeth all my real estate of whatever description, whether in the city of Cincinnati, O., or elsewhere, that I may own at the time of my death for her to control, use and enjoy the rents and profits thereof during the term of her natural life, and at her death the same is to go to and vest in my infant children by her, to-wit: Daniel, Joseph, Virginia and William St. John Elliott, and I hereby will and bequeath the same to them and their heirs in fee simple forever, subject to the life-estate of their mother. * * "

4. "I give, will and bequeath to my wife, Elizabeth, all my personal estate which I have or may be entitled to at the time of my death, consisting of goods, chattels, choses in action, stock, farming utensils, household furniture and plate, to be used or disposed of by her as she may think proper for the support of herself and the nurture and education of her said children, Daniel, Joseph, Virginia and William St. John Elliott."

These provisions of the will give the real estate to the wife for life, remainder to her children, and the personal property to her absolutely for the support of herself and the nurture and education of her children. It is not denied that the children have been supported and educated as contemplated by the will, but it is claimed by the plaintiff in error that the money obtained from the sale of the real estate, as provided for in the said lease, is subject to the same limitations as the real estate itself, and that, therefore, when the option was exercised by the lessees to buy

the real estate the wife took only a life interest in the purchase money, and that the purchase money itself went to the children after her death; and that if the administrator, Geo. W. Runyon, paid over to her said purchase money, or disposed of it as she directed, and it is lost to the children, it was contrary to the provision of the will and a violation of his trust for which his bondsmen are liable.

Whether this claim be tenable depends upon the doctrine of conversion as applied to the facts of this case and the provision of the will.

In Snell's Principles of Equity, page 148, it is said: "Nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed (or, as in this case, contracted) to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given, whether by will, by way of contract, marriage, articles, settlement or otherwise." Citing Fletcher v. Ashburner 1 White & Tudor's Leading Cases in Equity, 828.

The general doctrine is illustrated by the case of Lowes v. Bennett, 1 Cox 167, cited by Snell, p. 153. "A. made a lease to B. for seven years, and on the lease was endorsed an agrement that if B. should within a limited time be minded to purchase the inheritance of the premises for £3000, A. would convey them to B. for that sum. B. assigned to C. the lease and the benefit of this agreement. A. died, and by his will gave all his real estate generally to D. and all his personal estate to D. & E. Within the limited time, but after the death of A., B. claimed the benefit of the agreement from D., who accordingly conveyed the premises to C. for £3000. *Held*, that the sum of £3000, when paid, was part of the personal estate, and that E. was entitled to one moiety of it as such." It is very clear, observed the master of the rolls, that if a man seized of real estate contract to sell it, and die before this contract is carried into execution, it is personal property of him. Then the only possible difficulty in the case is, that it is left to the election of B. whether it shall be real or personal. It seems to me to make no distinction at all. * * When the party who has the power of electing has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal property at a future period." "Until, however," the author remarks, "in such a case the option to purchase is exercised, the rents and profits will go to the persons who were entitled to the property up to that time, as real estate." Citing Townley v. Bedwell, 14 Vesey, 591, and 30 Beaven, 206.

But, says the same author, Snell, on page 154, "A curious question sometimes arises where a testator devises lands over which a third party has a right at his option to purchase, whether, when such option is exercised, the purchase money is to be bound by the same limitations as the real estate for which it has been substituted, or whether it is to follow the destination of the personal property of the testator."

And two cases are given, pp. 154 and 155; to show the law on this subject, the first being the case of a specific devise subsequent to the contract for optional purchase, and the second being a case of a specific devise prior to the contract for optional purchase.

"In the case of Drant v. Vause, 1 Younge & Collyer's Exchequer cases, 580, under a lease for years, the lessees had an option to purchase the fee-simple of the demised lands. After the date of the lease, the lessor made his will, whereby he devised the lands, specifically describing

them, to G. for life, with remainders over. After the testator's death, the lessees elected to purchase the fee-simple of the lands. *Held,* on the special terms of the will, that the purchase money did not fall into the residue of the personal estate, but was subject to the same limitations as had been declared concerning the purchased lands, and that therefore G. took a life-interest in the purchase money." And the court cite Emuss v. Smith, 2 De G. & Sm. 722.

The above case seems, at first reading, to be precisely the case at bar. But as Snell says, "it must be observed that after the testator had made the agreement, he specifically and in express terms devised the lands, on certain limitations, from which it might be inferred that he intended at all events, that the land or its value, in case the option should be exercised, should go to certain persons. It will be seen, therefore, on principle, that in a similar case of an agreement first and the execution of a will afterwards, if the will do not specifically refer to the property so agreed to be sold, no such intention will be inferred, and when the option is exercised, the purchase money will fall into the personalty. This point was decided in Collingwood v. Row, 5 Weekly Reporter, 484."

In the case at bar the real estate which the testator, Ruffner, had agreed to sell, was not specifically or in express terms devised to the wife for life with remainder to the children ,but in general term with other parcels of land, the words of the will being "all my real estate of whatever description whether in the city of Cincinnati, Ohio, or elsewhere, that I may own at the time of my death."

In further illustration of the law on the subject the author cites the case of Weeding v. Weeding, 1 Johnson & Hemming, 424, being the case of a specific devise prior to the contract for optional purchase, the case of Drant v. Vause being where the devise was after.

"The testator after making a will devising a specific estate and bequeathing the personal residue to other persons, entered into a contract, giving an option of purchase over part of that estate, which option was exercised after his death. *Held,* that the property was converted from the date of the exercise of the option, and went to the residuary legatees, V. C. Wood made the following observations: "The testator must be presumed to know the law. With this knowledge he makes a will devising real estate in one way, and giving his personal estate on different trusts. After this he makes a contract, the effect of which he knows will be to give a third person the power of saying, at a future time, whether a certain portion of what was then his real estate, shall be realty or personalty. Then what indication have you in the will of the quality which the testator intended this property to possess? He only says, I wish A. to take what is land, and B to take what is money. You can not at any rate assume an intention that the property, in any event, be divided in the particular proportions as to value, which existed at the date of the will." And then the distinction between the two cases is pointed out, that is of a specific devise before, and a specific devise after a contract for optional purchase. The Vice-Chancellor says: "I understand the principle on which the cases of Drant v. Vause and Emuss v. Smith were decided, to be this. "When you find that in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract, without referring in any way to

the contract he has entered into, there it is considered that there is a sufficient indication of an intention to pass that property to give the devisee all the interest, whatever it may be, that the testator had in it. This was the nature of both the authorities relied on; for in one the contract was before the will, and in the other, the same effect was produced by the subsequent republication of the will. But the case is very different, when after having given the property by will, the testator makes a sale of it."

It will be seen from the two cases of Drant v. Vause and Weeding v. Weeding, the first thing that a specific devise after contract for optional purchase, and the second being that of a specific devise made before such contract, that the question whether the real estate is converted into personalty and to be treated as other personalty from the date of the exercise of the option, does not turn wholly on the circumstance of the devise being made before or after the contract, but on the fact whether the devise is specific or general. The case of Weeding v. Weeding is to the effect that in all cases where the contract for optional purchase is made after the devise, whether the devise be specific or general, and there is no express direction in the will, the real estate is converted into personalty for all purposes from the date of the exercise of the option; and the case of Drant v. Vause is to the effect that where the contract for optional purchase is made before the devise, and the devise is specific of the same property contracted to be sold, then the purchase money does not fall into the residue of the personal estate, but is subject to the same limitations as the purchased lands. But where the devise is general and not specific, it is immaterial whether the contract was made before or after the devise, as in either case the conversion takes place from the date of the exercise of the option. In other words, where the devise is general, it is immaterial whether it was made before or after the contract, and the conversion takes place when the option is exercised. Where the devise is specific the conversion still takes place if the contract is made after the devise, but not if the contract is made before the devise.

As we have seen in the case before us, the contract for optional purchase was made before the devise, but the devise is general and not specific, and under the above authorities, which we think express the law on the subject, the conversion of the real estate into personalty took place when the option to purchase was exercised, and the purchase money followed the provision of the will as to the personal estate. It follows that the administrator was not guilty of a breach of trust in paying over the purchase money to the widow, or in disposing of it as she directed, and that therefore the judgment must be affirmed.

Judgment affirmed.

Judges Yaple and Tilden concurring.

VENDOR'S LIEN. 101

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

ANN HUNTER, EXRX. v. JNO. A. HUNTER ET AL.

1. A vendor's lien, for balance of purchase money, for which a note was taken, can be enforced by an executor.
2. An attaching creditor of the vendor is not such a bona fide purchaser, as can hold the land freed from a vendor's lien.

ON RESERVATION.

TILDEN, J.

In 1871 the late Hocking H. Hunter, being then owner of certain lots of land situated in Cincinnati, conveyed the same to one Daugherty and his son John A. Hunter in fee simple and on credit. Subsequently, and on September 1, 1871, a payment was made by Jno. A. Hunter on account of his part of the purchase money which reduced the balance due from him to the sum of $1,096.25, for which he gave his promissory note payable to the order of H. H. Hunter on January 1, 1873, with interest at 6 per cent. Mr. H. H. Hunter has departed this life, and his promissory note which has been in no part paid, has become the property of the plaintiff, his widow, as executrix under his last will and testament. John A. Hunter, who was a member of the banking firm of Gaherty & Hunter, which failed in business, became insolvent; and the defendants, McCormick, Mahoney & Hoppel, his creditors, have brought their actions against him, and have caused orders of attachment to be levied on the real estate referred to. Mrs. Hunter, as executrix under the will, prosecutes the action against John A. Hunter and the attaching creditors to enforce a widow's lien for the unpaid purchase money, and asks for a sale of the property. John A. Hunter does not defend. The attaching creditors deny the existence and validity of the lien; they contend, on the evidence that it was not intended to be reserved, or, if so, that it has been lost, and, finally, they claim that by the levy of the orders of attachment, they acquired preferable lien. These questions, the evidence having been reduced to writing and testified, were reserved by the judge who had the case in special term for the consideration of all the judges.

These are all the facts which we deem material to an explanation of the grounds of our decision; and they have led us to the following conclusions:

1. The courts of this state have adopted the English doctrine on this subject. (Tiernan vs. Beam, 2 O. R. 58, Williams vs. Roberts, 5 *Id.* 35. Mayham v. Coombs, 14 *Id.* 428. Neil v. Kinney, 11 O. S. 58.) The principle upon which the lien depends is one of natural justice, and it is that a person who has obtained the estate of another ought not, in conscience, to keep it, and not pay the consideration money in full. On this principle a trust arises by construction of equity. It is true that the trust does not confer an interest in the land; but is collateral to it. It is a remedy for a debt, and not a right of property. It is the mere possibility of a right until it is established by the final judgment of a

court. But the remedy can be enforced as long as an action will lie for the purchase money; and, as between the original parties, nothing will put an end to it but something which would be a defence to an action to recover the debt at law.

2. The lien arises upon presumed intention. Prima facie the vendor has a lien for the purchase money and this presumption continues until displaced by evidence that it has been abandoned or extinguished, and the burden is on the vendee to repel the presumption. The cases have established no general rule by which to determine, in all cases, what will amount to an abandonment of the lien; and it has been considered that every case must depend upon its own peculiar facts and circumstances. It is, however, settled that the presumption of a lien may be rebutted, though no security is taken, by satisfactory evidence that the lien was not relied on, or by proof of conduct in the vendor that makes it unjust, unfair or inequitable in time to insist on the lien. In the present case the note of the vendor was taken, but there was no independent security, and the rule is settled that the mere taking of the vendee's note, or the renewal of it, is not sufficient evidence that the vendor intended to waive his lien. The relationship of the parties, and the legacy of a law library in favor of John A. Hunter, in the will of his father, are circumstances which have been strongly pressed in the argument. We are, however, unable to perceive in these circumstances any act of injustice towards the general creditors of John A. Hunter, or indication of any intention to abandon or waive any rights properly arising out of the relation of vendor and vendee.

3. We must reject the proposition contended for in the argument, namely: that the disposition of the note made in the will of H. H. Hunter was a transfer of it amounting to a waiver of the lien. The lien itself is a personal privilege in the vendor and passes to his personal representatives with the debt for the purchase money and for the benefit of his estate. What would have been the result had the note been specifically bequeathed it is not material to enquire; for here it passed to the executrix as part of the general estate to be collected, and the proceeds disposed of in due course of administration.

4. The vendor's lien prevails not only against the vendee, but against his heirs, against his creditors, and against his general assignees, and assignees in bankruptcy and insolvency and volunteers, and purchasers with notice; and can be displaced only by the plea of a bona fide purchaser for value and without notice. But a creditor in attachment is in no sense a purchaser. He acquires by the service of the order no better claim than the debtor himself has. He parts with no consideration on the faith of a specific contract *in rem*, and is entitled only to that which his debtor could honestly confer, viz.: his interest, subject to his equities as they existed at the date of the service of the attachment.

Judgment for plaintiff.

Lincoln Smith and Stephens for plaintiff.

Mallon and Coffey, for defendant.

MUNICIPAL CORPORATIONS. 102

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

JACOB S. LOWRY V. CITY OF CINCINNATI.

Where money was appropriated by a city council to the use of a board of city improvements, and thereupon the street commissioner, with the approval of the board, contracted with plaintiff for boulders for street paving while there was sufficient of this money in the treasury to pay for the boulders to be delivered, but before delivery it had been expended by the board of city improvements: *Held:* That the Worthington law (71 O. L., 80), applied, and no recovery could be had.

YAPLE, J.

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

Lowry sued the city to recover the sum of $2,315.00, with interest from February 3, 1875, for boulders, on that day contracted by him to be delivered to the city at $5.00 per perch, and which were delivered in about equal portions on the 3, 4, 5, 22, 23, 24, 25 and 26 days of February, 1875. The contract was made by and with the street commissioner, Michael Corbett, who assumed to act for and on behalf of the city. At the time the contract was entered into, there was on hand, specially appropriated by the city council to the uses of the board of city improvements, an unexpended balance of about $15,000, to-wit: $14,797.35. This was part of an appropriation made from the general fund in the city treasury to such board; and, out of such appropriations, payment of liabilities such as that of Lowry, was to be made, the board first affirming the acts of the street commissioners making such contracts. Upon the making of such contract, or at any time thereafter, neither the street commissioner, Lowry, nor the board of improvements set apart any portion of the fund on hand to pay for the boulders so contracted for, but the entire amount remained subject to be applied to the liquidation of any proper demands upon it.

On April 12, 1875, the board of improvements gave Lowry an order upon the city treasury for the payment of $1,203.60 of such claim, and, on April 19, 1875, another order for $600.00. Upon both these orders, the city auditor refused to draw his warrant upon the city treasurer for payment, as there was then no money in the treasury appropriated by the city council for their payment, the fund in the treasury when the contract was made having all in the meantime been paid out upon orders properly drawn upon it for other liabilities of the city. The balance of Lowry's claim was not passed upon by the board of city improvements and an order given therefor, because there was no money appropriated to pay it.

On April 16, 1874-71, O. L. 80—a statute was passed, and which is yet in force, known as the "Worthington Law," the third section of which enacts: "From the taking effect of this act no ordinance or other order for the expenditure of money shall be passed by the city council, or any board, or any officer, or any commissioner having control over the moneys of the city, without stating specifically in such ordinance

or order the items of expense to be made under it, and no such ordinance or order shall take effect until the auditor of said city shall certify to the city council that there is money in the treasury especially set apart to meet such expenditures; and all expenditures greater than the amount specified in such ordinance or order shall be absolutely void, and no party whatever shall have any claim or demand against said city therefor; nor shall the city council, or any board, or any officer, or any commissioner of said city have any power to waive or qualify the limits fixed by such ordinance or order," etc., etc.

It is claimed by the plaintiff that this statute can have no application to this case, as, when he made the contract, there was money in the treasury, which had been specifically appropriated to pay such claims, more than sufficient to pay him; and that it would have been idle for the city auditor to certify to the city council that there was money in the hands of the board of improvements appropriated and sufficient to pay it, as the council had nothing to do with the matter after such appropriation, and as the board of improvements knew precisely the amount of the unexpended appropriation.

We must look to the substantial provisions of the statute, rather than to criticise the mode in which it is to be practically applied; and by so doing, we are constrained to hold that it was the duty of either the street commissioner, or Lowry, or the board of improvements, or of all of them, to have so arranged that enough of the fund to satisfy this contract should have been set apart for its fulfillment, and withdrawn from the payment of other like liabilities. If the commissioner did not report it to the board for that purpose, it was Lowry's duty to have done so, and if the board had refused to so apply the money, he should have declined to furnish the boulders.

Any other construction would necessarily give the street commissioner and the board of improvements power to bind the city for unlimited sums of money. With $500.00 on hand of an unexpended appropriation they might make fifty or one hundred or any number of contracts of $5,000.00 each, for the payment of which the fund would be applicable, and then involve the city in debt to any amount. Upon a fair construction of the statute, this can not be done. When there is money appropriated for a given purpose, and a contract is made, which must be satisfied out of such fund, enough to satisfy it must be withdrawn from any and all other expenditures, whether otherwise properly payable out of such fund or not. In this case, that was not done or attempted to be done. Other contracts payable out of the $15,000 appropriated were entered into, and other liabilities incurred, as if this contract had not been made; and all the money was paid out to meet them before payment was sought by this plaintiff. He is, therefore, by force of the provisions of the statute, denied the right of recovery against the city.

With the alleged impracticability, hardship and injustice of the statute, we have nothing to do. Such considerations are only proper to be addressed to the legislature. A court can not remove or remedy them.

The judgment must be for the defendant.

Judges O'Connor & Tilden, concur.

Long, Kramer & Kramer for plaintiff.

Peck, Gerrard & Boone, city solicitors, for defendant.

AGENCY. 102

[Hamilton Common Pleas, 1876.]

*BENJAMIN F. STONE v. EURETTA DAVENPORT ET AL.

1. In a loan, proposed upon mortgage security, it was required the title should be examined, and the papers prepared by any one of three persons, named by the lender, that the borrower might select—the borrower to pay the fee. *Held:* That the service to be performed was for the lender, and that the person selected was, so far, the agent of the lender, rather than of the borrower.
2. Where such agent was informed of an out-standing incumberance, which, under a condition of the loan, was first to be removed, and, while this remained to be done, the borrower trusted to his hands the executed notes and mortgage, and they were delivered by him to the lender, who, upon his assurance the title was all right, paid him the money. *Held:* That the state of the title, in itself, constituted a limitation upon his authority to receive, on behalf of the borrower, more than the difference between the outstanding incumbrance and the amount of the loan, and that if the lender, deceived by his assurances respecting the title, paid him the entire amount, it was a matter wherein confidence was reposed in him by the lender, and not by the borrower.
3. In such case, the money paid to the agent being dishonestly appropriated to himself. *Held:* That, as between borrower and lender the loss must fall upon the lender, to the extent of what remained to be paid upon the outstanding incumbrance.

AVERY, J.

The question in the case is between the defendants, Mrs. Euretta Davenport, and Gibson and Young, trustees, upon a mortgage by her to them securing one principal note of $10,000, and eight quarter-yearly interest notes. The notes and mortgages bear date at this city, October 15, 1875, and were executed that day, at the office of John F. Follett, the legal adviser and agent of Mrs. Davenport, he signing the notes with her, and were then taken, by Charles E. Cist, to the place of business of Hugh McBirney. Charles E. Cist was an examiner of titles, and had examiner the title of the property, and prepared the notes and mortgages. Hugh McBirney was the agent of Gibson and Young, trustees, who resided in Philadelphia, and were engaged through McBirney, in this city in loaning money upon real estate security. In all cases certificates of title were required, and Cist was named as one of three examiners whose certificates would be accepted, but, other than whom, no one would be satisfactory. Among these, the borrower was to be accorded the right of selection, and he was left to pay the fee. It was essential that the security should be unincumbered property, and part of the loan for which the notes and mortgage of Mrs. Davenport were made, was to be applied in paying off a prior incumbrance of about $5,500 upon the property, being the mortgage held by Stone, the plaintiff in this suit. When the notes and mortgage, after execution, were taken by Cist to McBirney, and delivered with Cist's certificate of title and assurance the title was right, McBirney left the mortgage in his hands to be recorded, and paid him the amount of the loan, less interest in excess of the legal rate, premium for insuring the property, and commissions, making net $9,600. This payment was by check to Cist's order, and was at once deposited by him in bank. He then drew his check for $3,000 and took it to Follett, representing that McBirney had only that amount just then, but was expecting from Gibson & Young a mortgage which another party, for whom Follett was counsel, had given and was waiting to pay, and that the balance, being about what was outstanding on the Stone mortgage, one hand would wash the other. In ignorance of the truth, and deceived by this pretense, Follett received the check, and continued to have interviews with Cist urging him to bring the matter to a close. Meanwhile, the mortgage which had been left in Cist's hands by McBirney was recorded and returned, by him, to McBirney. Of the record, neither Mrs. Davenport nor Follett had notice. That it had been withheld until October 23, as

*This decision was affirmed by the district court. See opinion, 1 Bull. 322, *post*, and that opinion by the supreme court. See opinion, 29 O. S., 309.

is shown by the date, seems not to have been remarked by McBirney. Finally, November 29, Cist absconded, and with that came the discovery of his fraud. Between Gibson & Young, and Mrs. Davenport, the question is, who shall bear the loss.

The proposal for the loan, on the part of Mrs. Davenport, was made by Follett to Cist, and by him communicated to McBirney. Cist and Follett had been brought into relations by a previous loan obtained, by another client of Follett, from Gibson & Young. After the proposal on the part of Mrs. Davenport, McBirney visited Follett and whether or not at the interview, which was the only one, they talked of the title, or simply of Follett's signing the notes, the result was they separated, with the understanding, that when the title was satisfactory to Cist, the money could be obtained.

Cist was to examine the title and prepare the notes and mortgage. By whom he was to be employed, is not determined, by the question, who was to pay him his fee. The notes and mortgage were to be written in a peculiar form, that had been adopted by the lenders. The title was to be examined, not in the interest of the borrower, but against him. Loss from defects of title would fall upon the lenders, and this, naturally, would require the responsibility to be to them. The privilege, accorded to the borrower, of selecting any one of the three examiners, was to avoid complaints against charges that had arisen while the business was confined to a single examiner. The relations of the parties, nevertheless, remained the same, as at the time when such single examiner was the only one named, and, concerning him, McBirney writes to Gibson & Young: "He has been examining titles for us in all your loans." Concerning Cist, himself, another letter of very late date contains these words: "We have a proposition from Cist to foreclose any loans made through him at 1½ per cent. on amount, large or small."

The agency of Cist, as respects the present matter, began with the proposal for the loan. This was made to him by Follett, to be communicated to McBirney, and, so far, he acted for Follett. But then he became employed to examine the title, and prepare the notes and mortgage, and in this he acted for McBirney. Beyond communicating the proposal, he was clothed with no authority on the part of Mrs. Davenport, and the employment upon which he at once entered excludes the idea that he was treated as her agent by McBirney. The agent of the borrower would hardly be trusted by the lender, in reference to the security, upon which the safety of the loan was to depend.

At the time of the proposal, Follett stated to Cist that the object was to pay off the Stone mortgage. Whether this was stated to McBirney also at the interview which took place between him and Follett is in dispute. It was, however, the common understanding that the security was to be unincumbered property. Instructions to that effect were explicit to McBirney from Gibson & Young, and to Cist from McBirney. When the notes and mortgages were executed, the prior incumbrance of the Stone mortgage remained to be removed. Until then the state of the title would not be such as to satisfy Cist, or comply with the condition that on the part of McBirney was pre-requisite to the loan. Under these circumstances Follett committed the notes and mortgage to the hands of Cist, and upon Cist's assurance that the title was satisfactory, and his certificate of title, as may be assumed, although the certificate is not produced, McBirney paid him the money.

The object of Follett was to obtain the amount of the loan from McBirney. His receipt of Cist's check, and frequent interviews with Cist, admit of no explanation other than that the notes and mortgage were to be delivered to McBirney, and the money returned to him through the same channel. But, as part of the loan, the Stone mortgage was to be paid off, and it was the difference only that was to be returned. For the rest, the Stone mortgage was to be satisfied and the money, if received by Cist from McBirney, would be in McBirney's interest, and for him. That was the extent, as between Follett and Cist, of the authority of Cist. It remains to inquire whether he was clothed with greater apparent authority.

The possession of an instrument may sometimes carry with it an implied authority to receive payment, although none exist in fact. Thus, where notes constituting the evidence of the debt were left in the hands of an agent who made the loan, 27 Me. 58; 34 Barb. 612; 4 Yerg. 177. Likewise, where mortgages were left with a scrivener, it being the business of scriveners to put out money and receive it again, and therefore intrusting him with the security,

would imply authority to receive payment. 1 Salk. 157, 2 Freem. 289; 5 Exch. 90. Also, where an agent investing the money of his principal in the purchase of a mortgage, and being permitted to retain it in his possession, receives payment. 2 Sandf. Ch. 325. But, the case of an instrument, not executed by the party making payment, nor constituting evidence of obligation upon his part, is different. Thus, an executed deed of conveyance, with receipt for the purchase money indorsed, has been held not sufficient, in itself, to authorize payment to the solicitor of the vendor, 2 De G. & J. 468, 477. Here, the notes and mortgage in the hands of Cist, imposed upon Gibson & Young no obligation. They were made to Gibson & Young, not by them. It needed that the money should first be advanced, before they could become valid instruments for any purpose. The advance was to be made to Mrs. Davenport, or to some one authorized for her. It was not the purchase of negotiable paper from a holder clothed with apparent legal title. Cist made no pretense of title. McBirney knew that the notes and mortgage belonged to Mrs. Davenport, and that the transaction was with her.

The case rests, altogether, upon the character of Cist as an agent. He was to receive for Mrs. Davenport, or Follett her attorney, the difference between the amount of the notes and the Stone mortgage. The notes were trusted to him, and to receive payment, even if it was of all, was within the apparent scope of his authority. The turning point is the Stone mortgage. If limitations upon the authority of an agent are open to the knowledge of the person with whom he deals, the principal will not be liable beyond the exercise of actual authority. Where the authority of the agent depends upon an intrinsic fact, not peculiarly within the means of knowledge of the principal, the principal will not be bound by the representations of the agent. 34 N. Y. 30. The Stone mortgage was known to Cist, as an incumbrance upon the title, and must be taken to have been known to McBirney, under whom he was employed in examining the title. The knowledge of an agent in the business wherein he is employed is in contemplation of law knowledge of the principal, Ang. & Ames Corp., p. 305. Story Eq., p. 408; 36 Conn. 402. If McBirney when he paid the money to Cist supposed the incumbrance was removed, it was because of the assurance of Cist. In that matter, confidence was reposed in Cist by him, not by Mrs. Davenport or Follett. They committed the notes and mortgage to Cist while the title was not yet in a condition to satisfy the requirements of McBirney. The state of the title was, in itself, a limitation upon the authority of Cist to receive more than the difference between the Stone mortgage and the amount of the loan. Follett did not trust Cist to make a true report of the title to McBirney; McBirney trusted him. The extent of his confidence is shown by his leaving in Cist's hands the mortgage after he had paid him the money. And seeing that somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger. 1 Salk. 289.

A decree may be taken accordingly, in favor of Gibson & Young, but for the difference only between what was paid to Cist by McBirney, and the amount outstanding on the Stone mortgage, with interest at six per cent.

Judge Hoadly and E. S. Thorp for Mrs. Davenport.

Sage and Hinkle, contra.

HUSBAND AND WIFE. 103

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

*FREDERICA JENZ v. JOHN GUGEL ET AL.

No recovery can be had against a married woman upon her note unless it is averred and proved that she has separate property to be charged.

AVERY, J.

The action below was on a promissory note. Sophia Gugel answered that she signed the note as evidence of the indebtedness of her husband, and in no

*The decision in this case was affirmed by the supreme court. See opinion, 26 O. S., 527.

way concerning her personal property. No evidence was offered by either party, and John Gugel being in default, the court entered judgment against him, and in favor of Sophia Gugel. This was alleged to be error.

Where a wife joins her husband in a contract, the obligation, prima facie, is on him, because the two are in law but one person, and he is the head. Where she has separate property the law recognizes her separate existence, and so far she may charge her property by her contracts. Modern legislation has increased this capacity by enlarging her separate property, and under certain circumstances, also, where, for instance, she has been abandoned by her husband, she is permitted generally to act as a feme sole. Still the capacity so to act is an exception to the ordinary rule, and where a remedy is sought against her, the case must be such as to bring it within the exception. Section 28 of the code, as amended, that a married woman may be sued as a feme sole on a written contract or obligation signed by her, touches merely the remedy, and the question would remain whether the particular instrument is a contract or obligation binding on her. The supreme court has held, that a married woman may bind her property for her debts to such an extent as would be for the benefit of her separate estate, or for her own benefit on the credit of her separate estate, thus connecting the capacity of a married woman to make a contract with the possession of separate property, in reference to which such contract is made. The petition does not charge the wife has separate property, but simply that she made a note with her husband. The answer states she made the note as evidence of his indebtedness, and the reply admits she was the wife. As the case stood, it was without testimony on the part of the plaintiff, showing that it was one wherein the wife would be permitted under the law to contract. The court below found on the pleadings in her favor, and following the ruling made heretofore in this court (Cook v. Spencer & Craig Printing Works, 4 Rec. 665), the judgment will be accordingly affirmed.

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103 STOCKHOLDER'S LIABILITY.

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

*A. T. Stewart & Co. v. Triumph Insurance Co.

If the individual in whose name stock stands is in fact trustee for another, it is no defense to an action to subject them as stockholders, to the statutory liability.

Cox, J.

The plaintiffs recovered a judgment in the superior court against the insurance company, under a policy for a loss they sustained, and no property being found on execution they thereupon filed a petition in the common pleas against the stockholders, individually, seeking to charge them as contributors in double the amount of their stock, or to the extent that might be necessary to pay their judgment, and a decree was rendered against the stockholders. Two of the stockholders, George Davis and Buchman & Brothers, appealed to this court, where the case was heard upon an agreed statement of facts, which, in the case of Davis, was to the effect that the corporate assets were not sufficient to pay the judgment, and that twenty-five per cent. upon the stock was necessary to pay the debts of the incorporation, provided the parties are individually liable. This action against the stockholders was not commenced until more than twelve months after the loss occurred. The simple question on the agreed statement of facts was, whether, within the meaning of the seventeenth section of the policy, it was required to commence a suit against the stockholders under the individual liability clause within the term of twelve months.

The court was unable to see any reason why this section should have any application to the individual stockholders. The section in terms provides that no

*The decision in this case was affirmed by the supreme court. See opinion, 26 O. S., 643.

action against the company for the recovery of any claim shall be sustained, unless commenced within the term of twelve months. The section has reference only to the company, which is originally liable by the terms of the statute. The stockholders are liable in double the amount of their stock, as security for the payment of the debts of the company, and whether they can be sued with the company in the same action or not, it is as security they are held liable. The company is the principal debtor and, upon failure of its assets to meet its obligations as a corporation, proceedings may be instituted against the stockholders, and they will be held individually liable. The suit against the company itself is limited to twelve months; but the court was unable to find any case where it was held that the limitation applies to the individual stockholders.

It was claimed in argument, but there was no averment in the pleadings which seems to embrace the point, that the judgment of the superior court was not conclusive against the defendants, because they were not parties to the suit and had not their day in court. Whether the stockholders in a case against them can relitigate the question as to the liability of the company is not decided. But in a leading case in Massachusetts it is held that in a judgment against the company the stockholders had their day in court, the very parties they selected to represent them being before the court. Under the pleadings, however, we do not consider the objection raised.

In the case of Buchman & Brother, the defendants set up, in addition, the fact that although their names appeared on the books of the company as stockholders to the amount of $2,500, in fact they did not own the stock, but held it as trustees for a third party, Abraham Aug, for whom they made the investment and ask that he be made party defendant. But neither the plaintiff nor the company had any knowledge that Buchman & Brother held the stock under a trust. The court below rendered judgment in favor of plaintiff and the case is appealed.

This court was of opinion that it was the intention of the legislature that all the stockholders should contribute to the deficit. Buchman & Brother subscribed in their own names, and not as trustees, and it was settled by the authorities, both English and American, that a person so subscribing is liable as a stockholder to contribute, notwithstanding he in fact holds the stock for the benefit of another.

Their names appear on the books of the company as stockholders; they hold the certificate and are otherwise recognized by the corporation as members with the usual rights and powers incident to such character as stockholder, such as voting at meetings, serving as directors, receiving dividends and making transfers. And although they may be bound by contract or in conscience to account to others for the income or shares, yet so far as the books and their actions with the company show, they have a proprietary interest in the stock. A very strong reason for thus holding is given in the case of Crease and others v. Babcock and others, 10 Metcalf Repts. 546, growing out of the difficulty of charging the *cestui que* trust; they may be minors, married women, strangers, persons non compos mentis or not in being.

This doctrine is very fully treated in Lindlay on Partnership, vol. 2, p. 1311, and following, where the numerous authorities are collected. The general rule is therein laid down as follows: "A trustee who is a shareholder is, like any other shareholder, liable to be made a contributor, and he must look for his indemnity to his *cestui que* trust. The trustee, as between himself and the other shareholders, is bound to contribute with them to the payment of the company's debts; and he, therefore, and not the *cestui que* trust, is in ordinary cases the person to be on the list."

A decree will therefore be entered against the defendants for their pro rata contribution.

Collins & Herron, attorneys for plaintiff.

Donham & Foraker, Wright & Simon, attorneys for defendants.

104 GUARDIANS—CONSTITUTIONAL LAW.

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

*WM. A. HAGENY v. LEO. COHNEN.

1. The act authorizing appointment of guardians for inebriates, by the court of common pleas, is constitutional.
2. A court appointing a guardian for the estate of an inebriate, has no power to appoint a person other than the guardian, to carry on the inebriate's business. If his wife is the most suitable person, the guardian would have authority to employ her.

BURNET, J.

The defendant made an application in the court below for the appointment of a guardian of Hageny, upon the allegation that he was a man who by reason of his habitual drunkenness was incapable of taking care of his property. The guardian was appointed. At the hearing of the case the defendant below demanded a trial by jury, which was refused. The refusal to grant a jury was the ground of the error.

The counsel for the plaintiff in error has cited the court to a statute existing during the territorial organization of Ohio, by which a jury was allowed, in inquests of lunacy to determine the question whether the person who was alleged to be a lunatic was a lunatic in fact. The first constitution of the state contained the same clause that is now contained in the present constitution, that the right of trial by jury shall be held inviolate. Nevertheless, under the practice of the state of Ohio, during the time the first constitution existed, a trial by jury was not given in cases of the appointment of guardians, either for minors or lunatics. The appointment of a guardian to assume the control of the property of inebriates was not known in Ohio, until the recent statute of 1871. But the right of a trial by jury was not recognized in the hearing of any application for the appointment of a guardian under either the first or the present constitution. The court had no doubt upon the question. It was not a matter to which the article of the constitution referred to by the plaintiff in error was applicable.

But it was claimed that the court of common pleas had no jurisdiction under the constitution to appoint a guardian, but that this jurisdiction was conferred solely upon the probate court by article 4, section 8, and that it can not be conferred by the legislature upon any other court. It was a rule of interpretation of the provisions of the constitution that they should be interpreted with reference to the institutions and laws that have previously existed. The only guardians known to the law of Ohio previous to the adoption of this constitution were the guardians of infants and lunatics. Under the former law, such guardians were invested with the control of both the person and the estate of their wards. This article of the constitution must be properly understood as applying to that portion of the judicial power which had existed in the state up to the time of the adoption of this constitution, and that it was intended to give to the probate court that jurisdiction which was recognized ordinarily as the probate jurisdiction of the courts of Ohio, and which previously existed in the common pleas courts. This law gives no control over the person of an inebriate, but simply gives to the guardian appointed, the right to control his property for his benefit. This court would hesitate to pronounce a law of the legislature unconstitutional, being itself a subordinate court, and, unless the case were very clear, would not feel authorized to render any such a decision. In the present case, the court thought that the better judgment was that the law was constitutional in this matter, therefore, the court below had not erred.

It was claimed, however, that the judgment rendered and the findings were contrary to law. At the time the court appointed the guardian, the inebriate was engaged in business, and the court, in addition to appointing the guardian, found

*The decision in this case was affirmed by the supreme court. See opinion, 29 O. S., 82; but second point in syllabus not referred to.

that it was for the inebriate's advantage that his business should be continued, and that his wife was a proper person to continue it, and that therefore she should continue it. In this the court erred. The guardian was the proper person under the statute to be invested with the control of the property, and that should have been the order of the court, and if in his judgment it was desirable to continue the business, and the wife was the proper person to do it, he would have the authority to employ her to conduct the business.

John R. Von. Seggern, for plaintiff.

A. A. Kramer, contra.

SEWERS. 104

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

*SAMUEL DAVIS, JR. v. CITY OF CINCINNATI, FOR USE OF NOLTE ET AL.

The principle, laid down by the supreme court of Ohio in the case of Oviatt v. Upington (24 O. R., p. 232), applies as well to the building of sewers as to the improvements of streets.

Where the ordinance, providing for the building of a sewer, is defective, in not specifying a certain street, as one of the streets through which the sewer is to pass, and the assessment for the building of such sewer is invalid on that account; still, under the principle of the decision in Oviatt v. Upington, the property abutting on the street not specified in the ordinance, and the owner of the same is liable to the extent of the value of the work done.

MURDOCK, J.

The suit in the common pleas was brought to recover the amount of an assessment for building a sewer, running through Eighth street, Hunt street and Court street, on which latter street the property of the plaintiff in error abutted. He claimed the city was not entitled to recover; first, because the ordinance ordering the improvements did not specify Court street as one of the streets through which the sewer was to run; secondly, that he was not the owner of the abutting property, being simply there by sufferance, the property belonging to the heirs of Pendleton.

In the trial below the heirs of Pendleton were made parties, and they filed an answer and cross-petition, in which they claimed that Davis had been occupying the premises for ten years previous to 1872, under a written lease, in which he covenanted that he would pay an annual rent and all taxes, charges and assessments that might be charged against the premises during the continuance of his lease, and that by agreement with him he was to continue to occupy after the expiration of the lease on the same terms and conditions, and was so occupying the premises when the sewer was built and the assessment made to defray the expense. The common pleas made a finding of facts and of law, and among other facts found that Davis was occupying under an agreement made with the heirs of Pendleton before the expiration of the former written lease, that they would make him a lease for 10 years longer on the same terms and conditions, and that this was virtually a lease to him for ten years on the same conditions. Even if the ordinance was defective in not specifying Court street as one of the streets through which the sewer was to pass, and although the assessment was invalid on that account, the majority of this court was of opinion that, according to the decision in Oviatt v. Upington, the property was liable, and also the owner of the premises to the extent of the value of the work done; that the principle of this decision applied to sewers as well as the improvement of streets, it being the case of a street in which that decision was made.

*The decision in this case was reversed by the supreme court. See opinion, 36 O. S., 24.

It was also held that notwithstanding Davis was not the owner, so as to permit the city to charge him personally with the amount of the assessment, as such owner, yet where the real owners had filed a cross-petition, setting up the fact that he held the property under a lease from them at the time of the assessment, in which he covenanted to pay all the taxes, charges and assessments, the court, in the exercise of its equitable powers to adjust all claims between the parties, could order him to pay the amount of the assessment personally in the first place, instead of ordering the Pendleton heirs so to do, and then permitting them to recover against him.

Judgment affirmed.

Judge Cox dissented. He was of opinion that the ordinance was invalid in not designating the street through which the sewer was to pass. He also dissented from the views of the majority of the court in regard to the ownership of the property, believing that Davis could not be regarded as an owner within the meaning of the ordinance. He also remarked that there was no privity between the city and Davis, the lessee of Pendleton.

104

HUSBAND AND WIFE.

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet, and Avery, JJ.

*Edward C. Butler v. Lucy Hughes.

A married woman who has sold real estate and agreed that a debt of her husband may be deducted from the purchase price, can not afterwards repudiate the agreement and compel the purchaser to pay her the entire amount, because the debt was not chargeable upon her separate property.

Cox, J.

The defendant below brought her action to recover a balance of $200 upon the sale of a farm to the plaintiff in error. Testimony was offered in the case, tending to show that the husband of Mrs. Hughes was indebted to Butler, and that Mrs. Hughes agreed that, in consideration of Butler's purchasing the land, she would allow him to deduct from the purchase money the amount of that indebtedness, $200. In the trial, Butler's counsel asked the court to charge the jury, if they should find in support of this agreement, that it would bind Mrs. Hughes and entitle Butler to the benefit of the indebtedness. The court refused to so charge, but did charge that a married woman could not bind her estate in this way; that the promise made by Mrs. Hughes was without consideration or benefit to herself or property, and, therefore, not binding upon her.

Held, there was no error in the action of the court to refuse to charge as asked, but that there was error in the charge as given. When a married woman sells her property, she has the right to fix the specific character of the payment which she may receive, and this manner of payment of the debt due to Butler was simply a portion of the payment which she agreed to receive, and was not in the nature of a charge on her separate estate.

Judgment reversed.

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*This case was affirmed by the supreme court. See opinion, 26 O. S., 535.

CONTRACTS 104

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet, and Avery, JJ.

CITY OF CINCINNATI v. RICHARD HOPPLE.

Where a contract was awarded other than to the lowest bidder, by mistake of judgment as to responsibility of the lowest bidder, this irregularity does not defeat the contract, but will operate to prevent the contractor from recovering more than a fair value for the work honestly done by him.

FORCE, J.

The action was to enforce a lien for an assessment. The case came into district court by appeal, and was heard here on testimony. A number of points were presented, but all, except perhaps one, were disposed of in the Eighth street assessment cases, in this court, last term. The other point is this: It appears by the testimony that the bid offered by Wirth was not the lowest. Another bid was offered which, upon the testimony, was lower, and appears to have been given by a man who was responsible himself, and who offered responsible sureties. This bidder appears to have taken no steps, by mandamus or otherwise, to have his bid allowed. No evidence was offered that tends to show the city officers, in disregarding that bid, committed any other wrong than a mistake in judgment as to the responsibility of the bidder. No testimony was offered tending to show that Wirth, the contractor, was even aware of the fact that this lower bid had been offered. In the rejection of that bid the plaintiff committed no fault, and the city officers committed none, except a mistake in judgment. Hence, this disregarding the lowest bid is what the statute calls error or irregularity on the part of the city officers, which does not defeat the contract given to the plaintiff, but operates to prevent his recovering more than the fair value of the work honestly done by him. As to the value of the work, the testimony is clear and abundant, and substantially unanimous that the work was fairly and honestly worth the contract price. The only testimony varying from this was that of the disappointed bidder. He could not remember what his bid actually was, nor could he remember what was, in dollars and cents, the value of the work done. He could simply testify that his bid, whatever it was, represented the value of the work. This testimony, indefinite and vague, was contradicted by the unanimous testimony of all the other witnesses, who say that the work could not have been done for the sum named in that bid, except with a very great probability, if not with certainty, of loss to the contractor. According to the very great preponderance of testimony, the contract price for which the plaintiff agreed, is only a fair price for the work which the plaintiff honestly performed, and a decree would be allowed, charging it as a lien on the land of the defendant.

104 JURISDICTION—CONTINUANCE.

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet, and Avery, JJ.

JAMES MACK v. STEPHENS & NICHOLS.

Defendant may waive his right to object to the jurisdiction of a magistrate in another township. Obtaining a continuance without raising the objecion waives it, so that on the day when the continuance has expired the objection cannot be made.

Cox, J.

This was a petition in error. The action was brought by Mack before a magistrate of Spencer township. The defendants appeared on two separate days. On one of these days defendants filed an affidavit for continuance. On the last day to which the case was continued, Stephens appeared and made affidavit that the defendants were both residents of Cincinnati township, and not subject to the jurisdiction of the justice of Spencer township.

The subject-matter of the action was within the jurisdiction of the magistrate. But he had no jurisdiction over the persons of the defendants, if they had chosen to make the objection. This was, however, a personal privilege of which they could avail themselves by motion and affidavit. As to jurisdiction over their persons they could consent or waive it. Having on their first appearance not taken advantage of the want of jurisdiction over them by the magistrate, but consented to the jurisdiction by filing an affidavit for continuance, they could not avail themselves of it at a subsequent time.

Judgment of the court below reversed.

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109 PRACTICE—SUMMONS.

[Cuyahoga Common Pleas, 1876.]

HARMON & CROWL v. C. H. WHITTEMORE.

The answer day is the third Saturday after the expiration of six full weeks of seven days each, and default can be taken on the Monday following, and not before.

Harmon & Crowl, the plaintiffs, commenced suit in attachment against the defendant C. H. Whittemore, a non-resident of the state. A summons was issued and returned "not found," and the attachment was levied upon certain property of the defendant, situate within the county. Service was made by publication. The first publication was made on Wednesday, the 22d day of December, the next on Wednesday, the 29th day of December, and the subsequent ones on Wednesday, January 5, Wednesday, January 12, Wednesday, January 19 and Wednesday, January 26. On February 14, plaintiff took a judgment by default. Defendant now filed a motion to vacate this judgment, on the ground that it could not have been legally taken until February 21.

HAMILTON, J.

Although there were six publications in six consecutive weeks, it will be observed that the sixth week from the first publication would not have expired until the 2nd day of February, and the third Saturday thereafter would have been the 19th of February; at which time the answer should have been filed, or a default could have been taken on the following Monday, the 21st day of February. The only question to be decided in this case is whether such a publication is a substantial compliance with the requirements of the code. Judge Nash in his "Pleadings and Practice," takes the position that it is, and cites several authorities in support of it. We are, however, referred by counsel to a case, reported in the 1st Western Law Monthly, p. 704, Gilfillin v. Coke, in which Judge Lawrence takes the opposite ground, and his reasoning certainly appears the best. "'Six consecutive weeks" in our opinion, means six weeks of seven full days each, and the service is not complete until the expiration of that time, and a judgment can not be taken until the third Saturday thereafter. The judgment must be vacated.

A. T. Brewer, plaintiff's attorney.
Bishop & Adams, defendant's attorneys.

FRAUDULENT CONVEYANCE. 109

[Superior Court of Cincinnati General Term, April, 1876.]

*JAMES MACK v. J. V. WRIGHT & CO.

Yaple, O'Connor and Tilden, JJ.

When the plaintiff in action to set aside a fraudulent conveyance does not publish the required notice, his suit is for the benefit of all creditors, and a mortgagee who becomes a party, although having taken his mortgage pending the suit, is entitled to share the proceeds pro rata with the plaintiff.

YAPLE, J.

This is a petition in error prosecuted here to modify so much of a final decree made by this court in special term as provides that, in the distribution of the proceeds of the sale of certain real estate, the claim of Wright & Co. shall have priority of payment over the claim of Mack. No bill of exceptions has been taken; but the petition in error is based upon the record—the pleadings and the judgment of the court.

On January 9, 1871, Wright & Co. brought suit against one A. Constable and wife and others, alleging among other things, that, in the court of common pleas of Hamilton county, Ohio, on the 19th day of November, 1870, they obtained a judgment against the said A. Constable for $631.62 and costs, and that he had no property, real or personal, whereon to levy to satisfy upon execution any part of such judgment and costs; and that, about July 9, 1870, said A. Constable purchased of one Sewell and wife a certain described lot of ground in the city of Cincinnati, and caused the conveyance of the same to be

*A contrary opinion is found in Shorten v. Woodrow, 34 O. S., 645.

made by one McReady, in whom the legal title to the same was vested, to the wife of the said Constable, he, Constable, paying to Sewell the entire consideration for such lot, largely with stone he had before that time, by fraudulent means and representations, obtained from Wright & Co., and for the value of which they had obtained against him their said judgment for $631.62 and costs, and which conveyance was taken in the name of the wife of Constable in order to place the property beyond the reach of the creditors of said Constable, she holding it in trust for the benefit of her husband. The petition, among other things, prayed that on the final hearing, the conveyance to the wife of Constable might be set aside, and she decreed to hold the same in trust for the benefit of her husband; and that the property might be sold and the proceeds applied to the satisfaction of Wright & Co.'s said judgment and costs, etc.

Mack was not made a party to such suit, but he brought an action against Constable and wife to foreclose a mortgage made by them to him upon this lot of ground to secure their promissory note to him for $1,870.82, made on April 10, 1871, payable on or before the first day of January, 1872. The mortgage bore the same date as the note.

Both were made and executed some time after Wright & Co. had obtained their judgment against Constable and had brought their action against Constable and wife to set aside the deed to her and to subject the property to the payment of such judgment. The two actions were afterwards, by consent of the two parties, I suppose, consolidated, were tried and resulted satisfactorily, to both so far as Constable and wife and all other parties were concerned, except as to their own respective rights in the fund derived from the sale of the property, the proceeds being insufficient to satisfy the claims of both.

The following are the material parts of the decree: "The court find that, at the November term, 1870, of the court of common pleas of Hamilton county, Ohio, said J. V. Wright & Co. recovered, by the consideration of said court, a judgment against said Alexander Constable in the sum of $631.63 and costs, and that on the 9th day of January, A. D. 1871, they filed their petition in this court * * * * to set aside the conveyance made to said Elizabeth Constable of the premises described in the petitions of the said respective plaintiffs" (W. & Co. and Mack) "as made in fraud of the rights of the creditors of said Alexander Constable, to declare a trust in said Elizabeth Constable for said credits and to subject said premises to the satisfaction of said judgment, as the property of said Alexander Constable. That on the 10th day of April, A. D. 1871, said Alexander and Elizabeth Constable executed to said James Mack the mortgage set up in his petition, and the said mortgage was, on April 11, 1871, duly recorded, etc., and that there is now due to the said James Mack upon the same, including interest, etc., the sum of $ The said mortgage was executed for the purpose of securing said James Mack in the payment of the price of lumber furnished by him under a contract with said Alexander Constable for the erection of a dwelling house upon said premises, and upon the representation made to him by said Constable that the title to said premises was in him and was wholly unincumbered, and that, in accordance with such contract and upon such representations, said Mack commenced the delivery of said lumber in the month of July, 1870, and continued to make such deliveries until February 7, 1871, at which time the total value of

the same amounted to $1,733.36, and to secure which, with the future interest thereon, said mortgage was executed. That, although said lumber was sold by said Mack to said Constable for the purpose of being used in the erection of a house upon said premises, yet not more than $800.00 in value thereof, to-wit., $776.00, was so used and that the residue thereof was taken possession of by said Sewell and used by him in the improvement of other property belonging to him or his wife. The court further find that the title to said premises was formerly vested in the wife of said John W. Sewell, and that she and her said husband had conveyed the same to said James Macauley, by whom it was subsequently conveyed to said Elizabeth Constable. That said sale by said Macauley to said Elizabeth Constable was effected by said John W. Sewell, at the price of $875.00.—$375.00 of which were the value of a lot of stone, sold by said Alexander Constable to said John W. Sewell, and which stone had been purchased by said Constable from said J. V. Wright & Co., and for which they recovered the judgment set forth in their petition; and that, for the remaining $500.00, the note and mortgage set up in the answer of Jas. Macauley were given." (This Macauley mortgage was executed by Alexander Constable and wife to secure a note made by Alexander Constable to Macauley for $500.00, dated July 9, 1870, Mrs. Constable alone being the grantor in the mortgage executed to secure her husband's note.) The court then finds, that all the claims of all the other parties are fraudulent as against Mack and Wright & Co., and decrees, "that, unless the said defendants, or some of them, shall, within five days from the entry thereof, pay to said James Mack said sum of $ and to said J. V. Wright & Co. the amount now due to them upon said judgment, * * * $860.71, the sheriff, etc., proceed to sell said premises, etc. The court further find that, as between James Mack and said J. V. Wright & Co., said J. V. Wright & Co. are entitled to priority of lien, and it is therefore ordered and adjudged that, in the distribution of the proceeds of sale of said premises, the said judgment in favor of said J. V. Wright & Co., have priority of payment over the said mortgage of said James Mack."

To so much of this decree as found Wright & Co. entitled to priority over him, Mack excepted, and it is this he now seeks to have reviewed and modified upon this petition in error.

From the record it appears therefore, that, as between Constable and his wife, Sewell and wife and Macauley, the property in question was, by such deed to Mrs. Constable, vested in her; and creditors of the husband could not appropriate her property to pay his debts, without first setting aside the deed to her on the ground of its having been made to defraud them. The record also shows that Wright & Co. were creditors of Constable prior to the conveyance to his wife, and that Mack became such creditor subsequent to such conveyance.

Under the second section of the Statute of Frauds, passed in 1810, 1 S. & C. 656, such a conveyance was good as against subsequent creditors, unless made with intent, in fact to defraud them, but when set aside by prior creditors, the property became assets and subsequent creditors were entitled to receive such assets remaining after satisfying the lien obtained by the creditor's bill of the creditor bringing the suit. The seventeenth section of the act of April 6, 1859, 1 S. & C. 709-713, entitled "An act regulating the mode of administering assignments in trust for the benefit of creditors," and as amended in 1863,

(Vol. 60, O. L. 8-9), did not enlarge or limit the grounds upon which such conveyances could be set aside, but merely declared their effect, that is, to make them assignments for the equal benefit of all creditors, the property to be administered as all the debtor's other effects, the grantor being held their trustee.

Since the passage of these acts, a creditor filing a creditor's bill to set aside a fraudulent conveyance, can obtain no lien, but the action is in behalf of all creditors. Stanton v. Keys.

Since the act of 1863, if notice be published as therein required, such creditors as come in under the same and join with the plaintiff in the prosecution of the action and share the costs and expenses thereof, will be entitled to have their claims first satisfied out of the property, and other creditors will be remitted to the assets that may remain. If such notice be not published, it becomes too late to do so after a decree setting aside the conveyance, and all creditors (the plaintiff being reimbursed his costs and expenses,) will be entitled to share, pro rata in the fund, which may be administered by an assignee appointed by the probate court, or, in default thereof, by the court before which the cause is pending.

Jamison v. McNally, 21 O. S. 295; Combs v. Watson, 2 Supr. Ct. R. 523; Woodrow v. Sargent, 3 Am. Law Rec. 522.

The fact that a debtor purchases land with his own money or means and causes the title to be taken to another, he never, having the same in himself, to defraud his creditors, does not change the case from what it would be, if he had taken the conveyance to himself, and then conveyed to such other for such purpose. Both methods fall alike within such provisions of the statute of frauds. Woodbridge v. Sargent, above cited—p. 527, and cases there cited.

Section 458 of the Code authorizes a judgment creditor to file a bill to reach equities of the judgment debtor in lands and other property. By the commencement of such an action such creditor can obtain a lien upon such equities of his debtor paramount to the general claims of others. But this section applies only to cases in which such equities can be reached and subjected without having first to set aside a conveyance made by the debtor to defraud his creditors. If it be necessary to do that, the action must be governed and the rights of all the parties controlled by the 17th section of the acts of 1863; otherwise that section could be evaded and the entire policy of the law overthrown by simply ignoring its provisions and calling an action to set aside a fraudulent conveyance, a bill to reach and subject the equities of the debtor in such real estate.

Could that be done, the judgment of the court of common pleas and district court in Jamison v. McNally would not have been reversed but affirmed.

The affirmative of this proposition was also held by this court in general term, in the case of Woodrow v. Sargent, above cited, pp. 525, 526.

The action of Wright & Co. was one falling strictly under section 17 of the act of 1863, and notice to all creditors should have been given by publication as required by that section, so that such creditors might come in and assist in the prosecution of the action by bearing their proper portions of the costs and expenses and be enabled to receive their pro rata distribution. By not giving such notice until after a decree set-

ting such conveyance aside it then becomes too late, and all other creditors are let in to receive their pro rata shares of the proceeds, the attorney's fees, etc., of the original plaintiff being first allowed to him and deducted from the fund. Jamison v. McNally.

If no assignee should be appointed as provided for in section 17, "it would be competent for the court having jurisdiction of the funds and of the parties to direct the execution of the trust, and order distribution," *Id.* 305.

That a case like this, in which it is necessary to set aside a conveyance which prima facie gives another than the debtor the ownership of the property sought to be subjected, is governed by such section 17, the supreme court says: "The section, in terms, applies to all conveyances made with intent to hinder, delay or defraud creditors. * * * The operation of the section is, in our opinion, as comprehensive as the power of the court to set aside conveyances, on the ground of their being made in fraud of the rights of creditors." Jamison v. McNally, *Id.* 304.

In this case, Wright & Co. and Mack are the only creditors of Constable of whose existence the decree advises us, and neither have a lien upon the fund. Such fraudulent conveyances are simply assignments for the equal benefit of all creditors, sec. 27, and it is difficult to see upon what ground Mack can be denied a pro rata distribution of the fund, since Wright & Co., neglected to do what the law required of them, viz.: upon the commencement of their suits, to have published notice to all Constable's creditors that they might appear and assist in the prosecution of the action for the common benefit of all, had they so desired. Surely Wright & Co. should not be permitted to obtain a preference over any other creditor for failing to do what the law expressly required them to do.

The judgment below will be so modified as to find that Wright & Co. and Mack are entitled to the fund pro rata.

O'Connor, Judge; concurs.

COMMON CARRIER. 110

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet, and Avery, JJ.

ALEX. STARBUCK, ASSIGNEE v. CHESAPEAKE & OHIO R. R. Co.

1. It is not negligence in a carrier to receive goods to be forwarded at a time when by reason of a low stage of water his boat is so delayed that the goods spoil before arrival.
2. The fact that there was a standing advertisement that a boat would run daily during low water, is not a warranty, but a representation, and only good faith is required in making it, and where a boat was expected to be at hand to start that day, but by detention by fog and low water did not arrive until several days later, the delay was not from insufficiency of equipment for transportation but from want of a boating stage of water, the carrier is not liable.

FORCE, J.

Weber shipped sundry casks of beer in October, 1874, by the defendant, to a consignee in Richmond, Va. The defendants' line con-

sists of boats from Cincinnati to Huntington, and by rail thence to Richmond. Owing to extraordinary low water in the river, the beer was so delayed between Cincinnati and Huntington, that on its arrival in Richmond it was stale and flat. The consignee refused to take it because the beer had arrived in a worthless condition. The action is brought for damages to the plaintiff by the negligence of the defendant.

The testimony shows that unusual care was taken in handling and the forwarding of the beer; that no damage happened except by reason of the detention from low water in the river, and the bill of lading provides that the defendant shall not be liable by reason of such damage. Hence the plaintiff has no cause of action such as he actually avers in his pleading.

It is claimed, however, that it was negligence in the defendant to receive the beer at a time when it could not be forwarded. Some Missouri decisions are cited to the effect that if a railroad company receives goods for shipment at a time when it has not rolling stock enough to forward the goods so received, the railroad company will be liable for the delay. These decisions have not yet been approved by our supreme court, and moreover they are not applicable to the case on hand. They go to the extent of holding that the company must have sufficient equipment to transport the goods which it receives for transportation. In this case the defendant had a sufficiency of boats to transport the goods. The delay was occasioned by low water, and no rule of law obliges the defendant to keep a good boating stage of water in the Ohio river.

The case was mainly pressed in argument on a ground which is really not claimed in the petition. It appears in evidence that on the day when the goods were shipped, the Cincinnati papers contained an advertisement that a boat would leave every day during low water. But such a publication is not a warranty. It is at the most a representation which must be made in good faith. Now it appears by the testimony that this was a standing advertisement, and appeared for the last time on the day when these goods were received for shipment. It appears, moreover, that a boat was due in Cincinnati on that day and to return the same day, but being unexpectedly detained by fog and low water, did not arrive until six days after. The defendant, at the time the publication was made, expected, and had reason to expect a boat to be at the wharf to ship the goods in accordance with the terms of the advertisement; and hence, if damages had been claimed in the petition on the ground of misrepresentations, such claim would not be made out by the testimony, as it appears in the bill of exceptions.

Judgment affirmed.

JURY. 110

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet, and Avery, JJ.

HENRY TAUSZKY v. MARTHA C. BLATCHFORD.

The knowledge on the part of a defendant in default for answer that a cause is set for trial on a submitted calendar, without a jury, and his subsequently procuring a postponement with leave to file an answer, is not a waiver of his right to demand a jury on the day of trial. Up to the time of trial, either party may appear and demand a jury.

This was an action to recover rent, appealed from a justice to the court below. The case had been set for trial by the plaintiff upon the submitted docket, the defendant being in default for answer. On the calling of the case for trial, it was laid over, and on the arrival of the day to which it was postponed, the defendant's counsel being in court, leave was given to the defendant to file an answer, and the case again laid over. An answer was subsequently filed and the case again called for trial. The defendant demanded a jury. The court held, that, by the acts of the defendant, a jury had been waived, and refused to allow a jury. The case then went to trial. A judgment, as upon a waiver of the intervention of a jury, was rendered for the plaintiff. It was claimed that the court erred in the refusal to allow a jury.

BURNET, J.

Held: That under section 279 of the Code, in the absence of the consent by a party in a case in which he is entitled to a trial by a jury, to waive that right, the mere setting of the case for trial on the submitted calendar by either party, without objection from the other party who is aware of the setting, does not amount to such waiver. Up to the time of trial the other party may appear and demand a trial by jury.

Judgment reversed.

E. G. Hewitt for plaintiff.

Charles B. Wilby, contra.

[Hamilton District Court, April Term, 1876.] 110

JOHN FITZGIBBON v. JOHN K. GREEN.

For opinion in this case see 5 Dec. R. 350 [s. c. 5 Am. Law Rec. 2.]

[Hamilton District Court, April Term, 1876.] 111

GEORGE CRIST v. H. A. LANGHORST, ASSIGNEE.

For opinion in this case see 5 Dec. R. 352 [s. c. 5 Am. Law Rec. 4.]

111 **BILLS AND NOTES—PLEADING.**

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet, and Avery, JJ.

DANIEL MCMILLAN v. J. H. BURKHAM.

1. An averment in an answer that the notes and guaranty sued on were without consideration, is sufficient, if the detailed statement of facts is not inconsistent with the plea of want of consideration.
2. Where the answer avers that plaintiff conveyed to H. certain land, and after conveyance the notes and guaranty by M. were given to secure the payment, the phrase "after the conveyance" means after the deed was delivered, as well as executed, since there is no conveyance until then, and the original transaction being complete when the notes and guaranty were given, it was not a consideration for them, and such answer is not inconsistent with the plea of want of consideration.

FORCE, J.

This case came up by petition in error. Burkham filed a petition in the common pleas against Hinman and McMillan, claiming that Hinman was indebted to him on four notes for $850 each, payable at intervals of six months; that McMillan was liable on his written guaranty for the payment of these notes at maturity. Hinman suffered the case to go by default. McMillan filed an answer, and afterwards an amended answer. The plaintiff's demurrer to the amended answer was sustained and judgment given against the defendant. McMillan files a petition in error.

In his amended answer he states as ground of defense that the guaranty was obtained by fraud, also that the guaranty and notes were without consideration. It also sets out a statement of facts detailing the transaction. This statement is rather long and not at all clear. For present purposes it is enough to say, the answer states that McMillan sold to Burkham land worth $17,000 for a price not named, with guaranty by McMillan that in two years the land should be worth a certain sum, which sum is not named. After the conveyance was made, Burkham required that Hinman, who had some interest in the transaction, should give his notes, being the notes sued on, as interest at ten per cent. per annum in $17,000 for the two years intervening between the sale and the time fixed by McMillan's guaranty; that thereupon Hinman gave the notes and McMillan the guaranty sued on.

The case was argued here, as well as in the common pleas, where it was also decided upon the question whether these notes were really for interest, and usurious, or were in fact some part of the stipulation of purchase. But in disposing of the case we do not reach that question. The answer alleges as a defence that the notes and guaranty were without consideration. If the detailed statement of facts is not inconsistent with this denial of consideration, the defense of want of consideration is sufficiently pleaded.

Now the answer avers that after the conveyance was made which McMillan had agreed to make to Burkham the latter required Hinman and McMillan to give these notes and guaranty. The phrase, "after the conveyance was made," does not mean after the deed was executed, for the deed must have been delivered as well as executed before the conveyance was made. Hence, the original transaction was

complete. It could not be a consideration for the notes and guaranty. Nothing else is alleged to be such consideration. No consideration appears for them in the pleadings. Hence the distinct allegation by way of defense, that there was no consideration is sufficiently pleaded, and was good on general demurrer. The demurrer should have been overruled, and therefore, the judgment is reversed.

H. M. Cist, for plaintiff in error.

A. Brower, contra.

CHATTEL MORTGAGE—REPLEVIN. 111

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet, and Avery, JJ.

MAURA J. COLWELL, EXRX. v. ROBERT AITCHISON ET AL.

In a replevin case by a mortgage of the chattels, another person can not come in and by cross-petition claim that he has a prior mortgage on the same goods, and permitted plaintiff to take possession and sell the goods, and that they realized more than the claim of such cross-petitioner. Such pleading amounts, at most, to showing that plaintiff held the purchase money as trustee for the cross-petitioner to the extent of his claim, and such claim can not be intruded into the case.

BURNET, J.

The plaintiff below replevined certain printer's stock and material under a chattel mortgage which she alleged was wrongfully detained by defendant, Aitchison. After commencement of the action, Alexander Starbuck caused himself to be made a party defendant, and filed an answer and cross-petition, alleging that he was the owner of a prior mortgage upon the same chattels, and of a note for $250 secured thereby; that the plaintiff, by consent of Starbuck (without his waiving his priority) had taken possession of the property, and had been permitted to sell it; and that it had produced more than his, said Starbuck's, claim. The plaintiff moved to dismiss Starbuck from the case on the ground that he was an improper party. The motion was overruled, and plaintiff then answered the cross-petition, stating among other things that she admitted that she had taken possession of the chattels with the knowledge of Starbuck, and without opposition from him, and that she had sold them for more than his claim. Judgment by default was rendered for plaintiff against the original defendant, Aitchison, and judgment afterward rendered for Starbuck against the plaintiff for the amount of his claim. The overruling of the motion to dismiss Starbuck from the action by striking his answer and cross-petition from the files, and the rendering of judgment in his favor are assigned for error.

Held: That this case is distinguishable from the case of Morgan v. Spangler, 20 Ohio S. Rep. 38. Starbuck, if he desired to insist upon his mortgage lien, might have replevined the property out of the possession of plaintiff. But the most favorable construction that could be given to his answer and cross-petition was, that in consideration of his waiving the enforcement of his mortgage lien (to which his acts amounted, notwithstanding the contrary averment) and permitting the plaintiff to sell, she became a trustee for his benefit, of the proceeds, to the extent of his claim and this constituted a separate and distinct cause of action, which could not be intruded into his case.

Judgment reversed.

114 TAXES AND TAXATION.

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

ALLEN W. GAZLAY v. J. B. HUMPHREYS, AUDITOR.

The annual city boards of equalization have authority to increase or decrease the valuation for taxation of any lot or parcel of land within their respective city limits.

O'CONNOR, J.

This case comes into this court upon a reservation of a demurrer to the petition.

The petition sets out in substance that the plaintiff, Allen W. Gazlay, about the 28th day of June, 1875, became the owner of a certain piece of real estate in the city of Cincinnati, which, at the time of his purchase, was valued on the duplicate for taxation at the sum of $8,170.00, and that on his application, the special board for the equalization of real estate and personal property in the city of Cincinnati, on the said 28th day of June, 1875, reduced the value of said property for the purpose of taxation to the sum of $7,000.00, at which sum it was placed upon the duplicate by the auditor, the defendant, and in order not to reduce the real property of the city and county below the aggregate value thereof as fixed by law, the said board duly and legally assessed and added the sum of $1,170.00, so abated from the plaintiff's property, to other real estate within the city, which had been assessed too low by the same amount. But that the defendant, acting under the instruction of the auditor of the state that said board had no legal authority to make such reduction in valuation, threatens and is about to add said sum of $1,170.00 so abated, to the present assessed value of said real estate upon the tax duplicate, and the plaintiff asks that the defendant be perpetually enjoined from so doing.

To this petition the defendant filed a general demurrer, which was reserved for decision here.

The demurrer raises the question whether the action of the board of equalization, in reducing the taxable valuation of said real estate, was authorized by law. The question is a very important one, as it affects, or may affect, every piece of property in the state, whether in a city or in the county.

The legislation on the question is to be found in the 44, 45, 46 and 39 section of the act of April 5, 1859, for the assessment and taxation of property. Sev. & C. 14387, and the amendments to sections 44, 45 and 39 in the act of May 8, 1868, Sev. & S., 753 and 755.

Section 45 of the act as amended, provides that: "There shall be a special board for the equalization of real and personal property, moneys and credits, in cities of the first and second class, to be composed of the county auditor and six citizens of each of said cities, to be appointed by the city council of such city. Said board shall meet annually, at the auditor's office in said cities, on the fourth Monday of May, and shall have power to equalize the value of the real and personal property, moneys and credits, within said cities, and shall be governed by the same rules, provisions and limitations that are prescribed for the government

of county boards for the equalization of real and personal property, moneys and credits."

Section 44, as amended, and to which reference is made in the section 45 just cited, is as follows: "There shall be an annual county board for the equalization of the real and personal property, moneys and credits in each county, exclusive of cities of the first and the second class, to be composed of the county commissioners and county auditor, who shall meet for that purpose at the auditor's office in each county on the first Wednesday after the third Monday of May, annually. Said board shall have the power to hear complaints and to equalize the valuation of all real and personal property, moneys and credits within the county, and shall be governed by the rules prescribed in the 39th section of the act to which this is an amendment, for the government of county boards for the equalization of real property; provided, that said board shall not reduce the value of the real property of the county below the aggregate value thereof as fixed by the state board of equalization, nor below its aggregate value on the duplicate of the preceding year, to which shall be added the value of all new entries and new structures over the value of those destroyed, as returned by the several township assessors for the current year."

Section 39, to which reference is made in section 44 just cited, is as follows: "The county auditor, the county surveyor, the county commissioners, or a majority of them, shall form a county board of equalization of the real property of their county, with the exception of the real property in cities of the first and second class. * * * They shall meet on the first Tuesday after the first Monday of September, 1870, and every tenth year thereafter, at the auditor's office in the several counties, when the county auditor shall lay before them the returns of the real property made by the several district assessors of such county, with the additions he shall have made thereto, and having each taken an oath fairly and impartially to equalize the value of the real estate of such county, according to the provisions of this act, they shall immediately proceed to equalize such valuation, so that each tract or lot shall be entered on the tax list at its true value, and for this purpose they shall observe the following rules:

1st. 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 valuation thereof.

2nd. They shall reduce the valuation of such tracts and lots as, in their opinion, have been returned above their true value, as compared with the average valuation of the real property of such county, having due regard to their relative situation, quality of soil, improvement, natural and artificial advantages possessed by each tract or lot.

3rd. They shall not reduce the aggregate valuation of the real property of the county below the aggregate value thereof, as returned by the assessors, with the addition made thereto by the auditor as herein before required. The county auditor shall keep an accurate journal or record of the proceedings and orders of said board."

These then are the three rules to be observed by the special boards of equalization in cities now under consideration. They apply equally to sections 44, 45 and 39, that is to the annual boards of equalization of

cities of the first and second class, to the annual boards of equalization of counties and to the decennial boards for counties. And each of the several boards is authorized by express language to equalize the value of real property without exception, according to the three rules prescribed by section 39. It is difficult to add anything to these sections by way of construction or explanation, for the language and powers and duties are unambiguous, clear and precise.

But it is said, that it could not have been the intention to permit the annual city and county boards to undo what was done by the decennial county boards, and that the valuation of real property must remain, and was intended to remain, as fixed by the decennial board, until such board again met ten years thereafter. This is partly true as to the aggregate value of all the lots of real property in the county or in the city, as to which aggregate value it is provided by the 3d rule of section 39, that the board "shall not reduce the aggregate value of the real property of the county below the aggregate value thereof, as returned by the assessors"; but the board is not expressly forbidden to increase the aggregate value of all the property, nor is it forbidden to increase or decrease the valuation of any particular lot, but on the contrary is expressly authorized to do so by rules 1 and 2 of section 39. Again in section 44 it is provided that the annual county board "shall not reduce the value of the real property of the county below the aggregate value thereof as fixed by the state board of equalization, nor below its aggregate value on the duplicate of the preceding year, to which shall be added the value of all new entries, and new structures over the value of those destroyed as returned by the several county assessors for the current year," but the board is not expressly forbidden from increasing the aggregate value, nor is it forbidden to increase or decrease the valuation of any particular lot of land, but is expressly authorized to do so by reference to rules 1 and 2 of section 39. The system then is one which preserves the basis of taxation for periods of 10 years, by preserving the aggregate valuation of real property for such periods, while it permits, subject to such restriction, the change in valuation of particular lots. And for many reasons this should be so. In the present case although the fact cannot be shown on demurrer, it is said, the plaintiff's lot is described on the duplicate as being 177 feet in depth, when in fact it is only 77 feet, and a valuation is therefore placed on 100 feet more property than the plaintiff owns. Were it not for the power given to the city board, this error could not be corrected, under present legislation, until the year 1880.

Again it is said that the city and county annual boards can only consider such returns of property as is laid before them by the county auditor, and that he can lay before them only returns of personal property, new entries, subdivisions, new entries, etc. We have not been referred to any section or sections of the tax law which so provides, and after a careful examination can find none. On the contrary, section 39 provides that "the county auditor shall lay before them (that is the decennial board) the returns of the real property made by the several district assessors of such county, with the additions he shall have made thereto," and section 46, relating to the annual county boards, provides that "the several county auditors shall lay before said board of equalization the valuation of the several tracts and lots of real property in their county, as the same were entered on the duplicate of the preceding year, or as fixed by the state board of equalization, and of those returned by the assessors of the

several townships for the current year, * * * and the county auditor shall add to or deduct from the value of any tract or lot of real property, or of any distinct township or town, such sum or per centum as shall have been ordered by the board of equalization."

Section 44, also relating to annual county boards, provides that "said boards shall have the power to hear complaints, and to equalize the valuation of all real and personal property, moneys and credits within the county." Now section 45, relating to annual city boards, provides that "they shall be governed by the same rules, provisions and limitations that are prescribed for the government of county boards," that is in sections 44 and 46, and also, "shall have power to equalize the value of the real and personal property, moneys and credits within said cities."

There seems then to be no doubt that the annual boards of equalization for cities have the power to increase or decrease the valuation of any piece of real property within their respective limits, and that the legislature has done all that it well could do to confer such power on them.

We have reviewed the legislation on the subject with this particularity, because we are informed, and it is so alleged in the petition, that the auditor of state has instructed the county auditors "that the special city boards of equalization have no right to reduce or raise the valuation of real estate, except in cases of new structures, new additions to town plats, destroyed structures, etc.

In so far as the supreme court has given a construction to the legislation on the subject, it has come to the same conclusion which we have just announced. But it is claimed that the language of the supreme court, in so far as it relates to this question, was not essential to the decision of the case before it, and is therefore not authority. It is to be remarked, however, that the power of annual city boards of equalization, to change the valuation of real estate, is recognized both in the opinion of the court and in the dissenting opinion of Judge Rex, which would seem to show, if there were not other reasons that the court regarded the power of the boards as directly bearing on the question before it.

The case referred to is that of Mitchell & Watson v. the Treasurer of Franklin County, 25 Ohio St. 143. The action in the common pleas was to restrain the defendant from collecting certain taxes. The action was dismissed, and on appeal to the district court of Franklin county a like judgment was rendered against the plaintiffs, which judgment the plaintiffs claimed to be erroneous. From the statement of the case we find, "that the plaintiffs, in 1872, owned about six acres of land in the city of Columbus. It was not a part of the original corporation, but was added prior to 1870, during which year it was valued for taxation by an assessor, a city and state board of equalization, at $1,909, and that in September, 1872, the premises were subdivided into 34 lots. The premises were charged with taxes in 1871 and 1872 on the above valuation of $1,909, which taxes were duly paid. In 1873 the county auditor placed the premises so subdivided upon the duplicate for taxation at the valuation of $7,080, no part of which was for buildings or improvements of any kind. The auditor placed said duplicate in the hands of the treasurer for collection," and the plaintiffs asked that the treasurer be restrained, etc.

To the petition there was a general demurrer.

In 1866 the legislature enacted a statute (S. & S. 762) which provides:

"That whenever any person or persons shall lay out any town or addition to any city or town in this state, before the plat thereof shall be recorded, it shall be the duty of the proprietor or proprietors of such plat to present the same to the county auditor of the county in which lands so platted are situate, and the auditor shall cause the assessor of the proper township to assess and return the true valuation of each lot or parcel of said town, plat or addition to the county auditor, who shall enter such valuation upon the tax duplicate in the same manner as new structures are now entered."

It was contended by the plaintiffs that this statute applied only to the creation of a new town or to lands lying outside a town or city, and which were added to the town or city, and not to a subdivision of lands already embraced in a town or city. And that if the statute did apply to a subdivision of lands already in a town or city, then it was unconstitutional, as being in conflict with article 12, section 2 of the constitution of the state, which provides that "laws shall be passed, taxing by a uniform rule, all real and personal property, according to its true value in money."

The court held: "that the act applies to cases where lands within the corporate limits of a city or town are laid out into lots, streets, etc., as well as to cases where the lands so laid out are situate without the corporate limits," and

2. That "this act should be considered and construed in connection with the other statutes, in *pari materia,* and when so considered and construed, its operation does not conflict with the provisions of the second section of the twelfth article of the constitution." And thus, to show the constitutionality of the act the court proceeds to construe it in connection with other statutes in *pari materia,* and in so doing brings under review the very sections of the act which we have already cited and considered.

The court 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 annual 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 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 also as 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. (S. & S. 755.)"

"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, or any item of personal property, when the valuation is below its true value in money, and by reducing it when above its true,

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."

"Under this state of legislation, the assumption that other real estate in the city of Columbus, which has not been subdivided into lots since the decennial valuation in 1870, remains upon the duplicate for taxation at the valuation then fixed, is not authorized; nor can it be assumed, that the property of the plaintiff, as valued by the township assessor in 1873, is taxed on a valuation above its true value in money, or at a valuation greater than other real property in the city of Columbus of the same value in money."

"If inequality, however, does, in fact, exist—if the plaintiff's property is placed on the duplicate for taxation at a higher valuation than other city property of the same cash value, or higher than its true value in money, ample provision is made by statute for their relief. It is their right and privilege to complain to the annual city board of equalization for redress, and it is the duty of the board to grant them relief. Until, therefore, they exhaust their remedy thus provided by statute, a court of equity should not interfere, in their behalf, by enjoining the collection of the tax." It seems then that both for the purpose of showing the constitutionality of the act before them, as well as that the plaintiff had an adequate and complete remedy at law, and were not consequently entitled to relief in equity, the supreme court considered the powers and duties of annual county and city boards of equalization; and it follows therefore, that this consideration was not obiter, but directly in the line of their investigation. We would not feel authorized to disregard this decision, even if an examination of the statutes did not necessarily lead to the same result; and if what is therein decided is not the law, the supreme court is the proper tribunal to correct it.

The demurrer to the petition, therefore, must be overruled.

Demurrer overruled.

[Superior Court of Cincinnati, General Term, April, 1876.] 115

CATHERINE STAPLETON v. E. P. REYNOLDS ET AL.

For decision in this case see 5 Dec. R. 374 [s. c. 5 Am. Law Rec. 242.] A much fuller report is there given.

JUSTICE OF THE PEACE. 116

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet, and Avery, JJ.

UNDERCLIFFE LAND & BUILDING ASSN. v. ROBB.

Where a transcript recites that a bill of exceptions was allowed by a justice, and a paper called a bill of exceptions is attached to the transcript, but no reference is made in the transcript by which this paper can be identified as the bill, and the certificate of the justice that the transcript contains all the proceedings of the case excludes it, it will not be considered as a part of the record.

AVERY, J.

This is a petition in error to reverse the judgment of the court of common pleas affirming the judgment of a justice of the peace. The

errors complained of are contained in what purports to be a bill of exceptions taken before the justice, but this is not made part of the transcript. The transcript recites that a bill was allowed, and a paper called a bill of exceptions is attached to the transcript, but no reference is made in the transcript by which this paper can be identified as the bill, and the certificate of the justice that the transcript contains all the proceedings of the case before him excludes it. Section 511 of the code provides, that the judgment of a justice may be reversed in the court of common pleas. Section 515 provides, that the mode shall be by petition in error; section 517, that the plaintiff shall file with his petition in error a transcript of the docket and journal entries. The docket of a justice, by section 203 of the justice's act, must contain the exceptions to his rulings upon questions of law, taken by either party, and, by section 93, as it stood at the time of this trial, exceptions could be taken only upon matters of law arising during the progress of the case. This section implies that the exception must be entered upon the docket, for the docket constitutes the only record of the justice; and the section, after providing for the allowance of a bill of exceptions, goes on to provide, that the justice shall, if required, allow not more than five days for the signing and sealing of the bill, so that it may be made part of the record. Section 204 of the justice's act, also, by fair implication leads to the inference that the exceptions must be entered upon the docket, for while the exceptions need not be entered upon the docket at the time of the ruling, unless required by the party, it provides that they shall be after the judgment is entered. Where a case is taken from the court of common pleas to an appellate court, section 517, which provides, that the original papers may be taken up, would include a bill of exceptions, because the appearance docket and minutes of the daily proceedings of the court constitute the docket and journal, and the record is left to be made up in vacation after the end of the term. But before a justice of the peace, his docket constitutes the record, and when to a transcript of his docket he appends a certificate that it contains all the proceedings before him, and among the entries there is no bill of exceptions, it is not possible, in the absence of some reference in the paper attached, by which it may be regarded as incorporated in the transcript, to consider such paper a bill of exceptions, and review the case with respect to errors that are alleged as of record.

The conclusion to which the court have come is sustained by Judge Swan in his treatise, wherein he lays it down that the bill of exceptions must be entered at length upon the docket. If hardship would be caused by this rule, in that it would impose upon the party desiring to take exceptions, the expense of a voluminous bill, the answer may be made that it was not intended that voluminous bills should be taken before a justice, and, if a party desires to do it, he must do it at the risk of the expense of transcribing such bill upon the docket of the justice.

The court have not felt called upon to look into the bill of exceptions to determine whether there were errors or not, basing the judgment on the ground, simply that the transcript contains no bill of exceptions, and although it recites that a bill was allowed, it makes no such reference to the bill attached to the transcript as that the same may be considered a part of the record.

Judgment affirmed.

[Hamilton District Court, April Term, 1876.] 116

THEODORE FELDNER v. CARSTEN VOIGHT.

For opinion in this case see 5 Dec. R. 349 [s. c. 5 Am. Law. Rec. 1.] See also 5 Dec. R. 336.

JURISDICTION—ROADS. 116

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet, and Avery, JJ.

STATE OF OHIO EX REL. V. MCCLYMON ET AL.

1. The jurisdiction of county commissioners to appoint commissioners for a free turnpike is not conclusive and can be inquired into in a collateral proceeding against the commissioners so appointed, for usurping the franchises of a corporation.
2. Where the jurisdiction of an inferior tribunal of limited and special jurisdiction depends not on the existence of a certain fact, but on the finding of such tribunal, that a certain fact exists, its finding is conclusive until regularly reversed or vacated, and can not be inquired into in a collateral proceeding. Where, however, the jurisdiction of an inferior tribunal depends upon the existence of a certain fact, its finding and jurisdiction can be inquired into in a collateral proceeding.

FORCE, J.

The proceeding was quo warranto against the defendants for usurping the franchise of a corporation. The defendants were appointed commissioners for a free turnpike by the county commissioners in the summer of 1868, and this proceeding is to determine the legality of that appointment. The defendants filed two pleas to the information. The first is a simple traverse; the second avers that the defendants were duly appointed commissioners by the county commissioners, and that more than three years have elapsed since that appointment. To the second plea the state demurs. The second plea sets up a bar of limitation of three years. But the limitation applies when the proceeding in quo warranto is brought to oust a person from office, which it is claimed he intrudes into. This is not such a case. This suit is brought on the ground that the defendants usurp the franchise of being a corporation, and there the bar is twenty years. Hence the demurrer to this plea must be sustained.

By the first plea and the testimony taken under it, two questions are presented. First, as to the right to inquire in a collateral proceeding into the jurisdiction of the county commissioners in appointing the defendants; and, second, whether or not, as a matter of fact, the county commissioners did have such jurisdiction.

The county commissioners are authorized by the statute to appoint commissioners for a free turnpike, with corporate powers, after a petition duly signed shall have been presented to them. It is claimed that the county commissioners, in acting on such petition, act in a judicial capacity, and although in so acting they are an inferior tribunal of limited and special jurisdiction, still their finding of their own jurisdiction cannot be inquired into in a collateral proceeding, but must be held conclusive.

The court of appeals of New York, in a very recent case (Rodrigas v. East River Savings Institution) has held that in the case of inferior tribunals of limited and special jurisdiction, which depends on the existence of certain facts, the decision of such tribunal upon the existence of such facts, and their consequent jurisdiction, is conclusive until regularly reversed or vacated. This is a decision of a court of great weight, but it appears to stand alone and in conflict with all the other cases. There is one series of cases in Massachusetts very close to the present proceeding. In Massachusetts a probate court had authority to grant administration over the estate of any deceased resident of the county. The probate court of Suffolk county granted letters under which the estate of a decedent was administered. Afterwards the heirs instituted litigation concerning the property. This litigation was before the supreme court of Massachusetts three times (9 Mass., 5 Pick. and 9 Pick.) and in all these cases the supreme court held that the probate court had no jurisdiction if the deceased was not a resident of Suffolk county, and the finding of the probate court that the deceased was such resident was not conclusive, even in a collateral proceeding, because the court was never a court of limited and special jurisdiction, and hence the action of the probate court and all its orders were treated as null and void. This whole matter was again examined by the supreme court of Massachusetts, in 3 Allen. The same ruling was made by the court of King's bench, in 3 term report, and very pointedly stated by Ch. Justice Marshall in 8 Cranch. Our supreme court in Anderson v. the County Commissioners, made the same ruling, for there the court held the commissioners, in laying out a road, acted judicially; and yet, in an injunction brought against them by an abutting owner, their jurisdiction could be inquired into.

There is a class of cases where the finding of such tribunal is conclusive. That is, where the statute provides that where such tribunal shall find a certain fact the tribunal shall have jurisdiction. There it is not the existence of the fact, but the finding by that tribunal that gives jurisdiction. Hence, if the tribunal makes the finding, it has jurisdiction, and the correctness of the finding cannot be inquired into. With all deference, the recent decision of the court of appeals of New York seems founded upon a confusion of these two distinct classes.

We hold that the jurisdiction of the county commissioners to appoint the defendants can be inquired into. Their jurisdiction to appoint depended upon the filing with them of a petition signed as prescribed by law. The law prescribes the petition shall be signed by a majority of resident land owners within the bounds of the proposed free turnpike. The question here is, what are the bounds? That must be determined by the act of 1868, amending section 6, of the act of 1867.

By comparing the amended section with the original section, it appears the statute provides that the bounds include all the land on each side of the road and within one mile of it, except in two cases. The second exception is "when any state, county or free turnpike road shall run upon either side of such road within less than two miles, then the taxes shall be levied only on such land and personal property as lie within half the distance of such macadamized roads as run parallel to said road." In this case there were county roads parallel to the proposed road and less than two miles from it. but they were mud roads, and hence do not come within the exceptions. Hence the bounds of this road were one mile on each side of it, and as the petition was not signed by a majority of

the land owners resident within such bounds, no petition was ever presented to the county commissioners which gave them any authority to act, and their appointment of the defendants as commissioners with corporate power was an act by unauthorized persons, and conferred no power. The defendants in error never were properly appointed, and never authorized to assume the functions of free turnpike commissioners, and there must be a judgment ousting them from the franchise they have assumed.

Harmon & Durrell for relators.

Hoadley, Johnson & Colston contra.

STREETS. 125

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet, and Avery, JJ.

CHATFIELD & WOODS v. CITY OF CINCINNATI.

This case was brought to recover damages from the city in the amount of $75,000. The trial took place in the district court, April term. The charge to the jury was delivered by Judge Force, and contains a very clear and concise statement of the law in relation to the rights of property holders for damages sustained by improvements of streets in municipal corporations, as it now stands in Ohio. Both parties are satisfied with the correctness of the charge.

FORCE, J.

Charge to the jury:

Gentlemen of the Jury: You have not been sworn to try an issue, but to inquire and assess damages. The reason is this. When the city is about to make an improvement which may cause damage, a notice is published requiring the abutting owners to file, within a certain time, their claim for damages which might be done them by making the improvement.

The city may have the damage assessed either before or after the improvement is made.

When the city was about to improve Eggleston avenue up to the grade established by the city council, a notice was given, but these plaintiffs did not file their claim within the two weeks prescribed by law. They came into court averring that they were misled into not filing it within the time fixed by the ordinance. It was finally determined after litigation that they had been so misled, and that they should still have a right to file their claim. The city was directed to receive it and to call a jury to assess damages, or else a jury would be summoned by the court for that purpose. The work being done and a jury not having been called by the city, you were summoned here to assess damages, if any, that have been done to these plaintiffs by reason of this improvement of Eggleston avenue.

Eggleston avenue, of course, includes only the land within the bounds of the avenue. But in making this improvement, the city has constructed as a part of it, the slope running down from its west side into Bedinger street, so as to make it accessible from Bedinger street. So you are to consider that slope as a part of the improvement of Eggleston avenue. There are three matters which you are to consider. First, the liability

of the city to pay any damages of this kind; next, if the city is liable to this plaintiff for damages, then what sort of damages; and finally, the pecuniary amount of the damage done.

I will not trouble you with any discussion of the law, or the history of the law upon this matter; but will merely state to you the rules of law in Ohio applicable to damages of this kind. The claim for damages is for the change of grade, or for the adoption of an unreasonable grade, whereby the plaintiffs are injured. When the city establishes a grade, and abutting owners construct improvements adjacent, in accordance with such grade, they do just what the city has invited them to do, and if the city should subsequently adopt a different grade, it does so under the responsibility of paying the abutting owners whatever damages accrue to their improvements by reason of this change of grade.

Where persons put up improvements, at a place where the city has never adopted a grade, there the rule is different; and a person is bound to erect his improvements with reasonable care and prudence —with reference to any improvement which the city may afterwards construct. So that it is then a question of care and prudence in putting them up with regard to grades, the city may subsequently choose to make.

I have said that an established grade is an invitation, and notifies abutting owners that their improvements are to be put up in accordance with this grade. The city may also hold out an invitation, or give a similar notice, without actually establishing a grade by ordinance. If it so happen that the city by its acts, substantially gives assurance that the surface level of a highway is to be permanent level for improvement, that is an intimation on which persons have a right to rely. Whether or not such a thing has been done in this case, is a question of fact for you to pass upon. I have so far been stating general principles. In applying them, the first question that you will consider is whether or not there was a public highway between the plaintiffs' lot and the canal, before Eggleston avenue, as such, was established. A plat of the subdivision made by Williams is in evidence. That plat is a dedication to the public of the streets and the avenue along the canal, which are laid out in that plat. If the public by ordinary transit used and traveled that avenue as a highway, it was accepted by the public as a highway, and became a public highway.

Attention has been called to certain deeds under which these plaintiffs claim. They describe the land along Bedinger street as running out to the tow-path. Now the tow-path of the canal was not a public highway. It was the property of the state, held by the state for especial uses, and not a highway for the public. Though deeds describe the lots as extending to the tow-path of the canal, it does not follow as a conclusion of law that there was no highway outside of the tow-path. Hence if the lots extended actually to the tow-path, if there was no avenue, no highway, between the lots and the tow-path, then the lots did not abut upon a highway, and the city could not be held in any way responsible for the grade of the land, that is the tow-path, on which the lots abutted.

Describing land as running to the middle of the street does not obliterate one-half the street. So if after this plat had been recorded, and the dedication of the avenue had been accepted by the public, Williams had sold all the land on that plat as one lot, it is not a conclusion

of the law that obliterated the streets. So, if an avenue alongside the tow-path did exist, as a highway, then the deeds describing lots as running across the highway to the tow-path on the other side would convey that land subject to the easements of the public in the avenue.

Moreover as some witnesses speak of the way between the lots and the canal as a narrow street, or a broad tow-path, it is a fact for you to determine, whether the word tow-path, in these deeds, means that tow-path fixed by the state along the bank of the canal, or whether it was a word used to designate the entire way between the buildings and the canal. There is another matter which is to be left with you. That is this: There was read in evidence an ordinance of 1838, fixing the grade of Bedinger street, down to its intersection with the avenue. Now it is for you to determine what weight is to be given to that act on the part of the city, prescribing a grade for the intersection of Bedinger street and the avenue.

If you find as a fact that there was a highway dedicated by the former owner, who made the subdivision, which was used by the public as a highway, and to which the city constructed intersecting streets, and fixed the grade of these intersections, it is for you to determine whether or not that was such an intimation to the owners of property abutting upon it, as would reasonably authorize them to rely upon the existing surface as permanent. If it was, then the city was bound to respect the improvements put up accordingly. If you find there was no such a binding invitation, it is then for you, as a general question, to determine whether or not the persons putting up improvements along this avenue exercised that degree of prudence which is required of persons putting up improvements before any grade is established, and which, when exercised, authorizes a claim for damages, accruing from the establishment of a grade which they were not bound to foresee.

If you find, therefore, on the first part of the case, that the persons formerly owning the property now belonging to this plaintiff, put up these improvements upon the grade or line of level which they were substantially invited to do by the city, or if you find that they put them up with care and prudence in regard to future contingencies, then the plaintiff would have a right of action for such change of surface as is shown by the proof in the case.

That is the general statement; but there are one or two special inquiries. First, as to what was done by these plaintiffs after their purchase. If these plaintiffs put up new erections on the ground, after the 23d of July, 1871, when the new grade was adopted, they put up such new erections at their own risk. If instead of putting up new erections, they only modified the existing structures, so as to fit them for use in connection with their existing business on adjoining lots already owned by them, such fitting up of the old existing structures was a thing they had a right to do, and would not disqualify them to claim damages, if the modifications were valuable under all the circumstances.

There is another matter. A steam pipe runs under Bedinger street, from plaintiffs' boilers on the south side of Bedinger street to the machinery on the north side of the street, and this improvement by the city will require plaintiffs to change the position of this pipe. For this expense, the plaintiffs have no right to recover against the city.

If the plaintiffs have a right to recover against the city for this im-

provement of Eggleston avenue, then what is the sort of damages for which the city is liable? In the first place so far as the plaintiffs may be impeded or embarrassed in the use of their property, by reason of any uncertainty as to what the city will do in Bedinger street; as to when, if at all, the city will improve Bedinger street in accordance with the grade adopted for that street, in order to bring it up to the new grade of Eggleston avenue, this is a loss with which you have nothing to do, in the present litigation, and for which no allowance will be made in this suit.

So far as damages accrue from diminution of access from Bedinger street into Eggleston avenue, for general purposes, allowance will not be made. So far as the improvement blocks up, impairs or interferes with the access from one part of their property to another, that is a damage for which they have a right to recover. So far as it blocks up, destroys or impairs, or interferes with the access from their property into the street in front of it, of course, that is a damage for which they have a right to recover.

Also the law says you have a right to allow for damages to the plaintiff's structures. It seems that the plaintiffs have several buildings. So far as the corner building, the one actually abutting on Eggleston avenue and the slope in Bedinger street is injured, that is a damage for which they have a right to recover.

Again, if this structure at the corner is an integral part of a large establishment—if it is, by its connection with other portions of the plaintiff's paper mill, a part of the entire establishment—then, injury to this corner building, considered as a part of the entire structure, it is damage for which you have a right to allow. If this building on the corner has a value, not merely as a separate and unconnected building on this corner lot, but a value or utility by means of its connection with the rest of the paper mill, and cannot be affected or damaged without affecting the establishment with which it is connected, then injury to that value or utility is damage, for which the plaintiffs are entitled to recover.

When you have considered the sort of damage, you will then consider the amount. The amount of damage is this—the decrease of value. How much less valuable is this property, by reason of grading the avenue. Of course there is testimony, as to the value of the structure, and of the fixtures, the cost of repairing, the cost of rebuilding, etc. This testimony is admitted, not as fixing the amount of damage, but to aid you in arriving at the amount, which amount is the decrease in the value of the premises.

Of course you have a right to consider whether or not the building can be repaired, or must be re-built, or abandoned. These are matters to be considered by you in the determination of how much less valuable the premises are. You do not know, and it is not necessary that you should know whether the owners will repair it where it is now, or remodel it where it is now, or replace it by something else, or sell it and invest the proceeds somewhere else. But the probability of what a prudent man would do, may be considered by you, for the purpose of determining whether or not there is a partial or entire destruction of the value. But the thing to determine is the amount of loss of value; and that is how much less valuable it is now than it was before.

Verdict for plaintiffs for $1,500.

Matthews, Ramsey & Matthews, for plaintiffs.

Peck, Gerard & Malony, for the city.

[Hamilton District Court, April Term, 1876.] 126

OHIO BUILDING ASSOCIATION v. MICHAEL B. LEYDEN AND WIFE.

For opinion in this case see 5 Dec. R. 345 [s. c. 4 Am. Law Rec. 765.]

[Hamilton District Court, April Term, 1876.] 126

ALBERT MILLER v. CATHERINE BENGART.

For opinion in this case see 5 Dec. R. 347 [s. c. 4 Am. Law Rec. 767.] See also 26 O. S. 541, where case was affirmed.

PLEADINGS—BONDS. 126

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet, and Avery, JJ.

ADAM BISACK ET AL v. THEODORE PAPE.

A petition on an official bond is bad if it merely states that the bond was according to law. It should set out the conditions. The construction put on a similar statute in State v. Caffee, 6 O. 150, requires this. This error is not cured by verdict, for verdict only cures errors of form, such as would be open to motion to make more definite and certain, or special demurrer, and not want of a material averment of facts, such as would be ground of general demurrer.

Cox, J.

The defendant in error brought suit in the common pleas against Bisack, a constable, and the sureties on his bond, to recover damages for neglect of official duty. The petition alleged, that defendant executed an official bond, with the other defendants as sureties, but did not set out any of its terms and conditions. The constable answered, admitting the due execution of the bond, but the sureties answering separately, deny each and every allegation of the petition.

A verdict was rendered against all the defendants for the amount claimed, and judgment entered on the verdict. A petition in error is filed in the court to reverse that judgment. It was assigned for error, that the petition did not contain facts to authorize the judgment, and that it should have been for defendants. The special point urged by plaintiffs in error is, that the bond or its conditions should have been set out in the petition.

The court was of opinion that the petition was defective. The allegation as to the execution of the bond is not such a statement of facts as the Code requires. It is rather a conclusion of law. The supreme court has decided that "an official bond may be either a good statutory bond, or where there is authority to take it and the form is different from what the law requires, it may be sustained as a common law bond; but

where there is no authority to take it, the bond is void." They also decide, "Where a bond is required by stature, and the condition varies from the statute by imposing on the obligors that which is more onerous than that which the statute requires, the bond is void."

In this case, without setting forth the conditions of the bond so that the court can determine whether the bond was according to law, the pleader undertakes to decide the question by averring, without giving the facts, that the bond was according to law. It was decided by the supreme court (6 O. R.) State for use, etc., v. Caffee, 150, in an action on the statute, which was similar to that in sec. 566 of the Code, that the statute fairly admits of the construction which requires the plaintiff to set out the conditions and assign the breaches in the declaration, and in that case the court sustained a demurrer to the petition for want of such averment. Such seems to be the uniform practice in this state, and the Code does not provide for a different mode of pleading in that respect.

The question remains whether this error is cured by verdict, or can the court look into this defect on error? The question as to what defects in pleadings are and are not cured by verdict, has been the subject of repeated decision by the supreme court. In 14 Ohio Reports 139, the court says: "After verdict, when the case shows that the plaintiff has a good cause of action, although it may have been informally set forth, we would not for that cause arrest the judgment, nor will we for such cause reverse the judgment of an inferior tribunal." In 2 Ohio State Reports, 21, the court more minutely specifies the defects which will be cured by judgment, saying: "Slight mistakes or omissions in pleading will be cured by judgment; but when the pleading is totally defective, showing on its face, that the party can claim no right under it, the judgment will be held erroneous." And again in 9 Ohio State 43, "Where under the code of civil procedure and after verdict, or a finding by the court of all the issues in favor of the plaintiff, a petition states facts which, if proved on the trial, would make a good prima facie case for the plaintiff, such petition will be held good on error. When a petition is defective for want of a material averment, and such averment is supplied by the answer, and is not inconsistent with the averments and claims of the petition, the defects of the petition will thereby be cured.

In the light of these decisions we are of the opinion that the defective statements in a petition, which will be cured by a verdict, are such as are merely those of form, such as would be the subject of a motion to make more definite and certain, or of a special demurrer; but that, where a petition is defective for want of a material averment of facts, such as would be ground of general demurrer, then the judgment of an inferior court will be reversed, when given on such defective pleading.

Judgment reversed.

CORPORATIONS—SUBSCRIPTIONS. 127

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

WM. M. LATHAM v. UNION CENTRAL LIFE INS. CO.

1. Where a subscriber for stock in a corporation, instead of making the cash payment required by law, gives his note for the amount, such act will not invalidate the stock issued to him or be ground to cancel the note.
2. Where a corporation has power to increase its capital stock and the directors having determined to do so, the defendant's subscription is taken and stock issued in anticipation of such increase. Subsequently taking the formal steps required to take the stock after its issue validates such issue, and the defendant cannot, after getting the benefit of it for several years, seek cancellation of the note securing payment.

MURDOCK, J.

This was a petition in error. The plaintiff below filed his petition asking that a note and mortgage, which he had executed to the Home Mutual Life Insurance Co., might be surrendered and cancelled. He averred that the note was given for the purchase of $2,000 of stock of the Home Mutual Insurance Co., which company has been absorbed by the defendant. He further averred that he subscribed for the stock under an increase of stock made by the company, but that the company had no power to make the increase, and had not taken the steps required by the statute. It was also claimed the subscription was invalid because Latham had not paid $4 in cash upon each share of stock subscribed, as required by statute, at the time of the subscription.

Held: That, when a person instead of paying the money required by statute to be paid at the time of subscribing for stock of an insurance company, gave his note for the amount, such act will not invalidate the stock issued to him, and the payment of the note may be enforced against him.

The insurance company had power to issue this increased stock. It appeared, however, that the board of directors had determined upon such increase, and had obtained the consent of the requisite two-thirds of the stockholders thereto by the 5th of March, but no formal resolution to increase had been passed. On the 6th of March, in anticipation of such increase, Latham's subscription was obtained. On the 11th of March the directors formally passed the resolution, and forwarded and filed with the secretary of state a certificate of the amount of such desired increase of stock on the 13th of March.

When there is no want of power in the charter of an insurance company to increase its stock, but the formal steps required by law had not been taken before increased stock was issued, the company would still be enabled to maintain suit upon the note given for such stock, issued in anticipation of such increase, if such formal steps were afterward and within a short time taken.

The company would be estopped from denying the validity of stock issued under such circumstances. If it was estopped then the party obtained what he subscribed for and derived the same benefit as if issued after the formal steps were taken.

If the stock when issued was invalid by reason of the want of the formal steps being taken as required by the statute, there being no want of charter power, it may become valid by taking those steps after the issue, and that is the case here, the stock was valid in the hands of Latham.

It appears that he held the stock for several years before this suit was brought. It did not lie in his mouth after this length of time and getting the benefit of the stock to question its validity.

Judgment affirmed.

E. M. Johnson, for plaintiff.

Wm. M. Ramsey contra.

127

BILL OF EXCEPTIONS.

[Hamilton District Court, April Term, 1876.]

*FREDERICK WEILMAN v. JACOB WRIGHT.

Neglect to file a bill of exceptions.

BURNET, J.

The action was brought against the defendant, a constable, and Richard Calvin, and the case went to judgment before a justice. Upon an appeal to the common pleas, the allegation was that Wright, at the request of Calvin, unlawfully took from the plaintiff a horse and wagon, etc., and that from the negligent manner in which the property was cared for, the plaintiff was damaged. Calvin answered, denying the seizure was made at his request, and was dismissed from the action. Wright answered, setting up a general denial, and the jury rendered a verdict in his favor. A motion for a new trial was overruled. A petition in error was filed, but there was no bill of exceptions, and no error appearing upon the record, the judgment was affirmed.

Judgment affirmed.

*There seems to be no point in the above case.

TURNPIKES 132

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

WM. H. KELLEY v. CINCINNATI AND WARSAW TURNPIKE CO.

An injunction against a turnpike maintaining a toll gate within eighty rods of the city limits, will not be granted at the suit of a private individual not injured differently from the general traveling public. If the turnpike is entitled to maintain a gate, but the locality only is objected to, the amount of tolls not being complained of, the injury is merely a technical damage; if it is a substantial damage, it is merely obstructing the highway, inconveniencing plaintiff's use of the road, or compelling him to take some more circuitous route; this is a public nuisance, and not special to the plaintiff.

FORCE, J.

This case came up by appeal. The suit was brought for the purpose of obtaining an injunction. The petition states that the defendant is a corporation, and that as the city has been swelling and tiding over the country, it has now passed over and extended beyond one of the toll gates on the road. The plaintiff is the owner of a line of omnibuses running from a point within the city to a point a mile and a half beyond the limits of the city; that this gate is now within the limits of the city, and is therefore being illegally maintained. and ought therefore to be removed to a point at least eighty rods beyond the limits of the city; and that being illegally a gate on the road, it is an obstruction to the travel upon the highway, and an impediment to his daily use of the highway, and is an injury to his business as the owner of a line of omnibuses. He therefore asks an injunction, discontinuing the use of this gate at this point, or at any point within eighty rods of the city limits.

The court remarked that some questions with reference to the allowance of injunctions had been settled. As the provisional writ of injunction does not issue as a matter of course, upon petition and precipe, but is a discretionary writ, and issues only after allowance, so a final decree for a perpetual injunction is a decree which does not follow as a matter of course, when the plaintiff has made out, what is called in law a cause of action, a cause of action authorizing a claim for damages, but is relief given on the final hearing when it appears that the plaintiff, under all the circumstances of the case, is entitled to that sort of relief under that state of facts. The matter complained of here is an impediment to the plaintiff's use of the highway. To entitle him to relief by way of injunction, he must show that he has sustained, in the first place, damage which is substantial. In the next place, he must show that the damage is special to him, and not such as is common to all the public who use the pike.

As to the damage shown in this case, granting that this is an illegal toll-gate, and that the defendant has no right to have it nearer than eighty rods from the limits of the city, yet it is entitled to have a toll-gate, and even at eighty rods outside the city is entitled to collect all the toll that now comes to the gate complained of. The complaint is not the amount of the toll collected, but the position of the gate. If that is all, if the defendant is still entitled to have the toll-gate, to demand

its toll, and to receive just as much as it now receives, and the only thing complained of is that it maintains its gates at one spot instead of another, eighty rods from the limits of the city; if that is all, it is a mere technical damage. It is not a substantial damage; not such a damage as would authorize the court to give relief by way of injunction.

But supposing it were a substantial damage, the thing complained of is the obstruction of the highway. It is, therefore, what is called a public nuisance. The plaintiff, to have relief, either in equity or at law, must show that he has sustained personally some damage special to himself, different in character from that sustained by the public generally, who travel over and use the road. It is merely obstructing his travel, inconveniencing his use of the road, or compelling him to take some more circuitous route. That is a damage which must fall upon every one of the public at large, whose business or pleasure leads them to use that highway, and, therefore, it is not a damage special to the plaintiff, but is a damage common to the public at large, as well as to him. It is hardly worth while to refer to cases upon a point so frequently decided. I refer to a decision of the supreme court of Cincinnati. (Farelly v. Cincinnati, 2 Dis.) because it is a complete and exhaustive statement of the law upon the point, and because the facts so closely resemble the facts of the present case.

We hold, therefore, that this plaintiff has suffered, if anything, only a technical, not a substantial damage; and, secondly, that it is not of such a character that is special to himself, but is only such as is common to him with the public at large, and, therefore, not of that character, that he is entitled to complain of.

Action dismissed.

A. J. Jessup and T. A. Lane, for plaintiff.

Smith, Crawford & Young, contra.

133

COSTS.

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

GOTTLIEB RICHTER v. F. F. SCHOENFELDT.

An allowance by court to counsel for fees out of the proceeds in an action to set aside a fraudulent conveyance, is to be taken, not from the claims of creditors secured by mortgages or other liens, who are in no way benefited by the proceedings, but from the shares of creditors who had no liens, and for whom the proceedings preserved the property.

Cox, J.

This case was a petition in error to reverse the judgment of the common pleas in an appeal from the probate court, allowing a counsel fee to J. R. Challen and J. W. Okey.

The plaintiff, Richter, filed a petition in the superior court of Cincinnati to set aside an alleged fraudulent conveyance of certain real estate. The sale was decreed fraudulent and set aside and in the decree it was provided that if a sale were made of the premises a reasonable counsel fee should be paid to plaintiff's attorneys. Plaintiff then went

into the probate court and on his motion an assignee was appointed and that court proceeded to administer the estate, making parties defendants who held mortgages prior to the date of the fraudulent conveyance. The premises were sold under these proceedings for over $12,000, leaving a balance of some $5,000 to be distributed after paying off these prior liens. Counsel for plaintiff claimed to be paid fees out of the entire fund.

The probate court held that $800 was a reasonable fee, and from this decision an appeal was taken to the common pleas, which fixed forty per cent., on the first $2,000, and ten per cent. on the remainder of the fund, after paying the holders of liens which were prior to the fraudulent conveyance. The plaintiff claims that the common pleas erred in this, that it modified and nullified the decree of the superior court in only allowing fees out of the fund left after paying the first lien. But we do not think the judgment of the common pleas has done this. When the case was in the superior court it was competent for that court to have proceeded and made all persons claiming an interest in the fund parties, sell the property and distribute the proceeds. This was not done. But the parties contented themselves with obtaining the decree setting aside the fraudulent conveyance and an entry that they should be paid reasonable fees when the premises were sold and then transferred the whole case for sale and distribution to the probate court, which after sale acquired jurisdiction to distribute the proceeds. It was claimed by counsel that they were entitled to be paid a pro rata out of the claim of such creditors, whether the creditor's claim was a prior lien to the fraudulent conveyance or not.

Such, in the opinion of this court, is not the meaning of the assignment law. The creditors from whose claim such fee is taken are the creditors whose rights were intended to be protected in the cause. These proceedings in no way benefited the parties who held mortgages or liens on the property before the fraudulent conveyance, nor did the fraudulent conveyance affect their rights. As to creditors who had no liens, the proceeding did preserve the property, and gave them equality in distribution after the first liens were paid. For this benefit the statute permits counsel fees to be paid out of the fund secured, and the court was of opinion that the common pleas did not err in their order.

Judgment affirmed.

Challen & Okey, for plaintiff.

Disney, Jessup & Long, contra.

[Hamilton District Court, April Term, 1876.] 133

E. C. CROFTON v. BOARD OF EDUCATION OF CINCINNATI.

For opinion in this case see 5 Dec. R., 348 [s. c. 4 Am. Law Rec. 768.] See also 26 O. S., 571, where case was affirmed.

133

RAILROADS

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

*Wm. T. Crawford v. Cincinnati, Hamilton & Dayton R. R. Company.

A rule of a railroad company requiring a conductor to eject from the train a passenger who refuses to produce a ticket or pay his fare on demand, is a reasonable one, and the purchaser of a non-transferable commutation ticket, who has lost it, and refuses, on account of such loss, to pay his fare upon a train, falls within the rule, and cannot maintain an action of tort against the company to recover damages for being ejected by the conductor for a non-compliance with it.

Murdock, J.

This was a petition in error to reverse a judgment in favor of the railroad company on a petition brought by the plaintiff to recover damages by reason of being ejected from a train of the defendant's road, on the 23rd of February, 1874.

It appeared from the record that the plaintiff had a ticket entitling him to ride one hundred and sixty-two times between this city and Jones' Station; that on the 21st of the month in which this cause of action accrues, he boarded the train of the defendant, and when the conductor called for his ticket, he told him he had mislaid or lost it, and the conductor knowing he was a commuter passed him; that, on his return that day, the conductor again passed him on a similar statement being made; on the next day he again came to the city, and on his statement that he could not find his ticket, but that he wanted to see the officers of the road and see if they would not replace his ticket, he was again passed by the conductor; that he applied to the general ticket agent of the company, who told him it was against the rules of the company to issue for lost passes, but advised him to see the president of the road; that the plaintiff went to the president's office, but not finding him in, and the train being about ready to start, he got upon the train; that when the conductor called upon him for his ticket he made some statement, which the conductor refused to take, and required him to pay his fare or leave the train, giving him time to make up his mind as to what he would do until the next station was reached. When the train arrived at the next station, the conductor again called upon the plaintiff to show his ticket or pay his fare. Refusing to do either, or allow his friends on the train to pay his fare, he was ejected from the train at Brighton Station, no more force being used than was necessary to accomplish that result. Error was claimed in the charge of the court below.

Held: That where a person purchased a ticket to ride upon a train, either for a single trip or as a commuter, to ride a number of times within a certain period, he makes that contract, sometimes called a ticket contract, the evidence of which is the ticket, subject to the reasonable rules of the company for the running of their trains and the conduct of their business, and if he refuses to comply with a reasonable rule of the company for such conduct of the company's business by showing his ticket at certain times and places where that is required, or, in default paying his fare, he may be ejected from the train. The plaintiff knew when he got upon the train that he would be required to show his ticket to the conductor in order that it be punched, and he also knew that he had none.

The question is whether the regulation requiring the plaintiff to present his ticket was to be left to the jury to determine whether it was a reasonable regulation or not, or whether that question was to be determined by the court. The plaintiff asked the court below to charge that that was a matter to be determined by the jury. This court is of the opinion that it was for the court to determine. Where the facts are found by the jury or admitted by the parties, which are claimed to show the act reasonable or unreasonable, it is for the court to say

*This case was affirmed by the supreme court. See opinion, 26 O. S., 580.

whether the act was reasonable or not, and the court below did not err in refusing to charge the jury that it was for them to determine whether the rule was reasonable or not. The rule was a reasonable rule. It is reasonable because it is not to be supposed that the conductor would know every one who would come upon the train had a ticket, although he could or did not show it, and it would be but a reasonable rule that should require that the person having a ticket, which is the only evidence that he is entitled to ride, should produce it, or that the fare should be paid. To hold otherwise would require that the conductor should know every man who may live at the numerous stations on the line of the road. It would be very unreasonable and the company ought not to be subjected to that. Under the circumstances of the case, the plaintiff was rightfully ejected from the train.

Judgment affirmed.

Judge Hagans for the plaintiff.

Wm. M. Ramsey contra.

SIDEWALKS—ESTOPPEL. 133

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

ELIZABETH SPRAGUE v. CITY OF LINWOOD ET AL.

1. In order to assess an abutting owner for a sidewalk laid by a city along a turnpike company's road, the consent of the company necessary to enable the city to lay down and assess for the sidewalk, under section 593, municipal code, must be such that the property owner shall get the full benefit of the work. A consent by the turnpike on condition that the work be supervised by the company's superintendent, and that the city will remove it whenever requested by the company, is not such a consent as the statute contemplates; moreover, it is provided that the municipal authorities shall supervise and control the sidewalk.
2. An estoppel can not be invoked against such property owner from knowledge that the authorities were doing the work, for the city had the right, as between it and the turnpike company, to do the work, and the owner, in case the company required the walk to be taken up again, would not be getting the benefit of what he paid for.

AVERY, J.

The plaintiff is a lot-owner in the village of Linwood, and was required by ordinance to lay down a plank sidewalk in front of her premises on the Columbus and Wooster turnpike. Failing to comply with the ordinance, the work was done by the village and an assessment for the cost laid upon the property, which remaining unpaid, was certified to the auditor and placed upon the tax duplicate. This is an action against the village and the county auditor and county treasurer to enjoin the collection of the assessment.

Held: The power of municipal corporations, to lay down sidewalks is within the general power, by section 199 of the municipal code to improve streets, alleys and public places; but this does not extend to turnpikes and plank roads, except where they have been condemned by or surrendered to the corporation. Section 593 of the code provides, that the council may, where any turnpike enters into or passes through a corporation, with the consent of the authorities having charge of the turnpike, lay down sidewalks and assess the cost upon abutting property, thus, as it seems, treating the consent of the company as, so far, a

surrender to the corporation. At the time this ordinance was passed, no consent had been obtained from the Columbus and Wooster Turnpike Company. Subsequently that company passed a resolution that the request of the authorities of the village in relation to sidewalks along the pike to be granted, provided, that the sidewalks be laid under the supervision of the superintendent of the company and that no right be claimed thereby, and that the authorities of the village agree to remove the same at any time upon notice from the company.

This was not such consent as is contemplated by section 593. That section provides for an improvement, the cost of which is to be assessed upon the abutting property, and therefore the consent should be such as to allow the property-owner to receive the full benefit of that for which he is to pay. Moreover, it is provided in such case where consent has been obtained, the municipal authorities shall supervise and control the sidewalk in all respects as if said road were a street of the corporation. This is inconsistent with any option left with the Turnpike Company to compel the improvement to be removed upon notice.

The principle of estoppel could not be invoked as against the property-owner, for although she is to be charged with the knowledge that the village was doing the work, the village had the right as between it and the Turnpike Company to do the work, but was under a condition that at any time the Turnpike Company saw fit, it might compel the entire improvement to be removed, thus destroying the sidewalk and depriving the property-owner of the benefit for which she was to pay, and which she was entitled to receive under the assessment. The case differs from 5 Mich., 336, and I Vroom, 395, in that there the turnpike was treated as a street, and was so named in the ordinance, while here it was treated as a turnpike, and the municipal code made consent a pre-requisite.

Let the injunction be made perpetual.

J. & R. A. Johnston, for the plaintiff.

Harmon & Durrell, contra.

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134 **NEW TRIAL.**

[Cuyahoga Common Pleas.]

THOMAS DOYLE v. F. C. YOUNGLOVE.

Granting of a motion for a new trial on the ground that the verdict is against the weight of evidence, on condition of payment of the costs, or part of them is void. Where the granting of a new trial is discretionary, terms may be imposed, but not where it is a matter of right. And if the verdict is not instanced by the evidence, there is a right to a new trial.

BARBER, J.

The action is for malicious prosecution, tried at the January term, 1876, and verdict for plaintiff, $1,500. A motion for a new trial was granted "on payment of the costs of the term by March 15, 1876," for the reason that the verdict was not supported by sufficient evidence.

The objection made to this order is that the court, having found that the verdict is not supported by sufficient evidence, has no power

to require the payment of costs or to impose any terms as a condition precedent to the granting of a new trial.

Held: In all cases when the granting of a new trial is discretionary with the court, terms may be imposed, and if not complied with, the new trial refused. But when the right to a new trial is given by statute or is a matter of right, *"ex debito justitiae,"* on facts found by the court, no terms can be imposed as a condition precedent to a new trial which in any manner abridge or impair that right. Daniels' Chancery Practice, 1137; 15 Petersdorf, Ab'dg't, 187-8; 34 Ala. 71; 4 Blackf. 518; 11 Miss. 92 (Sm. & M.); 15 New Jersey 139; 3 Denio 259; 17 Jones N. C. 539; 8 M. & W. 265; 2 Chit. 398 (18 E. C. L.); 1 Stra. 642; 1 W. Black. 630; 12 Mod. 370; 1 Burrows 393; 1 J. J. Marshall (1 E. Y.) 478.

Section 297 of the code S. & C. 1030, gives the party against whom a verdict is returned, the right to a new trial if the court shall find that it is not supported by sufficient evidence. In this case the court found that fact to exist. Hence it is the right of the defendant to have a new trial and the order imposing as a condition precedent that he should pay the costs of the term is an abridgement of the right and the court had no more power to impose such a condition than it would have in a case where the party is entitled to an appeal to make an order that his case should not be docketed on appeal unless he would first pay the costs of the trial in the court below.

S. Burke for motion.

E. M. Brown and L. R. Critchfield, contra.

INJUNCTION. 134

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

CINCINNATI CONSOLIDATED STREET R. R. CO. v. CITY OF CINCINNATI, JOSIAH L. KECK. ET AL.

In granting a restraining order before final judgment only such restraint should be imposed as will keep the property in its actual condition until trial. The comparative mischief or inconvenience to the parties from granting or withholding the order is a governing consideration. The applicant for the order must show that the balance of inconvenience preponderates on his side, and the order is to be framed so that if the party in whose favor it is turns out to be in the wrong, the other party shall not be deprived of the benefit he was entitled to, and the means the court has to secure such benefit to the ultimately successful party is a consideration. The defendant, as a condition of refusing the order, may be required to do acts, or remove work, or keep accurate account of profits, and give an undertaking to pay them over if the other party shall succeed on final hearing, and bring into court an amount of money, the payment of which would be a condition precedent to exercising the right he claims. The inconvenience to the public at large is also to be considered.

TILDEN, J.

This is an application for an injunction. The plaintiff, by a consolidation under the act of the 10th of April, 1860, became owner of all the property and rights, and bound to the performance of all the obliga-

tions of certain former street railroad passenger companies, embracing certain street railroad routes known as Nos. 1, 2, and of two extensions of Route No. 5, and is now engaged in operating those portions of the railroad composing said routes to which the present controversy refers, by passenger cars drawn by horses, and is in the enjoyment of the toll fares and income arising therefrom. The defendants are the city of Cincinnati, under whose ordinances the other defendants are professing to act, the Storrs & Sedamsville Street Railway Co., and the Cincinnati & Sedamsville Street Railroad Co., and certain individuals, who are acting in the name of these companies and under the authority of the ordinance of said city. The ordinance, under which they are so professing to act, was passed on the 18th day of June, 1875, and under the grant therein contained, the defendants, or some of them, have among other things constructed and completed and are engaged in operating a street railroad on Eighth street, terminating at the intersection of Eighth street and Central avenue. They propose, at that point, to form a connection with the railway of the plaintiff in Central avenue, and to run their cars over it from that point south to Sixth street, and to occupy other portions of the plaintiff's road not necessary to be defined. The restraining order heretofore allowed, operated to stop the defendants at Central avenue on Eighth street, and the object of the injunction sought for is to continue that restraint and to prevent the proposed use of the roads of the plaintiff until the final hearing of the case.

The argument on the motion covered all the points, direct and collateral, arising upon the pleadings and the evidence. I have not found it necessary to the conclusions to which my investigations have led me to review the arguments at length or to assume to pass upon all the points presented. The questions of fact and of law which have been thus developed are very numerous, and some of the questions of law, or the application of some of the principles of it are not altogether free from difficulty. I conclude then that the consideration of these questions should be postponed until the final trial of the case, and that such disposition should be now made of the motion as shall appear to be best calculated to preserve the rights of the parties in statu quo, thus abstaining from prejudging the case.

The proper course to be adopted on all such occasions is in practice always a matter for the discretion of the court, and the leading principle which limits that discretion is, that only such restraint should be imposed as shall keep the property in its actual condition until the trial. The court is governed by a consideration of the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction, and will take care so to frame its order as not to deprive either party of the benefit he is entitled to, if in the event it turns out that the party in whose favor the order is made shall be in the wrong. If upon the balance of convenience and inconvenience it appears that a greater damage would arise to the defendant by granting the injunction, in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it, in the event of the legal right proving to be in his favor, the injunction will not be granted. The burden lies upon the plaintiff, as the party applying for the injunction, of showing that his inconvenience exceeds that of the defendant. He must make a comparative inconvenience entitling him to the interference of the court. In balancing the comparative con-

venience or inconvenience from granting or withholding the injunction, the court will take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood, if his legal rights had not been interfered with. The court may often by imposing terms on the one party as the condition of either granting or withholding the injunction, secure the other party from damage in the event his proving ultimately to have a legal right. If the court feels that it can by imposing terms upon the defendant secure the plaintiff in the event of the legal right being determined in his favor against damages from what may be done to the defendant in the meantime, and the defendant is willing to accede to the terms required by the court, an injunction will not be allowed. The terms imposed upon the defendant as the condition of withholding the injunction, vary with the circumstances and exigencies of the case. The defendant may be required to do such acts or execute such works, or remove any works or otherwise deal with the same, as the court shall direct, or may be required to enter into an undertaking to refrain from doing the acts complained of by the bill, or to abide by any order of the court, as to damages or otherwise in the event of the legal right being determined in favor of the plaintiff. If the permission to do the act complained of involves the making of profits, the terms imposed will be that the defendant shall keep an account of all profit made pending the trial, and an undertaking as to damages may be required as well as a keeping of account. (Kerr on Injunctions, 209 and sequel.) This principle has been frequently applied by courts of equity in the exercise of their jurisdiction in cases where an injunction has been sought against a railway company to restrain its use of its railway where such use would be productive of mischief, (High on Injunctions, Section 387) and in cases where, notwithstanding the legislative grant of a franchise, the legal right is not sufficiently clear to enable the court to determine correctly the questions before it. As matter of fact, I think that the decided preponderance of inconvenience would be produced to the defendants by granting the injunction. It is practicable to frame conditions which will protect the plaintiff at all events; but it is not so with regard to the defendants, because the loss, which would accrue to them would go beyond the fares and would be largely incidental and difficult of estimation. And, besides, the public would be put to inconvenience by stopping the road of the defendants on Central avenue, and this is a circumstance not to be wholly overlooked. (High on Injunctions, Section 584 and 599.)

Proceeding then to apply the principles above stated, I find that, by section 13 of the ordinance of the city council of July 1st, 1859, it is provided, that "the city council shall, at any future time, have the power, when the public good demands, to grant a second or third company or individual the right to occupy any track already laid down, provided the expense of the laying and keeping in repair of said track, so far as used by different companies or individuals, shall be equally borne by those that use them, but the council shall not have the right to grant permit to run upon any route already disposed of for a greater distance than one-tenth of the whole route." Whether or not this section is in force, considered either as a municipal regulation or as part of the contract between the city and the companies—to whose rights the plaintiff has succeeded—whether it is still binding and operative is one of the questions, and one of the most difficult of the questions presented by

the case. But treating it for the present purpose as still being so, it is clear that a condition of the right of the defendant corporation is made to be that which the section provides. But that section does not in terms make previous performance of the condition essential to the right, and apparently it should be made to operate as a condition subsequent. But by the provisions contained in the third clause of section 1 of the ordinance of June 1, 1875, to provide for the extension of the Storrs & Sedamsville Street Railroad, it appears on this point to be sufficiently clear. The railroad company last named is required to tender or pay an equal proportion of the present cost of laying the tracks, whilst the obligation to bear an equal proportion of the expense of keeping the tracks in repair necessarily operates as a condition subsequent. But without professing now to determine the effect of these provisions thus construed, I am of opinion that the defendants should be required to bring into court for the use of the plaintiffs, the amount which, by having tendered the same, the defendants admit to be an equal proportion of the present cost of laying the track, leaving the subject of the true amount to be adjudicated upon in the future progress of the case.

The evil or the most considerable one, apprehended by the plaintiff to arise from the interim use of the plaintiff's road consists in the fares, of which they are to be deprived for passengers riding over that portion of the defendant's road, which consists in the eastern extension. Should the plaintiff at the hearing maintain its case, it would be entitled certainly to that portion of its income, and conversely the same amount would be received by the defendants, to which they would thus appear not to be entitled. I think therefore that the defendants should be required either to keep accurate accounts of such fares to be properly verified, hereafter, or to enter into an undertaking with sufficient security, that they will render such account, and pay over to the plaintiff the proceeds of it, in the event that the plaintiff shall hereafter be adjudged to be entitled to the same. If these conditions shall be complied with on the part of the defendants, I shall deem it my duty to refuse the injunction. Otherwise, from the impression which I have derived of the case, I should deem it my duty to allow it, taking care to secure to the defendants the payment of all damages to which the pendency of the injunction shall give rise.

SCHOOLS. 139

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

*STATE OF OHIO EX REL. LEWIS V. BOARD OF EDUCATION OF CINCINNATI.

There being a lawful classification of schools so that colored children have their own schools, and the provision for colored schools being in proper proportion to the number of colored pupils, the court cannot interfere with the classification, in favor of a colored pupil living four miles from the school to which it is allotted. Classification necessarily produces such results, there being fewer colored than white schools, just as the fact that there are fewer intermediate than district schools, and only two high schools, renders distance unequal where classification according to grade is established.

FORCE, J.

This is an application for mandamus. The relator is a colored man, living in the twenty-first ward, and has three children of sufficient capacity and training to go to the intermediate school. They now go to the intermediate school in the western part of the city, on Court street, taking walks of four miles in order to get there. There is in the twenty-first ward, if not an intermediate school, a primary school, where the studies of the intermediate grades are taught. The relator claims that it is an abuse that his children are compelled to walk so far; that he applied for admission for his children to the schools of the twenty-first ward, but it was refused, and he now asks a mandamus to enforce their admission. The claim is that the refusal is in violation of the amendments to the constitution of the United States, and is, therefore, illegal. An alternative writ was allowed at a former day of this term, and the case now comes up on the question whether or not the peremptory writ should be allowed.

It has been determined by our supreme court in State ex rel. v. McCann, 21 O. S., 198, that the having of separate schools for white and colored children, provided the schools afforded equal advantages, is a mere matter of classification like classification by locality, sex, age, advancement in study, and does not contravene the provisions of the constitution. That determination has been followed by the supreme court of Indiana, Cory v. Carter, L. 8, Ind., 327. So far therefore, as the mere fact of having separate schools is concerned, it is not open for discussion. The question is whether or not in this case this classification operates to deprive the children of this relator of advantages to which they are entitled.

It appears in evidence that the schools for the colored children, and especially the intermediate schools to which these children go, are as good as any other schools of the same kind in the city; that at these schools are taught the same branches, are used the same text-books, and are employed teachers of as good capacity and general ability as in the other schools, and especially that the principal of the school to which the children of the relator go, is a well-known citizen, and a teacher of such ability and attainments, that they are fortunate to be under his care. It further appears, that taking the white and the colored children of the city together, a larger provision is made for the colored children, in proportion to their numbers, than is made for the white children.

The objection made is, that these children, living in the twenty-first ward, and having to walk four miles into town to the school to which they are allotted, have to walk further than any other children who go to the schools; have to pass by schools to which they are not admitted in order to get to the schools to which they are admitted, and the walk is of an unreasonable length.

As to the claim that they have to walk further than other scholars, somebody must walk further than the rest. It is not possible for all the children to live in one spot, so as to place them all equally distant from the school. They

*Motion for leave to file a petition in error in this case was overruled by the supreme court, thus affirming the decision.

cannot all live on a circle, having a school-house in the center. There is no way by which all the children can be made to be equally near the school. The fact, that there are some children who take the longest walk, is simply a thing that must exist, no matter what system is adopted, and that fact is not a fact of which any person can complain. It is simply inevitable in the nature of things.

It becomes more pointed, however, when it is stated that the children do not go to the nearest school, but must pass by some other school in order to get to the one in which they are allotted. This is equally inevitable when schools are classified. It is true, that Cincinnati is but one district. But then there are sub-districts throughout the city, and unless the sub-districts are equal in size and the schools are in the center of each sub-district, children living adjoining to put on opposite sides of the boundary line, will have to go unequal distances, and hence some will not be permitted to go to the school nearest their house. Some of the children who attend the more advanced schools, must pass by some of the schools of lower grade in order to get to the schools in which their branches are taught. Children cannot cluster around their schools like they do around their parish church.

There must be white children living in the vicinity of the colored schools. and by which they must pass in order to get to their own schools. If the classification is allowed by law, it must be in the nature of things, that some of the children must pass by a school in which their branches are taught in order to get to their own school.

The question, then, really comes down to whether or not in this case the distance is so great as to be unreasonable. It appears that the children walk four miles to their school. It appears in the testimony of the superintendent of the schools that there are instances in which white children have to walk as far as two to two and a half miles to school. It appears from the map put in evidence by the relator that many of the white scholars have to walk at least two miles to get to school. It must be, where classification is allowed, that some children in a large city must take a long walk in order to get to school. The primary schools, being more numerous, must be nearer to the children. The intermediates, being fewer, must be farther from the children than the district schools, and there being but two high schools, they must be farther from the scholars than the intermediates. Now wherever there is a classification of this sort, the pupils who go to the intermediate schools must walk farther than those who go to the district schools, and those who go to the high schools farther than those who go to the intermediates. Just so it must be if the law provides for white and colored schools. Inasmuch as the colored population is less numerous, and hence the school-houses for the colored population must be less numerous. for the same territory, that law necessarily implies that some of the colored children must go farther than the white children. The supreme court, knowing that, held that classification to be lawful and not contrary to the amendments of the constitution of the United States.

On the whole case, it seems that the provision made for colored children is greater in proportion to numbers than for white children. It is fully equal in character and quality to that given to the white children. It appears that the school which the children of the relator are attending is as good as any in the city, and as the only inconvenience complained of is taking a long walk, which walk is not longer than children must take who go to other schools, such as high schools, and less than some must take who go to the university, that is not such an objection as would warrant the court in setting aside the classification that has been adopted by the school board under the direction of the legislature and has been sanctioned by the supreme court.

Application dismissed.

C. B. Wilby and G. H. Wald, for the relator.

Gerard & Molony contra.

TAX SALE 140

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

STATE OF OHIO EX REL. PALM V. J. B. HUMPHREYS.

Where a person purchased a piece of property at the auditor's delinquent tax sale, and a lienholder learning of the fact, went the same day and paid to the treasurer the amount of delinquent taxes, by reason whereof the treasurer refused to receive the money of such purchaser coming later in the day to pay, and refused to issue to him a certificate of payment, such purchaser cannot compel the auditor to issue to him a certificate of purchase. If the lienholder's payment inures to such purchaser, the latter's remedy is against the treasurer to compel him to give the receipt.

Cox, J.

This case came up on a hearing for a peremptory mandamus to compel the auditor to furnish the relator with a certificate of purchase of a certain piece of property sold at a delinquent tax sale. The auditor answered that the relator had received no certificate from the county treasurer that he had paid the amount of the delinquent taxes, held against the lot, and, therefore, refused to issue to him, the certificate asked.

Upon examining the application for writ it appears that the relator was very careful to guard his statements, by saying that the money had been paid to the treasurer, but did not aver that he himself had paid the money. The facts, as proven, showed that the purchase was made by the relator about 10 o'clock of the morning of the sale, and that a party, who had a lien upon the property learning that it had been sold, went to the treasurer and paid the amount of the delinquent taxes, and in the afternoon, when the relator offered to pay the money, he was informed that it had been paid. The treasurer refused to give him a certificate that he had paid the money. But, nevertheless, he demanded the certificate from the auditor that he was the purchaser of the lot. The relator claimed that the party, who did pay the money, was merely a volunteer, and had no right to pay it, but having paid it that payment inured to him, and therefore he was entitled to receive the certificate from the auditor, the party paying it standing in the relation of his creditor.

The auditor is only required to give the certificate upon being satisfied that the person who makes the demand for it, has purchased the property in accordance with the law, and paid the amount of the purchase money. The proper voucher in that respect is the receipt of the treasurer, and the auditor would not be authorized to issue the certificate without such a receipt. Under the circumstances the auditor was justified in refusing to give the certificate to the relator. If the payment by the volunteer inured to the benefit of the relator, so as to compel the treasurer to give the relator the receipt, the plaintiff's remedy, if any, was against the treasurer.

Judgment for the defendant.

Otto Palm, for the relator.

T. B. Paxton, contra.

140 JUDICIAL SALE—HUSBAND AND WIFE.

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

ALEX. STARBUCK ET AL., ASSIGNEES v. MARY HYNOD.

1. A contract of sale signed by husband and wife cannot be enforced against the wife alone.
2. A judicial sale to Mary Inod, confirmed and deed made to May and Inott cannot be enforced against her.

Cox, J.

This was an action to enforce specific performance to purchase certain property sold by the plaintiff, as assignees of Geo. Weber.

The defense set up was, first, that the defendant, at the time of the alleged contract of sale, was a married woman, and that, therefore, the contract could not be enforced against her. Second, that the title to the property was not good, and, third, that no deed had been tendered her.

The case is presented in two aspects by plaintiffs. First, as a sale at auction and evidenced by a written contract signed by defendant and her husband; second, as a sale under proceedings in assignment in the probate court. In the views the court has taken, it is not necessary to decide the question of the validity of the title in the assignee of Weber.

Upon the question as to whether the sale can be enforced against the wife alone on the written contract signed by husband and wife, we hold that it cannot.

As to the sale to the wife by proceedings in the probate court, the proceedings show that the sale was made, not to Mary Inod, the defendant, but to *May and* Inott, and in that name was confirmed and to her a deed ordered to be made, and it was so made. May Inott, the defendant, is in no wise connected with these proceedings and they do not bind her, nor can they be enforced against her.

But we hold that such a contract cannot be enforced against a married woman.

A decree will be entered for defendant.

CORPORATIONS—MANDAMUS. 140

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

JOSEPH S. RICHARDSON v. GRAND VIEW MINING CO.

There is no provision in the statute making it the duty of a corporation to issue certificates of stock to subscribers. There is an adequate remedy at law to recover the value of stock on refusal to give a certificate, and where the receiver of the corporation in mandamus to compel such issue shows there are questions as to the ownership of certain shares, and it may become a question as to whether the number requisite for organization have been taken, mandamus will be refused.

Cox, J.

This was a motion for the allowance of a writ of mandamus to compel the officers of the company to issue to plaintiff a certificate for fifteen shares in the company. An answer was filed by certain parties in behalf of the company, in which they set forth that a controversy is now pending in the court of common pleas to which the plaintiff is a party, and that the object of that suit is to determine who are the bona fide owners of the stock, and to cancel certain shares, and that the board had determined not to issue any certificates until that question is determined. It was claimed by the plaintiff that his rights would not be protected in that way, and that his only relief was by mandamus.

The court holds that there is no provision of the statute enjoining it as a duty upon the corporation to issue the certificates of stock to persons who may be subscribers. The books and the subscription are the evidence of the right which the parties have, and in absence of any explicit statute upon that subject, the line of the authorities was that a mandamus was not the remedy. The party has a full and adequate remedy at law to recover the value of his stock. But, independent of that, the answer set forth that the parties were engaged in a controversy in the common pleas, in which the ownership of certain shares of stock in the company were being contested. The right upon which the plaintiff bases his claim was that he is one of the original corporators. It might be a question to determine the rights of the parties, to ascertain whether the corporation is really formed or not. Should it be held in the case now in the common pleas that there had been a less number of shares subscribed and paid for than the law required, it might be there would be no corporation at all. Under the circumstances the board had acted properly in refusing to issue the certificates.

Mandamus refused.

W. T. Forest, for plaintiff.

E. M. Johnson, contra.

140 MARSHALING ASSETS.

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

JULIANA CATHERINE GLASER v. FERDINAND HELLSMAN.

The proceeds of property owned by a husband and wife as tenants in common, on which are liens for which the husband is liable, but for part of which the wife is surety must be distributed, so that the joint liens shall be paid first, and if they consume half the fund, the wife shall receive the other half, and it is error to divide such other half into two equal parts, and out of one part pay the debts on which the husband is liable alone.

BURNET, J.

The plaintiff and her husband were tenants in common of certain real estate, upon which there were certain joint liens for which both the husband and wife were liable, the latter as surety only; and there were also other liens for which the husband alone was liable. The court below made an order that after the payment of the joint liens out of the entire fund produced by the sale of the property, the residue was to be divided into two equal parts, one-half of which was to be distributed to the wife, and the other half was to be applied to the payment of the liens for which the husband alone was liable. This was assigned as error, the wife claiming that the residue of the money, after the payment of the joint liens belonged entirely to her, more than one-half of the entire fund having been consumed in the payment of the joint liens for which she was liable as surety of her husband.

The court found that there was an error in paying the individual debts of the husband out of the residue of the fund, which was really the fund of the wife.

Judgment reversed.

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140 JUDICIAL SALE.

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

*JOHN K. STITES ET AL. v. LOUISE WEIDMER ET AL.

Where a tract of land not in fact sold, and for which no consideration was paid or intended to be paid, is, by mistake, included in the report of a judicial sale such mistake can be corrected after confirmation of deed, only by petition in error.

BURNET, J.

This case came up by appeal. The action was brought to quiet the title of the plaintiffs in certain lands in Turkey Bottom against the claims of the defendants. It was claimed that the interest of the plaintiffs' ancestor, Nahaniel W. Stites, in one of two pieces of land in Turkey Bottom was conveyed by the sheriff, under proceedings of foreclosure, by mistake, when his interest in the other was only intended.

*This case was reversed by the supreme court. See opinion, 35 O. S., 555.

The court held that the records of the case of foreclosure disclosed that the court found the sheriff had sold both tracts of ground, in which Nathaniel W. Stites had an interest. Although a doubt might perhaps be suggested to the minds of the court as to whether or not there was not a mistake, yet the court, in that case, had found that the lands and tenements described in the petition had been sold, and conveyance was made in conformity to the order of the court. The court having had jurisdiction to order the sale by the filing of the petition, the proceedings in that case, if in fact any error occurred, could only be corrected by a petition in error. Petition in this case dismissed.

J. Harmon, for the plaintiffs.

J. McDougal, contra.

MECHANIC'S LIEN. 150

[Hamilton District Court, April Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

PHILIP STURM v. CHARLES RITZ ET AL.

If, on sub-contractor's filing attested accounts with the owner, the chief contractor abandons the contract, leaving the house unfinished, the owner is not obliged to notify the sub-contractors of the contractor's abandonment, nor is he obliged to let the sub-contractors, or any of them, finish the house, but may re-let the finishing of the job to others, and hold the balance after paying for completion for the sub-contractors, and if the sub-contractors each threaten suit, he may file a petition to compel them to interplead and settle priorities in the balance.

MURDOCK, J.

This action comes into this court by appeal from court of common pleas.

Defendant Ritz was a sub-contractor under one who was a contractor with plaintiff, for building him a dwelling-house for $1,270, in Avondale, paying $500 when roof is on; $500 when house is finished; $270 in 12 months after key in delivered.

Defendant Ritz filed an attested account with plaintiff of the amount of material furnished by him as a lumber dealer to the contractor, used in the erection of the house. Then other sub-contractors, about the same time, also filed attested accounts with plaintiff of the amount of work and labor done and material furnished by them respectively on said house, under contract with the contractor. The plaintiff, the owner of the house immediately notified his contractor in writing that he had been served with these attested accounts, and the contractor thereupon abandoned the contract, and refused to go on and complete the house. The owner (the plaintiff) advertised for bids to finish it and receives a number, letting the job to the lowest responsible bidder, for $265.

He had paid the contractor in good faith, and as the work progressed, over $800 when he abandoned his contract. After paying what was necessary to complete the house, he had a balance in his hands of $150 due the contractor in 12 months, which time he offered to waive and pay the balance pro rata to this defendant Ritz and the other sub-contractors, it not being sufficient to pay all in full. They refused, and there being a dispute as to their properties, and each one being about to commence suit the plaintiff filed his petition to compel them to interplead and settle their conflicting claims among themselves and offering to pay said balance to whoever the court might order. A decree was rendered by the court of

common pleas, from which this Ritz alone appealed, and the cause was submitted to this court upon the fact stated. All the questions arising in the case have been heretofore decided in former cases under the lien law, except one.

The defendant Ritz claimed, that the plaintiff never notified the sub-contractors that the contractor had abandoned his contract, and never gave them an opportunity to complete the house.

The owner is not bound to do either.

The sub-contractors have no other claim upon him than what they obtain by filing their attested accounts with him, and that is they secure their claims to the extent of any money due from him to the contractor at the time of such filing, or which may become due thereafter under the contract; and if, having given the contractor notice of the filing of their attested accounts, the contractor abandoned the work, the owner may get the same finished at a fair price, without consulting the sub-contractors, and incurs no additional liability to them by so doing. He is not bound to let the sub-contractors, or either of them, finish the work. The court rendered a decree dividing the balance due on the contract pro rata among the sub-contractors, including Ritz.

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151 DEPOSITIONS.

[Hamilton Common Pleas Court, June Term, 1876.]

JOHN CARR v. ELIZA CARR.

The court may refuse to believe testimony in deposition cases when, from the internal testimony of the paper, the court is led to believe that the witnesses were testifying to what they had no knowledge of, and either testified to prepared stories learned by rote or on hearsay. The court may refuse, in a submitted case, to give credence to depositions, just as a jury may refuse to believe a witness on the stand. The court may, in discussing the case, order such depositions to be locked up in the safe, for use in some future case that might be instituted.

FORCE, J.

This was an application for divorce, submitted on the papers for decision.

The court, in passing on the case, said it was not very difficult to dispose of it, but there were some aspects of the case that could not be passsed over without comment. The petition avers that the plaintiff has been a bona fide resident of this county for the last year past. He married his wife in Michigan some years ago. There is no witness brought into this court to testify viva voce in the case. The evidence was submitted on depositions. These depositions were taken in Indianapolis. The notice is not personal but by publication. A notice was published in the Post that four weeks after the date of publication the depositions would be taken at Indianapolis. On running over the depositions the first thing that strikes one is this: That here is a case pending in Ohio; and notice is given to take in Indianapolis, depositions, not of persons living in Indianapolis, but of persons who were to arrive in Indianapolis from New York, Illinois and Missouri. When we look at the testimony, the things they testify to are as striking as the

fact of the witnesses trooping together from such remote parts, all on the same day, to testify at all. The first proof to be offered was that the plaintiff was a resident of this state. No person in this state has been called on to testify to that fact. But some man from New York, another from Terre Haute and a milliner from St. Louis ran over to Indianapolis to testify in these depositions that the plaintiff is a resident of this county.

The next fact to be proved is the marriage. A laborer from Niagara Falls runs on to Indianapolis to testify there, his testimoy to be used in a case here, that these parties were married in Michigan. The cause of action claimed is willful absence of the wife; when the proof of that is wanted in a suit pending here a milliner from St. Louis runs over to Indianapolis to testify that the defendant deserted her husband at Niagara Falls, and is now living, the witness does not know where, but at all events not in Ohio.

This batch of depositions is something new in my experience. It is phenomenal. It is a new species of the genus deposition. It sometimes happens, not very often, that when a witness leaves the stand, every one instinctively says: "That man has testified to a prepared story that he has learned by rote." One can not well read these depositions without feeling that this is testimony of that sort put upon paper. If there could be such a thing as a machine to grind out depositions, I would say that these depositions, signatures and all, were the product of such a machine.

Now it is the business of the court, when a case is heard on submission, just as it is the business of the jury when witnesses testify, to consider the credibility of what witnesses say. When witnesses testify upon the stand, you see their look, you note their demeanor. That aids you. When their testimony is on paper you have to determine the question of their inherent credibility by what is called the internal testimony of the paper.

It being, therefore, the business of the judge to pass upon the inherent credibility of the testimony, I say upon the internal testimony of the papers in this case, no credence whatever can be given to these depositions.

In disposing of this case, that is not necessary. It can be easily disposed of by this mere statement, first that there is no service but a mere publication. No copy of the petition has been sent to the defendant, nor is there any affidavit explaining why none has been sent. That alone is enough. But in looking into the depositions, supposing these are genuine witnesses, and that they give honest testimony, yet it appears that in testifying to essential facts in the case they testify to matters as to which they can have no knowledge, and therefore must testify to hearsay, and therefore it is testimony which can not be received. Case dismissed.

The court made an order that the depositions offered in this case should be locked up in the safe, as they might be needed in some future case that might be instituted.

153 **DIVORCE.**

[Hamilton Common Pleas, June Term, 1876.]

LOUISA WOLFERT v. CHARLES WOLFERT.

In an action for alimony alone, the testimony of the plaintiff in her own behalf, is admissible.

FORCE, J.

This is an action for alimony alone. Plaintiff offered to testify. The act allowing the husband and wife to testify applies to all actions and proceedings, unless specially excluded by some other act. Section 4 of the divorce act requires the court in proceedings for divorce to act "upon disinterested testimony," and hence in an action for divorce the plaintiff can not testify on her own behalf. But section 11 provides that in actions for alimony alone, the court shall act "upon satisfactory proof." Hence, in a proceeding for alimony alone, the general act concerning evidence applies. The plaintiff is a competent witness on her own behalf; the court must determine if the testimony she gives is satisfactory.

Plaintiff failed to make out a case.

Action dismissed.

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153 **DIVORCE.**

[Hamilton Common Pleas, June Term, 1876.]

ROSA HUMMEL v. PETER HUMMEL.

A single act will not constitute extreme cruelty unless very outrageous, or the culmination of a series of persecutions.

FORCE, J.

Plaintiff proved, that the defendant one day placed a quantity of red pepper between the sheets of plaintiff's bed, which she did not discover till she went to bed. A divorce is sometimes granted on the ground of extreme cruelty, when only one act of personal abuse is proved. This is, when the act proved is so aggravated and outrageous itself, or else is the outcropping of, and connected with such a long continued, systematic persecution or oppression, that the plaintiff may reasonably apprehend, that life will not be safe or endurable with the defendant. The one act proved is not so outrageous in itself, nor is it shown one act in a series of persecution.

Action dismissed.

DIVORCE. 153

[Hamilton Common Pleas, June Term, 1876.]

WEST MOULDING v. ROSA MOULDING.

A wife may be guilty of extreme cruelty, entitling the husband to a divorce.

FORCE, J.

It is not often that a divorce is asked for by the husband on the ground of the extreme cruelty of his wife. But there is no reason in law or in the nature of things that makes it impossible. Sir Creswell Creswell granted a divorce to the husband on that ground, when it appeared that he was a member of the Society of Friends, and the wife, taking the advantage of his principles of non-resistance, would violently assault and strike him Sunday morning in front of church, when the throng was greatest. In this case, the defendant began by pulling her husband's hair; advanced to sticking him with pins; went on to jobbing him with scissors; becoming more bold, burned him with a red-hot poker; and finally, with a large knife, cut open his face, from the ear to the chin; 'just," according to one of the witnesses, "as you would slice upon a ham." The witnesses agree she is a dangerous woman.

Divorce allowed.

DIVORCE. 163

[Hamilton Common Pleas Court, June Term, 1876.]

JULIA ZIEGLER v. CHRISTIAN ZIEGLER.

1. Gross neglect of duty need not exist for any particular length of time, but varies with the character of the neglect.
2. Willful absence for less than three years cannot be made into a cause for divorce by changing its name.
3. Letting the wife support the entire family by her labor, doing little work though able to do much, spending all his money for drink, and making the wife feed and clothe him by her toil, is gross neglect of duty.

FORCE, J.

This cause of action is often alleged; but seldom made out. It is often alleged when the defendant has simply been willfully absent less than three years, as if a thing which is not a cause of action, could be made one by changing its name.

The statute does not determine how long the gross neglect must continue before it will ripen into a cause of action. The length of time must depend on the character of the neglect. It may bear so much the aspect of unfeeling cruelty as to ripen quickly into a cause of action. It may bear so great analogy to willful absence, as to require endurance for three years before it can fairly be called ground for divorce.

In this case the defendant has not deserted his wife, but except the one duty of co-habitation, he has neglected every other duty. He,

though practiced in labor, has left to his wife the entire support of the family by her labor. He does little work, though able to do much, spends all his money in drink; and besides making his wife lodge, and feed and clothe him by the proceeds of her toil, he extorts from her much of her savings, and spends that in drink. Witnesses do not agree that he is drunk, but they agree that he is always in liquor that though able to support his family, he does nothing whatever to contribute to their support. He gives them his company when he wants to eat, to sleep, or to get money for drink; but he gives no solace by his company, for no kind act or kind word of his toward family is testified to by any witness.

Divorce allowed.

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164 **DIVORCE—PLEADING.**

[Hamilton Common Pleas Court, June Term, 1876.]

ELLEN BURNER v. HERMAN BURNER.

Simply using the phrase, "gross neglect of duty" in a petition, without stating wherein or what duty has been neglected, is not alleging a cause of action.

FORCE, J.

Divorce prayed for on two grounds, habitual drunkenness for three years, and gross neglect of duty. The second ground is simply stated in the language of the statute—the defendant has also been guilty of gross neglect of duty. The petition does not state wherein the defendant has neglected his duty, or what duty has been neglected. It does not specify any act done or omitted. Using the phrase "gross neglect of duty," is not alleging a cause of action. The phrase is the description of a class, not of an act; and is merely the label to be affixed to any cause of action of that class, when such cause of action is properly averred. Testimony cannot be admitted under this bare allegation "the defendant has also been guilty of gross neglect of duty."

The testimony under this head was not received. Habitual drunkenness for three years being proved, a divorce was allowed on that ground.

MARRIAGE. 164

[Hamilton Common Pleas Court, June Term, 1876.]

FREDERICK LIPEN v. ANNA LIPEN.

While marriage may be proved by reputation, time will be given to produce record proof from the marriage records of the county.

FORCE, J.

Testimony showed that plaintiff rented a house, took defendant to it, calling her his wife; that after eighteen days she left him to return no more. It also appeared that the defendant was before, as she has been since, a prostitute.

Held, while marriage may be proved by reputation, as living together as man and wife, time was given to produce record proof of the marriage from the records of this county, and then divorce allowed.

MARRIAGE. 164

[Hamilton Common Pleas Court, June Term, 1876.]

WILSON MANYARD v. LAURA MANYARD.

Proof of living together as husband and wife not accepted as proof of marriage.

FORCE, J.

Testimony showed that plaintiff and defendant lived together several years as husband and wife; and that the defendant lived with another man for over a year as wife and husband. No other proof of the marriage of the plaintiff and defendant being offered, *held,* under the circumstances the marriage was not sufficiently proved. Time was given to produce record proof, and then divorce allowed.

164 EVIDENCE—RESIDENCE.

[Hamilton Common Pleas Court, June Term, 1876.]

PHILIPINA WAGENFUHR v. FERDINAND WAGENFUHR.

Evidence that plaintiff has been living at a boarding house eleven months before suit was brought, not sufficient as to residence.

FORCE, J.

Testimony offered by plaintiff, the defendant not answering or appearing, showed that the plaintiff came to this state eleven months before the suit was brought and had been living at a boarding-house. It does not appear that the plaintiff has been an inhabitant of the state one year. It is not clear that she has been a resident at all. Time will not be given to procure oral testimony to establish her residence.

Action dismissed.

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164 ATTACHMENT.

[Hamilton Common Pleas Court, June Term, 1876.]

*JOHN GAUGHAN v. SQUARES & MCDONALD ET AL.

1. The party against whom an attachment is sought must stand in the relation of a debtor to the plaintiff in the action, and the debt cannot be based upon a judgment against a third party, to which the attachment debtor was not a third party, except as garnishee.
2. An attachment cannot be issued against a garnishee, based upon a judgment in the case, until that judgment shall be one against him for his unsatisfactory answer.

COX, J.

The plaintiff set up that he recovered a judgment against one Michael McKenzie for $105 and costs, and that the judgment is wholly unpaid; that in said action in which the judgment was recovered, Squares & McDonald were served with garnishee process as having money belonging to McKenzie; that Squares & McDonald filed an answer to the garnishee denying that they had in their hands or under their control at the time they were served, any funds belonging to McKenzie. The plaintiff averred that the answer was unsatisfactory and untrue; that at the time of the service they were indebted to McKenzie in the sum of $700, and that in their settlement with him they retained in their hands an amount sufficient to satisfy the garnishment. Therefore the plaintiff asked judgment against them for judgment obtained by him against McKenzie. The plaintiff filed an affidavit, and subsequently an amended affidavit, setting up the recovery of the judgment and the unsatisfactory answer of the garnishees, and alleges that, by virtue of the judgment, he has been subrogated to all the rights and privileges of McKenzie against Squares & McDonald, and that, by reason of the premises, they are indebted to him in the amount of the judgment obtained by him against McKenzie. The plaintiff further averred that the trustees of the Cincinnati Southern Railroad are indebted to Squares & McDonald in a large sum of money, and that the defendants, Squares & McDonald, are non-residents of the state of Ohio. Therefore the plaintiffs asked that the trustees of the Southern Railroad be made garnishees, and an attachment be issued against Squares & McDonald.

*The decision in this case was affirmed by the district court. See opinion, 2 Bul., 76 *post*.

It was claimed that an attachment could not be issued against Squares & McDonald under the 9th subdivision of the 191st section of the Code, which provides that an attachment shall not be granted on the ground that the defendant is a foreign corporation or a non-resident of the state for any other claim than a debt or demand arising upon a contract, judgment, or decree.

It was claimed upon the part of the defendants that the meaning of this section is that the debt or contract, judgment or decree which forms the basis of the attachment must be a debt, demand, judgment, contract, or decree against Squares & McDonald, and that unless it be against them, no attachment will lie.

It was claimed on the other side that the plaintiff, having obtained a judgment against McKenzie, he had such a judgment as that he could procure an attachment against the garnishees.

The court held that such was not the intention of the Code. The party against whom the attachment is sought to be made must stand in the relation of a debor himself to the plaintiff in the action, and that that debt must grow out of either a demand arising upon contract, judgment, or decree, and cannot be based upon a judgment against a third party, as to whom and in the case in which the judgment was rendered he was not a party, but simply brought in as a garnishee.

It was claimed by the plaintiff, by virtue of the 218th section of the Code, that when a suit is brought against a garnishee for an unsatisfactory answer, that such proceedings may be had as in other actions and judgment may be had in favor of the plaintiff for the amount of the property and credits of every kind in the possession of the garnishee, and for what shall appear to be owing and the costs of the garnisheement. It was claimed that this provision included in it an attachment against the garnishees.

The court held that that was not intended by the provision of section 218. An attachment could not be issued against a garnishee based upon a judgment in the case in which he was garnisheed until that judgment shall be one against him for his unsatisfactory answer. But after such judgment were obtained in the suit brought against him for his unsatisfactory answer, that would be such a judgment as an attachment could issue upon the ground of non-residence.

Attachment dismissed.

BILLS AND NOTES. 170

[Superior Court of Cincinnati, General Term, April, 1876.]

Yaple, O'Connor and Tilden, JJ.

WM. G. MCCOY v. EDWARD HORNBROOK.

1. A transferee who receives a note from his debtor, endorsed in blank, to collect, apply the proceeds to his debt, and account for the surplus, may sue upon the note in his own name. The question of title, where the facts are not disputed are for the court.
2. An endorser cannot be sued until the notice of non-payment is served upon him, and if a non-resident, until time enough has elapsed for delivery through the mails.

This case comes before us in general term upon a motion for a new trial reserved in special term.

On September 19, 1873, McCoy brought an action in this court against Hornbrook, seeking to recover $7,000 as damages for the alleged sueing out of an attachment, maliciously and without probable cause, by Hornbrook against McCoy, on the 15th day of May, 1873, in a court of record in the state of West Virginia, and causing a steamboat, the R. W. Skillinger, owned by McCoy, to be seized and held for some days under such writ of attachment, by which the alleged damages accrued to Mr. McCoy.

Malice and want of probable cause for sueing out such attachment and seizing and holding the boat under the writ were denied by Horn-

brook; and it is admitted that if Hornbrook was the owner of the claim against McCoy upon which the attachment was based, and if a suit upon such claim could then be brought against McCoy, the latter had no right of action, as he was a non-resident of the state of West Virginia and a resident of the city of Covington, Ky., and that such non-residence was a ground of attachment by the laws of West Virginia, and the court in which it was so sued out had jurisdiction.

The writ of attachment was sued out on the 14th day of May, 1873, and the boat was seized on its arrival at Wheeling on the morning of May 15, 1873, at about 4 o'clock in the morning.

McCoy's liability, if it then existed, arose as follows: On March 11, 1873, at Cincinnati, Ohio, the Southern Transportation and Wharfboat Company, located at Cincinnati, made its negotiable promissory note for $2,683.20, payable 60 days after date, at the First National Bank of Cincinnati, to the order of McCoy. Before it fell due McCoy endorsed the note to one A. J. Flesher, in these words written upon the back of the note: "Pay to A. J. Flesher, or order, W. G. McCoy." Flesher then endorsed the note in blank as follows: "A. J. Flesher," and delivered it to Hornbrook, the plaintiff. Hornbrook did not endorse the note, but left it for collection, when due, with the Merchants' National Bank of Wheeling, West Virginia. That bank sent it for collection to the First National Bank of Cincinnati, endorsed as follows: "Pay T. Stamwood, cashier, or order, for collection, account of Merchants' National Bank of Wheeling, West Virginia. John J. Jones, cash'r."

On May 13, 1873, on the last day of grace, the Cincinnati bank placed the note in the hands of Ezekiel L. DeCamp, a notary public, in Cincinnati who certifies that he duly presented it for and demanded payment, which was refused; that, as such notary, he duly protested the same, "and notified the drawer and endorser thereof by a separate notice to each, enclosed in one envelope, addressed to John J. Jones, cashier Merchants' National Bank, Wheeling, West Virginia, and deposited the same in the post office in this city on the same day, postage paid. Also same day left a second notice for W. G. McCoy at the ferryboat Fannie Webster, this city."

Besides being certified by the notary the above facts were admitted and proved; but McCoy had nothing to do with the ferryboat, was not upon it, and the notice there amounted to nothing.

McCoy, as stated, resided at Covington, Kentucky, Flesher at Murraysville, West Virginia, and the other and last endorser was at Wheeling, West Virginia.

The Merchants' Bank of Wheeling received the note and notices of protest by mail on May 14, 1873, and on that day Hornbrook brought suit and sued out the attachment against McCoy. The writ was served and the boat of McCoy seized on May 15, 1873, at about 4 o'clock in the morning, and about seven o'clock of the same morning, he being upon his boat, he was served personally with the notice of protest forwarded to Wheeling to be sent to him.

Besides the legal purport of the endorsements appearing upon the back of the note, McCoy at the trial below, offered in evidence the deposition of Flesher, who testified that he owed Hornbrook a note for $2,400, having some six months to run, and which by agreement between them was to be renewed for six months after falling due; that he proposed to Hornbrook to let the latter have the McCoy note for the note

of his held by Hornbrook, the latter to pay him the difference, which Hornbrook declined, but took the note and promised to give him an answer in ten minutes. "He went away with the note and after a short time returned and said that he would take the note and, if paid at maturity, he would then return to me the difference between the two notes. I then endorsed the note and gave it to him." The above was all the evidence adduced at the trial as to Hornbrook's ownership of, or right to sue McCoy upon the note, Flesher's evidence being offered by McCoy, as above stated.

The court instructed the jury when the plaintiff rested his case to return a verdict for the defendant, which they did. If such instruction was correct a judgment should be entered upon the verdict for the defendant; if erroneous, the verdict should be set aside and a new trial granted.

Two questions are presented on these facts for our determination. One is whether Hornbrook, the defendant, was not the mere bailer of Flesher of the McCoy note, and so not being the owner of it, not entitled to bring an action upon it which would authorize an attachment under any circumstances. We are all clear in the opinion that where the holder of a negotiable instrument endorsed in blank, delivers the same to another, to whom he is indebted upon an agreement that the proceeds of its collection shall be applied to the payment of such debt, and the balance accounted for the legal ownership of the instrument is effectively transferred, and that the transferer may maintain an action upon it in his own name against the parties liable. We also agree that where the facts showing the state of the title to the instrument are before the court, and undisputed as in the case before us, they were by the deposition of Flesher, the question of title is a question of law, and need not be submitted to the jury.

2. On the other question we have not been able to agree, and the conclusion which I am to report, is that only of two of the members of the court. That question, and the precise one, presented by the facts, and excluding all circumstances not bearing directly upon it, is whether, where a note or bill, payable in bank at one place remains unpaid, and the notary transmits to the last holder in another state and in one envelope, notices of non-payment to all prior parties, and such last holder, instead of posting the notice to a prior endorser having a known address, causes the notice to be personally served upon him, in such a case is the endorser charged, as such by any of the previous steps taken to charge him, or by any act, except that of the actual, personal service made upon him? If not, then as the action in the Virginia court was brought and the attachment levied before such actual service, and before an action against the endorser had accrued, the verdict must necessarily be set aside.

The condition of the liability of an endorser being, that the holder shall employ reasonable, previous diligence to communicate to him notice of non-payment by the party primarily bound, it legally follows, and is affirmed in all the reported cases, that until such diligence is exhausted, his liability does not become absolute. The object of this requirement of diligence is to enable the endorser to take prompt measures to indemnify himself as against the parties to whom he has a right to resort, and the thing essential to the attainment of this object is the actual

notice to which diligence is presumed to lead. It is on this presumption that a notice properly addressed and deposited in the postoffice at the place where payment is demanded, is held to be due diligence. But even in this case an action does not accrue against the endorser until he has actually received the notice, or until sufficient time has elapsed to authorize the presumption that he has so received it, the fact of the actual reception of notice in contradiction to the means employed to secure actual notice being the material condition of his liability. Jarvis v. St. Croix Manufacturng Co., 23 M., 287; Darbishin v. Parker, 6 East. 3; Bank of Columbia v. Bank U. S., 1 Pet., 578.

It has, however, been suggested that the operation of the rule as here stated would be inconvenient and embarrassing to trade, especially in cases where the endorser resides at a great distance from the place of demand, in a foreign country for example. It is said that it would be unreasonable to require the holder to wait until an endorser, residing perhaps in San Francisco or Hong Kong, had actually received notice, or until the expiration of a period of time sufficiently great to authorize the presumption of notice; and one of the evils, it is said, to be probable to result from such delay would be to suspend the remedies of the holder, that by attachment for example, in a manner which would deprive him of the means of security available to all other creditors. Arguments of convenience, however, how persuasive soever on a question of legislation are entitled to very little influence in any inquiry to determine what the law is. Then, too the delay resulting from the remoteness of the place of residence of the endorser is a mere incident and therefore by legal construction a condition of the contract of the endorser, and any fancied inconveniences such as are supposed may be effectively guarded against and can only be guarded against modifying the contract of endorsement. Nor does the delay interfere with any right vested under the contract. The obligation of the endorser becomes fixed by the notice no matter where he resides and the only effect of the delay is to postpone the remedy, a thing which is always done whenever a promise is made to pay money or do some other act at a future day and if the delay prevents a resort to accustomed remedies, it is only because the debt is not due and this too is a big thing which always happens with respect to creditors in general.

If in the present case, notice had been posted by the notary at Cincinnati, addressed to McCoy, at Covington, where he was known to reside, the full duty of the holder would have been performed. But had a like notice, similarly addressed, been posted at Wheeling, where both the holder and endorser, for the time, actually were the liability of McCoy, so as to authorize an action clearly, would not have been complete, because there was no ground for a presumption that the notice had reached him. The holder, certainly, was not confined to a notice by mail. He had a right to give notice, in fact, either in person or by a messenger, and that at any place where the endorser could be found; but in that case the legal sufficiency of the notice does not result from any presumption of fact but depends entirely upon the fact itself. A compliance with the requirement of diligence consisted in the act of giving actual notice, and such notice was received at the very moment it was given. Then it was, and not before, that the liability of the endorser became absolute, and not till then did an action accrue against him. The presumption, when notice is sent by mail, that the notice had been received, so as to consum-

mate the liability of the endorser, has no application; and to contend that it has, appears to me to involve a contradiction of terms. On principle, therefore, two of the members of the court are unable to hold, on any presumption of fact, that McCoy was charged as endorser at any time before he received actual notice.

The authorities too, as two of us think, abundantly sustain the doctrine upon which we are proceeding. The case of Castrique v. Bernabe, 6 Ad. & E. N. S., 498, appears to be precisely in point. There it appeared that both parties resided in the city of London, and suit was brought on the day of the dishonor of the bill. Notice was put in the postoffice, and on the same day the action was brought. There was no presumption that the notice had been in fact received, and it was held that the action was premature. On a strong analogy the case of Walker v. Barnes, 5 Taunt, 240, is to the same effect. There it was held that the drawer of "a bill, dishonored by the acceptor, is not liable to pay interest for the time which elapses between the day when the bill becomes due, and the drawer receives notice of the dishonor." As against the acceptor the bill was due, and he was liable to pay interest and to an action from the day of the dishonor of the bill; but the drawer was not bound to pay interest, because until he received notice, which he did not until the next day, the bill did not, as against him, become due. In Smith v. The Bank of Washington, 5 Serg. & R., 318, the case was that notice of non-payment of a promissory note, to an endorser residing in another place, was put in the postoffice on the 13th of the month which could not have reached him before the 19th, and the action which was brought on the 16th, was held to be premature.

We have been cited in the argument to several cases, decided by the highest courts in Massachusetts, and Maine, which are supposed to be in conflict with the view we have taken. In all these cases, however, the notice was sent through the postoffice, and are not direct authority, and do not furnish any just analogy for a case where, as here, the holder takes upon himself the duty of giving actual notice. For the rest of these cases bear only indirectly on the question before us, and indeed, so far only as they tend to establish the doctrine that the legal liability of the endorser becomes complete, so as to authorize an action against him the moment that the notice to him is placed in the postoffice. This doctrine two of the members of the court do not feel at liberty to adopt, preferring that announced in the case cited in support of this opinion, as one of the most reasonable and least calculated to operate inconveniently.

The conclusion, therefore, of the whole matter is that a new trial must be awarded.

YAPLE, J., (dissenting opinion.)

The principle of law involved in this case has never been settled by any decision in Ohio, has been differently decided by the courts in other states of the union, and the precise question may not be settled by the English courts, and any holding upon it by any court other than the one of last resort may be fairly open to doubt.

The case does not present a much mooted question and one upon which there is a great conflict of authority, viz.: whether after the dishonor and protest of commercial paper and notice mailed to the drawer or endorser an action may be brought upon the very day of such dishonor, that is, upon the third day of grace, nor whether if such endorsers re-

side in the same town at which payment is to be made, an action can be brought against them by the holders on such day of dishonor by merely mailing to them notice of dishonor without giving them actual notice.

The question here is whether, where the several endorsers reside in different states from each other, and different from the state in which such paper is, by its terms, made payable, and the same is dishonored by the maker or acceptor, and a notary public is officially entrusted to make demand, protest the paper for non-payment, and notify the endorsers or drawers, and he does so by enclosing notices to each in an envelope addressed to the last endorser, and duly depositing the same in the post office, an action may be brought by the holder on the next day after dishonor against all the endorsers.

In Walker v. Barnes, 5 Taunt., 240, it was held that "the drawer of a bill which was dishonored by the acceptor, is not liable to pay interest for the time which elapses between the day when the bill becomes due and the day when the drawer receives a notice of the dishonor." There the drawer had notice of dishonor on the 12th day of the month and tendered the money on the morning of the 13th, less one day's interest. In the case of Castrique v. Barnabe, 6 Ad. & El., N. S. 498, both parties resided in the city of London. Suit was brought against the endorser on the day of the dishonor of the bill. Personal notice of the dishonor was not given to the endorser. The plaintiff put a letter notifying him of the fact in the postoffice and brought his action before the letter could reach the defendant. The court held the action prematurely brought. The above are the only English cases cited bearing upon the subject.

The supreme court of Pennsylvania, Gibson, C. J., pronouncing the opinion, held in the case of Smith v. The Bank of Washington, 5 Serg. & Raw., 318, that "notice to an endorser, who lived at another place of non-payment and protest of a promissory note was put in the postoffice on the 13th, and by the course of the mail could not reach him before the 19th; *held,* that a suit commenced against him on the 16th was too soon." The court held that the plaintiff, to entitle him to recover, must aver notice to the endorser, and if he did not judgment would be arrested after verdict, and that unless there was a possibility of such notice being received it could not be that notice was proved.

If this can be the law, the ruling of the court below was erroneous and a new trial should be granted. But in the case of The New England Bank v. Lewis, 2 Pick. 125, which agrees with the English case of Castrique v. Barnabe, 6 Ad. & El., N. S. 498, in holding that "in an action by an endorsee of a note against the endorser, both of whom had their places of business in the same town, the writ was served on the day when the note became due before notice to the endorser, which was, however, duly given by a notary public on the same day. *Held,* that the action was prematurely brought, and that it was an immaterial circumstance that the notice had been put in the hands of the notary before the writ was in the hands of the officer." The court, by Parker, C. J., held the law to be just the reverse of what Gibson announced it to be in 5 Serg. & Raw., which was quoted and relied on before him. He says, p. 128: "When the endorser lives in a different town from the holders, the law considers putting a letter seasonably into the postoffice as using due diligence, or as a constructive notice; and it is for the convenience of trade that it should be so considered."

The case of The City Bank v. Cutter, 3 Pick., 414, is directly opposed

to the decision cited from 5 Taunt., 243. It holds that "a tender by an indorser of a promissory note, on the day after it has become due, is not sufficient without interest." And it is difficult to understand why the holder of a note should not be entitled to recover as much from the indorser as of the maker or acceptor of a note or bill.

Greely v. Thurston, 4 Greenl., 479, decides that the drawer of a bill of exchange of the endorser of a promissory note may be sued after notice, etc., is given or duly forwarded. To the same effect is the case of Flint v. Rogers, 15 Me., 67.

In the case of Shed v. Brett, 1 Pick., 401, it was held that, "where the indorser lives in another town, putting the notice in the postoffice is sufficient to authorize the commencement of an action against the indorser although it should never be received." The court, Parker, C. J., at pages 411, 412, says: "Another objection to the recovery in this action made by the defendant is that the action was commenced too soon, viz., before the notice could have reached the defendant. The writ was made out on the evening of the day on which the note fell due, after the letter of notice was put in the postoffice. By the course of the mail the notice could not have reached the defendant until after the writ was served. The argument is, that notice of non-payment is essential to the plaintiff's right of action; that it is necessary to aver it in the declaration as a fact existing; and that, as the case shows this could not be true, the plaintiff has failed in an essential point. But this argument proceeds upon the ground that there must be an actual reception of notice before the plaintiff can sue; and this is certainly fallacious. If the putting of the letter into the postoffice is notice in itself, which we have shown, then it was given before the commencement of the suit. And it would be mischievious to decide otherwise, for every plaintiff's right of action would commence at different times, according to the distance of the party sued; and the time of suing must be conjectured, as it can not be known when the notice will be actually received. Besides if the object of waiting be to give the party opportunity to take up the note, there must be a sort of double usance; for the holder must wait till his letter is received, and for a reasonable time afterwards, for the party receiving it to come and pay the money. Who would take a bill or notes remitted from New Orleans if this doctrine be correct? And if the parties liable be beyond sea such instruments would be mere waste paper. If the bill should not be accepted, or the endorsed note not paid, the unfortunate holder with property belonging to the drawer or indorser before his eyes must remain an idle spectator of the scramble of other creditors for it, or suffer it to be withdrawn by the debtor himself, without the power of arresting it. If subsequently received, notice will relate back to the time when it was sent."

In Stanton v. Blossom, 14 Mass., 116, the court hold that suit may be commenced against the indorser after protest, before notice is mailed to him, if such notice be afterward duly given, but the case of Shed v. Brett overrules that case to that extent.

In Big & Red's Ld. Cas. on Notes, etc., pp. 496, 497, the authors, in their note expressly approve of the doctrine contained in the case of Shed v. Brett upon this point though they claim that where a bill or note is payable generally no suit can be maintained upon it on the last day of grace and after dishonor, but when payable at a particular place, as a bank, a suit may be maintained, if brought after the close of business hours.

Parsons, in his work on Notes and Bills, vol. 2, p. 462, states the rule thus: "After demand and refusal and the depositing in the postoffice notice thereof to an endorser, it seems that in the United States an action may be commenced, on that day, against the endorser, although the notice will not reach him until the next day. The rule may be different in England."

In the cases above cited, the notices were put in the postoffice, addressed to the party sought to be held liable. In the case at bar, the notices for Flesher, the second, and McCoy, the first endorser, were mailed by the notary public in an envelope, addressed to the Merchants' National Bank of Wheeling, the third or last endorser, with the notice of dishonor for it as such last endorser; and it is claimed by the plaintiff's counsel that this was not a sufficient mailing of the notice to McCoy.

Although Hornbrook made the Wheeling Bank his agent to collect the note, and that bank endorsed it for collection to the Cincinnati Bank, where the note was made payable by its terms, the course pursued by the notary was that which is sanctioned by the law. Ohio Life Ins. Co. v. McCague, 18 O., 54; Warren v. Gillman, 5 Shepl. (17 Me.), 360. The note was made and payable in Ohio, and the second and third endorser lived in West Virginia in different cities or towns, and the first endorser, McCoy, resided in the state of Kentucky. An authorized course of giving the endorsers notice, was to notify the Wheeling Bank, for it to forward notice to Flesher at Murraysville, and for him to forward to McCoy at Covington, Kentucky. A promissory note, after endorsement, becomes, in effect, a bill of exchange and as the last endorser was known to live in another state, it was within the scope of the powers of a notary public, when called upon officially, to protest the note and give notice to the endorsers. (1 S. & C., 872, etc.) He acted officially, and was required to do no more than he did; neither he nor the holder should be required to know where any of the endorsers, except the last, resided; but by making out and mailing notices for all, an intention to hold all was manifested, and the legally appointed machinery for doing so set in motion. In Warren v. Gilman, *supra.*, the court say: "Mr. Stevenson, the notary, employed on this occasion, was duly called upon to act in his official capacity by the cashier of the Suffolk Bank, notices coming from him, affect the parties intended to be charged." The Suffolk Bank was the agent of the Penobscot Bank at Bangor, which was the agent of the plaintiff. When the notice enclosed for endorser reached the latter bank the court say: "No want of diligence is imputed to the cashier. He received and opened the whole package directed to him, and the same morning returned to the postoffice, with proper directions, the notice enclosed, prepared for the defendant."

The case of Manchester Bank v. Fellows, 8 Fost. (N. H.) 312, expressly holds, "that, as the notice comes from the notary, the mode adopted for transmitting it," (the same as in this case) was sufficient. "The notice came to such cashier from the notary, and whatever the cashier did was done as the agent of the notary." p. 312.

The judgment in that case was for the defendant, because suit was brought on the very day of dishonor, and, therefore, held to be premature. Had it been brought on the next day, as in the present case, notice to the endorser sent by the notary to the cashier and by him given in time to the endorser, would have been good. The fact that the cashier in Wheeling, on learning that McCoy was in the city on the morning of

May 15, 1873, gave him the notice, in person, instead of mailing it to Murraysville to Flesher and having Flesher to mail it to McCoy at Covington, was all for the benefit of McCoy, and he can claim nothing from such deviation from the regular course. This was held by Lord Ellensborough in a case, to which I have not on hand the reference.

In case an endorser be sued before a reasonable time elapses for him to receive notice of dishonor, and he should thereafter promptly come in and tender the debt and interest, full justice would seem to be done him by allowing him to stay proceedings without cost, and granting him the costs of his motion. This, it seems, may be done, where money is to be paid on an accepted check or draft, understood, but not expressed at the place of the acception, on demand, and the holder, without making such demand sues the acceptor. Bringing suit is a sufficient demand to sustain the action, "but," says Chitty on Bills, 8th ed., 391-392, chap. 9 "in such a case upon an early application the court would stay the proceedings without costs."

This is perhaps, what the court should have done in the case reported in 5 Taunt., 243, instead of refusing the plaintiff interest for such period of time.

The argument against the right to sue such endorser before he has actual notice of the dishonor, or before such notice is put in the post office, addressed to him, is, that the last endorser to whom the notary has enclosed it, may not mail it or give notice to such prior endorser in which event the latter can not be held liable.

It is often said in the books, that notice is necessary to fix the liability of an endorser; also, that if such notice be not given, the endorser will be discharged. Perhaps the latter form of expression is the more correct in view of the history of the law. A guarantee, like an endorsement, is a collateral undertaking. If notice to the guarantor be not given in a reasonable time and injury has resulted to him in consequence, he will be discharged. By the commercial law, if such notice be not given to an endorser, injury to him is conclusively presumed, and he will be discharged from his original liability. Hence, such notice becomes practically necessary to fix his liability. But when such notice is put in the postoffice on the day following the dishonor of the paper, the endorser's liability relates back to the dishonor and interest is recoverable against him the same as from the primary debtor. So notice transmitted by mail to a distant endorser, who can not receive it for some time, relates back to the time of mailing. When notices to all of the endorsers are mailed by a notary, addressed to the last one to be by him mailed or delivered to the others, he is the agent of the notary, and if such notices are properly given, they will relate back to the date of the dishonor, they having been all the time in transit by a legally sanctioned and approved method.

The doctrine must go to that extent or be limited as ruled in the case in 5 Serg. & Raw., 318.

Mr. Daniels, in his recent work "Negotiable Instruments," Vol. 2, p. 217, sec. 1212, states the case to be that "an action lies against the endorser as soon as notice is put in train of transmission." Bank v. Fellows, 8 Fost. (N. H.) expressly so decides, and no case can be found which holds the contrary. Where the parties reside in different towns or states, though that case holds that an action can not be brought on the very day the note falls due. I hold then that the Wheeling Bank, to whom the notice was sent for McCoy, was the agent of the notary and

not of Hornbrook, and when so mailed, was in regular course of transmission. Any other holding, it appears to me, would be productive of confusion and difficulty, and matter, governed by mere artificial rules of law, in a matter which should not be embarrassed by other technicalities than now govern it.

Lincoln, Smith & Stevens, and Matthews, Ramsey & Matthews, for plaintiff.

Donham & Foraker, and Hoadly, Johnson & Colston, for defendant.

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172 **CORPORATIONS.**

[Superior Court of Cincinnati General Term, April, 1876]

Yaple, O'Connor and Tilden, JJ.

ANDES INSURANCE CO. v. WATERS.

Refusal of transfer on books of corporation, of stock, under a by-law, void as unreasonable and unjust discrimination against one class of bondholders, entitles party to recovery of value of stock for conversion. But the right to recovery waived by party by subsequently collecting dividends and receiving new certificate of stock.

TILDEN, J.

Note ($1,000), and maturing July 9, 1870, in payment of stock, 50 shares at $20 each.

May 22, 1871, sale of the stock by Eustis & Co., to Ryland, at 18 1-4 amounting to $1,182.50, and refusal to permit transfer same day by reason of a by-law.

The Chicago fire, and October 26, 1871, assessment of 56 per cent. $500. 3 notes $166 2-3, all paid.

June 7, 1872, stock reduced one-half, old certificate surrendered, and new one for $500 accepted in name of the husband of the plaintiff below.

July 1, 1871, dividend 10 per cent., $100 ———— judgment $2,011.50, being market value of stock $1,182.50, assessment $500, and interest on both.

1. We have seen that the $500 paid by Mrs. Waters on account of the assessment made by the company upon its stockholders in October, 1871, was included in the judgment. We are of opinion, that in this particular there was error. This cause of action was not set forth in the petition, and it formed no proper element in the estimation of the damages which resulted from the injury complained of. And, more than this, it is apparent from the evidence that no case was made, which in law authorized a recovery back of the money paid, because the payment was a purely voluntary one, and one which the law implied no promise and raised no obligation to repay.

2. The conclusion thus stated would authorize merely a modification of the judgment below, and it remains, therefore, to be considered whether the recovery can be sustained with respect to the other elements included in it.

In considering this question, we have been led to the conclusion that neither the authority of the board of directors vested in them to pass by-laws, nor that of imposing restrictions upon the transfer of stock, afforded to the defendant below any sufficient legal excuse for the refusal in the present instance, of permission to make such transfer. The by-laws under which it was in the argument, attempted to justify such refusal was, by its terms, limited to those stockholders who had received

their certificates of stock in exchange for their notes and mortgages, and who declined or failed to pay, in money, the amount of such notes previously to the transfer. But the delivery and acceptance of the notes and mortgage was, in law, a full payment for the stock, and on delivery of the certificate, the mortgagor became in every sense a stockholder, and entitled to all the rights and privileges of such. Ang. & Ames on Corporations, section 568, and cases there cited. The regulation, therefore, imposed by the by-law, was in our judgment an unreasonable and unjust discrimination in favor of one class of stockholders and against the other and not authorized by law. Nor was the liability of the corporation in any degree affected by the circumstances that the act of passing the by-law, and that of obstructing the sale and transfer of the stock was not the act of the stockholders. It was, nevertheless, the act of the corporation. The board of directors was clothed with the general power to pass by-laws, and to make regulations restricting the transfer of stock, and the passage of the by-law relied on, and the refusal to permit the transfer complained of were acts done, though wrongfully done, in the exercise of these powers, and in contemplation of law, they were the acts of the corporation itself. Ang. & Ames, sections 311, 382, 384. The refusal therefore, of the officers of the insurance company to make the transfer required as it was by the terms of the by-law, and resulting as it did, in a loss of the opportunity to sell the stock, was in fact, an injury to the plaintiff below, production of actual and substantial damage; and, in our judgment, the injury was an actionable one, and such as to have authorized the plaintiff below to sue for a wrongful conversion of the stock and to recover for its value in the market.

But the ultimate and material question in the case is a question arising out of the subsequent transactions between the parties. The sale to Ryland took place on the 22d of May, 1871. On the following July, the plaintiff below collected a ten per cent. dividend on the stock. In October, 1871, or after the great Chicago fire, she submitted to and paid an assessment of 50 per cent. or $500, upon her stock; and in June, 1872, under a resolution of the board of directors or stockholders, reducing the capital stock to one-half of the original amount, she surrendered the original certificate, and in lieu of it, received a certificate, in the name of her husband, and this certificate, so far as appears, is still outstanding. This course of conduct was clearly inconsistent, and not such as to authorize the construction now, that the plaintiff below intended to insist on her legal rights by treating the refusal as a conversion of the stock. We think, as before stated, that she had that right, but that on the principle of law, that any one may at his pleasure renounce a benefit or right, existing entirely in his own favor, the subsequent, frequent acts of ownership, afford not only evidence of an intention not to insist on a conversion, but also a legal basis for holding that she lost the right to do so. On this ground, then we hold that the defendant below was not in law entitled to recover, and that the judgment must be reversed with costs.

Donham & Foraker, for plaintiff in error.

A. W. Waters, for defendant.

173 **EXECUTION.**

[Hamilton Common Pleas, June Term, 1876.]

A. J. CUNNINGHAM v. GEORGE A. SIMPSON.

1. Where a husband has an estate by courtesy in two pieces of property, and one piece is given him in fee, and the other for a term of years, by will, until he makes an election, which he will take, he is presumed to hold both, and an execution creditor cannot make an election for him.
2. A right to receive rent of a house for a term of years, does not give the devisee an interest in the premises that is subject to execution.

Cox, J.

This case came up on a motion made by the defendant to set aside the sale of a ten years' term in a house and lot in Camp Dennison. George A. Simpson, the husband of Martha A. Simpson, was a tenant by curtesy in two distinct parcels of property in Camp Dennison, a storehouse and a dwelling house. Mrs. Simpson made a will, devising to her husband, in fee, the storehouse, and gave him the receipt of the rents of the dwelling house for ten years, subject to taxation, the property, at the expiration of ten years to be sold and the proceeds divided among the heirs. The plaintiff, Cunningham, obtained a judgment against Simpson, and levied on the estate for ten years created by the will. The property was sold and a deed made by the sheriff. Simpson moved to set aside the sale, claiming that he was tenant by courtesy in both these pieces of property, and that the will of his wife could not divest him of that tenacy. It was claimed, also, that by the terms of the will possession was not given to to him for the ten years, but simply the right to receive the rent, and that such interest was not the subject of a levy on execution.

It was claimed on behalf of the plaintiff in execution, that admitting that Simpson had an estate by courtesy in both pieces of property, yet, one piece being given to him in fee by the will and the other for a term of years, he is obliged to elect which he will have, and that not having done so it was to be inferred he had taken an estate in fee in the store-house and that the plaintiff was entitled to levy on the ten years' term.

As regarded the doctrine of election, it was admitted the husband was a tenant by courtesy in both pieces of property, and the point was fully decided in Huston v. Cone, 24 O. S., 11, that where a tenant by courtesy to whom one estate is given, larger than his courtesy, and from whose right of courtesy in other property a portion is taken he may be compelled in equity to elect which he will take: that an election to take both was not an election to take either. So in this case Simpson keeps both. There is no election as to which he will take, and the presumption is that he holds on to both. But until he does make an election, the plaintiff in execution has no right to make an election for him. If he is entitled to hold the property by virtue of courtesy, the sheriff would have no right to carve out a term of years to serve an execution upon it. As to whether this is an estate that can be levied on by execution, the court remarked that the will did not give George A. Simpson the possession for ten years, or a lease for ten years, and there was nothing to show he had any control over the property, but simply a right to receive the rent, and that was not, under the law, subject to execution. The sale should therefore be set aside.

Cunningham, for plaintiff.

Fox & Bird, for defendant.

JUDGMENT. 186

[Lorain Common Pleas Court, 1876.]

BUCK V. HUNTLEY ET AL.

A judgment before a justice for a greater sum than was endorsed on the summons may be opened on suit to marshal liens and subject equities.

The petition alleged that on a day named therein the plaintiff recovered a judgment, before a justice of the peace, against the defendant, Huntley, for the sum of $148.02 debt and $2.25 costs, that she had paid thereon $14 and no more, that a transcript thereof had been filed in the office of the clerk of the court of common pleas, and execution issued therefrom to collect said judgment, which execution had been returned wholly unsatisfied, that said Huntley had no property from which judgment could be collected by execution; that she was the owner of the equity of redemption of a certain piece of land, described in the petition, upon which the other defendants had, or claimed to have, liens. It prayed that the liens might be marshalled, their priorities determined, the land sold, and the proceeds applied to the plaintiff's said judgment, and for equitable relief. The answer of the defendant Huntley alleged that she had occupied a house of the plaintiff's for a certain period, that rent had accumulated to the amount of $242.50, that payments had been made by her to the amount of $220, leaving only $22.50 due when said action before the justice was commenced, that the copy of summons served upon her in said action before the justice had endorsed on it as the amount claimed in the action, the sum of $26.50, that relying on said endorsement and knowing that $26.50 was about the amount due plaintiff, she failed to appear at the trial of said case; that the plaintiff, by fraudulent statements of the amount due him, obtained judgment to be entered for $148.02; that, not knowing that any larger judgment than $26.50 had been rendered, she suffered ten days from the date of said judgment to elapse without perfecting her appeal, and thereby lost her remedy at law, and prayed that plaintiff might be enjoined from collecting more than said sum of $26.50. To this answer the plaintiff demurred on the ground that it did not state facts sufficient to constitute a defense. The court held that the defendant had a right to rely on the fact that the copy of the summons served upon her was a true copy of the original writ; and that, whether the variation was the result of the fraud of the plaintiff or a mere mistake on the part of the constable, the practical result was to work a fraud upon the defendant; and that the facts stated in the answer showed that no service of summons was made upon her in the action before the justice, which would authorize the judgment rendered; and that she was entitled to have the judgment opened and make her defense in this action.

Demurrer overruled.

G. B. Metcalf, for plaintiff.

Hale & McLean, for defendants.

186 **ASSIGNMENT.**

[Lorain Common Pleas Court, 1876.]

BURGE v. MINER, PARKER & CO.

A debtor who pays to second assignee of a non-negotiable chose in action, without notice of former assignment, is protected by such payment.

BOYNTON, J.

Petition averred that defendants were indebted to J. N. & J. M. B. and that on the 16th day of November, 1875, said J. N. & J. M. B. sold and assigned said indebtedness to plaintiff for a valuable consideration, and that plaintiff was still the owner thereof, and prayed judgment.

Defendants answered admitting the indebtedness to J. N. & J. M. B., but averring that on the 20th of December, 1875, said J. N. & J. M. B. sold and assigned said indebtedness to one J. M., and that they, defendants, had without notice of the assignment thereof to plaintiff, fully paid said indebtedness to said J. M. The indebtedness was upon a contract not negotiable.

Plaintiff demurred to the answer on the ground that it did not state facts sufficient to construe a defense. The court held that an assignment of a thing in action passes the whole title to the assignee. But that when a chose in action was assigned by the owner to A. and subsequently the assignor, by express assignment, assigned the same claim to B. and the debtor, without a notice of the assignment to A., paid the claim to B., he would be protected in such payment. Citing 3 Hill, 228.

Demurrer overruled.

Herrick & Johnston, for plaintiff.

Dickson & Hale, for defendants.

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186 **CONTRACTS.**

[Lorain Common Pleas Court, 1876.]

AQUILA H. PICKERING ET AL v. HENRY CHASE.

Speculative option contracts in grain upon the Chicago market held to be illegal and void.

SCOTT, J.

This controversy arises out of grain transactions between parties, about which there does not seem to be any serious misunderstanding, except as to two "option deals" in corn—one for 10,000 bushels for delivery in August, and another for a like amount for delivery in September.

But there is another consideration that is fatal to a recovery in any event, so far as the two last deals are concerned. There is no sufficient evidence that any grain was in fact bought for defendants for delivery in August or September. So far as anything is proven, the alleged purchases are purely fictitious. The grain plaintiff bought of Hutchinson was immediately sold back to him. It was not paid for, nor was it ex-

pected by the parties it would be called for or delivered. The parties were merely speculating in difference as to the market values of grain on the Chicago market. Such contracts are void at common law, as being inhibited by a sound public morality. They were in no just sense contracts, with the privilege of the seller to deliver at a future day. Time contracts are of daily occurrence, and must of necessity be in commercial transactions. Agreements for the future delivery of grain or any other commodity are not prohibited by the common law, nor by any statute of this state nor by any policy adopted for the protection of the public. What the law does prohibit, and what it deems detrimental to the general welfare, is speculating in differences in market values. The alleged contract for August and September comes within this definition. No grain was bought and paid for, nor do we think it was ever expected that any would be ever called for, or that any would have been delivered had demand been made. What were these but "option contracts" in the most objectionable sense?—that is, the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the grain, just as they chose. On the maturity of the contracts they were to be filled by adjusting the differences in the market values. Being in the nature of gambling transactions, the law will tolerate no such contracts. The judgment is for quite as much as it ought to be under the evidence, and will be affirmed.

AGENCY—BILLS AND NOTES. 186

[Lorain Common Pleas Court, 1876.]

*JARED M. HOOD v. J. J. NICHOLS & R. M. ROBERTS.

An indefinite promise to forbear suit fixing no time, is not a sufficient ratification of a forged signature to a note to make it binding; but an extension for a definite time, or until plaintiff should notify, the defendant will support the ratification.

BOYNTON, J.

Petition stated that, on December 1, 1875, the defendants executed and delivered to plaintiff their promissory note for $105.50, payable in sixty days from date, and sending forth a copy of the note, and further alleged that, after the maturity of the note, on the 5th of February, 1876, the defendant Nichols, in consideration that the plaintiff would extend the note thirty days, agreed for himself and Roberts to pay the note at the expiration of the extended time and that the extension was given; and ask for judgment.

Roberts was not sued. Nichols was served and answered denying all the allegations of the petition.

On the trial plaintiff offered the note in evidence and testified that, after the maturity of the note, the defendant Nichols came to him and said that R. had gone east to get the money to pay the note, and asked him to extend the time of payment sixty days, promising to pay said note at the expiration of that time; that he refused to do it, but agreed he would extend it thirty days.

Defendant testified that he did not sign the note, nor authorize any one to sign it for him, that he had a talk with plaintiff for R. about extending the note and that plaintiff promised to wait awhile, but no definite time was agreed upon to which payment should be deferred; that plaintiff said he would not sue the note without notifying them.

The court charged the jury "If you find that the defendant Nichols did not sign the note in suit nor authorize any one to sign it for him, he is not liable in this ac-

*The judgment in this case was affirmed by the district court. See *post* 174.

tion unless he ratified the act of the person signing his name to the same; and if the signing of his name to said note was not done by him, nor by his authority, but was a forgery, such signing could only be ratified upon a consideration moving to Nichols, or from the plaintiff, 67 Pa. St. 391, and that a mere promise on the part of the plaintiff not to sue the note, without fixing any time for which he would forbear to sue, would not constitute a consideration in law; but that an agreement between the parties to extend the note for a given length of time, or, until the plaintiff should notify defendants to pay it, would be a good consideration to support such ratification.

Verdict for the defendant.

P. P. & N. L. Johnson, for plaintiff.

Hale and McLean, for defendants.

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186 **RES JUDICATA.**

[Summit Common Pleas Court, 1876.]

ANONYMOUS.

An action before a justice of the peace not a bar to an action to reform a contract.

Plaintiff, the holder of a note, had sued the maker and an endorser thereon before a justice of the peace, in which suit he had recovered a judgment against the maker, and the endorser had recovered against him. From the judgment against him, in favor of the endorser, he had appealed to the court of common pleas, and had there dismissed his action without prejudice. Subsequently he brought the present action in the court of common pleas, against the endorser, in equity, asking that the contract of endorsement be reformed by striking out the words "without recourse," and that upon the contract as reformed he should have judgment against the endorser. Defendant answered, setting up the facts above stated of judgment before the justice, the appeal and dismissal; and claimed that inasmuch as the plaintiff had, in the other action, undertaken to appeal from only a part of the judgment, that, in fact, the appeal had effected nothing, and that the judgment of the justice was still in force and was a bar to this action. The court held, upon demurrer to answer, that it made no difference in the present case what proceedings had been had in the case before the justice; for this was a new case, founded upon a different cause of action, and the judgment of the justice, even if still in force, would not work an estoppel as against the plaintiff in this action.

Demurrer sustained.

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186 **CHATTEL. MORTGAGE.**

[Summit Common Pleas Court, 1876.]

ANONYMOUS.

Where A buys property of B, which B is to purchase of C, and in doing so B gives C a mortgage on the chattel, which C neglects to file, his right is not postponed to that of A for the purchase-money, as the statute does not require a mortgage to be filed as against antecedent purchasers.

Plaintiff under took to purchase from his brother a pair of mules and did pay him for them. The mules were not the property of the brother, but it was agreed he should purchase them of A., the owner, and deliver

them to the plaintiff. He, the brother, purchased the mules of A., but instead of paying for them gave A. a chattel mortgage upon them for the purchase money, and delivered them to plaintiff. The chattel mortgage was not filed as required by statute, (66 O. L. 345), and was assigned to defendant. The mules having come to the hands of the defendant, the assignee of the mortgagee, the plaintiff brought this action to recover possession of them from the defendant. The court charged the jury that the statute relating to chattel mortgages, made chattel mortgages, not filed in accordance therewith, void only as against creditors of the mortgagor, and subsequent purchasers and mortgagors in good faith; and that the plaintiff, having purchased and paid his money before his brother had title to the property, took no title thereby; and, his attempted purchase, having been made prior to the making of the mortgage, the mortgagee was not required by the statute to file the mortgage at all as against such antecedent purchaser.

Verdict for the defendant.

CONFLICT OF JURISDICTION—LIFE INSURANCE. 189

[Hamilton Common Pleas Court, June Term, 1876.]

JULIA GESSEL v. REPUBLIC LIFE INSURANCE CO.

1. A charge by the court to a jury until reversed by a reviewing court, will be held in the same case to the court that pronounced it, as stating the law.
2. Where statements in the application are made warranties, and one of them is that no other company had ever declined to insure on the proposed life, and the jury found specially that such statement was not true, but nevertheless found for the plaintiff, the defendant is entitled to a judgment under the Code, section 277.
3. Where such applicant had been a member of another company, which failing, a third company agreed to insure the risks, if insurable, but such latter company refused to insure his life on account of age, this is declining to insure, which renders the statement of the application false.

AVERY, J.

This case came up for decision on a motion for a judgment by the defendants, the jury having rendered a verdict for the plaintiff. The action was brought upon a policy of life insurance issued by the defendants upon the life of the plaintiff's husband. The policy contained a condition that the statements of the application were warranted to be true. Among other statements was one that no other company had ever declined to issue a policy on the proposed life. The evidence in the case tended to show that the Merchant's Life Insurance Company of New York, had declined to take a risk on the party prior to the issuing of the policy by the defendants, and in submitting the case to the jury under the charge they were directed to find whether a policy had been declined the insured prior to the issuing of the policy in this case. The jury found in the affirmative of the question, but, at the same time, they found a verdict for the plaintiff. This was a motion to render judgment for the defendant, notwithstanding the verdict, under section 277, of the Code.

The court in disposing of the motion, said that it seemed to be conceded by the counsel for the plaintiff that if this special finding were inconsistent with the general verdict, the result must be that the judgment

would be entered in accordance with the finding. It was one of the defenses of the answer that such a policy had been declined by the Merchant's Company, and that the question had been put to the insured and answered in the negative. The jury were instructed that by virtue of the condition of the policy warranting the truth of the answers in the application, the consequence would be that if the answers were false the policy would be void, irrespective of any question of materiality, or any question of knowledge which would be required to make the answer fraudulent. If that was a proper instruction, the finding of the jury was a finding that there was a breach of warranty, and consequently the legal conclusion would be that the defendants were discharged, and following the provisions of section 277, there would be no escape from the conclusion that the judgment must fall, if the law be correctly laid down.

To the construction of the law as given in the charge, the plaintiff excepted, and so far as it may be supposed there was error in it, it lies open for the action of a reviewing court. It was enough for this court to know, however, that so long as that instruction stood unreserved, it must be taken by the court who pronounced it to be law, and then, if the finding of the jury upon this special question under that law would result in a judgment for the defendants, that judgment must be entered, notwithstanding the jury rendered a general verdict for the plaintiff.

It was claimed in the argument that the husband of the plaintiff had made no application to the Merchant's Life Insurance Company. The facts were that he had been a member of the Eclectic Life, which failing, an arrangement was made by which the Merchants agreed to insure the risks taken by the Eclectic, provided they were insurable. Gessel requested the substitution and stated that all the matters contained in his original application to the Eclectic were true. Assuming that that was not an application for insurance, Gessel had applied for insurance previously and been declined, but simply whether any company had declined a policy on his life. Certainly that was a declination of the Merchant's Life to take the risk, and the case became stronger when the reason upon which the Merchant's Life declined the risk is considered. Gessel, when he made his application to the Eclectic, stated he was born in 1805, and when he requested a substitution of risks, the Merchant's Life referring back to his original application, declined to issue the policy on account of age. It was one of the defenses that Gessel was a man of sixty years of age, and upon that the jury found for the plaintiff. But the fact that his life had been declined by the Merchant's Life, upon the ground of over-age was certainly a fact, which, if it had been brought to the attention of the defendants, would have set them upon inquiry. If inquiry had been made the strange inconsistency would have appeared, which was, in this case, unexplainable for Joseph Gessel, in March, 1873, obtained a policy in one company, representing himself as born in 1805, and, in September of the same year, obtained this policy, representing himself to have been born in 1813, having gone eight years backward in six or seven months forward.

Motion allowed granting judgment for defendants.

Geo. B. Hollister and Geo. Harris for the plaintiff.

C. D. Robertson, contra.

RAILROADS. 190

[Lorain Common Pleas, 1876.]

*SHELTON v. L. S. & M. S. R. R. Co.

The owner of a commutation ticket, who has failed to sign its conditions is not entitled to ride upon it after it has been taken up by the company, even if such taking up was wrongful.

BOYNTON, J.

The plaintiff brought this action against the defendant to recover damages for his wrongful ejection from the train of cars on the defendant's road. Defense, that plaintiff refused to produce a ticket, or pass, or to pay his fare.

On the trial the plaintiff offered evidence tending to show that he had purchased a "commutation ticket," entitling him to ride twenty times over defendant's road, between Vermillion and Cleveland; that, after having had five rides thereon, when he offered it to the conductor for the sixth ride, he (the conductor) said it had been forfeited by the failure of the plaintiff to sign the conditions printed upon the back thereof, and that he would take it to the general ticket agent of the defendant, and plaintiff could call there and arrange the matter; that he, plaintiff, objected to said conductor taking up said ticket, and demanded the return thereof to himself; that he then offered to sign said conditions upon said ticket, but that the conductor refused to return it, but allowed the plaintiff to ride to Cleveland; that on the afternoon of the same day the plaintiff got upon one of defendant's trains to return to Vermillion; that, when the conductor came to him to collect his fare, he stated to him the above facts, and claimed he had a right to ride upon the ticket taken up by the other conductor; that the conductor told him he must either produce a ticket entitling him to ride to Vermillion, or pay his fare or leave the train; that he refused and failed to do either, and that upon the arrival of the train at B., an intermediate station, the conductor compelled him to leave the train, without unnecessary force or circumstances of insult.

Upon the back of the ticket were several conditions printed, the last of which was as follows: "Void unless properly signed below, and is accepted with these conditions."

The defendant's testimony did not differ materially from that of the plaintiff upon the points upon which testimony was offered by plaintiff. It offered in addition testimony to prove the following facts: That, by the regulations of the defendant it was the duty of the conductor to take up any commutation ticket, when presented to him, if the terms and conditions thereof were not signed by the person or persons mentioned upon its face; that this ticket was not so signed, and was taken up under such regulations; that by the regulations of the company each conductor is instructed to let no person ride upon the cars unless they have a pass or ticket, or pay the money for their fare; that, when plaintiff was called upon for his fare, upon the train from which he was put off, the conductor told him of the last mentioned regulation; that the conductor who put plaintiff off the train was not the same as the one who had taken up his ticket, and knew nothing of that transaction except as he was told by the plaintiff. It was agreed that said ticket was delivered to the plaintiff by the defendant, and that he had been permitted to ride on it five times, and that he had never been requested to sign the conditions upon the back of it, and that the conductor of said morning train took up said ticket and refused to carry plaintiff upon it, the plaintiff offering at the time to sign the conditions; and that, for want of a ticket or payment of his fare, he was removed from the train upon the afternoon of the same day upon which said ticket was taken up.

The plaintiff disclaimed the right to recover for the wrongful act of the company in taking up the ticket on the morning train. Thereupon the court charged among other things as follows:

It being agreed that that defendant sold and delivered the commutation ticket to the plaintiff, and permitted him to ride upon it five times over the route from

*This case was affirmed by the district court, *post* 175, and that opinion by the supreme court. See opinion, 29 O. S., 214.

Vermillion to Cleveland, without requiring or requesting the plaintiff to sign the conditions upon its back, the taking it up and refusal to carry him upon it by the conductor of the morning train were a breach of the contract to carry upon the part of the company. But the plaintiff disclaiming the right to recover for such breach of said agreement, our inquiries must be confined to the right of the plaintiff to recover for the alleged wrongful eviction from the train or car on the afternoon of that day.

The defendant had the right to make reasonable rules and regulations to govern the action of the conductors of its trains, prescribing their duties, and for the carrying of passengers upon its trains over its road; and while in some cases it is a question of fact whether a regulation is reasonable or not, it is so obviously as to require a passenger to pay his fare to the conductor, or produce a ticket, as evidence of his right to be carried by the company, that it will be declared reasonable as matter of law. The existence of the regulation at the time of the expulsion of the plaintiff from the train of the defendant is claimed to be established, and if you find its existence, I am of opinion that the wrongful act of the company, or its conductor upon the morning train, in taking up said commutation ticket, and in refusing to carry plaintiff on it did not relieve the plaintiff from the duty of complying with the regulation of the company requiring him to produce a ticket or pay his fare on the return train, from which, for want of a ticket or payment of his fare, he was expelled. Therefore, if you find such regulations to have existed, and that the defendant wrongfully took from the plaintiff his ticket which evidenced his right to ride from Vermillion to Cleveland or Cleveland to Vermillion for future times, and refused to carry him on said ticket on the morning or down train on the day alleged, and he boarded the return train, and refused to pay his fare or to produce a ticket, the defendant had the right to cause him to be removed from said train.

The court also instructed the jury that the written or printed terms on the face and back of said ticket must be taken as constituting the contract between the company and the holder of the ticket.

Verdict for the defendant.

The court in the instructions followed Townshend v. The N. F. C. and H. R'y. Co., 56 N. Y., 295.

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190 JUDGMENT—JUSTICE OF THE PEACE.

[Lorain Common Pleas, 1876.]

*KEITH V. FAIRCHILD ET AL.

The announcement by a justice of the conclusion at which he has arrived, regarding the decision of a case before him, is not rendering a judgment therein, but judgment is not rendered until the decision is entered upon the docket, and no action lies against a justice for failure to record the judgment.

BOYNTON, J.

Petition stated that R. Cooley, deceased, the intestate of one of the defendants, Cooley, was in his lifetime a justice of the peace of Brownhelm township, and that the defendants, Fairchilds and Wells, were sureties on his official bond. A copy of the bond was set forth and its acceptance by the township trustees alleged. The bond was conditioned that Cooley "would well and truly perform every ministerial act enjoined upon him by law." The petition further alleged that the plaintiff, on the 24th of October, 1870, by the consideration of said R. Cooley acting as such justice, "recovered a judgment against one B in the sum of $90 and $5 costs; that immediately upon the rendition of said judgment said plaintiff requested and ordered said R. Cooley as such justice to issue an execution against said B to collect said judgment and costs; and plaintiff still further says that said R. Cooley, as such justice, failed and neglected to make any record of his said judgment except as follows: 'Judgment for $90 in said cause,' and failed and neglected to issue execution on said judgment as he was by said plaintiff requested

*The case was reversed by the district court, *post* 176, and the district court sustained by the supreme court. See opinion, 29 O. S., 156.

and ordered to do, whereby and by reason of which the plaintiff hath lost his said judgment and the money due and payable thereon." It further alleged that by reason of the premises the official bond had become broken, and prayed judgment against the defendants for $95, the amount of judgment and costs against said B.

To this petition defendants demurred on the ground that it did not state facts sufficient to constitute a cause of action.

The court *held,* That notwithstanding the petition stated in terms that plaintiff "recovered a judgment" against B, still, as it stated the facts in the case, the court would determine from such facts whether a judgment had in fact been rendered or not.

That the announcement by a justice of the conclusion, at which he has arrived, regarding the decision of a case before him is not rendering a judgment therein, but that judgment is not rendered until such decision is entered upon the docket of the justice.

That such record of the judgment is a judicial and not a ministerial act, and for the neglect or failure to perform it no action will lie against the justice or the sureties on his official bond. [Stallcup v. Baker, 18 O. S., 544.]

Demurrer sustained.

RAILROADS—CONTRACTS—ESTOPPEL. 201

[Hamilton Common Pleas Court, June Term, 1876.]

*Western Union Telegraph Co. v. Atlantic and Pacific Telegraph Co. et al.

1. In an agreement between a railroad and telegraph company, for the construction and operation of a line of telegraph, wherein the former is designated as the Cincinnati and Indianapolis Junction Railroad Company, but the road referred to as belonging to it, and concerning which the agreement is made, in fact belongs to the Junction Railroad Company, and the agreement is signed by the president and sealed with the corporate seal of the Junction Railroad Company, and that company enters upon and receives performance of the agreement, the words "Cincinnati and Indianapolis" may be rejected as surplussage, and the agreement held binding upon the Junction Railroad Company.
2. If the railroad afterward be sold under foreclosure, the telegraph not being party, to a new company having constructive notice of the agreement, and this company continues for several years to receive and enjoy performance on the part of the telegraph company, which expends considerable sums upon the faith that the agreement has been sanctioned and adopted, such agreement is binding upon the new company, although it may not run with the land, and although the mortgage under which the sale upon foreclosure is made, was prior in date to the agreement.
3. The agreement by the railroad company granted the exclusive right of way for construction of the lines of telegraph, and bound the railroad company to transport and deliver wherever along the road materials were needed in such construction, operation or repair of the telegraph lines, but bound it not to deliver, except at regular stations, for any competing line. *Held,* That equality being the duty of the railroad company in its relations to the public as carrier, this stipulation was against public policy, but that the use of its right of way for the purpose of erecting a line of telegraph, not concerning it in those relations, nor interfering with the interests of transportation, the exclusive grant of such use would be enforced.

Avery, J.

In 1870 the Western Union Telegraph Company and the Cincinnati and Indianapolis Junction Railroad Company, as it was called, although in fact no such organization existed, the true name being the Junction Railroad Company, made an agreement, to continue in force twenty-five years, by which the exclusive right of way for construction of a line of telegraph along the railroad was granted the

*For decision of district court making injunction perpetual, see 5 Dec. R., 407; [s. c. 5 Am. Law. Rec., 429.]

telegraph company, in consideration that such company supplied the poles, wires, batteries and other appliances for keeping up the line, of which the railroad company was to have free use, the railroad company, on its part, to furnish the poles from Newcastle to Fort Wayne, Indiana, to transport and deliver anywhere along the line whatever was needed in constructing, operating or repairing the telegraph line, and, upon the other hand, not to transport and deliver, except at regular freight rates and regular stations, for any competing line. It was also provided that telegraph offices, as required by the railroad company, should be established and operators employed by such company, to be under the rules of government prescribed for the telegraphic corps of the telegraph company and that they should attend to the general business of the telegraph company at such points, and account for the receipts, except that the latter company, whenever its business at any one point exceeds $3,000, should establish an office there and employ the operator; and that, over the first wire put up, railroad business of any important character should have preference, and as soon as such wire was required for the exclusive use of the railroad company another should be supplied by the telegraph company. In 1872, meanwhile the agreement having been kept by the Western Union Telegraph Company on one side and the Junction Railroad Company on the other, proceedings in foreclosure, to which the telegraph company was not party, were had against the railroad company, and the road sold to the Cincinnati, Hamilton and Indianapolis Railroad Company, which has from that time received and enjoyed performance on the part of the telegraph company, and observed upon its own part the obligations of the agreement until now, when, as the petition alleges, it and the Cincinnati, Hamilton and Dayton Railroad Company, under whose management it is averred to be, have entered into an agreement to grant to the Atlantic and Pacific Telegraph Company, the use of its right of way for a competing line of telegraph, and to transport poles for such line at less than regular rates, and not to regular stations.

This was a motion for a temporary injunction. The following opinion was announced by the court:

The contention is, 1. That the agreement with the plaintiff was not made by the Junction Railroad Company. 2. If it was, it did not become binding upon the Cincinnati, Hamilton and Indianapolis Railroad Company. 3. If otherwise, it would have been binding, that it was against public policy.

1. The first point is not tenable. The name set forth in the agreement is, "The Cincinnati and Indianapolis Junction Railroad Company," but the agreement is signed by Lewis Worthington, who was president of the Junction Railroad Company, and the corporate seal of that company is affixed. The signature is, "L. Worthington, pres'dt C. & I. J. and Ft. W., M. & C. R. Rds." but there was no such company as the "C., I. & J.," and so far there was an inaccuracy, merely in the addition, while, upon the other hand, to add "Ft. W., M. & C." was correct, as the Ft. Wayne, Muncie and Chicago road was under lease to the Junction Railroad Company. It is true the seal of the Junction Railroad Company and the signature of its president would not help an instrument which, from the body of it, could not be construed as the act of the corporation, but the line of the road from Hamilton to Connersville and Indianapolis and from Connersville to New Castle and Fort Wayne constituted the lines of the Junction Railroad Company, and the agreement, although the company is called the "Cincinnati and Indianapolis Junction," these lines were called its lines. If to this it be suggested that it requires proof outside the instrument, the answer as such proof is competent, upon the principle that a court may resort to collateral circumstances for the purpose of being placed as nearly as possible in the position of the party whose language requires interpretation, and if, without other assistance than is derived from a knowledge of the circumstances to which the words expressly or tacitly refer, an accurate description can be made out by rejecting surplusage, the legal certainty of the language may be declared. Greenleaf Evidence, 295, 299. If it is objected that this principle implies that the parties are ascertained, the answer is the telegraph company is ascertained. That company at least was contracting about something with somebody.

2. The second point rests upon rights derived by purchase under the mortgage which was prior in date to the agreement; and independently of that, upon the character of the agreement, in respect to its binding assignees.

In judicial sales upon foreclosure, the rule in this state is that the purchaser, together with the title of the other parties to the suit takes the title of the

mortgagee. Frische v. Kramer's Lessee, 16 O., 125. Childs v. Childs, 10 O. S, 339. But a mortgagee may, by his conduct, preclude himself from treating a tenant of his mortgagor as a trespasser. 4 A. & E., 313; 9 A. & E., 355. He may unite with the mortgagor in making a lease. 3 T. R., 393. If he consent to a contract for lease made by the mortgagor it may be specifically enforced against the tenant. 2 Sch. & L., 166, 167. Without previous consent it may, upon a common maxim of the law, become goods by ratification.

These principles apply as well to any other interest in the land as to a lease, and to purchasers upon foreclosure as well as to the original mortgagee, for as against any interest not made party, the purchaser merely stands in the place of the mortgagee. Thus, where a tramway was laid from a mine over adjoining land subject to a mortgage, under an agreement with the owner that involved the payment of rent, and afterward the mortgagee took possession under the mortgage and continued to receive the rent, his grantee, there being no default in the tender of the rent, was restrained from interfering with the use of the tramway. Mold v. Wheatcroft, 27 Beav. 510.

The Western Union Telegraph Company, jointly in connection with the Junction Railroad Company, was occupying the telegraph lines at the time of the purchase by the Cincinnati, Hamilton and Indianapolis Railroad Company upon foreclosure. It was not party to the suit. It had begun reconstructing the line between Hamilton and Indianapolis, and after purchase went on and completed the work, doing by far the larger portion after the purchase, and expending upon the whole over $3,600.

The Cincinnati, Hamilton and Indianapolis Railroad Company upon the purchase entered at once into the use of the telegraphic wires and appliances, in connection with the road, and is still using them under the terms in all respects of the agreement by which the Junction Railroad Company had the use. It has from time to time made requisitions upon the telegraph company for whatever was needed to maintain and operate the lines, and has required an additional wire, with the necessary insulators and batteries, all which have been supplied free of charge by the telegraph company.

In equity there is a doctrine that one may become bound by acquiescence. It is the doctrine of equitable estoppel. This prevails against corporations no less than against individuals, upon the ground that otherwise there would be fraud. Fry on Specific Performance, 176, 177. For the railroad company to have stood by and seen the expenditure in reconstructing and maintaining the telegraph lines, to have taken the benefit of that expenditure, to have enjoyed every right under the agreement, and then to require that to obtain performance of the obligation the telegraph company must redeem would, in equity at least, be a fraud. Hill v. South Staffordshire R. R., 2 Jur. N. S., 192.

These considerations render it unnecessary to determine whether the agreement, in itself, was of a character to be binding upon assignees. Whether it attached to the estate or not it affected the use of the land, and even if at the time of the purchase there was not actual notice, constructive notice was enough. L. R. 1 Ch. App., 463.

Restrictive covenants concerning the manner of using or enjoying the land, although personal in nature, may be enforced against a purchaser with notice, because he takes, having notice of a valid agreement concerning the property, which he can not equitably refuse to perform. 11 Gray, 364. L. R. 2 Ch. App. 72. 11 Beav. 571. L. R. 7 Eq., 200. Thus, where a brewer sold land to a building company which covenanted he should have the exclusive right of supplying all ale, beer, or malt liquors consumed in any building on the land that should be used as an inn, public house or beer shop, and another brewer acquired a portion of the land, with notice of the covenant, and built a public house and supplied it from his own brewery, he was restrained by injunction. Catt v. Fourle. L. R. 4 Ch. App., 654.

Again, where with full knowledge of the grant of a license, there is an exercise and enjoyment of a right conferred as the consideration of a license, it is evidence of ratification. Thus, the use of a right of way granted by a railroad company over its own land, in consideration of the license of an adjoining owner to permit a corner of one of its warehouses to be supported on his land, was evidence of a ratification against a subsequent purchaser of the property, although at the time of his purchase the warehouse was not built, and he had no notice then of the license. And the warehouse being destroyed by fire, and rebuilt upon the same foundations, and he having stood by while the company went on with

the work under an honest belief that he was satisfied with and had sanctioned the previous arrangement made before the warehouse was originally built, it was held that he was estopped. Cumberland Valley Railroad v. McLanahan, 59 Penn. St., 23. In view of the reconstruction of the lines and subsequent repairs by the telegraph company after the purchase under foreclosure, this fits the present case.

3. The third point presents a question that rises above the mere rights of the parties. As between them the railroad company may be estopped from refusing performance, but the question remains whether upon grounds of a public nature performance should be enforced. If the agreement is against public policy it should not be, and in a court of equity will not be.

So far as the design on the part of the railroad company was to secure a line of telegraph there can be no objection. In the operation of a railroad the use of telegraph is necessary. It is an adjunct without which transportation over single tracks at satisfactory rates of speed can not be maintained, or if maintained can be only at great increase of the danger of accident and loss. As a method of signaling the movement of trains its use is involved in the business of running the road, and as the perfection of means to the end there is no less a duty than a right upon the part of the company to employ it. Whether a telegraph line be constructed entirely by a railroad company, or whether the expense be shared by another, and whether such share be reimbursed in money or in services or other considerations by the company can make no difference. The agreement under consideration, at least, whatever may be the facts as to other agreements entered into by the telegraph company, contains nothing pointing to a partnership.

But the object of the telegraph company, besides obtaining a right of way, was to exclude rival companies. To this end are the stipulations of which violation on the part of the railroad company is threatened. One the principal that the telegraph company should have the exclusive right of way along the road for its lines. The other, the accessory, that the railroad company should not transport and deliver, except at regular stations and regular rates, any material for the construction of the lines of a rival company.

Agreements in restrain of trade are against public policy if the restrictions are general, but otherwise if limited or partial as to persons or place. Thus, an agreement not to carry on the trade of a candle-maker anywhere in the United States was held bad, but, within this county, the covenants being divisible, was conceded to be good. Lange v. Werk. 2 O. S. 519. For like reason an agreement to entirely discontinue the business of chemical works at a certain spot was upheld. Grasselli v. Lowden, 11 O. S. 349. Of the same character are agreements not to run a coach upon a particular road, 3 M. & W., 545; not to act as common carrier over a certain route, 6 A. & E., 959; not to pursue the calling of a common carrier during life, except as an assistant to one party, 2 M. & W., 273; not to oppose each other in a line of coaches, and to charge the same fares, 2 Chitty, 407. Such agreements must be reasonable, but the test is that the restraint shall not be larger than what, having regard to the subject matter, will afford fair protection to the interests of the party in whose favor it is allowed, and not interfere with the interests of the public. 11 O. S., *supra*. 1 E. & B., 391. L. R. 9 Eg., 345, 354. The consideration need not be adequate, it is sufficient if valuable. 11 O. S., *supra*. 7 C. B., 716.

The consideration of the agreement in question was valuable. It consisted in the obligation of the telegraph company to supply the material for constructing, maintaining and operating the lines. A main object was to secure freedom from competition, as a protection to the enterprise, and to that end the exclusive right of way was necessary. Whether, then, consideration attaching to the use of the right of way of a railroad, or to its facilities for transportation, are of such a nature as to involve, under the agreement, an interference with the interests of the public, is the question.

Touching common carriers at large, it may be conceded, upon the cases already cited that one can agree not to carry to a particular place or not to carry anywhere, except for a particular person; but this is, as to the particular route, or generally, if the agreement be general, a surrender of the character of common carrier. The character of common carrier imposed upon a railroad company, however, can not be surrendered. It is imposed as the consideration which the public are to receive in return for the grants and privileges under the charter. The company, perhaps, may abandon its franchise and cease operating its road, but until then, at least, the condition that it shall be a common carrier subsists.

The general duty of a common carrier is to deliver to consignees along his route. There is an exception in respect to railroad companies, which are only

required to deliver at depots or stations. 10 Met., 472. The reason is they run upon fixed tracks, at rates of speed that make stoppage inconvenient, except at particular places. It would not be required, therefor, that they should stop except where, in the exercise of the power to make reasonable regulations, places of stoppage are fixed. But a regulation that should require stoppages all along the line for a particular person, and should exclude from the privilege every other person, would not be reasonable. The regulation itself would be a surrender of the reason of convenience, but for which duty to the public would require stoppages without reference to depots or stations. The company, in the particular case, might be content to bear the inconvenience, but inconvenience in reference to public modes of transportation is inconvenience to the public, and if the burden is to be borne the privilege should be open, and the public admitted to share in the benefit. A regulation to deliver anywhere upon the line for all shippers but one, and to confine deliveries for him to regular stations, would be odious, and equally so would be the discrimination, if in favor of one and against all the rest. The power to regulate transportation over a road does not carry with it the right to exclude any particular individuals, or to grant exclusive privileges to any. It results from the nature of the right to take tolls, that the benefits should be extended to all alike, and that no special privileges should be granted to one man or set of men and denied to others. 24 Penn. St. 378; 20 N. J. Eq., 379; 11 Kan., 602.

The stipulation not to deliver for other telegraph lines, except at regular stations, bound the railroad company in the present case to a discrimination of this kind. By another part of the agreement it was bound to deliver anywhere along its roadway for a particular line of telegraph; by this part it was bound not to perform like services for any competing line. It is no answer to say that, in transporting material for the competing line, the company was upon its own business. If a railway company enter upon a business, even though connected with its own management, which involves completion, it can not discriminate in favor of itself. Equality among all must exist up to its capacity to accommodate, at the same rates for transportation, and as far as possible in accommodation. 62 Penn. St. 230.

With respect, however, to the stipulation reserving the right of way for exclusive use of the telegraph lines, the case is different. That did not interfere with the interests of transportation. The public had no paramount rights, such as attached to the running of the road. To construct and maintain a line of telegraph was within the purview of the power, of the railroad company, and the use of its right of way for that purpose, an appendage to its business. The distinction is the same, as that taken in a Pennsylvania case, where special privileges of doing business in the warehouses of a railroad company, were conferred upon its agents Cumberland Valley R. R. Co.'s appeal. 62 Penn. St. 218. The exclusive use for a telegraph line did not concern the railroad company, in its relation to the public as a carrier, and only in such relation did the duty of equality exist. Nor apart from this, are any other reasons of public policy to be found. There is a statute, that use of the right of way of a railroad, for the construction of a line of telegraph may be obtained by a condemnation. If this would indicate that there should be a line of telegraph along every railroad, it is sufficient that the agreement secures a line along this railroad. If the argument is, that the property may be condemned for the use, and therefore there should be no restriction against the use, the same argument would destroy all restrictions upon the use of property, for all eminent domain. That it may be taken for a particular use, imposes no obligation to leave it free for that use.

Equity, where it can not execute the principal part of an agreement, will not compel specific performance of the accessory. 3 McQ. H. L. Cas., 382. But here, the stipulation as to right of way is principal, while that touching transportation is accessory. They are divisible stipulations and the law does not forbid the one, although it does the other. The defense of illegality, urged by a party to avoid performance of a stipulation, for which he has received the consideration contracted for, is not regarded with favor in equity. 16 Beav. 451. And where an agreement is only in part illegal, the court, if it be possible to divide, will enforce the legal part. 3 J. & L., 200.

If an agreement is of such nature that, consistently with the rules and principles of equity, it can be specifically enforced, injunction is a proper remedy against the violation of negative clauses. The ground of jurisdiction is the necessity of preventing multiplicity of suits, as well as the difficulty of estimating the damages at law. And although affirmative parts of an agreement may be incap-

able of execution, relief will not be withheld in respect to negative parts, where they are independent, substantive and distinct. L. R. 4 Ch. App. 654, 660. 3 K. & J. 675. Kerr on Injunctions, pp. 495, 529. High on Injunctions, Secs. 713, 714, 734, 735.

It results that so far as concerns the right of way, but not as to the privilege of transportation, the case is a proper one for relief. There is a question touching parties. But the Atlantic & Pacific Telegraph Co., although stranger to the agreement, threaten to violate plaintiff's right under it. The Cincinnati, Hamilton, Indianapolis R. R. Co. denies that the threatened violation is by a contract with it. The right of the plaintiff, however, is to protection against the act, whether it is to be accomplished by express authority from the railroad company, or simply by tacit consent. The right to protection makes it necessary that the railroad company should be party, for otherwise it would be impossible, against the real party, to award proper relief.

A temporary injunction, therefore, will be granted against the Atlantic and Pacific Telegraph Co., as threatening an act which would produce great and irreparable injury to the plaintiff; and against the Cincinnati, Hamilton & Indianapolis R. R. Co., and Cincinnati, Hamilton & Dayton R. R. Co., which admits all allegations of the petition, as parties, through whom, it is necessary to reach the Atlantic and Pacific Telegraph Co. The order will restrain the defendants, until final hearing from erecting poles and from establishing a competing line of telegraph upon the right of way. The amount of the bond will be fixed at $10,000.

Collins & Herron and Hoadley, Johnson & Colston, for plaintiff.

Matthews, Ramsey & Matthews, for defendants.

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225 ALTERATION OF INSTRUMENTS—CONTRACTS.

[Lorain District Court, 1876.]

Prentiss, Cadwell and Jones, JJ.

HORR, WARNER & CO. PHIL. v. HAWKHURST.

1. Where H. & W. endorse their guaranty of performance of a contract, on a form, and before its execution by or delivery to B it is altered by an erasure, B, not knowing of the alteration, a subsequent ratification of the act of erasure binds H. & W. If, after they became aware of the erasure, they knew plaintiff was going on under the contract and in reliance of their guaranty, and they acquiesced in or adopted such alteration, they were bound, although they did not communicate such acquiescence to B; but mere knowledge without action is not ratification, but affirmative assent by acts or words is sufficient, and the ratification may be by parol.
2. Where a guaranty of a contract that a person would receive and pay for milk for a cheese factory, provided that a person would not reserve for his own use a larger proportion of his milk during the early and late months than during the hot months, a trifling departure from this proportion is no defense *de minimis non curat lex*. Only a substantial departure will constitute a breach.

PRENTISS, J.

The plaintiff in error was defendant below, and the defendant in error was plaintiff below.

The plaintiff below brought this action to recover of the defendants a sum of money claimed to be due him, from one John C. Clark, upon a certain written contract, for the sale and delivery of milk for the season of 1875, by plaintiff to said John C. Clark, a copy of which contract was set forth in the petition, and upon the back of which plaintiff averred defendants had guaranteed to him the performance thereof by Clark. A copy of the alleged guaranty was also set forth; performance by plaintiff, and failure to perform by Clark averred, and judgment asked against defendants.

Defendants answered, denying that they ever guaranteed the performance by Clark of the contract set forth in the petition; and setting up that they did endorse a guaranty upon a form of contract, which said Clark proposed to use for making purchases of milk, for his cheese factory, for the season of 1875, and set forth a copy thereof and of their guaranty; but denied that the plaintiff and said Clark ever entered into said contract upon which they had so placed their guaranty.

The reply averred that the contract sued upon was the same as that signed by the plaintiff; and that, if any change had been made therein, it was prior to the signing thereof by the plaintiff; denied that any change had been made therein since the guaranty was written; and also set up certain facts which tended to show that, if any change had been made, defendants had ratified it. The evidence tended to show that one clause of the form of contract, on which the defendants had written their guaranty, had been erased before it was signed by Hawkhurst; that Hawkhurst did not make the change, nor knew it except from the appearance of the paper; that it was made without defendant's knowledge or consent, and that they had not assented to it. There was also evidence tending to show that defendants had ratified and confirmed the alteration.

The fifth clause of the contract between plaintiff and Clark provided that the parties of the second part (one of whom plaintiff was) should "not reserve for their own use a larger proportion of their milk during the early and late parts of the season than they reserve during the hot months, and the same shall not exceed the milk of— cows." And there was evidence on the part of the defendant tending to show that the plaintiff delivered about twice as much milk in June and July as he did in April, and that he kept out as much in April as he did in June and July; but the evidence on the part of defendant tended to show that the amount reserved was very small, being about three quarts a day for the whole season.

The exceptions in the case are to the charge of the court as given. The court below charged as follows:

"That the burden of proof was on the plaintiff to show either no change in the contract, or a ratification of it by the defendants. This must appear from the whole evidence affirmatively." This charge, we think, is as favorable to the defendants as they can ask. The court further charged the jury: "The erasure of the fourth clause, if made after the guaranty was executed and delivered, by the defendants, without their assent or authorization, would discharge them from liability, and they can, in such case, be held liable only in case of ratification." In that particular the charge is unexceptionable. The court below them proceeded to instruct the jury upon the subject of ratification and considerably in detail. He instructed them as follows: "If the defendant had no knowledge of the erasure of the fourth clause of the contract, and it was erased by some one not authorized by them to erase it, they are not liable on it, for the very good reason that there was no acceptance of the proposition or offer to guaranty by them made, and upon the terms made.

"If the terms of the contract, the performance of which by Clark they proposed to guaranty, were changed without their knowledge or assent, they cannot be held unless they assented to the alteration after they had become aware of it. If, upon ascertaining the change, they adopted it, or ratified the act of the person making the change as their act; assented to the contract in its altered form of condition as their contract—accepted it as the one they undertook in the first place to guaranty, then they are

bound to it as fully as they would have been by the original contract had the erasure not taken place.

"Ratification is sanctioning and adopting the act of another, accepting it as done for the one ratifying. An assenting to it after it has been performed or done and recognizing it as a valid act.

"If there was such assent or adoption, in other words such ratification of the act, it is as binding on the defendants as if the act of erasure had been by their express authority previously given. If there was no such assent, nor such ratification, then the defendants are not liable, if the erasure was made without their authority. To determine whether the defendants ratified and adopted this act of erasure as their act, you must look to the testimony. If, after they became aware of the erasure in fact, they knew that the plaintiff was delivering his milk to the factory under the contract and in reliance upon their guaranty and they acquiesced in the erasure or alteration and adopted it, they are bound by it, although they did not communicate to the plaintiff the fact of such acquiescence and adoption. It was not necessary that ratification should be in or by writing, it is sufficient if by parol. An affirmative assent either by words or acts to the erasure of the fourth clause would be a sufficient ratification. Positive dissent by the defendants was not required to avoid liability or action, mere knowledge of the change, with no action upon it by the defendants would not work a ratification." This seems to us sound law. In regard to the fifth clause in the contract the court instructed the jury that "the plaintiff had a right, under that clause, to keep back a reasonable amount of milk for the use of his family. He had no right to keep out more in proportion to the whole quantity produced, in April than in the summer. If he did keep back very much more proportionately for that purpose in April than in the summer it would be a violation of the terms of the contract. But the law does not regard trifles, and if you find that the whole amount retained was very small, so as not to amount to a substantial departure from the terms of the contract, the plaintiff would not be precluded from recovering on that account, if the proportion was not the same in April as in the summer. But if he retained any considerable amount, so as to make a substantial violation of the contract, he cannot recover unless the retaining was by the consent or ratification of the defendant." We see no error in the charge in this particular. There must be a substantial departure from the terms of the contract by the plaintiff to defeat a recovery.

Judgment affirmed.

J. H. Dickson and Hale and McLean, for plaintiffs in error.

Pennewell & Lamson, for defendant in error.

226

DEEDS.

[Lorain District Court, 1876.]

Prentiss, Cadwell and Jones, JJ.

*PETER J. SCHLEIF v. JOHN W. HART.

The "east half" of a certain parcel of land means the exact half in quantity.

ERROR to the Court of Common Pleas of Lorain county.

CADWELL, J.

The plaintiff in error was the defendant below, and the defendant in error was the plaintiff below.

*This case was reversed by the supreme court. See opinion, 29 O. S., 150.

The original action was ejectment to recover possession of a portion of the "east half" of the southwest division of section 17 in Carlisle township.

The plaintiff offered evidence to show title in himself to the east half of said division and then offered evidence to show that the fence between him and the defendant (who owned the west half of said division), was east of the line which divided the division into two exactly equal parts and that defendant was in the possession of a portion of such exact east half, being the land described in the petition, and rested. The defendant offered evidence of his title to the west half of said division and then offered to prove that one Herman Ely, who formerly owned the whole of said section 17 and the sections directly north and south of it, had many years ago, and while he owned the whole of said sections, caused said sections to be surveyed into six divisions each, namely: southwest, west-middle, northwest, northeast, east middle and southeast, and lines of such divisions to be marked and established. This was conceded by the plaintiff. Defendant then offered proof that said Ely had caused a line to be run and marked through the west divisions of said sections, which ran near but a few rods distant from the middle of said southwest division of section seventeen; that he had marked said line on his map of said sections and had pointed it out both by himself and his agents as a permanent boundary line between the subdivisions of said division; that he had, with others, petitioned for a county road upon said line, and that the commissioners had laid out and established a road thereon, but that said road had never been opened on said section seventeen; he further offered to prove that deeds had been made bounding on said line in the vicinity and that it was generally known and recognized in the neighborhood as the line between the east and west halves of said divisions and was the line intended by the deeds as the boundary line between the east and west halves of said southwest division of section 17. The plaintiff objected to the testimony so offered by the defendant and the court sustained the objection and excluded said evidence.

It appeared in the case that the premises in controversy had formerly belonged to Herman Ely, who died in 1852 and that by partition among his heirs the whole of said section became the property of Albert Ely, under whom both parties claim.

It is only necessary, in announcing the conclusion at which we have arrived, to go directly to the charge of the court below. All the errors alleged in the case are included under two heads: That the court erred in excluding the evidence offered by the defendants below, and that he erred in the instructions given to the jury and in refusing to instruct as requested by the plaintiff below. If the charge to the jury was correct, then the exclusion of the evidence was correct; and, if the exclusion of the evidence was right, the charge was right. In the charge to the jury the court below say: "The partition deed between Herman Ely, Albert Ely, and C. A. Ely set apart and conveyed to Albert Ely the southwest division of section 17 in Carlisle township."

By the deed from Albert Ely to Thomas Graham, dated July 28, 1862, Ely conveyed to Graham the east half of the southwest division of section 17, said Ely reserving to himself and his heirs forever the right of occupying for a public highway a strip of land two rods in breadth to be taken from the west side of said land. The title to said half of said division passed by said grant to Graham, subject to the right of Ely and his heirs to use the strip two rods wide for a public highway. The deed from Graham to the plaintiff dated Dec. 18, 1873, conveyed to the plaintiff the east half of said southwest division of said section 17.

So much of said east half of said southwest division as is described in the petition of the plaintiff and as is unlawfully in the possession of said defendant and wrongfully withheld by him, the plaintiff is entitled to recover. The deed from Ely to Graham of the east half of said southwest division was executed and delivered July 28, 1862, and the deed to Coughlin from Ely of the west half was dated June 29, 1864. The deed from Ely to Graham conveyed the east half and, at the date of the deed to Coughlin, Ely did not own any of said east half to convey; nor does his deed to Coughlin purport to convey any land except the west half of said subdivision. The half conveyed to each is the mathematical half in quantity "the court having excluded evidence to show that the line was an old surveyed line and road line." The court held that the deed interpreted itself and that extrinsic evidence was not admissible to give any other interpretation, and therefore excluded it.

In the deed of Ely to Graham the description is as follows: "The east half of the southwest division of section seventeen, containing fifty-four acres and eighty-

four hundredths of an acre of land (54.84-100) be the same, more or less, but subject to all legal highways, said Ely reserving to himself and his heirs forever the right of occupying for a public highway a strip of land two rods in breadth taken from the west side of the above described land." In the deed from Graham to Hart the description is the same except there is no reservation. The deeds to Schleif and his grantors purport to convey the west half of the same division by a similar description and the same quantity of land. The court supposed from the deeds that Ely intended to convey the mathematical half; and that, if he had any other meaning, he had failed to express it, and that the court could not go outside the deed to find it. It is clear from the deeds, if we look at them alone, not only from the conveyances from the east and west half, but from the amounts of land being the same, that the parties proposed to divide the land in the middle; but the question was whether the court could go outside the deed to ascertain the intention.

We are unable to say that the court was wrong in holding it could not.

Judgment affirmed.

R. P. Ranney & N. L. Johnson, for plaintiff in error.

Hale & McLean, for defendant in error.

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226 **ANIMALS—FENCES.**

[Lorain District Court, 1876.]

Prentiss, Cadwell and Jones, JJ.

*M. W. PHELPS v. JOEL COUSINS.

Owner of land is not bound to fence against stock habitually breachy and unruly.

ERROR to the Court of Common Pleas of Lorain county.

CADWELL, J.

The plaintiff in error was defendant below, and the defendant in error was plaintiff below.

The case came into court below by appeal from a justice of the peace. The action was for a trespass by the horses of the defendant below upon the land of the plaintiff below, the parties being owners of adjoining lands. The petition averred that the trespassing horses were unruly and accustomed to jump fences, and that the defendant knew that fact; and that they unlawfully entered plaintiff's land, and did damage to his crops; and asked judgment.

The answer was a general denial.

The evidence of the plaintiff tended to show that the defendant's horses were breachy and unruly, that he knew it and that they entered plaintiff's land through that part of the line fence which it was the defendant's duty to maintain; and that said fence was low and poor and insufficient to his stock. The defendant's evidence tended to show that the horses entered plaintiff's line through that part of the line fence which it was the plaintiff's duty to maintain, and that fence was poor and low and insufficient to turn stock. Thereupon the court below charged the jury, among other things as follows: "If the defendant's horses were habitually breachy and unruly and, being thus habitually breachy and unruly, broke and entered the close of the plaintiff, over and through that portion of said fence that said plaintiff was to keep up and in repair, he is entitled to recover for such entry, whether his fence was effectual to restrain stock not unruly or not."

The court below in his charge to the jury must have had in mind two statements of the common laws of the state with regard to breachy and unruly animals, made by the supreme court. In Kerwhacker v. C. C. & C. R. R. Co., 3 O. S., 172, the contrary on p. 183. "The right, however, to all animals to run at large has its qualifications. The owner of animals known to be mischievous and dangerous, is bound to confine them, and if he omit this duty he is responsible for any loss or damage which any other person may suffer thereby. And whenever the owner is notified of the fact that any of his creatures at large have become troublesome by means of breachy, unruly and dangerous habits, it is his duty to take them up without delay and to confine them." This doctrine is again

*This case was reversed by the supreme court. See opinion, 29 O. S., 135.

recognized in M. & C. R. R. Co. v. Stephenson & Brown, 24 O. S., 48. We think these two recognitions of the rule by the supreme court justified the court below in its charge. We cannot say that there was any error in the record.

Judgment affirmed.

N. L. Johnson & J. W. Coon, for plaintiff in error.

Hale & McLean, for defendant in error.

DEEDS—EVIDENCE. 226

[Lorain District Court, 1876.]

Prentiss, Cadwell and Jones, JJ.

E. G. L. FITZGERALD v. L. S. & T. RY. CO.

Where a deed grants lot 14 on the village plat of Black river, parol evidence is admissible to show that by "village plat" the recorded plat was not meant, but that the proprietors bought additional lands in order to extend said lots and other lots to the river, and made a new plat, extending said lots and sold from such plat, which was never recorded and that such plat was meant.

ERROR to the Court of Common Pleas of Lorain county.

CADWELL, J.

The case was ejectment to recover a certain portion of "lot No. 14 on the village plat of Black River."

The court held, reversing the judgment of the court below, that, by the language "Village plat, etc.," it was not to be conclusively presumed that the recorded plat of said village was meant; but that evidence was admissible to show that, after the making and recording of the recorded plat, the proprietors bought additional land for the purpose of extending said lot 14 and other lots to the bank of the river, and made a new plat upon which said lots did extend to the river, and were accustomed to sell lots from such new plat (which was never recorded) and that said new plat was the one intended, in the deed to the plaintiff, by the language "village plat of Black river."

C. W. Johnston & S. Burke, for plaintiff in error.

J. C. Hale and J. W. Coon, for defendant in error.

CORPORATIONS. 227

[Lorain District Court, 1876.]

Prentiss, Cadwell and Jones, JJ.

JOS. C. HENDERSON v. G. HOGAN ET AL.

1. It is not necessary that a subscriber to stock shall have paid up his stock in order to be entitled to vote thereon, but the subscription and its acceptance constitute them stockholders.
2. Ownership of stock is necessary to eligibility for directorship in a manufacturing corporation. This is inferable from the provision that a director shall cease to be such on ceasing to be a stockholder.
3. Where the owners of a majority of stock vote a ticket for directors on which part of the candidates are ineligible and by reason of the wrongful denial of the right of such owners to vote, the minority ticket is declared elected, the court cannot, on *quo warranto*, induct the eligible candidates on the majority ticket, where, by reason of all the minority candidates having received the same number of votes, it can not be said which was and which was not elected. In such case the election will be set aside and a new one ordered.

Information in the nature of a *quo warranto* by himself and three others named in the information.

PRENTISS, J.

The realtor claimed that himself and three others named in the information were directors of the Lorain Stove Co., a corporation organized under the laws of Ohio; and that the defendants had usurped the office of directors of such corporation, and unlawfully held and exercised the same, and kept the relators from controlling the affairs of said corporation as they had a right to do; and asked that the respondents be expelled and relators inducted into said office of directors of said Co. It appeared that at the election for directors of said company for 1876, Shaver and Henderson had offered to vote for directors upon 150 shares of stock, that upon their tickets were the names of themselves and of two others, that the judges of election decided that they were not stockholders and hence, not entitled to vote; that Shaver and Henderson had subscribed for 150 shares of the stock of said company, that said subscription had been accepted; but there was evidence tending to show that said Shaver and Henderson had not paid up their said stock. It appeared that the respondents received each 96 votes and were declared elected. It appeared also that two of the persons, whose names were on the ticket of said Shaver and Henderson as candidates for directors of said company were not stockholders therein.

It was held: That it was not necessary that Shaver and Henderson should have paid up their stock in order to be entitled to vote thereon. The subscription of Shaver and Henderson of the 150 shares of stock, and the acceptance of such subscription by the corporation constituted them stockholders, and gave them the right to vote on their stock. But that persons not stockholders in a manufacturing corporation are not eligible to be elected directors thereof. The statute provides substantially that a director of a manufacturing corporation shall cease to be such when he ceases to be a stockholder therein. From this it is clearly inferable that the ownership of stock is a necessary qualification for the office of director of a manufacturing corporation under the laws of this state. Since two of the persons voted for on Shaver and Henderson's ticket were ineligible and the respondents all received an equal number of votes, it is impossible to say which of them was elected. The election is therefore set aside and a new election is ordered.

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227 **BILLS AND NOTES.**

[Lorain District Court, 1876.]

Prentiss, Cadwell and Jones, JJ.

*JARED M. HOOD v. J. J. NICHOLS ET AL.

Where the signature of one of the makers of a note was made by some one else without authority of such maker, and was a mere forgery, such signing could only be ratified on a consideration moving to such maker or from the payee, and the mere promise not to sue without fixing a time is not a consideration; but an agreement to extend for a given time, or until plaintiff should notify defendants to pay, would be a consideration.

PETITION IN ERROR to reverse the judgment of the Court of Common Pleas of Lorain county.

CADWELL, J.

The distinction between said contractors and those that are capable of ratification seems to be well defined and it is that those are void which

*For common pleas decision, see *ante* 157.

are illegal. It is claimed that the court below went too far and may have misled the jury in saying to the jury: "If the signing of defendant's name to the note was not done by him nor by his authority, but was a forgery, etc.," We think the testimony of the defendant, as set forth in the bill of exceptions clearly tended to establish a forgery. We find no error in the record and the judgment will be affirmed with cost.

RAILROADS. 227

[Lorain District Court, 1876.]

Prentiss, Cadwell and Jones, JJ.

*W. T. SHELTON v. L. S. & M. S. RY. CO.

The owner of a commutation ticket is not entitled to ride on the cars of the railroad company after such ticket has been taken up and cancelled by the company, though such taking up was wrongful.

ERROR to the Court of Common Pleas of Lorain county.

PRENTISS, J.

After stating the case and the regulation of the company mentioned in the statement above referred to.

The regulation was a reasonable one. There is no question about that. It was a general one under all the contracts the company makes with its passengers. All its contracts with passengers are made in reference to it and subject to it.

This action is not brought for the breach of any contract, but for the tort consisting in removing the plaintiff forcibly from the train. The court below told the jury the plaintiff was bound to conform to the regulations, and if he refused to do so it was the right and duty of the conductor to eject him from the train.

If the charge was wrong, it was wrong because the regulation did not apply under these particular circumstances. If it was wrong, it was wrong by reason of the wrongful act of the other conductor, the one on the morning train, in depriving the plaintiff of the evidence of his right to ride. We are unable to see how the wrongful act of the other conductor could make an act done in conformity to the regulation wrongful; or justify Shelton in his refusal to leave the train under the circumstances under which he was requested to do so.

Taking up the ticket constituted an actual breach of the contract. It determined and put an end to it, so far as it is possible for one party to a contract to do so; and the consequence was, that, if the railroad company was responsible for that act of the conductor, plaintiff had a claim against the railway company on which he might have brought an action, or if the company was not responsible for that act of the conductor, there he had a cause of action against the conductor, and in either case it constituted no excuse to Shelton for refusing to comply with the reasonable regulation of the company. If one makes a contract he has a right to put an end to such contract whenever he will; but he thereby subjects himself to an action for any damages that may have been sustained by the other party in consequence of such action on his part.

This very question was passed upon in Townsend v. N. Y. C. & H. R. R. Co., 56 N. Y., 295. That case cannot be distinguished from this one. The judges also referred to the case of Crawford v. C. H. & D. R. R. Co., in Hamilton county district court *ante* 121, and said he could not see how it was distinguishable in principle from the present one. A majority of the court think the charge below was correct.

Judgment confirmed.

Cadwell, J., concurred.

Jones, J., dissented.

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*For common pleas decision see *ante* 161. The district court was affirmed by the supreme court. See opinion, 29 O. S., 214.

227 JUDGMENT—JUSTICE OF THE PEACE.

[Lorain District Court, 1876.]

Prentiss, Cadwell and Jones, JJ.

*KEITH v. FAIRCHILD ET AL.

The entering of judgment in the proper form on the docket and issuing execution thereon, by a justice of the peace after rendering a judgment in a case, were ministerial duties of the justice, for the non-performance of which an action will lie on his official bond.

ERROR to the Court of Common Pleas of Lorain county.

JONES, J.

Questions of considerable importance have been argued, and, to some extent, considered by the court in this case; but we content ourselves with holding that the petition below contained a plain averment that the plaintiff "recovered a judgment" before the justice and that the justice failed to perform the ministerial duty of issuing an execution thereon, and that these were sufficient to constitute a cause of action. We think the demurrer was not well taken, and that the court below erred in sustaining it.

Judgment reversed.

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234 INJUNCTIONS.

[Mahoning Common Pleas, 1876.]

ATKINS v. VEACH.

In an action to recover specific personal property, an injunction lies to prevent defendant from disposing of it, although defendant may have ample property to satisfy the plaintiff in any pecuniary demand.

CONANT, J.

The plaintiff filed his petition, alleging himself to have been the owner of certain promissory notes, which he was induced to part ownership with to the defendant for some Rolling Mill stock. Plaintiff further alleged that the representations made by the defendant to induce plaintiff to part with the notes were fraudulent, and the rolling mill stock worthless; and prayed for recovery of the notes; also asked for an injunction to restrain defendant from parting with the notes, and to restrain the makers from paying said notes, which was allowed. Defendant filed a motion to dissolve the injunction, showing himself to be the owner of sufficient property in this state to satisfy the plaintiff in any demand.

Held, that where specific property is sought to be recovered, an injunction restraining the defendant from disposing thereof is properly allowed, although defendant may be amply able to satisfy all pecuniary demands the plaintiff might have against him.

Motion dismissed.

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*For decision of common pleas see *ante* 162. The district court was affirmed by the supreme court. See opinion, 29 O. S., 156.

EXECUTIONS—REPLEVIN—PARTIES. 234

[Cuyahoga District Court, 1876.]

Boynton, Watson and Finefrock, JJ.

CONRAD DEUBLE v. GEORGE H. KOLBE ET AL.

1. Where a constable levied certain executions on property worth about six hundred dollars, and it was replevied from him before the defendant, a justice of the peace, and it was appraised at over three hundred dollars, but the justice did not certify the case up to common pleas, nor did he make any record of his proceedings, and the constable sued on his bond for the amount of the appraisement. *Held:*
2. The constable is the real party in interest, and can maintain the suit.
3. It is no defense that, without any fault of the justice, the papers were stolen, so that he could not make any record of the case, or certify up.
4. It is no defense that the plaintiff in the replevin case is, and was, willing to consent to a substitution of such papers as would give the common pleas court jurisdiction.

ERROR to the Superior Court of Cleveland.

The petition sets forth that in February, 1874, the plaintiff was a constable, and by virtue of his office, held, under certain writs of execution, a hack valued at upwards of six hundred dollars. The sums due under the executions amounted to three hundred and thirty dollars and ninety cents. A suit in replevin was commenced by one Isabella Keany to obtain possession of said hack, under a claim of ownership, before defendant, George A. Kolbe, at that time a justice of the peace. The other defendants are bondsmen of Kolbe. On the return day of the summons it appeared that the property was appraised at more than three hundred dollars. Under the law the plaintiff claims the justice was bound to certify his proceedings in the case to the court of common pleas and file the original papers therein, together with a certified transcript of his docket entries in the clerk's office of said court. This the justice failed to do; and he also failed to make any record of his proceedings. The plaintiff asks for damages in the sum of three hundred and thirty dollars and ninety cents, that being the sum total of the executions in his hands. The defendants deny in the first place that the constable is the proper party, plaintiff, he not being the real party in interest. In the second place they aver that without any negligence or carelessness on the part of defendant Kolbe, the papers were stolen, and that he is not liable for the consequence of such larceny; and thirdly, they aver that plaintiff is well aware that said Isabella Keany was and is now willing to consent to a substitution of such papers as would give the court of common pleas jurisdiction.

To this answer plaintiff demurred. The court below overruled the demurrer and then insisted that the plaintiff should consent that it be treated as a demurrer to the petition. It then sustained it.

To this the plaintiff demurred.

Held, that the demurrer to each of the several defenses set up in the answer was well taken, and the judgment of the court below is reversed.

277 **AGENCY—MORTGAGE.**

[Superior Court of Cincinnati, General Term, October, 1876.]

SAMUEL S. CASE v. WM. C. KINNEY AND JOEL F. KINNEY.

Where a lessee of property is bound to pay taxes, and the property sold for non-payment of taxes, and the purchaser obtains possession, and a suit in ejectment by the lessee against such possessor results in favor of the latter, and afterward a brother of the lessee without authority makes a mortgage in the lessee's name, on the property, which comes into the hands of the defendants, who bring suit against the buyer at tax sale to recover the property, and pending such suit such mortgagees and the lessee make a contract whereby the lessee deeds them the property, in order to enable them better to conduct the suit, they to deed it back, if successful, on receipt of the amount of their mortgage, or to pay him the difference between the mortgage and the supposed value of the property, and if unsuccessful, agree to charge nothing, such agreement being made without deception, and the lessee understanding the material facts and the value of the property as well as such mortgagees, the agreement is valid, and ratifies the unauthorized mortgage.

O'CONNOR, J.

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

The action below was to set aside a contract and deed upon the ground of fraud. The plaintiff below is the plaintiff in error, judgment having been rendered for the defendants.

The contract sought to be set aside grew, in part, out of previous litigation in reference to a leasehold.

In 1849 Henry Clark, of Cincinnati, leased to Elijah C. Case, for the term of ninety-nine years renewable forever, certain premises on the east side of Lodge street, between Fifth and Sixth streets, in this city. E. C. Case assigned the lease to one Ford, who shortly thereafter assigned the same to the plaintiff, S. S. Case, brother to E. C. Case, the original lessee. The lease did not provide for a forfeiture in case of breach of conditions, but provided that the lessor might re-enter until the back rent and taxes were paid.

1. In January, 1858, the assignee, S. S. Case, being in default for the non-payment of taxes for the years 1856 and 1857, and also being in default for rent, the property was sold at a tax sale to one Samuel Stokes for $115.00, who assigned his claim to Henry Clark, the lessor, who then leased to Adolphus Lotz, and two years thereafter obtained a deed from the auditor for the premises. Lotz has ever since been in possession of the leased premises.

2. In 1860 S. S. Case brought an action of ejectment against Lotz to recover possession of the premises, which resulted in a judgment for the defendant, the court being of opinion that Case had mistaken his remedy.

3. In 1865 Henry Clark brought his action against S. S. Case to forfeit the lease. Case filed an answer and cross-petition to redeem, and for an account, and thereupon Clark dismissed his petition, and the action is still pending on the cross-petition of Case.

4. In 1852 S. S. Case executed to his brother E. C. Case, a power of attorney, constituting E. C. Case, his attorney in fact for the term of ten years, or until 1862, which was duly recorded. In 1864 S. S. Case gave his brother, E. C. Case, a second power of attorney, which after some delay was also put on record.

Between the expiration of the first power and before the execution of the second, E. C. Case, on the 11th of June, 1864, executed five promissory notes in the name of S. S. Case, one for $400 and four for $1,000 each payable to Geo. F. Case, his son, or order, in one, two, three and four years after date, and all secured by mortgage on the leased premises on Lodge street, and delivered the notes and mortgage, as claimed by Kinney, the defendant in this action, to Geo. F. Case.

Geo. F. Case, in January, 1867, at Nashville, Tenn., for the consideration of a horse and buggy, valued at $800, assigned the fourth of this series of notes, as claimed by the defendant in this case, and so much of the mortgage as secured it, to William C. Kinney, the defendant in this action.

5. In March, 1873, Kinney filed his petition in this court to foreclose his mortgage against S. S. Case, making E. C. Case, Adolphus Lotz and Henry Clark, parties defendant.

On the 23d of January, 1874, the defendants in this action, William C. Kinney and Joel F. Kinney, his brother, called upon the plaintiff S. S. Case at his place of business at South Bend, Indiana, and, as stated in the petition, "informed him of the existence of said note and mortgage, which the petition alleges Case was ignorant of until so informed, and of the pendency of the suit brought by said William C. Kinney upon the same. That said defendants represented to the plaintiff that said note was a valid and legal claim against him, that the same was secured by the said mortgage, and that said mortgage was a valid lien upon said leasehold estate. That said Wm. C. Kinney and plaintiff had a common interest in the aforesaid suit brought by Henry Clark against plaintiff. That said suit had been entirely abandoned by plaintiff's attorneys; that in consequence thereof a decree had been entered by the court forfeiting said leasehold estate in favor of Clark; that said decree had been set aside through the intervention of the attorney of said Wm. C. Kinney, and that but for his efforts the claims of this plaintiff would have been entirely lost. That said Kinney by virtue of the mortgage aforesaid had brought suit against Clark and said Lotz for the recovery of said property, which was done in the interest of both plaintiff and himself; that he, said Kinney could not conduct said cause successfully unless plaintiff conveyed said property to him; that immediate action was necessary, and that unless plaintiff was willing to take their word for the truth of their statements, the delay necessary for investigation would prove fatal to the plaintiff's claim, as the time for issuing process would have passed, and the case would be dismissed for the want of tender of back ground rent. Defendants also represented that the property in controversy in said suit was worth not to exceed $3,000, and that the claim of said Kinney with interest and costs of prosecution of suit would amount to about $2,000. That said defendants, after making said representations, proposed to plaintiff that said Wm. C. Kinney should prosecute with vigor said suit; that to enable him to do so successfully plaintiff should convey to him the property in controversy; that if successful in the suit said Wm. C. Kinney should pay to plaintiff $1,000, or if plaintiff should so elect, said Kinney should convey the property to him upon plaintiff paying him the amount of his pretended mortgage with the interest upon the same and the costs and expenses of said litigation. Plaintiff says that this proposition of defendants appeared to him to be fair and reasonable, in the light of the representations made by them and in the truth of which he

placed implicit confidence," and thereupon the parties entered into a written agreement, which is set out in full in the petition, binding themselves to the performance of the proposition of Wm. C. Kinney; and thereupon S. S. Case, the plaintiff, executed and delivered to Kinney a quit claim deed for the property.

The petition further states that the representations made to the plaintiff by Kinney, and on the faith of which plaintiff entered into said agreement and executed said deed, were wholly false, etc.; that said note for $1,000 was not a valid or legal claim against the plaintiff, and was not secured by said mortgage, and that said mortgage was not a valid lien upon said leasehold estate.

The petition prays that the contract and deed be set aside for fraud, etc.

The defendant, Wm. C. Kinney, for answer, denies that certain of the representations charged were made, and that the other representations were made in good faith and were true. That the plaintiff, Case, had full knowledge of all the material facts before he saw the defendant, and entered willingly into the contract sought to be set aside. That he knew that the note which he, Kinney, presented to him was made by his brother, E. C. Case, after the first power of attorney had expired, and before the second power had been given, and also that he the plaintiff had been informed by his brother, E. C. Case, that such a note was in existence, and to look out for it, and further that the plaintiff was more familiar with all the litigation concerning the said leasehold premises than he, the defendant, was, and was equally as well informed as to its value.

The judgment at special term was for the defendants Wm. C. and Joel Kinney. It is now sought to reverse this judgment.

Without reviewing in detail the testimony contained in the bill of exceptions, we think it sufficient to say that it satisfied us, that the plaintiff S. S. Case, before he saw the defendants, had at least sufficient knowledge of all the material facts to enable him to enter intelligently into the contract he seeks to have set aside.

In the first place, the evidence shows he knew of the existence of the note held by Wm. C. Kinney, and in the second place he knew that said note was made in his name by his brother E. C. Case, without authority, and therefore was not binding on him, and that the mortgage given to secure it, was also given without authority and was void.

It was claimed on the hearing that the note given by E. C. Case to his son, Geo. F. Case, and by Geo. F. Case to the defendant, Wm. C. Kinney, being the note in question, was not secured by any mortgage, but one of four notes, for one, two, three and four years, given by E. C. Case to his son for the purpose of making a trade, and that the trade not being made, Geo. F. Case had agreed to return them to his father, which he neglected to do. These four notes were made by E. C. Case in the name of S. S. Case, about the same time the four notes mentioned in the mortgage were made, and were consequently also made without the authority of S. S. Case. It was further claimed that no one of the four notes which are mentioned in the mortgage was ever delivered to Geo. F. Case, but are yet in the possession of his father, as shown by the testimony, and that the note which Geo. F. Case transferred to Wm. C. Kinney, was the fourth of the first series of notes, the date being altered by Geo. F. Case to correspond with the description of the note mentioned in the mortgage, and was therefore a forgery. On the part of the defendant it was claimed

that the note was one of the notes secured by the mortgage, and that the four notes now in possession of E. C. Case, are copies of the original notes made by E. C. Case at the time he delivered the originals.

Whatever may be the truth of the matter is wholly immaterial, for S. S. Case, the plaintiff, was no more bound to pay a note issued in his name, without his authority, than he was bound to pay a forged note. The fact still remains that he knew the notes presented to him by Wm. C. Kinney were made in his name without his authority. The evidence further shows that S. S. Case knew the history of the litigation about the property, and that the contract in question was drawn by a lawyer of his own selection. It is further in the testimony that the plaintiff said to Kinney at the interview at South Bend, that if his brother, E. C. Case, made the note, and Kinney paid value for it, it ought to be paid, and that he would take no technical advantage of it.

Now, we think all these circumstances show that S. S. Case was not imposed on by Kinney, but that he made the contract with his eyes open. Besides, we think the contract was a good and fair one for Case. The controversy between him and Clark commenced in 1858, since which time Case has been out of possession of the property. The suit now pending upon his cross-petition against Clark and others for the possession of the property was commenced in 1865. Kinney's action to foreclose the mortgage was commenced in 1873. Under these circumstances the prospect of Case recovering the property could not be considered very flattering. Case says the property is worth $15,000. Kinney enters into a contract with him in 1874 by the terms of which he, Kinney, undertakes to recover possession of the property, solely at his own expense and by his own exertions, and if successful agrees to reconvey the property to Case, provided Case, within six months after the termination of the suit, will pay him, Kinney, the amount of his note and the expenses of the suit; or, if Case prefers it, he will cancel the note and pay Case $1,000, and he, Kinney, retain the property. And further agrees that if he, Kinney, is unsuccessful in the suit, he will release Case from the payment of the note and have no claim on him for his expenses.

Now apart from any desire S. S. Case, the plaintiff, may have had to ratify the unauthorized acts of his brother and of his nephew, and thus protect their credit, if not their honor, it seems to us that Kinney gave a full consideration for any advantage he may derive from this contract. S. S. Case told Kinney that his brother, E. C. Case, was not a fit person to conduct a law suit, it appearing from the testimony that E. C. Case had for many years been giving his best energies to the construction of a piece of mechanism, in which friction would be entirely overcome and thus result in perpetual motion. At the date of the contract he had not yet succeeded in making out the problem. S. S. Case himself could not personally attend to the suit, which had been pending nine years, and we are not surprised, therefore, that he willingly accepted the offer of Wm. C. Kinney.

We think the judgment ought to be affirmed.

Snow and Kumler, for plaintiff in error.

Henry M. Cist, for defendant in error.

278 **PLEADING.**

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

*NEW YORK LIFE INS. CO. v. HARRIET LA BOITEAUX.

If no objection, by motion or demurrer, be made to a reply to an answer until during the trial of the cause, and words in the reply must be constructed as a denial, or as meaning nothing, the court will construe them as amounting to a denial, though such denial be argumentative.

YAPLE, J.

This is a petition in error, prosecuted here to reverse the judgment of this court, rendered in special term, in favor of the defendant in error, and against plaintiff in error, in the sum of $25,323 and costs.

The action was brought on three policies of life insurance issued by the defendant to Lafayette La Boiteaux, since deceased, the husband of the plaintiff, for her benefit in case of his death.

The first was a paid up policy for $700, issued on January 5, 1871; the second was issued on the 5th day of June, 1871, for $5,000, and the third on October 13, 1871, for $15,000, to continue one year.

The insured died on the 18th day of October, 1871. The paid-up policy was issued for one of $10,000, which had been taken in September, 1865, and upon the declarations contained in the application for such $10,000 policy. In that application La Boiteaux was asked the question: "Are the habits of said party at the present time, and have they always been, sober and temperate?" Answer—"Six years ago I was accustomed to drinking, daily; since then I have not." That is, not accustomed to drinking daily. In the applications for the next two policies sued on, the insured answered the above question, "Yes." These applications were introduced in evidence at the trial by the insurance company together with the depositions of witnesses tending to show the cause of the insured's death and also his habits of intemperance.

One of the defenses to the action set up in the answer of the defendant was as follows: "The defendant alleges that each one of the policies of insurance referred to in the petition, was issued upon application made by Lafayette La Boiteaux to defendant, partly in writing and partly in print, each of which said applications contained the declaration and statement that the habits of said La Boiteaux were then and always had been sober and temperate; and that upon the faith of said declaration and statement each one of said policies were issued; and each policy contained an express stipulation, that if said declaration should be found in any respect untrue, then and in every such case said policy should be null and void. Defendant alleges that said statements and declarations were not nor was any one of them true; that the habits of said La Boiteaux were not, nor had they always been sober and temperate; but that, on the contrary, said La Boiteaux had been, prior to the first of said applications, and was thereafter up to the time of his death, subject to periodical attacks of drunkenness."

The reply to this answer was as follows:

"The plaintiff, in reply to the first (said) defense in the defendant's answer contained, denies that said policies was (were) issued upon the declarations and statements therein set forth, or upon any other untrue declarations or statements whatsoever."

*For a former opinion in this case, see 5 Dec. R. 242 [s. c. 4 Am. Law Rec. 1].

At the close of the trial, the defendant's attorneys asked the court to instruct the jury, that, upon the answer and reply, they should render a verdict for the defendant, which instruction the court refused to give; and such refusal is alleged as a ground of error.

The reply denied, in effect, that each of said policies was issued upon the declarations and statements contained in the answer; and this was a true denial—each policy was not so issued, but one was issued upon a declaration that six years before 1865 the applicant drank daily, but that he had not drank daily since that time. No motion was made to require the reply to be made more definite and certain, by stating whether or not any, and if any, which of such policies, was issued upon an application not containing such statement and declaration. The reply then averred that the policies were not issued "upon any other untrue declarations or statements whatsoever."

Strictly the word "other" would exclude the representation stated in the answer and leave the reply silent as to that, which silence would be to admit that it was made and was untrue. If this be the proper construction, those words in the reply would be entirely useless, as the answer did not claim that any untrue statement was made except that alleged in it. We are bound to make each word in the reply mean something, if that be possible; we think they may be made to mean no representation of like kind, or substantially such as that alleged in the petition was untruthfully made. If that be so, the reply argumentatively denies the truth of the insured's intemperate habits, and it would have been open to a motion to make it more definite and certain. This question upon the pleadings seems never to have been made until the trial spoken of, though the record shows that was the second trial of the cause, and that it had been in the supreme court.

Many other errors of law are alleged; but they all arose in the case of this plaintiff against this defendant on the first trial of the cause, and were argued in general terms and decided not to be well taken. The case reported in 5 Dec. 242, s. c. 4 Am. Law Rec., 1. The case went to the supreme court, and the judgment in favor of the plaintiff was reversed upon a collateral ruling of the court, to-wit: the effect that the jury might give to the testimony of a witness, the ruling making it possible for the jury to consider it evidence of a fact, when it could not be so considered. The supreme court stated that to be the ground of reversal; and if there had been others, it is fair to presume, considering the importance and novelty of many of the legal questions involved, that that court would have passed upon them and reported the case.

It is also claimed that the verdict and judgment were against the evidence. The evidence is the same as was given upon the first trial, and which came before us in general term and before the supreme court. But, at the first trial, the defense set up in the answer, now insisted upon, was waived, and the evidence upon the subject of the insured's previous habits went for nothing, except to show whether or not he died from the excessive voluntary use of alcohol and opium, which would have avoided the policies, and which issue of fact was the one then relied on by the defendant and tried.

We do think the jury were wrong in refusing to render a verdict in favor of the defendant upon the evidence given by it as to the intemperate habits of the insured.

The judgment will be affirmed.

Sage & Hinkle, for plaintiff in error.

King, Thompson & Longworth, contra.

283 SET-OFF—COUNTERCLAIM

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

MICHAEL DOUGHERTY v. EDWARD CUMMINGS.

1. In an action on a judgment by an assignee thereof, a counter-claim that, in an attachment in the action in which the judgment was rendered, the plaintiff, as surety, and the then plaintiff, jointly gave the attachment bond, but the attachment was dismissed as being wrongful, whereby there arose a liability on the bond, is not a valid counter-claim, for it does not arise on the transaction set forth in the petition nor is it connected with the subject of the action, and, being against plaintiff and another jointly, it lacks mutuality.
2. Mutuality is an essential condition of a valid set-off, though not prescribed by the Code, section 97, as it is the case of counter-claim, section 94. Therefore, in an action on a judgment against C., C. cannot set off a demand against plaintiff, which the answer shows is against plaintiff and a third person jointly, being on an attachment bond made by them to defendant, which attachment was adjudged to have been wrongfully issued.

The petition sets forth a judgment recovered in a court of general jurisdiction in Floyd county, Indiana, in favor of one James McGuire, against Cummings. The present defendant avers that the judgment has been assigned to the plaintiff, and demands judgment upon it in this court.

The defendant, by answer, presents three ground of litigation, upon the facts forming one of which the plaintiff takes issue by a reply and to those constituting the other two of which there is a demurrer, and the case comes into general term by reservation of the questions arising upon the demurrer. It was stated by counsel at the argument that the controversy involved in one of these defenses was in course of adjustment and we understood we were not required to consider the subject of it, and have not considered it. We are therefore to express our opinion only upon the questions arising upon one of the defenses, being the third in the order in which they are numbered in the answer.

The facts which are claimed in the answer as being stated by way of counter-claim are alleged to be true. When McGuire commenced his action in the Floyd county court he wrongfully caused an attachment to be levied on the goods of Cummings, of the value of about $4,000, the greater part of which were lost to Cummings. McGuire, before he procured the attachment, was required to give bond in the sum of about $8,000, and such a bond was executed by Dougherty, the plaintiff, as surety, conditioned that McGuire and Dougherty would pay to the defendant all damages which should result from the attachment, should it turn out to have been wrongfully issued and levied. It was afterwards adjudged by the court that the attachment had been wrongfully issued, and the same was dismissed by order of the court. It does not appear in the answer that any steps have been taken to ascertain and liquidate the amount of the damages which have been occasioned by the breach of the bond; but it is averred that these damages have, in fact, amounted to the sum of $3,500; and the relief prayed for is that these damages be adjudged to the defendant, and directed to be applied by way of credit on the judgment. In the argu-

ment which has been submitted to establish the validity of this defense it was contended that the facts were available to the defendant in this action by way of counter-claim, or, if not, then by way of set-off, and whether or not they are so, in either form, are the questions upon which we are to give our opinion, and as these questions belong wholly to the law of the remedy or forum, we are simply to apply the rules of practice which govern our own courts.

We are of opinion that the demurrer is well taken. The counter-claim given by the Code is the re-compact according to the former practice in the courts of common law, with the addition that where the subject of the recoupment is such as, under the former practice would have been one of exclusively equitable cognizance, it may, nevertheless, be available in action under the Code. Timmons v. Dunn, 4 O. S., 680; C. W. & Z. R. R. Co. v. Comrs. 77, 1 O. S., 95. The requisites of a counter-claim are the same as those of a recoupment at the common law, and among these is, viz., that the cross demand must be one "arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's demand, or connected with the subject of the action." It would, we think, be easy to show that on principle the cross demand set forth in the present case does not conform to these conditions; but we think it enough to say that according to our understanding of the laws cited in Seney's notes to sec. 94 of the Code, the question has become judicially settled, and the conclusion above stated established.

This court appears in two cases, heard in special term, to have decided that a cross demand, to be a proper subject of set-off, must have been liquidated in separate proceedings. Judge Swan, in his treatise, expresses a contrary opinion, and his reasons are certainly very strong. We find it unnecessary, now, to express any opinion of our own. We place our judgment upon another ground, on the ground, namely, of a want of mutuality. Had the answer described the bond as being joint and several, or had it set forth any separate agreement binding the plaintiff alone to perform the condition of the bond, or any special circumstance, such as in equity would raise a similar obligation, the objection under notice would not occur. But the obligation, as described in the pleading is unmistakably joint. It is the obligation of Dougherty the plaintiff and McGuire. To allow the set-off as claimed, would be to compel Dougherty alone to discharge an obligation which, at law, is the joint obligation of himself and McGuire, and which, in equity, the plaintiff being a surety merely, is prima facie, the obligation of McGuire only; and it would be to do this without an effort even, being made to make McGuire a party to the proceeding. In all the history of the law of set-off the condition of mutuality is believed to have been constantly insisted on: and though not, in terms, prescribed by sec. 97 of the Code, as it is by sec. 94, relating to counter-claims, it is, in our judgment, imperative. The certificate sending the case back to special term will, therefore, contain a recommendation that the demurrer be sustained.

284 ACKNOWLDGMENTS.

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

*JOHN LUDLOW v. JAMES O'NEIL.

The act of June 1, 1831, S. & C., 458, "to provide for the proof, acknowledgment and recording deeds and other instruments of writing," requires the joint, but not simultaneous evidence of a deed for the conveyance of real estate from husband and wife, and therefore a deed purporting to convey the land of the husband, duly signed, sealed and acknowledged by the wife on one day at Cincinnati, Ohio, for the purpose of relinquishing her expectancy of dower and duly signed, sealed and acknowledged by the husband on a subsequent day of the same year in the state of California, bars the wife of dower in the premises so conveyed.

O'CONNOR, J.

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

The action below was to specifically enforce a contract for the sale and purchase of a piece of real estate in the city of Cincinnati. The plaintiff in error, Ludlow, refused to receive from O'Neil, defendant in error, a deed for the property in question, or to pay the purchase money, alleging that O'Neil, at the time of the tender of the deed, could not convey a perfect title.

The judgment below was for the defendant in error. It is now sought to reverse this judgment on the general assignment that the court erred in giving judgment in favor of the defendant in error, when the same ought to have been given in favor of the plaintiff in error, and that the court erred in overruling the motion for a new trial.

It appears from the evidence, as contained in the bill of exceptions, that one Scholl and wife, grantors in the chain of title through which O'Neil claims, executed a deed in which the real estate intended to be conveyed by them was described as commencing at a point on Liberty street, forty-five feet west of Locust street, and extending west twenty-five feet, when in fact the true point of commencement was forty feet west of Locust street, and the deed therefore purported to convey five feet of ground, which the grantors did not own, and failed to convey five which they did own and which they at the time intended to convey. An effort was made by Scholl and wife to correct this mistake by executing separate deeds to the grantees, one deed being executed by Scholl and acknowledged by him out of the state of Ohio, and the other deed being executed and acknowledged by his wife, who also relinquished her expectancy of dower, in Hamilton county, Ohio. It being admitted that these separate deeds did not constitute a joint deed of husband and wife, as required by the statute, another deed correcting the mistake in description was prepared and was executed and acknowledged and dower relinquished by the wife in Cincinnati, Ohio, and executed and acknowledged by the husband in California. The fee simple of the property was in the husband, the wife merely undertaking to relinquish her expectancy of dower. The only question presented to us in general term is, whether a deed so executed by husband and wife is such a compliance with the statute prescribing the manner of executing and acknowledging deeds as to divert the wife from her expectancy of dower. It is contended by the plaintiff in error that the statute requires a joint and simultaneous execution of such deed by husband and wife, and that the reason of the requirement is that the presence of the husband may protect the wife from the fraud of third persons, and that the separate examination of the wife required by the statute, is to protect the wife against the fraud of the husband.

The first section of the act of 1831, S. & C., 458, under which this deed was executed, provides: "That where any man, or unmarried woman—shall execute within this state any deed, etc.—such deed—shall be signed and sealed by the grantor or grantors, maker or makers, and such signing and sealing shall be acknowledged by such grantor or maker in the presence of two witnesses who shall attest such signing and sealing, and subscribe their names to such attestation, and such signing and sealing shall also be acknowledged by such grantor or grantors, maker or makers before judge, etc., justice of the peace, notary or

*This case was affirmed by the supreme court. See opinion, 29 O. S., 181.

mayor, etc., who shall certify such acknowledgment, on the same sheet on which such deed, etc., may be printed or written, etc.

Section second provides: "That when a husband and wife, she being eighteen years of age, or upward, shall execute, within this state, any deed, etc., for the conveyance or incumbrance of the estate of the wife, or her right of dower in any land, etc., situate within this state, such deed, etc., shall be signed and sealed by the husband and wife; and such signing and sealing shall be attested and acknowledged in the manner prescribed in the first section of this act and in addition thereto, the officer, before whom such acknowledgment shall be made, shall examine the wife separate and apart from her husband, etc."

These sections do not in terms require the simultaneous as well as joint execution of a deed of husband and wife. They do provide that each shall execute the same instrument on the same sheet of paper.

In Williams v. Robson, 6 O. S., 510, it was held that: "In order to the valid execution of a deed of conveyance, so as to bar the wife's right of dower in the premises conveyed, under the act of February 24, 1820, 2 Chase. 1139, it is not necessary that the acknowledgment of husband and wife be jointly and simultaneously taken. A separate acknowledgment of the husband one day, and a separate acknowledgment of the wife on a subsequent day, are sufficient."

The act here referred to is substantially the same as the act of 1831, in force at the time the deed under consideration was executed. And if it be true that the acknowledgment of husband and wife need not be taken at the same time, it is difficult to see why the signing and sealing must be done at the same time, as the acknowledgment is as essential a part of the execution as the signing and sealing. In so far as it is urged that the policy of the statute requires the presence of the husband to prevent fraud being practiced on the wife by third persons, the wife has the protection, although the husband be absent; because, whether the husband executes the deed before or after the wife, he either invites or sanctions her execution of the same instrument, and in either case she has his approval.

In the case of the lessee of Newell v. Anderson, 7 O. S., 12, the facts, as stated in the syllabus, were that "S. and his wife A., jointly executed and acknowledged in 1815 a deed of conveyance for lands of A., but the certificate of the officer does not show a separate examination of A. In 1829, the coverture still subsisting, A. separately and upon proper examination again acknowledged the deed before a different officer; both the certificates being on the same sheet of paper with the deed. *Held:* "That these acknowledgments were sufficient to perfect the conveyance." And the case of Williams v. Robson above cited was approved. In the case of lessee of Feagly v. Higbee in the old superior court of Cincinnati, decided by Judge Coffin in 1846, it was held that, "by the statute of 1831, husband and wife must execute the same deed to convey or encumber the wife's estate, but it does not require a joint (i. e., a simultaneous) execution. A deed executed on one day by the husband, and on a subsequent day by the wife, binds her and her heirs."

The case of Ward v. McIntosh, 12 O. S., 231, 242, has been cited by plaintiff in error as holding a different view of the statute. The question in that case was, whether the omission of the words, "and that she is still satisfied therewith," in the certificate of the wife's acknowledgment, was material; the court held the omission was material, and that the wife was not barred of her dower. The question of a joint or simultaneous execution of the deed by husband and wife did not arise in the case, but the court in enumerating the requirements of the statute, say it requires "a joint acknowledgment by husband and wife of the deed. 2. An examination of her by the officer, etc. 3. A declaration from her to the officer that she did voluntarily sign, seal and acknowledge the deed. 4. And *instar omnium*, the further declaration upon such separate examination, that she is still satisfied therewith." It is true the court say in this enumeration that a joint acknowledgment of the deed is necessary, and so the court said in all the cases above cited, but the court did not say that a simultaneous execution or acknowledgment was necessary, nor did the court intend to be so understood because in the cases first cited the court held exactly the contrary, and it can hardly be imagined that it was intended to overrule these decisions without even alluding to or mentioning them.

We think then that the construction given the statute in the cases cited renders valid the execution of the deed by Scholl and wife, and that consequently she is barred of her dower in the premises conveyed, and that O'Neil was able to and did tender to Ludlow a clear title to the premises contracted for. The

fact that the wife executed the deed in Cincinnati, and the husband executed it in California, can make no difference, because sec. 5 of the statute referred to authorizes the making of a deed conveying lands in Ohio to be executed in conformity to the laws of the place where the grantor is at the time of the execution, or in conformity to the laws of this state.

We think therefore the judgment rendered at the special term ought to be and is affirmed.

Hoadly, Johnson & Conston, for plaintiff in error.

Healy & Brannan, for defendant in error.

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284 **LIFE INSURANCE.**

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

LOUISA C. SMITH v. UNION CENTRAL LIFE INS. CO.

1. Where a life policy provided for a participation by the assured in the profits of the company, and for a forfeiture on non-payment of the quarterly premium promptly at the home office, or to agents having receipts executed at the home office, and for two years the general agent in the state where the assured was, forwarded him, before due, bill for premium, less the dividend earned, which the assured remitted to him, and assured removed to a different state, but the agents kept a record of his residences and continues to send him the bills, and he to remit. A failure of the agent to send him a bill, whereby he, having waited until the last day for it, remitted on the following day what he supposed to be the amount, less dividend, which was too small. This is not ground for returning the premium and forfeiting the policy. He has a right to rely on the custom of sending the bills in advance, and could not know the exact amount of premium. A letter from the secretary declaring a forfeiture unless a physician's certificate of good health were sent, can not compel him to furnish such certificate, and his writing that he had sent it, where he had not, does not authorize a forfeiture.
2. The failure of the assured to tender the premiums thereafter accruing before his death, which occurred about nine months afterward, is not a forfeiture. where the prior communications from the company show an unequivocal renunciation of the contract, so that the money would have been declined. Such non-tender does not prove a mutual breach and agreement to rescind, for there was no breach on the part of assured, and he could either sue then, or the time for performance could be awaited.

In this case plaintiff brought her action to recover upon a policy of insurance executed by the defendant, to and in the name of her husband for the insurance of his life, the policy containing a clause declaring the loss, if any, to be payable to her. The issues arising out of the pleadings were tried to a jury in special term, and the jury under the charge of the court, rendered a verdict in favor of the plaintiff. It was not, and is not now claimed if the court correctly instructed the jury on the points of law litigated at the trial, that the verdict itself was open to any objection. These questions of law were thought to be important and difficult and, on a motion for a new trial, were certified into general term for the opinion of all the judges. They have been fully argued here, and carefully considered, and in the conclusions now to be stated all the judges concur.

The leading facts proved at the trial as they appear in the certificate of reservation, and as we understand them so far as they serve to explain the grounds of our opinion, were thus:

The policy sued on was duly executed on the 13th day of July, 1867, and delivered to Benjamin F. Smith, the insured and the husband of the plaintiff, by one Johnson who, from the spring of 1867 to the spring of

1869 was the general agent of the defendant at Mendota, Ill., for a district of country known in the transactions of the defendant as the Northern District of Illinois, and as such general agent, he was empowered or accustomed, with the knowledge and acquiescence of the defendant to solicit insurance, appoint local agents, receive renewals from persons insured and remit them to the defendant, and to receive and remit all premiums upon policies issued in his district or through his agency.

The policy provided for a participation by the insured, in the profits of the defendant, for the prompt payment of quarterly premiums of $10.60 each, on the 13th day of July, October, January, and April in every year during the continuance of the policy for the forfeiture of the policy if the installments of premiums should not be promptly paid at the office of the company in Cincinnati, "or to agents when they should produce receipts signed by the president or secretary;" and for the payment at the office of the defendant in Cincinnati of the amount of the insurance in ninety days after notice and proof of death, during the continuance of the policy of the person whose life was insured.

At the time the policy was taken out, Smith resided at Henry, Ill., a place distant about 35 or 40 miles from Mendota, the seat of the general agency. Before the end of the first year, and in the spring of 1868, he removed to Iowa and remained there until October of the same year, when he removed to Brooklyn, Ill. In February, 1869, he returned to Henry, Ill., October, 1870, he removed to Holden, Missouri, whence he removed in March, 1871, to Wamego, Kansas, and in October, 1871, he returned to Henry, where he remained until his death, which occurred in April, 1872.

Johnson, the general agent at Mendota, continued as such to transact the business of the defendant for his district until the spring of 1869. During this period the uniform habit and course of business of the defendant, in the collection of premiums accruing upon policies issued by him, was to forward to him the premium receipts, signed by the president or secretary, and as often as dividends had been earned and declared, these receipts were accompanied by statements of the amounts payable to the holders of policies and for which they were entitled to credit in the payment of the installment of premium, then about to become due. The agent at Mendota, kept himself informed of the places of residence of persons holding policies issued by him, and of their changes of residence, and it was his custom, on receiving the receipts and statements, to give notice to them, usually some days in advance of the day when the premium was required to be paid. In this way and according to this custom the business went on, all the premiums having been promptly paid down to the period when Johnson ceased to be agent. After that and for a season premiums were collected from the home office, through the local banks; but at some time prior to October, 1870, the collection of the premiums accruing under this policy was committed to the general agents of the defendant residing at Bloomington, Ill., and they collected the premiums, for October, 1870, and for January and April, 1871. In October, 1870, Smith resided at Holden, Missouri. In April, 1871, he resided at Wamego, and he continued to reside there until October, 1871, when he returned to Henry, Ill. As early certainly as January, 1871, his residence at Holden, Mo., appeared on the books of the agency at Bloomington; and in both April and July following they showed that he resided at Wamego, Kansas.

In the register of the home office of the defendant the residence of Smith appeared as being at Henry, the entry being, probably, that which was originally made on Johnson's report that the policy had been issued. The defendant had no notice of the removal of Smith from Henry, and prior to the maturity of the July premium the secretary of the defendant, posted the usual notice directed to him at that place. There is no evidence that he received this notice, and the probability is he did not, because at that time he was at Wamego able and ready to pay the premium, and waiting to receive the usual notice from the agents at Bloomington, to whom on the very next day after that on which the premium was required to be paid the 13th of July, he transmitted what he believed to be payable. This remittance was forwarded by the agents at Bloomington to the home office, and on the 18th of July, the secretary of the defendant addressed to Smith at Wamego a communication acknowledging the receipt of the remittance, stating that the policy had expired on the 13th of July, and declining to accept the premium unless furnished with a physician's certificate of existing good health, a form of which was enclosed. To this communication Smith replied by note under date of August 14, stating that he had, about three weeks previously, forwarded a physician's certificate properly signed as required and desiring to know what course the defendant intended to take. On the 16th of August the secretary again wrote to Smith in these words: "Yours of the 14th inst. is before me and duly noted, the certificate of good health referred to by you has not been received at this office. Therefore on the 14th inst. we returned to you by express the money sent by you. The amount sent by you was not equal to the amount of your premium less dividend, said premium being $10.60, less dividend $2.19, leaving $8.51 balance due; you remitted $7.20. Your policy has therefore lapsed."

Smith died on the 6th of April, 1872, two further installments of premium, that for October, 1871, and that for January, 1872, having accrued, neither of which was ever paid or tendered, or demanded. The plaintiff submitted her case for the advice of counsel in Illinois, who, on the 20th of July, 1872, addressed to the defendant a communication on the subject of her claims under the policy, to which, on the 23rd of July, the defendant, through its secretary, replied, reiterating the grounds of forfeiture stated in former letters and insisting on such forfeiture. No proofs of the death of Smith were furnished to the defendant. In December, 1873, this action was brought.

TILDEN, J.

The first question upon which we are to express our opinion, is that which arises out of the claim of forfeiture for non-payment of the premium, made payable by the policy on the 13th day of July, 1871. The argument supporting the claim includes the objection that the offer of payment should have been made at the home office in Cincinnati; or at least, not at the agency at Bloomington, that the offer made at Bloomington on the 14th of July was, by one day, too late; and that the sum offered was by $1.31 too small.

1. The validity of the first of these reasons depends upon the effort of the acquiescence of the defendant in the payments previously made at Bloomington. They were so made in October, 1870, and in January and April, 1871, and the amount so paid was remitted to and received by the

defendant, and there is no evidence that Smith ever had any notice that the agency at Bloomington had been withdrawn. We think, therefore, that he had a right to make payment at the agency there, and that an offer of payment at that point was a performance of his obligations under the same circumstances that it would have been if made at the home office in Cincinnati, or at Henry, Ill. There is every reason to believe that if the usual notice, and statement of the amount of the dividend had been forwarded to the agency at Bloomington the full amount of the premium would have been paid on the very day it was due. And, if the defendant was under any obligation to give such notice and furnish statement, it is very clear that the duty was not well performed by the transmission from the home office, of an enclosure containing them to the address of Smith at Henry. Smith did not receive it, and there was no reasonable ground to believe that he would.

The necessary and actual result of the defendant failing to place in the hands of the agents at Bloomington the usual receipt and statement, was, that Smith was misled. He could not know, and did not in fact know, the precise amount he would be bound to pay in order to preserve his rights under the policy. He acted with reference to the course of dealing previously observed, and which must have been adopted and followed mainly from motives of convenience to the defendant itself. He waited for the usual notice until the close of the last day, and on the very next day he forwarded to Bloomington a sum as nearly the true one as he had the means of estimating it. We think the defendant was bound by the former course of dealing which the defendant could not, honestly or rightfully change except on reasonable previous notice. The right, therefore to apply to the July premium the clause of forfeiture contained in the policy, which was asserted in the letters of the secretary of the defendant of the 18th of July and the 16th of August, and which is now insisted on, did not arise, and can not be recognized. This conclusion is, in our judgment, founded on a sound reason in the abstract, and it is fully sustained by the authorities cited by counsel in the argument. We think it proper to add that the statement of Smith made in his letter to the secretary of the 14th of August, has not been considered as a circumstance entitled to exercise any influence on our judgment. We are not satisfied that Smith had obtained a physician's certificate as stated in his letter. Considering his state of health at the time the letter was written, it is apparent he could not have obtained an honest one. His motive in writing it may have been a hope to obtain a withdrawal of the threat of forfeiture. If that was so, he was disappointed. Still it is manifest that the act of writing the letter, whether the contents were true or false, did not effect any change in the legal relations of the parties. Smith was under no obligation, legal or moral, to obtain a further certificate, and the statement that he had obtained and transmitted one was not a representation calculated to, or which in fact did, induce any change whatever in the attitude of the defendant.

2. It is not claimed on behalf of the defendant that it was incumbent on Smith, notwithstanding the unequivocal declaration of forfeiture for non-payment of the July premium, strictly to tender the premiums which accrued subsequently and prior to his death; and that his omission to make such tender of the October premium and again of the ensuing January and April premiums, were themselves breaches of the condition

such as that without any further step by the defendant, they operated to extinguish all claims under the policy.

It is entirely clear that a tender of either period and at both periods, would have been unconditionally declined, and that to have made either would have been an utterly vain and useless act, and one which as a general rule the law does not exact. The renunciation of the entire contract by the defendant, in the previous July, was in the language and according to the terms of the letters by which it was communicated to Smith absolute, unequivocal and full. It comprehended all its terms and all the stipulations of the policy on both sides and was, in effect an unequivocal declaration and notice that no further premiums if offered would be received. Smith had a right to understand the letters as meaning this, and so long as the refusal of the defendant to go on with the contract remained unretracted, he continued in the law without doing any further act to stand on the same footing as that on which the refusal had placed him. The only conceivable mode of retraction which can be binding in such a case, is one which is accompanied by notice. So long as such notice is withheld the intention to renounce the contract may well be regarded and traced as continued. There was no such mutual breach of the contract here as to authorize the presumption of a mutual agreement to rescind. In Mowny, and Kirk and Cheever, it was held as a matter of fact, that there was. Here there was no breach on the part of Smith at all. We have already held that the offer of payment of the July premium, was legally equivalent to a payment in fact, and in effect that was the only act which down to that time, the contract required him to do. The breach was wholly on the other side. It consisted of a refusal to be further bound by the policy, or afterwards to pay to the plaintiff on making proof of the death of her husband the sum stipulated in it. On the authorities which were cited by counsel in the argument, and which we have carefully examined and considered, the law may be regarded as having become settled, in the case of premature breach of an executory contract, that the party not in fault has his election of remedies. He may bring his action at once, and thus treat the renunciation of the contract as a breach of it, or he may wait until the time arrives, when the contract is to be performed according to its terms and then sue upon the contract itself. In practice it is probable the distinction may not prove to be very important, because the rule of damages is in both cases prima facie the same. The practical operation of the rule then is rather to produce a modification of the pleadings, than of the rights of the parties. The effect however of an election to sue upon the contract is to leave the contract open for all purposes, and to leave the party who causes the premature breach in the full possession of all his rights under it. One of these rights is that of retracting the act by which he disavows the contract, but if such disavowal remains unretracted down to the period for performance the other party retains the right to recover upon the contract according to its terms. A mere delay in beginning an action which, by the very terms which define the right to bring it, can not be brought until the expiration of the contract, and in case of life insurance, until the death of party whose life is insured affords no evidence whatever of an intention to rescind the contract, or to waive any rights or remedies which have resulted from a previous breach of it.

3. What we have already said renders it unnecessary to explain at any length the grounds upon which we are required to reject the third proposition submitted to us in behalf of the defendant. The terms of the letter of the secretary of the defendant of the 23rd of July, 1872, addressed to the attorneys of the plaintiff, were such as in our opinion, to render any further steps unnecessary before bringing the action.

We hold therefore that the plaintiff is entitled to retain her verdict and take judgment upon it, and it will be certified.

FIRE INSURANCE. 286

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

ALEXANDER M. HALLIDAY v. EUREKA FIRE & MARINE INS. CO.

A section in a charter that all policies or contracts of insurance shall be subscribed by the president and attested by the secretary, and being so executed shall be obligatory, does not prohibit parol contracts altering a policy.

YAPLE, J.

This is a proceeding in error by which it is sought to reverse the judgment of this court, rendered in special term, against Halliday and in favor of the Insurance Company.

Halliday sued the Insurance Company upon a policy of insurance to recover the sum of $5,000.00, less an unpaid premium note, for the loss of the steamboat "Jennie Howell," insured to plaintiff by that policy dated August 9th, 1872, for one year, in the sum of $5,000.00. The policy covered fire and marine perils, and the boat was lost within the year by encountering a marine peril.

The defendant claimed that, after issuing of the policy, and before the loss, to-wit, on May 17, 1873, the policy was cancelled, by the verbal agreement of the parties to all risks covered by it except that of fire, the defendant crediting the plaintiff upon his premium note, which it held, in the difference in the premium which such cancellation *pro tanto* would make.

The defendant denied such agreement and cancellation, and also insisted that such alleged verbal agreement would be invalid—that it should have been in writing. Upon the evidence, it will be enough to say that the jury were warranted in finding for the defendant; and this will dispose of the claim that the verdict was against the evidence.

But, the defendant is a joint stock insurance company organized and incorporated under the act of April 11, 1856, and doing business under that act and acts amendatory thereof (1 S. & C., p. 360).

The thirteenth (13) section of that act, which has ever since been in force, provides that "All policies or contracts of insurance made or entered into by the company may be made either under or without the seal thereof; they shall be subscribed by the president, or such other officer as may be designated by the directors for that purpose, and shall be attested by the secretary, and, being so subscribed and attested, they shall be obligatory on the company." The first and ninth sections of the same act, as the latter was originally passed and as it has since been amended, give to such corporations full and ample power to insure and

to carry on the business of insurance, etc. The plaintiff, however, claims, that, by force of such thirteenth section, the parol agreement insisted upon by the defendant is void.

We need not consider whether or not the release of a portion of the risks, by the insured, upon the valid consideration, such as the release by the company of a corresponding portion of the unpaid premium note, would not be valid in any view of the meaning of the statute, as such agreement would operate to discharge the corporation from a liability not to fix an obligation; for the supreme court of the state, upon three sections, substantially the same as these, has settled the question adversely to the claim of the plaintiff. Dayton Ins. Co. v. Kelly, 24, O. S., 363-364-365.

This decision settles the law in this state, and we are bound by it, though we are satisfied, that outside of the decision, the holding of the court is in accordance with the number and weight of the modern authorities everywhere.

The judgment is affirmed.

Judges O'Connor and Tilden, concur.

H. J. Harrup and Snow & Kumler, for plaintiff in error.

Lincoln, Smith & Stevens, for defendants in error.

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286 **TAXES AND TAXATION.**

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

*JOSEPH B. HUMPHREYS AND JOHN GERKE v. LITTLE SISTERS OF THE POOR.

1. Article 12 section 2 of the constitution of Ohio, authorizing the legislature by general laws to exempt institutions of purely public charity from taxation; and the act of March 21, 1864, S. & S. 761, passed in pursuance thereof, exempting from taxation "all buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit," etc., do not require that such institutions shall be public; they may be private, that is owned and controlled by private individuals, or private corporations, the charity only in furtherance of which the same are employed, is required to be "purely public."
2. Article 13, section 4, of the constitution, which requires the property of corporations to be taxed the same as that of individuals, does not require the property of a private corporation, employed for purely public charitable purposes, to be taxed, as, in such cases, the property of an individual can be and is exempted.
3. It is the use to which the property is devoted for the time being, that is to determine whether the property is actually employed for the purposes of a purely public charity. It will be exempt, though only held by the institution upon a lease for years.
4. The word "belonging," in the act of exemption, which provides that "all buildings belonging," etc., is not there used in the sense of ownership, but is employed in the sense of "pertaining to," "being part of," etc., and such buildings need not be owned in fee, but they will be exempt, if held by lease for years only.

*This case was reversed by the Supreme Court. See opinion, 29 O. S., 201. The decision has been cited. 36 O. S., 253, 258; 42 O. S. 128, 132.

5. The effect of article 1, section 7, of the constitution, is to declare religion, in the widest and most comprehensive sense of the word a good, but it does not determine, and takes away from the legislature and courts the right to determine, what form of religion is better or best; between all forms of religion known among its people, the state is bound to be neutral and impartial; "no preference shall be given, by law, to any religious society," is the constitutional provision.
6. While the constitution provides that "no person shall be compelled to maintain any form of worship against his consent," it also declares that religion is essential to good government; hence, if an institution, under the management and control of any religious order, sect, or creed, which, for the time being may inhabit the state, be created and maintained wholly without taxation, but entirely by private resources, and is not carried on or maintained for pecuniary gain or profit, but solely to promote the religion of such order, sect, or creed, and to the benefits of which institution all who desire can avail themselves by voluntarily accepting such aid; such institution is one of purely public charity," and this even though the recipient of such charity be required by the rules of the institution to attend the religious services of such order, sect, creed or denomination for such attendance would be voluntary, because the entrance and remaining in the institution would be voluntary.
7. On a trial to determine the question, of exemption from taxation, the rules, prescribed for the mere government and conduct of its inmates by an institution claiming to be one of purely public charity, are, prima facie, immaterial, and an application by the opposing party to require their production and introduction in evidence may properly be overruled by the court where the party so asking does not state to the court what material fact or facts it is excepted to prove by them.
8. The religious and benevolent order known as "The Little Sisters of the Poor," incorporated for the sole object of offering an asylum for the destitute men and women, and the incurable sick and blind, irrespective of their nationality or creed, and which corporation is to be sustained entirely by private charitable contributions, is incorporated to establish and maintain a "purely public charity" within the meaning of our constitution and tax laws; and while it shall carry out the objects of its creation, all its property employed in maintaining such charity and reasonably necessary therefor, will be exempt from taxation. and, in the first instance such corporation is vested with the discretion to determine what property is necessary and with which discretion a court can not interfere unless it has manifestly been abused.
9. In case the property so employed by such institution has been leased to it, and it has agreed with the lessor to pay all taxes that may be levied upon it, no unauthorized tax can be levied and such lessee be bound to pay the same; and the state can not avail itself of such term in the lease in any way, as it is a stranger to the transaction and not in privity with either of the parties to the lease.
10. If, at the time such institution obtains its real property, the lien of the state for the taxes of that year has already attached in such real property, such year's taxes must be paid, though for the residue of the year such property be employed solely in carrying on such purely public charity.

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 Little Sisters of the Poor, against Joseph B. Humphreys as auditor of this county and John Gerke, treasurer, which judgment found the property of the sisters to be exempt from taxation and restrained the defendants and each of them from taxing the same or selling it for taxes.

On December 20, 1873, the plaintiff filed its petition against the auditor and treasurer, stating among other things that it was a corporation duly incorporated under the laws of Ohio "for the sole and only object of offering an asylum for the destitute men and women and the incurable sick and blind, irrespective of their nationality or creed;" that, in order to carry out that object, they on July 1, 1869, leased certain described property with the buildings thereon, from Hines, Strobridge & Co., and at subsequent times purchased from C. H. Gould and wife two other lots or parcels of land, all being situated in the city of Cincinnati, and

fully described in the petition, that the plaintiff entered on said premises, and, in pursuance of its corporate design, threw open its doors to the public, sheltering within its walls the persons provided for in its organization, and still continued so to shelter, without any pay or remuneration whatever; that although the plaintiff was still an institution of purely public charity, and although said premises for the year 1873, have been actually occupied and used by the plaintiff in pursuance only of its corporate design, and not leased or otherwise used with a view to profit; said auditor had illegally taxed said premises on the duplicate of the county for the year 1873, and threatened so to do for the previous years of the plaintiff's occupation as aforesaid, and that the treasurer was about to collect such taxes, so illegally assessed, and to enforce the collection thereof. The petition prayed for an injunction restraining the collection of the taxes for the year 1873 and also the taxation of the property for the previous year of the plaintiff's occupancy, etc.

The defendants, by their answers, admitted that the plaintiff was a corporation as stated in the petition, that it was the owner of the leasehold estate and the owner of the other tracts described therein, but denied that such property was illegally placed upon the duplicate for taxation and also denied that the plaintiff was an institution of purely public charity, and occupant as such of such property, or that the same was used without a view to profit.

A decree for the plaintiff as prayed for was taken, pro forma, after the hearing of the testimony by the court, without the case having been argued, and thereupon, a motion for a new trial being overruled pro forma, this proceeding in error was begun, that a full hearing might be had before all members of the court.

At the trial it was agreed, first, that the plaintiff was a corporation organized under the laws of Ohio, was a religious and benevolent order, named "The Little Sisters of the Poor."

Second, That as such organization, they leased from Hines, Strobridge & Co., the property as alleged in the petition, the lease commencing to run July 1, 1869, and expiring January 1, 1874, and by the terms of the lease the plaintiff was to pay the lessors for the use of the property $3,000 per annum, payable quarterly, or $750 at the end of each quarter, and all assessments on the property, payable during the continance of the lease, and also taxes except those payable to the county treasurer on or before June 20, 1869.

Third, That the plaintiff was the owner in fee of the last two pieces of property described in the petition, and valued in their deeds of purchase at $6,900; and were in possession of all of said property at the commencement of proceedings in this case, and up to January 1, 1874, at which time they left the same.

Sister Mary J. Theresa was then called as a witness for the plaintiff and testified: "I am the Superior of this institution, we offer a home and asylum to destitute old men and women and the incurable sick. It is kept up by voluntary contributions, the sisters go out on the streets and solicit funds from all. We go to restaurants and get their refuse eatables, and we obtain clothing in the same way for the inmates. We had on Lock street, (the property in question), sixty people, thirty-four (34) males and twenty-six (26) females, their average age was sixty or seventy. We made no charge to any inmate for anything. We furnished them board, clothing, lodging, medicine and washing. Our institution was not run for profit, our sole object was to relieve aged poor people and the infirm; it is carried on for no other object. We had there Protestants and Cathlics. We bought the two pieces of property on Fifth street to have an entrance on Fifth street. We found it necessary to have them for our wagons in passing in and out, a corner of the house projected over on one of the lots we had on Fifth street. We make no charge to any inmate."

On cross-examination she testified:

"Have you rules printed governing the institution?"

"We have written rules."

"Can you and will you produce a copy of said rules here in court?"

This question was objected to by the plaintiff's counsel, which objection was sustained by the court, and the defendants' counsel excepted to the ruling of the court.

"How many are there members of this corporation and to whom do you report?"

"There are nine (9) of us, we live in the institution, we had inmates who required attendance day and night. It was not possible to attend to them by living

out of the house. We report to the head house in France. We require no condition of any one for admittance, except that they are old and infirm or crippled. We have no written rules concerning the admission of applicants. The written rules we have regulate the conduct of the inmates."

Also, Michael Ryan, who testified: "I am acquainted with the institution. I have been there five or six times. I think it charitable. I think this amount of property necessary to carry out the object of the institution. I saw there about fifty or sixty old people of both sexes, some of them were healthy, some had to be carried around by the sisters, all the old men were crippled or helpless. I saw people of different nationalities there, Germans, Irish and Americans. The sisters went around the city and collected food and clothing, some on foot and some in wagons from the charitably disposed. They got into the rear of their building by way of Fifth street, which is very steep there."

Ryan testified upon cross-examination:

"I know they were given to them because they told me so, I asked two or three donors, they told me they gave them, and I saw the wagon, so I know they paid nothing for them."

And also, Sister Catherine St. Joseph, who testified: "We collected food, clothing and medicine for our old folks by going out and soliciting of the charitable. We went every day on Lock street, and frequently in the wagon."

The defendant offered no evidence, and the foregoing was all the evidence given at the trial.

There was no question of fact to determine in this case. All the evidence given at the trial was introduced by the plaintiff below, and it went affirmatively to distinct facts and was in no particular contradictory. The question then is one of law, purely arising upon the pleading and those facts.

The constitution, section 4, article 13, provides that, "The property of corporations now existing or hereafter created, shall forever be subject to taxation, the same as the property of individuals." And article 12, section 2, provides that "Laws shall be passed, taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, etc., may, by general laws, be exempted from taxation, but all such laws shall be subject to alteration or repeal."

The legislature, by act of March 21, 1864, (61 O. L., 39, S. & S. 761), enacted that, "All buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustaining, and belonging exclusively to such institutions," shall be exempt from taxation. Under the foregoing provision of the constitution and under this clause of that act of the general assembly, it is claimed the property in question is exempt from taxation, without reference to what religious sect or denomination may occupy and so employ it.

Article 1, Section 7, of the constitution provides, that "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship against his consent, and no preference shall be given by law, to any religious society; nor shall any interference with the rights of conscience be permitted, * * * Religion, morality and knowledge, however, 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."

The fact that the Little Sisters of the Poor are a private corporation, does not render them liable to the taxation sought to be imposed, if an individual, or natural private person or persons holding and using the property for the same purpose would be entitled to have it exempt from taxation; for the constitution places private corporations and individuals upon precisely the same footing as to taxation. Neither the constitution nor the act of the legislature requires as a condition of exemption from taxation, that the institution should be a public institution of purely public charity, but only an "institution," it may be private or public. It is the use, not the character of the owner of the property that determines the question of exemption. If a mere private person establishes an institution of purely public charity upon or with his private property, that prop-

erty will be exempt from taxation, so long as it is used and employed for such purely public charitable purpose.

But, it is claimed in this case, that this property is not employed for a purely public charity, because nine sisters, who are engaged in carrying it on, have their homes and support there; because the house on the leased lot does not belong to the institution, using that word as synonymous with the person of the owner, the corporation, but is only held on a lease for years, the fee being in the lessors, and, because, taking into consideration the entire use and employment of the property, it is not an institution of purely public charity. As to the first claim, it may be said that the property does not belong to any or all of the nine sisters who live there, but to the corporation, whose mere agents they are, employed in carrying out the objects of the institution. Sixty old and incurable sick persons, many of whom require attendance both day and night, and all of whose food, clothing and medicines have to be obtained by the exertions of those nine sisters by going through the city and soliciting them in charity, surely require at least nine women to attend upon and provide for them properly, at least the defendants did not attempt to prove that number was greater than necessary. The inmates of a hospital require attendants night and day, and such attendants should be in the hospital or it would fail in the objects for which it was created. No hospital could ever be properly maintained if the attendants resided out of the building, and the evidence in this case is clear and uncontradicted, that this institution could not be carried on if those engaged in maintaining it, resided out of the buildings.

Nor, do we think that it makes any difference whether the building and property of such an institution is owned or merely leased by those carrying it on. The word "belonging" is not used in the sense of "owning," but in the sense of "pertaining to," "being part of it," it is the use of the property that determines whether it is exempt from taxation or not, and if the use for the time being exempts, the entire property and estate is, for the time of such use, wholly withdrawn from taxation. The land and buildings are exempt. It never could have been the intention of the legislature to tax property employed by persons for a public hospital, who might be too poor to purchase the grounds and buildings, and, therefore, obliged to rent them, but if they should be rich enough to buy in fee and so purchase, the property would be exempt. The entire estate is taxed or no part of it. Distinct estates in land are not separated for taxation and distinctly taxed. But, it is said that these lessees, in the lease, agreed with the lessors to pay all taxes, etc.; that might be levied upon the property, except that part of taxes for the year 1868, which became payable in June, 1869, and that, therefore, they became bound to the state to pay the taxes now levied upon such property.It would be difficult to understand how an agreement between a lessee and a lessor in relation to the payment of taxes to be levied by the state, could give the state power to levy any tax upon the property, if the law of the state exempted it from taxation. But, the state is a stranger to that agreement and can take nothing from or by it in any way.

Kitzmiller v. Van Rensselaer, 10 O. S. 63, which case is referred with approval in Big. on Est., 2 Ed., p. 242 and followed by this court in the case of the Canal Elevator and Warehouse Co. v. Mathers, decided at the present general term. The lease in this case was made in July, 1869, after the lien for that year for taxes had attached to the land, and such taxes for that year had to be paid. This was, in effect, what the lessees agreed to pay by the terms of their lease.

The evidence is that all this property and the buildings upon it were necessary, properly to carry on and carry out the objects of the institution, and no attempt was made to contradict it by other evidence. In the first instance the corporation had the right and discretion to determine what and how much property was necessary to establish and maintain the institution; and, except in case of a manifest abuse of that right and discretion, no court can control or affect the same.

The establishment and maintenance of this institution relieves the state from the charge of maintaining many poor, aged, and incurably sick persons, and it is both in a legal and popular sense a charity, and it is a charity carried on for no pecuniary gain or profit. It is purely public, for it is open to the reception of all such objects of charity as it can provide for, without reference to their religion or nationality. Anyone can apply for admission and support, its objects are not limited to a single or specified number of named persons, and it is therefore in no sense, a private charity, but a public one, though maintained

by a private corporation. If it should cease to maintain such purely public charity, the property, with any increased value it might have, would at once become subject to taxation, but not until then.

But, a witness, the Sister Superior, was asked by the counsel for the defendants in error: "Have you rules printed governing the institution?" She answered: "We have written rules." "Can you and will you produce a copy of said rules here in court?" This was objected to, the objection sustained by the court, and an exception taken. The witness then said: "We have no written rules concerning the admission of applicants, the written rules we have regulate the conduct of the inmates."

The fact that such an institution may have written rules is no test of its being an institution of purely public charity or not, and was prima facie immaterial, and the counsel asking the question, did not state to the court what he expected to prove by them material to the case; and unless he stated some material matter which he claimed such rules tended to prove, there can be no ground to complain of their exclusion. The institution is not supported by taxation or by anything compulsory upon the public, and no inmate is or can be there, who is not voluntarily so; nor is any one obliged to stay, but all may depart whenever they wish. How, then, can the rules prescribed for their conduct while there be material? In argument, however, it is argued that these sisters belong to a religious order, and that order to a particular church, the Catholic church. The record does not show to what church, the religious order is allied, and if it did, and if the rules required all who were physically able to attend religious services while remaining as inmates, it is difficult to see how that could affect the question, as none were obliged to go or stay unless they chose, nor were any obliged to remain longer than they chose, and nobody is taxed to support the institution, its inmates or those who provide for and take care of them.

Religion, by the constitution, is declared to be essential to good government. Religion, therefore, is regarded by the constitution as good. It simply gives the state no power to declare which religion or religious sect is better, or best. "No preference shall be given by law, to any religious society," is the language of the constitution. This makes the state impartial and neutral between every creed, faith and sect existing among its people for the time being. Protestants of every denomination, Catholics and Jews have thus had their respective creeds made equal before the law and all declared to be good, and no preference can be given by law, to either.

Religion, thus, being declared a good, and as bequests and gifts to promote it have again and again been declared by the courts bequests and gifts for a charitable purpose, it would follow that if an institution were established for the sole purpose of promoting any form of religion known among our people, which institution should not be created or maintained by taxation, nor carried on for pecuniary profit, and to the benefits of which all who desired could avail themselves by voluntary accepting its aid and assistance, such would be an institution of purely public charity, though the recipients of such charity might be required by the rules to attend therein the religious services of such creed or denomination, as such attendance would be held to be voluntary, because the entrance to the institution would be voluntary.

We find no error in the judgment below; but it may be indefinite and uncertain as to the taxes for the year 1869 upon the leasehold property such taxes being a lien thereon when the corporation leased the property, we think the decree ought to be so modified as to render it certain by providing that nothing contained in it shall affect any rights of taxation against the property so leased, for the year 1869.

So modified, the judgment will be affirmed with costs.

Judges O'Connor and Tilden, concur.

A. G. Collins and W. T. Forrest, for plaintiffs in error.

Gray & Tischbein, for defendants in error.

290 LIFE INSURANCE—CONTRACTS—TRIAL.

[Superior Court of Cincinnati, General Term, October, 1876.]

Yaple, O'Connor and Tilden, JJ.

*UNION MUTUAL LIFE INSURANCE CO. v. EVA REIF.

1. Where a life insurance company, a foreign corporation, makes, within a state a contract of insurance upon the life of a citizen of such state, and receives from him the premium for such insurance, the insurance company cannot set up as a defence to an action upon the policy, that, by the laws of such state, it had not authority to make such contract of insurance.
2. Where certain warranties and representations are made in an application for life insurance, which application is, by the policy, made part of it, and the answer sets up, by way of defense, the breach of such warranties and the falsity, in fact, of such representations, the plaintiff, in making out his case, is not bound to prove the truth of such warranties and representations; they are collateral to the contract, and it is incumbent on the defendant, not only to aver, but to prove such breaches of warranty and the falsity of such representations.
3. Where the party insured, in his application, represents that his habits have always been sober and temperate, and that they are still so, his intemperance must amount to a habit to render the representation false. The fact that such party may have used intoxicating liquors upon occasions to excess will not render the representation false.
4. Where the insured answers "no" to the questions "Have you ever been afflicted with bronchitis, habitual cough, disease of the lungs, consumption, spitting of blood, severe colic, or disease of any other of the vital parts, if so, state particulars; has the party ever had any serious illness, local disease; or personal injury, if so, of what nature, and at what age; is the party now afflicted with any disease or disorder whatever?" Such party must have been afflicted with symptoms reasonably indicative of such disease or diseases, or his answer will not amount to misrepresentation.
5. If, to the question, "State the name and residence of your usual medical attendant," he answers, "Have none," such representation will not be false, though the party may have previously applied to a druggist at a drug store for a proper prescription for some ailment he then had or thought he had, and which prescription was furnished and filled by such druggist upon his, the druggist's judgment and advice.
6. If such applicant, not being a physician, be asked the cause of his father's death, and he answers "from drinking cold water when heated," such representation is not false, though, from drinking cold water when heated, his father was thrown into typhoid pneumonia and died from it.
7. Section 266 of the Code, which prescribes the mode of conducting a trial by jury, and is divided into seven parts, is directory and not mandatory. The following clause applies to all and every part of such section: "When the jury has been sworn, the trial shall proceed in the following order, unless the court, for special reasons, otherwise devised." The times of charging the jury upon the request of counsel, and by the court at the close of the argument, are parts of the order of trial, and are under the control of the court and in the exercise of fair and reasonable discretion can not be reviewed on error, unless there has been a clear and manifest abuse of such discretion.
8. Part 5 of such section, which provides: "When the evidence is concluded, either party may request instructions to the jury on the points of law, which shall be given or refused by the court, which instructions shall be reduced to writing if either party require it," does not give the party asking such instruction the right to have the court give it in the very language of such party, but the court may determine in what words such instruction shall be given; and the court may require the same to be put in writing, though neither party requests that to be done. Under this provision, the party can only

*The decision in this case was reversed by the supreme court. See opinion, 36 O. S., 596.

request the court, at the close of the testimony, to instruct the jury "on points of law." Counsel can not frame an entire charge for the court, such as it is contemplated by part 7; the court shall give at the close of the argument, and by splitting it up into points, require the court to give it before the argument to the jury commences. In such a case, and especially where such charge as a whole is argumentative, the court may refuse to give any part of it, and defer giving any charge in writing until the close of the argument. If, in such a case, the party whose special charge has been so refused does not, at the close of the court's charge, request to be permitted to argue the case to the jury, in view of said charge, he can take no valid objection to the course pursued by the court, and the points of law asked by the parties to be charged should not be argumentative; if they are, the court should refuse them.

9. A judgment will not be reversed because the verdict is contrary to the evidence, unless it is manifestly so, and the reviewing court will always hesitate to do so where the doubts of its propriety arise out of a conflict in oral testimony.

YAPLE, J.

This is a petition in error prosecuted here to reverse the judgment of this court rendered in Special Term in favor of Eva Reif against the Union Mutual Life Insurance Company, a corporation, for the sum of $3,486.37.

The action below was upon a policy of life insurance issued on July 22, 1872, upon the life of Charles Reif, the son of the plaintiff, in the sum of $3,000, the said Charles having died on the 19th day of October, 1872. The premium paid for the year was $56.70, and the agreed premium to be paid yearly thereafter was the same amount.

The policy stipulated that the loss should be payable to the plaintiff if she should out-live her son, the insured, but if she should die first, the policy was to revert to him. He was without means; his mother had property and paid the premium, and expected to pay or to provide the means of paying the future premiums.

The policy among other of its conditions, provided: "Sixth, the application herefor shall form and be part of this policy, and if any statement made therein, or in the medical examiner's certificate accompanying it, by the applicant, or the person whose life was to be insured, shall be found untrue in any respect, then this policy shall be null and void."

The fifth condition provided, among other things: "If the said insured shall become so far intemperate, or addicted to any vice or habit, as to seriously and permanently impair his health, or induce delirium tremens, then this policy shall be null and void." In the policy itself it is stipulated, "Provided especially that this policy be issued, and it is accepted by the assured and the said applicant, upon the expressed conditions and agreements set forth on the back hereof, and they shall constitute a part of this contract in the same manner and to the same extent as if they were printed in the body of this policy, and are to be referred to in order to ascertain and explain the rights and obligations of the parties hereto in all cases."

And the ninth condition provided: "In case this policy becomes null and void for any of the above causes, all payments of premiums made thereon, and all apportionments credited thereto and remaining unpaid, shall be thereby forfeited to the company," etc.

At the close of his application, which is dated July 16, 1872, Charles Reif states: "I, Charles Reif, of Newport, county of Campbell, state of Kentucky, do hereby declare, that the above answers and statements are true, and that I have not concealed or withheld any material circumstance or information touching the past or present state of health or habits of life of the party whose life is proposed to be insured, or anything with which this company ought to be made acquainted; and that I have an insurable interest in the life of the full sum above mentioned, (viz. $3,000); and I do hereby agree that the above statements, and this declaration, shall form and be the basis of the contract between me and the said company for insurance on the life of Charles Reif, and that if any untrue or fraudulent allegation be contained in this proposal, which I agree shall form and be a part of the policy, or if anything material or important affecting the risk applied for, which this company ought to know, has been concealed, withheld, or omitted in the foregoing, the policy, with all moneys paid thereon, and dividends credited, shall be forfeited to the said company," etc.

Question 5, in the application and answer thereto, was as follows: "5. Has the party whose life is to be insured ever been intemperate?" Answer. "No."

"Is the party now of correct and temperate habits?" Answer. "Yes."

Question 8. "Has the party whose life is proposed for insurance ever been afflicted with bronchitis, habitual cough, disease of the lungs, consumption, spitting of blood, severe colic, or disease of any other of the vital parts? If so, state particulars." Answer. "No."

Question 9. "Has the party ever had any serious illness, local disease, or personal injury, if so, of what nature, and at what age?" Answer. "No."

Question 11. "Is the party now afflicted with any disease or disorder whatever?" Answer. "No."

Question 12. "Name and residence of the party's usual medical attendant." Answer. "Have none."

In the certificate of the medical examiner are found the following questions and answers: "Has the party ever spit blood, or been subject to cough, if either, state particulars." Answer. "No."

And question 16 of the application: "Is the father living?" Answer. "Dead." "If no, give his age at death and cause of it?" Answer. "Age (is or was at death) 43. From drinking cold water when heated."

The defendant set up in its answer, first, that Charles Reif, previous to the date of his application, had been intemperate, and that he falsely and untruly answered that part of question five, and concealed such fact from the defendant; second, that, at the time of the application, Reif was not of correct and temperate habits; third, that the answers to questions eight were untrue, that the applicant had been afflicted with habitual cough, disease of the lungs, bronchitis, spitting of blood, and severe colic; fourth, that the answer to question nine was untrue; that, previous to the date of the application, Reif had had serious illness and local disease, to-wit: hemorrhage of the lungs, spitting of blood, consumption, and local disease of the throat and lungs, producing cough, disease of the lungs and of the stomach; fifth, that the answer to question 11 was untrue; that Reif then was afflicted with cough, disease of the lungs and stomach, chest, throat, and with general debility; sixth, that the answer to question 12 was untrue; that the applicant had a usual medical attendant; seventh, that the applicant's answer to question 16 was untrue; that his father did not die from drinking cold water when heated, but that he died of typhoid pneumonia; eighth, that the answer to the medical examiner, "has the party ever spit blood or been subject to cough," was untrue; that he had spit blood and been subject to cough; ninth, that the contract was a gaining one, the applicant having no insurable interest in the life of his mother, but this answer was withdrawn and the question raised by it is not before the court; tenth, that the premium was paid by a note which the assured did not sign, but that his name was forged thereto as maker; eleventh, that Charles Reif did not sign the application, but that his name was forged thereto, and that the statement of his next friend, part of the application, was not signed by such next friend, but the name was forged thereto; and twelfth, that the insured and the insurance broker lived in the state of Kentucky, and the defendant was a foreign corporation, incorporated by the state of Maine; that the contract was made in Kentucky and the policy delivered there, and that the defendant had no authority to do business of life insurance in Kentucky, etc. To this answer the plaintiff demurred, and her demurrer was sustained, and this is alleged as a ground of error; thirteenth and that the premium note was unpaid, the amount of which was pleaded as a set-off. The reply took issue upon all the defense.

At the trial numerous exceptions were taken by the defendant to the exclusion and admission of testimony, which, so far as they are deemed of any importance, will be noticed hereafter. At the close of the testimony, and before the argument to the jury had been commenced, the defendant requested the court to give the general charge of the court to the jury in writing, and each and all of thirty-two (32) special written charges prepared by the counsel for the defendant, before the argument should be commenced, all of which the court declined to do, but did give the general charge in writing to the jury at the close of the case, to parts of which the defendants excepted, and exception was taken to the refusal of the court to give such special charges.

At the close of the plaintiff's evidence, the defendant moved the court to instruct the jury to return a verdict for the defendant, claiming that it was incumbent on the plaintiff to prove, in chief, the truth of all representations and statements contained in the application, the truth of which was denied by the answer, which motion was overruled and an exception taken by the defendant.

The issues were comprehensively stated thus: Had the insured, previous to his application, been a temperate and sober man, and was he such at that time? Was his health unimpaired by the disease or ailments which he was asked about, or had he always been free from them? Had he no usual medical attendant? Did his father die from drinking cold water when overheated? Was the premium note made by him or by an authorized person for him? Did he sign the medical examiner's certificate, or authorize any one to sign it for him? And did his purported next friend, Stephen Cromer, sign the paper called the next friend's statement, or assent to its being signed for him by another?

If any of these facts were untrue, the plaintiff was not entitled to recover.

The question would then have arisen, whether, if the party had ever been under the influence of excessive drink, or then, at times, drank to excess, the policy would be avoided, or whether such use of intoxicating liquors must not amount to a habit to have such effect; and whether or not the disease and ailments referred to should, or need not amount to an affliction, that is whether one or more of them must or need not have so fastened itself upon him, as, for the time, to become a condition of his being?

Two or three comprehensive charges asked by the defendant upon these points, would have been enough to draw from the court its views of the law sufficient to enable the defendant's counsel to argue the case to the jury upon the facts understandingly; and then a full charge by the court, at the close of the argument, if all such charges were correct in law, would have been all that the case required for its full understanding by the jury. But, the defendant's counsel, after requesting the court, before the argument began, to charge the jury in writing, also requested the court then to give to the jury, in writing, a series of thirty-two (32) charges, the first of which embraced twelve distinct charges, making forty-three (43) in all, prepared by such counsel.

The first charge asked the court to tell the jury that the following twelve were the issues, not in language like this, "whether, etc.," but as follows: "That the answer "no" of Charles Reif to the following question contained in the application, viz.: "Has the party whose life is to be insured ever been intemperate? is untrue," and so on throughout the specified facts, "that they were untrue, that the note was forged," etc. Had these been given as asked, the jury might have been misled, for they could have inferred that the court was telling them, not what the issues, but what the facts were. This was immediately followed by a lecture to the jury as to their duty to be impartial, free from all bias prejudice or feeling, etc. The third charge is of the same character as the second. No. 4 asked the court to charge that the answers to questions Nos. 5, 8, 9, 11, 12 and 16 in the application, were warranties, and must have been literally true, or the plaintiff would fail. No. 5 asked the court to tell the jury that such answers were material in law and that it was not a question whether they were so in fact, No. 6, that if any of the answers were untrue in any respect, the plaintiff could not recover, no matter how they came to be made; No. 7 is but a variation of No. 6, with one or two additional arguments added; Nos. 8, 9, 10 and 11, on the habits of the insured, were merely particularizations of No. 6; Nos. 12, 13, 14, 15, 16 and 17 were also merely itemizations of No. 6 on the subject of health; No. 18 embraced a period down to July 26, 1872, ten days after the application was made, and four days after the policy was issued, it clearly ought not to have been given; Nos. 19, 20 and 21 are covered by No. 6, and relate to the health of the insured; No. 22 asked the court to charge the jury that if Charles Reif ever went to and consulted a physician about his health and procured medicine for himself, that there could be no recovery. This charge was properly refused. He was bound only to state what was his usual medical attendant and where he resided; No. 23 was that if Reif had a usual medical attendant and concealed the fact, the plaintiff could not recover; No. 24 asked the court to charge the jury, that if Reif's father died of typhoid pneumonia, no recovery could be had. The court rightly refused this, because there was evidence tending to prove that such typhoid pneumonia was directly caused by drinking cold water as stated in the application; No. 25 is a mere generality, an abstraction in view of the evidence; No. 26 relates to the cause of the death of Charles Reif's father and was properly refused; No. 27 relates to a branch of the case which the defendant has withdrawn; Nos. 28 and 29 relate to the risk being void, if the premium note and the medical examiner's certificate were not signed by Charles Reif, but was so signed without his knowledge or consent, if he afterward approved of and sanctioned it, both would be valid, and there was no evidence to contradict that of the plaintiff showing that John Reif signed the note and certificate in Charles' presence and at his re-

quest. The charge, had it been given, was misleading; No. 30 relates to the policy being void, if the next friend's certificate was signed for him without his knowledge or consent; if before the policy was issued, the next friend was asked about it by the insurance broker and was assured by such friend that it was correct, that the wife of the friend was advised of the matter, that she told the person to sign it, as her husband was from home but had told her about it, and that it was done accordingly, the next friend afterwards saying it was right as above mentioned, the policy would not be void for such reason; and the testimony in this case fairly required the court to give this qualification, if the charge was given, it was, therefore, properly refused; Nos. 31 and 32 are mere arguments, and the court could properly refuse to give them at any time. In fact, all the charges, except No. 23, could properly be refused because they were too argumentative in behalf of the defendant, and that charge asked the court to tell the jury that that was a "concealment" which could be but a "misrepresentation," the first being fraudulent, the last not necessarily so.

The court refused to give any of the charges asked, the defendant's counsel excepted, and waived his argument to the jury, and thereupon the court charged the jury in writing fully upon all the issues.

The defendant excepted to the following portions of such charge. The court among other things, said: "The first and second of these answers, which it is claimed avoids the policy, are given to questions 5 in said application, said question is as follows: 'Has the party whose life is to be insured, ever been intemperate?' To which Charles Reif answered 'no.' And also, 'Is the party now of correct and temperate habits?' To which said Charles Reif answered 'Yes.' It is obvious that these inquiries are not whether the person whose life is to be insured was ever drunk, or whether he ever used intoxicating drinks; but whether he has ever been intemperate, that is, whether, at any time of his life his usual and daily habits were such as to constitute and render him what is known as an intemperate man, a man habitually under the influence of too great an amount of intoxicating liquor. They do not relate to the question whether the applicant habitually uses intoxicating drinks, for he may do this and yet be a temperate man, but whether at any period, or at present, he habitually used, or now uses intoxicating drinks to such excess as to make him an intemperate man. If you find from the testimony that Charles Reif did so habitually use intoxicating drinks to excess, then the plaintiff cannot recover in this case."

The defendant also excepted to the following part of the court's general charge:

"It is next claimed that Charles Reif, in his application, untruly answered question eight, which is as follows: 'Has the party whose life is proposed for insurance, ever been afflicted with habitual cough, disease of the lungs, consumption, spitting of blood, severe colic, or disease of any other of the vital parts?' to which the answer was 'no.' It will be obvious that as to each of these diseases the question is whether the applicant has ever been afflicted, that is, whether the disease has fastened itself on him, so as, for the time, to become a condition of his being. He was not asked whether he had ever coughed, or whether he had ever been afflicted with these symptoms, so as to constitute disease. If you find from the testimony that Charles Reif was so afflicted, then the plaintiff cannot recover."

Also to the following portion of such general charge: "It is next claimed that the evidence shows that Charles Reif untruly answered the ninth question in the application, which was, 'Has the party ever had any serious illness, local disease or personal injury? The answer was 'no.' It is claimed that Charles Reif had, before the application, serious illness and local disease, to-wit, hemorrhage of the lungs, spitting of blood, consumption, and local disease of the throat and lungs, producing coughs, disease of the lungs and stomach. You have heard the evidence of the various non-professional witnesses and of the family physician, if you find from this evidence that Charles Reif, before the application, had such serious illness and local disease as before explained, the plaintiff can not recover."

Also to the following: "To question eleven in the application, 'Is the party now afflicted with any disease or disorder whatever?' the answer was 'no.' The defendant says the answer was false. You have heard the testimony of the physician who examined Charles Reif at the time he made the application, and the other testimony in the case. If you find from the testimony that the answer was false, that he was so afflicted, as before explained, then the plaintiff cannot recover."

Also to the following: "The answer to the question twelve as to the name and residence of the applicant's usual medical attendant was 'has none.' The defendant says this answer was false. The question refers to a medical attendant, a physician as usually understood, and not to a druggist or drug store, where the applicant may have gone for medicines. The question also refers to the applicant's usual medical attendant, or physician, and not to one whom he has consulted on one occasion or for one purpose. If you find from the testimony that the answer was false, the plaintiff cannot recover."

Also to this part: "To question sixteen in the application, 'is the father living or dead, if dead, give his age at death and cause of it.' The answer was, 'age 43, from drinking cold ice water when heated.' The defendant says his answer was false, that the father's death was caused by typhoid pneumonia. If you find from the evidence, that the father of Charles Reif, when heated, took a drink of cold water, that this immediately deranged his system and prostrated him, bringing on by regular stages, typhoid pneumonia, of which, in a few days, he died, then, although typhoid pneumonia was the proximate or immediate cause of death, yet if it was induced and brought on by drinking the cold water while heated, then the answer for the purpose of this case is not false, but true."

The court charged fully and correctly upon all other questions involved in the case.

The demurrer to the answer, setting up that the insured and the plaintiff, when the insurance was effected, lived in the state of Kentucky, when the contract of insurance was made, and where the defendant had no legal authority to transact the business of life insurance, was properly sustained. The state of Kentucky alone had the right to set up such want of authority; the defendant after making such a contract there, and taking the insured's money upon it, must be estopped from asserting its wants of power to make it.

The motion made by the defendant, at the close of the plaintiff's evidence, for an instruction to the jury to bring in a verdict for it, was properly overruled by the court. Warrants and representations, such as were made in this case, and which the defendant claimed were false, are in their legal nature, collateral to the main contract of insurance; and the defendant resisting the policy must set them up by answer and prove their breach or falsity. This is the rule as to all contracts of insurance, except, perhaps, as to implied warranties of sea worthings in Marine insurance, where the insurer has no opportunity to inspect the vessel.

If the opposite rule prevailed, it is difficult to understand how life insurance cases, the policies in which are based upon so many representations, could be tried at all.

As to evidence excluded. Charles Reif, when he applied for insurance, was twenty-four years old. He was a tinner by trade, he had served his apprenticeship; and, for some years previously, he had worked off and on at his trade in Cincinnati; here he occasionally lost time. Evidence that he stated, on returning to work after some of the absences, on being asked the cause, that he had been sick, was ruled out through all testimony of what he stated as to his illness on occasions when he claimed to be sick were admitted. The rejection of such statements by him was excepted to by the defendant.

Such declarations of his could only be admitted against the beneficiary, the plaintiff, as parts of the *res gestae*, and we think they were too remote and too vague to amount to *res gestae*.

Bliss on Life Insurance, 593, 4, section 382; Averon v. Kinnaird, 6 East 188; Kelsey v. Universal Life Insurance Co., 35 Com. 225; Fraternal Mutual Life Insurance Co. v. Applegate, 7 O. S., 292; Stobart v. Dryden, 1 Mee. & Wels., 615; Roscoe's Evidence at Nisi Prius, 71.

The defendant's counsel asked one of its witnesses to state what transpired between Eva Reif, the plaintiff, and the witness, Charles' wife, with regard to the condition of Charles' health at that time, when the plaintiff came to their house to remove Charles to hers, stating that it was expected to show that the plaintiff had knowledge that Charles was sick at that time. This was long after the insurance was effected, when Charles was prostrate with the sickness of which he shortly afterwards died, the evidence was properly excluded, as the defendant did not claim that such knowledge related to a period anterior to the insurance.

All other evidence excluded or admitted against the exceptions of the defendant was immaterial, and need not be stated or commented upon.

It is next claimed that the court erred in refusing, before the argument to the

jury, to give, as requested by the defendant, the charge, and each proposition contained in it, which was a proper charge, prepared by the counsel for the defendant.

It is insisted that the court should have done this by virtue of section 266, of the Code as amended in 1868—that such section is mandatory and imperative upon the court. There are seven subdivisions of the section, all controlled by the following sentence at the beginning of the section. "When the jury has been sworn, the trial shall proceed in the following order, unless the court, for special reasons, otherwise direct:

"5. When the evidence is concluded, either party may request instruction to the jury on points of law, which shall be given or refused by the court, which instruction shall be reduced to writing if either party require." Then part 7, provides for the court giving its general charge at the conclusion of the argument.

It will be seen that the time of giving charges to the jury form part of the "order" of trial; and that the court for special reasons, may direct a different order. This makes the section directory and not mandatory and places the matter within the fair and sound discretion of the court, the action of which cannot be reviewed an error except in case of a clear and palpable abuse of such discretion. Indeed, if it had been attempted to make such provisions mandatory, it would be a serious question whether the legislature did not thereby invade the judicial province and attempt to interfere in many cases, with the due administration of justice. The court is never bound to give the jury an instruction in the very words of the party asking it, though it may be correct in law. The words of this section of the Code are, "which instructions shall be reduced to writing if either party require it." And surely the court may require it if neither party does; "shall be reduced to writing"—these words do not give to either party the right to frame the very language. The court may control that. Nor does this section give to either party the right to frame an entire charge to the jury for the court, and compel the court to give such charge if substantially correct. "Either party may request instruction to the jury on points of law." It is only upon points of law that the parties have the right to request the court to instruct the jury, and this right cannot be enlarged by splitting an entire charge into points and thus compel the court to give such charge. In the United States circuit court the entire case cannot be broken up into "points," and a review of it be thus obtained before the Supreme Court of the United States, as that court has again and again decided. In the present case, an entire charge of great length, divided into forty-three paragraphs, was prepared by the counsel for the defendant, who asked the court to give the same before the argument commenced, and which, had it been given, would have superseded the duty of the court to charge the jury, in writing or in any other manner, at the close of the argument, as part seven of the section requires. Besides, the charge so prepared for the court was very argumentative, and if it had been given by the court would have been unfair to the plaintiff. We think the court had good special reasons for adopting the course it did in relation to charging the jury. If, after the conclusion of the court's general charge, the party whose special charges have been refused, because, they were not merely "points" but an entire charge for the court, claims that his argument to the jury has been affected thereby, it is his duty to ask the court then to be permitted to argue the facts to the jury, under such charge, and if he do not, it will be presumed that he has not been prejudiced.

The general charge of the court fully covered all the issues involved in the trial, and was not, we think, incorrect in any respect. This is all we need say here. as the portions of the charge excepted to are not given above. The strict rule contended for by the plaintiff in error would render invalid every contract of life insurance, and leave all policy-holders to depend alone upon benevolence of the insurers.

Nor do we think we are justified in setting aside the verdict and judgment on the ground that they are against the evidence. "Before we can reverse a judgment for the reason that the verdict is contrary to the evidence, it must be clearly so. The jury who try a cause, and the court before which it is tried, have much better opportunities to determine the credibility and effect of the testimony, and we ought, therefore, to hesitate before disturbing a verdict rendered by a jury and confirmed by a court possessing such advantages, merely because there is an apparent conflict in the testimony. The conflict or its effect might all disappear if the witnesses were examined before us, and we could see or hear them face to face, as they were seen and heard by the court and jury whose verdict and judgment are passing in review before us." Breese v. State, 12 O. S., 156.

The evidence shows that the widow of Charles Reif was opposed to a recovery by the plaintiff, her mother-in-law, and that she was active in her opposition. She

appears to have been Irish and her husband and his family Germans. The husband's family opposed his marriage to her—unwisely, we are constrained to believe, as she appears to have been in all respects worthy—and they were never friendly to her. She felt that it was wrong that she could get no part of this insurance upon the life of her husband, and aided in the preparation of the evidence to defeat a recovery, being herself a principal witness for the defendant. This may have caused the jury to receive with caution and less credibility the testimony on that side.

Witnesses testified that the premium note, the application and the medical examiner's certificate were signed by John Reif, Charles' brother, at his instance and request; and also that the certificate of the next friend was signed for him on the statement of his wife, in his absence, that it might be so done; and the insurance agent, or broker, who had done much business for the defendant, testified that he afterwards, before the policy was issued, called upon such next friend, who told him he was advised of what had been done and that it was all right. The evidence showed, also, that the father of the insured brought on typhoid fever by drinking cold water when heated, which fever caused his death; that the usual medical attendant of Charles' family, from his birth, was Dr. Gunkle, the medical examiner of this insurance company, but that he never attended upon Charles until his last sickness, because he had always been healthy. Concede that the insured had called upon the druggist, George Rosline, for a prescription and advice, that could not be considered, in ordinary language, as constituting him "a usual medical attendant."

Charles Reif was a young man, and while the evidence showed that he, upon occasions, had been intoxicated, just as his companions and fellow-tradesmen had been, it failed to show that he had ever acquired a habit of intemperance; on the contrary, he seems to have had the control of himself in the matter of drinking.

Upon the question of his health, the evidence was much more close and evenly balanced; and had the jury found for the defendant upon this branch of the case, the verdict would not have been disturbed. Dr. Gunkle, however, testified to his good health at and previous to the medical examination which he made for the insurance company; and he states, when he became sick afterwards, what that sickness was, to-wit, pneumonia, which, by neglect, developed into bronchial consumption, causing speedy death.

Rosline, the druggist, who testifies to his being consumptively affected previous to the insurance, stated that he was the son of a doctor; that he came to this country and worked as a stevedore at New Orleans, as a furnace hand for some years, and at ordinary labor generally.

The jury may not have given him the same degree of credit as they did Dr. Gunkle. The non-professional witnesses on behalf of the defendant they may have thought partisans of the widow of Charles Reif, but, be these matters as they may, we cannot say that the finding of the jury upon this branch of the case was clearly against the evidence.

The judgment, therefore, will be affirmed.

Sayler & Sayler, for plaintiff in error.

Hoadley, Johnson & Colston, and R. W. Nelson, for defendant in error.

LIFE INSURANCE. 293

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

*Anna M. Bonner v. Northwestern Mutual Life Ins. Co.

1. A policy of life insurance for the sum of $5,000 on the ten-year plan, was delivered to the insured in consideration of the sum of $136.75 in cash paid, and of an annual premium note of $91, and an annual cash premium of $136.75, to be paid yearly thereafter during the first ten years of the continuance of the policy, the company promising to pay the said sum of $5,000 within ninety days after notice and proof of death of the insured, deducting therefrom the balance of the year's premium, and all notes given for premiums, if any. It was stipulated in the policy that, if default was made in the payment of any premium, or in the payment of interest on any premium note, the company

*This case was reversed by the supreme court. See opinion 36, O. S., 51.

would pay as many tenth parts of the $5,000, as there had been paid complete annual premiums at the time of the default. It was admitted that the assured had paid six annual cash payments, of $136.75 each, and given six annual notes of $91 each, which notes were a lien on the policy, and had annually paid the interest on all the notes, except on the last, and that when it fell due he refused to pay the interest, and made no further payments of any kind and gave no other notes. It was further admitted that the dividends of the profits of the company had paid and cancelled the first two of the premium notes, and that as to the other four, the company had ceased to declare dividends for the years which such four notes in part represented. Three years after the last payment of interest the assured died. In an action on the policy by the widow, she claimed that she had made six payments of complete annual premiums, and was therefore entitled to recover six-tenths of $5,000, the original sum insured, deducting therefrom the unpaid notes. It was claimed by the defendant that only two complete annual premiums had been paid, and that the plaintiff was only entitled to recover two-tenths of said original sum.

2. *Held,* That neither the policy nor the premium notes fixed any time for the payment of the notes, and that it was not contemplated that the notes should be paid during the life of the assured otherwise than by the application of dividends of the profits of the company; that during the life of the assured at least, the notes were taken in satisfaction of the part of the premium which they represented, and that, therefore, the payment of $136.75 in cash, and the delivery of the premium note for the balance of the year's premium, constituted the payment of a complete annual premium, and that the plaintiff was entitled to recover six-tenths of the whole amount insured, less the unpaid premium note.
3. That the company was not entitled to interest on the unpaid notes from the time the assured ceased to pay interest and up to the time of his death, because by the rules of the company, dividends were not allowed for the years represented by the notes after the interest thereon ceased to be paid, and such dividends in this case would have amounted to more than the unpaid interest.

O'CONNOR, J.

This case was reserved for decision here on the evidence presented at special term.

The defendant is a corporation under the laws of the state of Wisconsin, having a place of business and agents in the city of Cincinnati.

The petition states "that on the 27th day of October, 1865, the defendant, by its policy of insurance of that date, in consideration of the sum of $136.75 to it paid by Mary Bonner, sister of Stephen P. Bonner, and of an annual premium note of $91, and an annual cash premium of $136.75 to be paid yearly thereafter during the first ten years of the continuance of said policy, did insure the life of said Stephen P. Bonner, of Cincinnati, Ohio, in the sum of $5,000, for the term of life, for the sole use of the said Mary Bonner; and did thereby agree with the said assured to pay the said sum to the said Mary Bonner or her executors, administrators or assigns, in ninety days after due notice and proof of the death of said Stephen P. Bonner, deducting therefrom the balance of the year's premium, and all notes given for premium, if any."

The policy contains this clause: "And the said company further promise and agree that if default shall be made in the payment of any premium, they will pay, as above agreed, as many tenth parts of the original sum insured as there shall have been complete annual premiums paid at the time of such default." And this further clause: "That if the said premiums or the interest on any note given for premiums, shall not be paid on or before the days mentioned for the payment thereof, at the office of the company, or to agents when they produce receipts signed by the president or secretary, then in every such case the company shall not be liable for the payment of the whole sum assured, and for such part only as is expressly stipulated above."

These are the only parts of the policy material to the question which has been presented to us for decision.

In 1867, Mary Bonner assigned her interest in the policy to the plaintiff, Anna M. Bonner, at that time the wife of Stephen P. Bonner.

It is alleged in the petition, and admitted in the answer, "that during the first six years of the existence of said policy, namely, from the 27th day of October, 1865, until the 27th day of October, 1871, the said yearly premiums and the

interest upon all notes given for premiums were regularly paid, and that on the 27th day of October, 1871, there was default in payment of premium, and no further payments have since been made," "and that on the 22d day of December, 1874, the said Stephen P. Bonner died." The petition further alleges that at the time of the death of Stephen P. Bonner, the policy under the terms was in force to the extent of six-tenths of the original sum insured, and the plaintiff asks judgment for $3,000, being six-tenths of $5,000, the original sum insured, and for interest.

The defendant denies that at the time of the death of Stephen P. Bonner, the policy was in force to the extent of six-tenths of $5,000, and claims that it was in force only to the extent of two-tenths of $5,000, because, as the defendant alleges, at the time of said death and at the time of said default, only two complete annual payments had been made by the assured. It is admitted by the defendant that by the terms of the policy, the plaintiff is entitled to recover as many tenths parts of the sum of $5,000, as there were complete annual premiums paid at the time of the default in October, 1871; and the only question we are called on to answer is, what, under the policy, constitutes a complete annual premium, or what constitutes the payment of a complete annual premium.

As we have stated, it is admitted by the defendant that during the first six years of the existence of the policy, the annual cash payments of $136.75 were made, and an annual premium note, making six notes for $91 each, was regularly given, and that the annual interest on these notes at the rate of 7 per cent. was regularly paid, except on the last note, which was given in October, 1870, the interest on which became due in October, 1871, and the interest on which was not paid.

These promissory notes were all in the following form: We give the first.

$91. MILWAUKEE, WIS., October 27, 1865.

For value received, I promise to pay to the Northwestern Mutual Life Ins. Co., ninety-one dollars, with interest at the rate of seven per cent. per annum, which interest shall be paid annually or the policy be forfeited: This note being given for part of the premium on policy No. 13,161, is to remain a lien upon said policy until it becomes due by limitation, or by the death of Stephen P. Bonner, of Cincinnati, when the note shall be deducted from the said policy, unless sooner paid. The dividends on the policy are to be applied to the payment of the notes.

(Signed) STEPHEN P. BONNER.

It is to be observed that no time is fixed in these notes when they shall become due—and that it is not contemplated either in the policy or in the notes, that, during the life of the assured, they shall be paid otherwise than by the application of dividends of profits, and if not so paid during the life of the assured, then they are to be deducted from the policy on final settlement. The notes do provide that if the interest on the notes is not promptly paid, the policy shall be forfeited. But there is no such provision in the policy itself, and it is clear that by the word "forfeiture" in the notes, nothing else was intended than what is expressed in the policy, namely, that if the interest is not promptly paid, the company shall only be liable for as many tenth parts of the $5,000 as there have been complete annual premiums paid.

The policy by its terms, was delivered in consideration of the sum of $136.75 then paid, and of an annual premium note of $91, and an annual cash premium of $136.75 to be paid yearly thereafter during the first ten years of the continuance of said policy; and if the assured complies with these conditions, the company promises to pay $5,000 on the death of the assured, "deducting therefrom the balance of the year's premium, and all notes given for premiums if any."

It is further stipulated that if default shall be made in the payment of any premium, the company shall pay as above agreed as many tenth parts of the sum of $5,000 as there shall have been complete annual premiums paid at the time of such default. And it is also further stipulated that if the said premiums or the interest on any note given for premiums, shall not be paid on or before the days mentioned for the payment thereof, then in every such case the company shall not be liable for the payment of the whole sum assured, and for such part only as is expressly stipulated above. The only difference between these two stipulations is that the first makes provision in case of non-payment of premium, and the second makes provision in case of non-payment of interest on premium notes, but neither stipulation contemplates the payment of the notes otherwise than as expressed in the notes themselves, that is, by the application of dividends, or, as expressed

in the policy, by deducting the amount of the unpaid notes from the amount due on the policy on the death of the assured, and the stipulations taken together provide that whether the premium be not paid, or whether the interest on notes be not paid, still the company will pay as many tenth parts of $5,000 as there have been complete annual premiums paid.

It is contended by the defendant that, under this policy, a complete annual premium is the sum of $227.75, being the amount of the annual cash payment of $136.75 and the promissory note for $91, and that until the note has been paid either by the application of dividends, or in cash by the assured during his life, the company has not received a complete annual premium, and that at the time of default in payment of further premium or interest, only the first two of the six notes given for the balance of annual premium had been paid, and these had been paid by the dividends of the earnings of the company, and that, therefore, nothing having been paid thereafter, only two complete annual premiums had been paid, and consequently there was due on the policy, at the death of the assured only two-tenths of $5,000, the original sum insured. The plaintiff on the other hand, contends that the payment of $136.75 in cash, and the giving of a note for $91 for the balance of the premium, constitute, under the terms of this policy, a complete annual premium, and these cash payments having been made annually for six years, and notes given annually for the same six years, that six complete annual premiums have been paid, and that therefore there is now due on the policy six-tenths of the original amount insured, that is six-tenths of $5,000, which would be $3,000, from which is to be deducted the amount of the four notes remaining unpaid at the time of the death of Stephen P. Bonner.

The question then resolves itself into this: To what extent if any, were the premium notes received by the company in satisfaction of the balance of unpaid annual premium? It is true as a general proposition that the delivery and receipt of a note does not discharge the debt for which the note is given, unless such is the agreement of the parties, and the note is received in satisfaction of the debt. It is clear in this case that the premium promissory notes were not received by the company in full satisfaction of the unpaid premium which they represented, because it is stipulated in the policy that if, at the death of the assured, any note remain unpaid, its amount shall be deducted from the sum to be paid the beneficiary; but it is also clear that such notes were taken in satisfaction of the balance of the annual premium unpaid, so long at least as the insured lived: First, because during his life no time was fixed for their payment, and secondly, because no provision was made for their payment in any way during his life, except by the application of the dividends of the profits of the company, and if such dividends were not sufficient to cancel any of such notes, the company could not legally enforce their payment by the assured, nor could the assured compel the company to receive from him cash for the notes, because the notes were a lien on the policy, drawing seven per cent. interest, and the company had the right to retain this investment rather than to receive payment of the notes otherwise than by dividends during the life of the insured. The contract then between the parties was that no further cash payment than that of the $136.75 annually was to be made by the assured, except the interest on the annual premium notes.

What then was the effect, under the contract, of the refusal of the plaintiff to pay further interest after the expiration of the first six years? So far as we know the history of the business of the company from the evidence, such refusal was a benefit and a profit to the company. This was a mutual insurance company, in which every policy holder was entitled to share in the profits of the business. Dividends were declared annually, triennially, or every five years, at the discretion of the manager. The dividends on this policy, as shown by the testimony, very much exceeded the interest on the premium notes. Before the expiration of the first six years, these dividends were sufficient to cancel the first and second notes, and part of the third, amounting to about $250, while the interest due and paid on all the notes was only about $100. By the construction which the company put on the policy, and according to which it conducted its business, and which construction we may assume was the correct one, whenever there was a failure to pay interest on any premium note, the policy holder was not entitled to any dividend for the year represented by such note, either on the note or on the cash payment of $136.75 for that year. So that in October, 1871, when Dr. Bonner refused to pay further interest on the outstanding notes, the company ceased to credit him with any further dividends except upon the payments of the two years represented by the first and second notes, which had been cancelled, and

as to which years it was therefore admitted he had made payment of complete premiums, and except also upon the payment of part of the year represented by the third note, which the dividends had also partly cancelled.

It appears then that the only effect of the refusal to pay further interest, was the forfeiture of the benefits of future dividends, and in no way affected the question as to how many complete annual premiums had been paid, or what constituted a complete annual premium. It was clearly at the option of the insured, whether he would avail himself of the benefit of dividends by the payment of interest, as it was clearly at his option at any time within the ten years of the policy, to decline to pay further annual premiums or give annual premium notes, in which case he would still be entitled to as many tenth parts of the original amount insured as he had paid annual premiums and given annual premium notes, the notes unpaid by dividends at his death to be deducted from the policy.

The claim of the company is that until the outstanding premium notes are paid by dividends, and there is no other way by which either party could enforce their payment during the life of the assured, the annual interest on such notes must be paid, or, so far as they represent the annual premium, no complete annual premium has been paid. We think it sufficient to say that we can find no such contract in the policy nor in the body of the premium note. If such was the contract, and the assured had lived his expectancy of life, say for thirty years after he ceased to pay interest and the affairs of the company had been such that during these thirty years it had been unable to declare dividends, the result would be that during the life of the insured it could never be determined as to the unpaid notes, whether a complete annual premium had been or would be paid.

We do not think the contract between the parties will bear such a construction. Nor can we see that the construction we give to the contract works any hardship to the company. The business of life insurance is necessarily conducted on the theory and on the fact as derived from experience, that the average number of the insured will live their expectancy of life. In the present case the expectancy of the insured's life was about thirty years from the time he ceased to pay interest on the premium notes. He had up to that time paid to the company in cash premiums and interest on premium notes $916; this sum invested even at simple interest for thirty years at seven per cent. would have produced principal and interest, $2,839. The amount due under this policy, in the view we have taken, is $3,000 less the amount of the four unpaid promissory notes for $91 each which would be $364, which deducted from $3,000 leaves $2,636 due to the insured at the time of his death, which is $203 less than the amount he has paid the company with simple interest at seven per cent. for thirty years. The company, however, receives compound interest on its investments, which would yield a very much larger sum, and far exceed the dividends to which the insured in this case would have been entitled for thirty years, had he lived so long on the two complete annual premiums which it is admitted have been paid. If then the assured had lived his expectancy of life the view we have taken of the contract between the parties, would have afforded the company a large profit on the policy. That the insured did not live his expectancy of life is the very risk the company took, and the loss in this particular case is more than compensated by the gains derived from the average of risks where the expectancy of life is realized.

We hold, therefore, that the payment of the annual cash premium of $136.75 and the delivery of a premium note of $91 for the balance of the annual premium of $227.75, constituted under this policy a complete annual premium, and as it is admitted that six such payments were made, and six such notes given, it follows that the plaintiff is entitled to recover six-tenths of the original sum insured, or the sum of $3,000 with interest to commence to run ninety days after the company was furnished with notice and proof of the death of the assured, from which is to be deducted so much of the four premium notes as remained unpaid at the death of Stephen P. Bonner. And for this sum we give judgment for the plaintiff. We allow no interest to the defendant on the notes unpaid at the time the assured ceased to pay interest; because from that time to the time of his death the company, under its rules and under its construction of the policy, cut him off from the benefit of dividends as to four-tenths as we have before explained. If the company were entitled to interest on these unpaid notes under its own rules the plaintiff would be entitled to dividends on the four-tenths in part represented by the notes, which as we have shown would be more than the interest. But whether as to some years of the company's business, this would be so or not, we are satisfied to adopt the construction of the policy acted on by the company on the subject of dividends.

In an action on a policy of this same company, the policy being issued the same year, and being precisely the same as this, the Supreme Court of Iowa, in the case of Ohde v. The Northwestern Mutual Life Ins. Co., 40 Ia., 357, held "that the payment of the principal of the premium notes was not necessary to constitute with cash premiums and the payment of interest, 'the complete annual premiums' upon which payment by the company was made conditional." In this case also the assured had failed to pay the interest due on the last premium note, and the notes remained unpaid to the time of his death, and he made no further payments. The court further held, "that when the assured had made the cash payments, executed and delivered his note for the balance of the premium, and paid the interest due on the previously executed note or notes, then a 'complete annual premium' was paid. This the assured performed for two years, which entitled his widow, upon his death, to two-tenth parts of the whole sum named in the policy, deducting therefrom the amount of the two premium notes, and their accrued interest."

In the case cited it does not appear that the court had any evidence that where interest remained unpaid, the assured was deprived of the benefit of dividends, and therefore the court allowed interest to the company on the unpaid notes. But for the reason we have stated, the payment of interest necessarily entitles the assured to the benefit of the dividends, and the company can not claim interest and at the same time deprive the plaintiff of accruing profits.

This is the only case to which we have been cited which bears fully on the case before us. Counsel on both sides, in elaborate arguments, referred to many authorities bearing on the subjects of forfeiture and conditions precedent and subsequent. But we do not see that these authorities elucidate the question we have decided. The question of a forfeiture does not arise on this policy in this case. On the facts admitted the assured could not work a forfeiture of any kind, unless it be as to dividends by refusing to pay further premiums or interest, or the refusal to give other premium notes. It was at his option to avail himself of the terms of the policy for the ten years, or for any shorter period, and when he declined to make any further payments or to give other notes, he was entitled to the legal benefits, under the policy, of the payments he had already made and of the premium notes he had already given.

Judgment as above indicated is given for the plaintiff.

J. B. Mannix, for plaintiff.

Sayler & Sayler, for defendant.

298

REMAINDER.

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

*Thomas G. Smith v. Elias Block.

Real estate was conveyed to C. for life, and after her death to her children by E., during the life of each of the children, and after their death to E. and to his heirs, habendum to C., during life, and after her death to the "said surviving children," and after the death of each of them, to E. and his heirs. *Held:* that the provision for the children was contingent upon their surviving their mother, and only such of the children as survived her took the estate. That E. took a vested remainder in fee, subject to the intervening contingent estate of the children.

This was an action in this court, at special term, by the present plaintiff, to recover possession of a fourth part of a house and lot situated in this city. The action was tried to the court without the intervention of a jury, and the trial resulted in a judgment in favor of the present defendant. The evidence was made part of the record by bill of exceptions, and the general question for our determination is whether or not, upon the facts thus presented, the plaintiff was entitled to recover. The plaintiff founded his claim of right on the second clause of section one of the act of July 1, 1853, "regulating descents, and the distribution of personal estates," which provides that when any person shall die intestate having

*This case was affirmed by the supreme court. See opinion, 29 O. S., 488.

title to any real estate of inheritance in this state, which title shall have come to such intestate by descent or devise, or deed of gift from any ancestor, such estate, if there be no children, or their legal representatives living, shall pass to and vest in the husband or wife, relict of such intestate during his or her natural life. 1 S. & C., 501. The material facts proved at the trial, as they appear in the bill of exceptions, were these: On September 4, 1864, Helen McDowell, in whom the title then was, by deed, conveyed the premises in controversy, as expressed in the words of the granting part of the deed, to Catharine Smith, "during her natural life, and after her death to the children of Elijah Smith and Catharine Smith during the natural life of each of said children, and after their death, to Elijah Smith, his heirs and assigns forever." The habendum clause was in the words, "To have and hold the same to the said Catharine Smith during her natural life, and, after her death, to the said surviving children of Elijah Smith and Catharine Smith, his wife, and after the death of each of said children, to Elijah Smith in fee, and to his heirs and assigns forever." On the third of June, 1852, Elijah Smith, to whom the remainder in fee was conveyed by the deed of Mrs. McDowell, conveyed such remainder in fee, by deed, to the children of himself and his wife, Catharine Smith, not describing them by their proper names, but as forming a class of persons. At the date of the first deed Elijah and Catharine Smith were husband and wife, and there were five children living, the issue of the marriage. One was subsequently born to them. Prior to 1857 one of the children, a daughter, Georgiana, and unmarried, departed this life, intestate and without issue, and her death was followed in July, 1857, by that of Helen V. Smith, who had intermarried with the plaintiff and who left no issue. Another child, whose name does not appear, a minor, had died prior to 1855 also intestate and without issue. On the death therefore, of the wife of the plaintiff, in July, 1857, only three of the children living at the date of the deed of Mrs. McDowell remained; these were Andrew McAlpin, Charles McDowell and Clarence Eugene Smith. In this state of things, Catharine Smith, in 1864, brought an action in the court of common pleas of Hamilton county under the act "to provide for the sale or lease of estates tail in certain cases (1 S. & C., 550) making as parties defendant the surviving children above named, and praying for a sale of the premises, and an investment of the proceeds agreeably to the provisions of the act. To this action Elijah Smith procured himself to be made a party, and in it he sought, but failed to obtain a judgment setting aside his conveyance. The premises were regularly sold under the order of the court, and the present defendant became the purchaser. He entered into possession under his purchase, and has ever since held and now holds such possession and claims to be the rightful owner.

TILDEN, J.

All the children named in the deed of Helen McDowell and in that of Elijah Smith, except Helen V. Smith, the wife of the plaintiff, and the three brothers referred to in the petition, had died intestate and without issue, prior to July, 1857. We may then abstain from the consideration of some of the questions which have been included in the argument, and assume that the entire inheritance, except the life estate then outstanding in Catharine Smith, had become vested in these four surviving children as tenants in common. Each had title to one-fourth part of the remainder in fee; and if their estates in remainder for life, after the death of Catharine Smith, had become merged in the inheritance, both remainder for life and the inheritance passed to the surviving brothers under the statute of descents by the death of Helen V. Smith. It is contended in behalf of the plaintiff, the former husband, relict of Helen V. Smith, that her estate in the remainder in one-fourth part for life to commence in possession at the death of Catharine Smith, did so become merged in the inheritance and united in her by virtue of the conveyance of the remainder in fee by Elijah Smith. It is further contended in behalf of the plaintiff that an estate for the life of the plaintiff, to commence in possession at the death of Catharine Smith, passed to and became vested in him, as the husband relict of Helen V. Smith, she having died intestate and without leaving children or their legal representatives, and the estate having come to her by deed of gift from Elijah Smith, the ancestor from whom the estate came. Included in this claim is the proposition, the correctness of which is assumed by the plaintiff, and impliedly conceded by the defendant, but upon which the court is not to be understood as intending to express any opinion that the right or title which passed from Helen V. Smith by her death, was "a title to real

estate of inheritance" within the words and meaning of the first section of the act regulating descents (1 S. & C., 500). The proposition, in other words, is that the statute does not merely refer, and is not to be confined to a "title or right" which is absolute; to an estate in fee simple, to an inheritance, according to the apparent and popular significance of the word; but that if there be technically an inheritance, a fee simple in remainder, such remainder, to take effect in possession at the determination of intermediate estate, then that the husband or wife relicit becomes entitled under the statute for the remainder of his or her life. This proposition being assumed, it would not be easy to perceive, on the title as already stated, on what ground the claim of the plaintiff could be successfully resisted.

It is accordingly contended in behalf of the defendant, conceding the above construction of the statute to be correct, still that the surviving brothers, whose rights became vested in the defendant by the proceedings which took place in the court of common pleas, besides succeeding to the rights of Helen V. Smith, as her heirs, were further entitled, separately, to the life estate created by the deed of Helen McDowell, and that until the death of all of them, a right of present possession such as will sustain an action, has not become vested in the plaintiff. If the deed of Mrs. McDowell had the effect thus ascribed to it, it is very clear that the right confined by it was not in any degree abridged by the subsequent deed of Elijah Smith, nor did it become merged in the remainder conveyed by it. A merger will not be forced upon a party. The doctrine never applies when it would work an injustice to the owner, nor when his interest requires that these rights should have a separate existence. Myers v. Hewett, 16 O., 449.

We are to consider then what was the effect of the deed of Helen McDowell. The operative or granting part is in the words: "Bargain, sell and convey, to the said Catharine Smith during her natural life and after her death, to the children of Elijah Smith and Catharine Smith, during the natural life of each of said children, and, after her death, to the said Elijah Smith, in fee, and to his heirs and assigns forever." The habendum clause is as follows: "To have and to hold the same to the said Catharine Smith during her natural life, and, after her death, to the said surviving children of Elijah Smith and Catharine Smith, his wife, and after the death of each of said children, to said Elijah Smith in fee, and to his heirs and assigns forever."

It is, we think, sufficiently apparent to require us to hold that the grantor in this deed meant something more than the creation of a tenancy in common in the children. The general words used in the deed, namely, "to the children," etc., would have accomplished that purpose without more, and without the words which follow, the effect would have been that upon the death of each child, his or her interest would have become vested in Elijah Smith. This was not intended, and it was because it was not intended that the further words were added limiting the operation of the words granting the remainder in fee to Elijah Smith. These words are "after the death of each of said children." It has been supposed that the legal effect of these words is such that the death of each child not only operated to put an end to the estate of such child, but also to entitle Elijah Smith, as the owner of the remainder in fee, so soon as such remainder should take effect in possession, by the death of Catharine Smith, to claim the possession of the share of the child so dying. But the deed does not say so. Besides it appears in the case that the consideration for the conveyance was furnished by Elijah Smith and Catharine Smith, the parents of the children named in the deed and the benefits conferred by the deed may well be considered as having been intended as a provision for them. These children formed a class of which each member was equally the object of the provision; and they are referred to in the deed as forming such class. For whilst by the granting words the remainder to the children is to continue "during the natural life of each of said children," the remainder over to Elijah Smith is not to take effect until "after their death," i. e., until after th death of all of them. The operation of the plural pronoun "their" is to prevent the vesting or merger in Elijah Smith of any part of the estate of the children, until the estate of all is gone by the death of all, thus leaving the possession in the surviving children, at the death of each, from time to time, until the death of the last, when, the intermediate estate having come to an end, that in remainder takes effect in possession. Reading the language of the grant to the children, therefore, in connection with that of the limitation over, and considering the relations of the parties, and the general purpose of the conveyance, we conclude that when the action was brought the right of present possession was in the defendant, and that judgment was properly rendered in his favor.

Judgment affirmed with costs

[Superior Court of Cincinnati, General Term, October, 1876.] 299

WILLIAM MURRAY v. SUSAN MURRAY ET AL.

For opinion in this case see 5 Dec. R. 382 [s. c. 5 Am. Law Rec., 266.]

[Superior Court of Cincinnati, General Term, October, 1876.] 300

WILLIAM HEPWORTH v. GEORGE H. PENDLETON ET AL.

For opinion in this case see 5 Dec. R., 386 [s. c. Am. Law. Rec., 285]. See also *post*, 4 Bull., 120.

[Superior Court of Cincinnati, General Term, October, 1876.] 301

DATER v. SIMON & CO.

For opinion in this case see 5 Dec. R., 377 [s. c. 5 Am. Law Rec., 257].

RECOUPMENT—COUNTERCLAIM 302

[Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

MARTHENS v. DUDLEY & CO.

In an action on a note, a claim to recoup the amount of other notes given by defendant to plaintiff on the occasion of defendant being financially embarrassed and making a composition with his creditors at 60 cents on the dollar, but secretly agreeing to give plaintiff 75 cents on the dollar, so as to induce other creditors to come in, and for the extra 15 cents the notes set up in the answer were given, but were not paid. *Held:* This is not a counterclaim, because not connected with the transaction set up in the petition, nor is it a set off, for defendant would only have a cause of action to recover back if he had paid anything on such notes and could set up the fraud to defeat recovery if sued on them.

O'CONNOR, J.

The action was on a promissory note made by Marthens, dated January 19, 1876, for $480, payable to Dudley & Co. There was no defense to the note, but Marthens, the defendant below, alleged in his answer, by way of counter claim or set-off, if it should be either, that in 1873 he was in embarrassed circumstances and made a composition with all his creditors on the basis of sixty cents on the dollar, except with Dudley & Co., and that while they ostensibly agreed to receive sixty cents on the dollar, so as to induce the other creditors to come to the agreement they secretly insisted on Marthens giving them promissory notes for seventy-five cents on the dollar, which Marthens did; that these notes becoming due, Dudley & Co. induced him to renew them, and to secure the same by mortgage on real estate; that the amount of this fifteen per cent., in excess of sixty cents, which the other creditors had agreed to receive, would be about $1,000 and he asks the court to give him judgment for the differ-

ence, $520. The answer was demurred to and demurrer sustained at special term; and judgment rendered for the plaintiff.

Judge O'Connor announcing the opinion of the general term, held, that the answer did not set up either a counter claim or set-off. It was not a counter claim, because the promissory notes spoken of in the defendant's answer did not grow out of the same transaction as the promissory note sued on; nor were they connected with the transaction in which the note was given. It was given in 1876, and the notes spoken of in the answer in 1873, and rendered in 1875, long before the note sued on was given, and it was not claimed in the answer the note sued on had any relation to the other notes, but might have been given on a wholly different consideration. Therefore it was not a counter claim.

It was not a set-off, because that must be a separate cause of action, existing in favor of the defendant and against the plaintiff, upon which the defendant might have brought an independent suit. In this case the defendants had paid nothing on the notes of 1873 to the plaintiffs, and therefore had no cause of action, and if sued on the notes of 1873, he might set up the fraud stated in his answer to defeat a recovery on the part of the plaintiff. But at present, as he has not been sued on these notes, he has no cause of action against them, and therefore the fact stated in his answer not constituting a counter claim or set-off, the judgment must be affirmed.

J. R. Challen, for plaintiff in error.

F. D. Lincoln, for defendant.

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302 ATTACHMENT—SUB-CONTRACTORS.

[Hamilton District Court, October Term, 1876.]

Cox, Force, Murdock, Avery and Burnet, JJ.

CITY OF CINCINNATI v. C. C. MCNEELY ET AL.

1. Where, after general creditors had attached part of the amount due to a contractor remaining in the hands of the owner, the owner made payments to the contractor and his assignee, leaving more than enough to satisfy the attachments, and subsequently accounts of sub-contractors were filed with the owner, of which he had no notice at the time of such payment to the contractor. Since the attachments are subject to the claims for labor, the latter are entitled to be paid in full out of the money in the owner's hands, and if there is a deficiency, owing to the prior payment to the contractor and his assignee, the attaching creditor is entitled to judgment against the owner for the amount so paid.
2. Section 1, 72 O. L., 166, that when attested accounts are delivered to the owner he shall retain out of subsequent payments the amount of such labor, means that if the amounts are found and ready to be paid, but are, in fact, not paid, but retained for the benefit of those filing such accounts, this appropriates the amount to them the same as if paid, and the priority is not changed by subsequent accounts being filed, and by section 4, providing that where, at the time of payment, there is more than one account filed, they shall be paid *pro rata*, without regard to date of filing. The subsequent accounts are simply entitled to equality among themselves.

AVERY, J.

The City of Cincinnati being indebted to McNeely upon a contract for building the approaches to Kemper Lane Bridge, in the sum of $937, was served by laborers under him, as provided in the mechanics' lien law,

with attested accounts, to the amount of $123.64, and was also garnisheed by general creditors in two suits, one for $300, and the other for $35, in which judgments being rendered, orders were made upon the garnishee to pay. Afterwards, without notice of other claims for labor, and without collusion with McNeely, the city paid him $160, and to W. B. Dodds under an assignment from him, subsequent in date to the first garnishment $300, retaining in its hands the balance, $477. After this, other attested accounts for labor were delivered to the city, amounting to $380.43, of which the amount of $116 was subsequently paid in full, leaving in the hands of the city $361, which it now brings into court in this proceeding for the adjustment of the rights of the parties.

Section 1 of the amendatory and supplemental act (68 O. L., 107), amended (72 O. L., 166), provides that when attested accounts for labor are delivered to the owner, he shall retain out of his subsequent payments to the contractor, the amount of such labor for the benefit of the persons performing the same.

Section 4 provides that where, at any time, anything is paid under this act upon any such attested accounts, more than one such account is in the hands of the owner entitled to immediate payment, and the funds applicable thereto are insufficient to pay all in full, they should be paid pro rata, without regard to date of delivery or filing.

Upon these sections this question arises. The amount retained out of the payments to McNeely, and to Dodds, his assignee, was more than the attested accounts at that time in the hands of the city and would have been sufficient to pay them in full, but, if the subsequent accounts are to be admitted to an equal footing it will be insufficient. Nor can recourse to make up the deficiency be had against the city, because of the payments. Enough was retained out of these payments to satisfy the attested accounts, which, up to that time, had been delivered, and the city had no notice of the rest.

The question is then whether the accounts in the hands of the city, at the time of such payments, are to be preferred. If paid at that time, those subsequently filing accounts could have shared only in what was left. Although not in fact paid, the amount was retained for their benefit. This is expressly provided by section 1. Being so retained, the amount was in effect appropriated to them, and consequently must be first applied to their payment.

But while they are to be preferred, the others, who subsequently filed attested accounts, were entitled to equality among themselves. So far, then, as the payment of $116 to a portion of these, in full has diminished the proper share of the rest, the latter may recover against the city.

The general creditors of McNeely, by garnisheeing the city, acquired a lien upon the fund. This, however, under section 3, of the amendatory act, before referred to, was subject to all claims for labor. Still, if a portion of the fund in hand when the process was served, had not been withdrawn in payments to McNeely and his assignee, there would have remained a surplus, after accounting to all the laborers in full, and to that extent, the attaching creditors would be entitled to judgment against the city upon the orders made in the attachment proceedings. The surplus would have been $340.

Judgment accordingly may be taken by the first attaching creditor for $321.75 in full of his claim, and by the other for the balance of $18.25.

The fund in court, $361, will be distributed, first, in payment of costs; second, to the attested accounts, which are entitled to be preferred; and third, to the rest, pro rata. For the difference between the share of these last, and what they would otherwise have received, but for the $116, which was paid by the city in full, no judgment will be rendered in this case. The parties allege that they have already, before the commencement of this suit, obtained judgment in separate proceedings against the city, for the full amount of their several claims. All that can be done here, is to order the payments made in distribution, to be credited on their respective claims, and to leave them to their proper remedies for the balance.

Murphy, for the laborers.
Coppock, for the creditors.
City Solicitor, for the city.

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303 OMISSION OF PETITION CURED BY VERDICT.

[Hamilton District Court, October Term, 1876.]

Cox, Force, Murdock, Avery and Burnet, JJ.

DENNIS MCCARTIN v. JOHN SULLIVAN.

The omission of any prayer in an action to recover damages for assault and battery, except that the reply prayed judgment for the damage alleged in the petition, is cured by verdict for plaintiff.

FORCE, J.

The case came to this court by petition in error to reverse a judgment of the common pleas. The suit, brought to recover damages for assault and battery, was tried by a jury, who returned a verdict for the plaintiff, and a motion for a new trial was overruled. There was no bill of exception taken, and the only ground of error alleged, that can be considered, was one: The plaintiff in error claims that no judgment could be rendered on the pleadings.

The petition stated that the plaintiff was unlawfully assaulted by the defendant and damaged to the amount of $5,000, but there is no prayer for relief. The answer sets up self-defense, and the answer also omits a prayer for relief. The reply, however, of the plaintiff does contain a prayer for judgment for the damage alleged in the petition. The pleadings are certainly unusual in their form, and the petition is defective; but upon these pleadings after verdict for plaintiff, it was not error to render judgment.

Judgment affirmed.

Blackburn & Shay, for plaintiff in error.
G. Tafel, for defendant.

REMEDY TO FORFEIT LEASE. 303

[Hamilton Common Pleas Court, November Term, 1876]

JOHN RYAN v. WILLIAM J. KIRKPATRICK.

Since an existing unexpired lease is not forfeited by operation of law by use of the premises for purposes of prostitution (Crofton v. State, 25 O. S., 249), but the statute only gives the option to avoid it, the lease is still subsisting, and the landlord has only a right to enter and proceed by ejectment, and can not recover possession by forcible entry and detainer.

FORCE, J.

Suit to reverse the judgment of a magistrate in a suit of forcible detainer. The defendant (Ryan) in that suit set up a lease, and claimed the magistrate had no jurisdiction. The verdict was against him. Objection is taken to the charge of the magistrate, to the effect that if the premises were used by the lessee for the purposes of prostitution, or if he failed to pay rent, the lessor could enter and take possession by reason that the lease was void.

If a lessor desires to forfeit an existing lease, he must do so by entry and action of ejectment, not by forcible entry and detainer.

When a lessee uses the premises for purposes of prostitution, it has long been the practice in this county, for the lessor to eject the tenant by proceedings in forcible entry and detainer. And when the legality of this proceeding was prosecuted in a case like the present one, a little more than a year ago, I affirmed the judgment of the justice on the ground that the interpretation of the statute had been so long acquiesced in that I would follow it until a higher court should direct otherwise.

Since then, the supreme court in Crofton v. State, 25 O. S., 249, has decided that the lease is not forfeited by operation of law upon such act of the tenant; the statute only gives the lessor the right to enter and avoid the lease, which right he may exercise or not as he may choose. Hence, since the lease is subsisting and the landlord simply has the right to have it forfeited, he must enter and proceed by ejectment, not by forcible entry and detainer.

Judgment reversed.

[Superior Court of Cincinnati, General Term, October, 1876.] 309

WESTERN UNION TELEGRAPH CO. v. ATLANTIC & PACIFIC TELEGRAPH CO. ET AL.

For opinion in this case see 5 Dec. R. 407 [s. c. 5 Am. Law Rec., 429]. For common pleas decision see *ante* 163. The case was affirmed by the district court, 5 Dec. R., 474 (s. c. 6 Am. Law Rec., 117); and reversed by the supreme court. See opinion, 38 O. S., 24.

[Superior Court of Cincinnati, General Term, October, 1876.] 310

JOHN W. PATRICK AND RUTH A. PATRICK v. JOSEPH H. LITTELL & CO.

For opinion in this case see 5 Dec. R., 379 [s. c. 5 Am. Law Rec., 260]. Affirmed by supreme court, 36 O. S., 79.

314 ORIGINAL PROMISE NOT WITHIN STATUTE OF FRAUDS.

[Superior Court of Cincinnati, November Term, 1876.]

O'Connor, Tilden and Yaple, JJ.

JAMES H. LAWS ET AL. v. N. E. SCALES.

Where plaintiff's debtor assigned property to the defendant in consideration whereof the defendant agreed, in writing, with the debtor, to pay the amount due from him to the plaintiff; this is not a collateral promise to answer for the debt, default or miscarriage of the debtor, but is an original promise, and although the writing was delivered to the defendant, the statute of frauds does not apply. It is well settled that the plaintiff can sue on such promise, though he is not the promisee.

TILDEN, J.

This cause is presented to the court on a demurrer to the petition filed in the case, the ground of which is stated to be that the facts contained in it are not sufficient in law to constitute a right of action.

The facts material to the consideration of the case are that Thomas Lucas and John Gaynor, who were partners under the firm name of Thomas Lucas & Co., became indebted to the plaintiffs in the sum of $545.78 for merchandise sold to them by the plaintiffs. That Lucas & Co. had a construction contract with the Cincinnati Southern Railroad, and that on the 27th of September, 1875, with the consent of such railroad, they assigned and transferred such contract to the defendant, who in consideration of such sale and assignment undertook in writing with Lucas & Co. to perform and complete such contract, and to pay to the plaintiffs the sum due them from Lucas & Co., with interest from January 19, 1875. The breach of this promise is alleged, and judgment is demanded for the amount due from Lucas & Co. to the plaintiffs.

The ground of the demurrer, as it is stated to be in the brief of the counsel of the defendant, is that the promise of the defendant was a promise to answer for the debt, default and miscarriage of Lucas & Co., and as the written evidence of the promise was made and delivered to Lucas & Co. such promise was within the statute of frauds and perjuries and void. The objection of the court to this argument is, that the promise was not collateral or one to answer for the debt of another. It was an original promise and the promise to pay the debt of the promisor himself. It is true that the promisees were Lucas & Co., but though made to them, it was made for the benefit of the plaintiffs, and it is perfectly settled in this state, and elsewhere, that such a promise may be enforced by such third party by an action in his own name.

The authorities cited by the counsel against the demurrer, particularly the case of Thompson v. Thompson, 4 O. S., 333, are full as to this proposition. The demurrer will be overruled.

DEMURRER—DEED FOR A DIFFERENT PARCEL 314

[Superior Court of Cincinnati, November Term, 1876.]

O'Connor, Tilden and Yaple, JJ.

DANIEL GANO RAY v. HUGH QUINN.

Whether a contract to convey a specified lot, being twenty-four feet, six inches, more or less, in front is satisfied by an offer to convey the lot, describing it as twenty-four feet, more or less, in front, cannot be raised by demurrer where the petition alleges that the deed was of the identical premises, and the variance is to be questioned by comparing the petition with documents not constituting part of it, although the petition shows the descriptions as in the documents. The general averment of identity is admitted by the demurrer.

TILDEN, J.

The petition filed in this case states that on July 3, 1876, the plaintiff caused the following described real estate to be offered at public auction, viz.: "Premises No. 70 West Sixth street, a two-story brick store with side entrance; house in good condition, and the lot has a frontage of 24 feet more or less, on the following terms." These terms are set forth at length in the petition, which further sets forth that at such auction sale said premises were bid in by the defendant at the price of $449 50-100 per front foot, that immediately after such a sale the defendant entered into a written contract of purchase from the plaintiff, which writing is copied into the petition at length, the premises being therein described as being the two-story brick house No. 70 on the north side of Sixth street, between Walnut and Vine, with lot 24 feet 6 inches, more or less, in front, and 100 feet, more or less, in depth.

The petition then purports to set forth in extenso a copy of the advertisement. Avers that the amount of the purchase money was $10,788. It alleges that the plaintiff caused a deed of general warranty to be executed and tendered to the defendant, but that he declined to receive the same, or pay said purchase money, or to carry out said contract, while the plaintiff on his part did all and singular the things required by him to complete the contract. It is further alleged that the plaintiff thereupon again caused the property to be advertised for sale on August 3, 1876, and notified the defendant that he should hold him responsible for any loss he should sustain in selling said property; that, at such sale, in August, 1876, the property was sold to one L. B. Harrison for $412 50-100 per front foot, Harrison being the highest bidder therefor. That the proceeds of the sale to Harrison amounted to $9,900 only, that in such second sale, the taxes due on December, 1876, amounted to $105.35, that the advertising costs amounted to $47.50, the commission paid to the auctioneers $100, making the total expenses $252.85, leaving as net proceeds of the sale the sum of $9,647.15, and the difference between the proceeds of the last sale and the sale to the defendant $1,140.85 as the sum he claims to have lost by reason of the refusal of the defendant to carry out his contract with the plaintiff. Judgment for this sum with interest is demanded.

It would have been sufficient in this case to have set forth the substance of this contract according to the legal effect of its terms, and to have averred a breach of it by the defendant. It was unnecessary and

improper to copy into the petition the advertisement of the sale at auction, the written contract between the parties and all the statements in the petition, except that of the terms of the contract according to its legal effect. So far as such statements are in any view material, they are of matters of evidence merely, which, though proper to be proved at the trial, have no proper place in the pleading, their tendency being not merely unnecessarily to incumber the record, but to induce uncertainty and confusion, and to obscure the issues to be determined at the trial. Had a motion been made for that purpose, this redundant and irrelevant matter would have been stricken from the petition, and the petition itself, reduced to a statement of facts constituting the ground of the action. But instead, the defendant has preferred a demurrer, challenging only the sufficiency of the facts constituting the ground of action in which the plaintiff seeks to recover.

The ground of the demurrer is stated to be that it appears from the petition that the deed alleged to have been offered to the defendant, was for a different parcel of real estate from that which the contract describes. It is certainly true, as an abstract proposition, that an offer of performance on one side, must be an offer to do that which is required by the contract to be done. If one man contracts to sell and to convey to another a described parcel of land, and then tenders a deed for the conveyance of a different parcel of land, he will not at the trial be able to prove that he has offered to perform the contract on his part. This question then is purely one of evidence. The averment of the pleading is simply that the plaintiff has offered to convey the particular parcel of land and called for by his contract, and if this averment is denied, the plaintiff must prove at the trial, as matter of fact, that the land in the deed is identically the same as that which the plaintiff contracted to convey. Such being the nature of the question, and the mode of its presentation it becomes apparent that the demurrer raises a question of evidence merely, since the variation which is suggested as the foundation for the demurrer arises from a comparison of the description contained in the contract, and the description contained in the advertisement for sale. The description as given in the contract is this: "A house No. 70 Sixth street, with a lot 24.6, m. or l., feet in front and 100, m. or l., feet in depth, as per advertisement." Elsewhere in the petition the description is: "Premises No. 70 Sixth street, with a lot having a frontage of 24.6 feet, more or less, by 94 feet deep, more or less." But the plaintiff has elsewhere in the petition averred generally that he has performed, in every particular, the contract on his part, and offered to convey the premises contracted to be sold. The truth of this averment is admitted by the demurrer. And so the demurrer, admitting that the premises sold are identical with those offered to be conveyed, the argument raises the question of identity by comparing the description in the deed with that contained in documents not constituting any part of the petition itself. The demurrer, then, is not regarded as having been well taken and will be overruled.

J. C. Thoms, for plaintiff.

King, Thompson & Longworth, for defendant.

INTEREST ON FOREIGN NOTES—GUARANTORS 314

[Hamilton Common Pleas Court, November Term, 1876]

O. J. WILSON v. ROSE CLARE LEAD & SPAR CO. ET AL.

1. The rule that on a note made in one state and payable in another the parties may adopt the rate of interest which is legal in either state, applies to guarantors signing in the latter state.
2. A plaintiff is entitled to a joint judgment against joint guarantors for the whole amount and cannot be compelled to take a *pro rata* judgment against each.

JOHNSTON, J.

This was a suit on eleven promissory notes of $1,000 each. The notes were made by the company, and guaranteed by Van Vleck and others, Richard Smith, A. Hinkle and James Morrison & Co. being among the guarantors. The notes were made in Illinois, and secured by mortgage there, but were payable at Cincinnati. Van Vleck and Stearns & Foster alone answer the former setting up usury,and latter claiming that there should be only a pro rata judgment against them. The plaintiff demurs to the two answers.

Judge Johnston in deciding the case, remarked that there was much difference of opinion as to the question of interest where the note is made in one state and payable in another, the question being whether the rate of interest at the place the note is made shall govern, or the place of payment. The supreme court of this state has very recently settled that question so far as our courts are concerned, in the case of Kilgore v. Dempsey, 25 O. S., 413. The court there decides that where the rate of interest in the state in which the note is made and the state where it is made payable conflict the parties may in good faith adopt the rate of interest legal in either state. Hence, in the case at bar, the parties had the right to adopt the rate of interest legal in Illinois to govern them, and did so, fixing the rate at ten per cent. To that extent the contract would be considered legal here; but Van Vleck alleges in his answer that in addition to the ten per cent., $1,000 was also reserved as usurious interest.

Referring then to the statute of Illinois, by which the parties were willing to be governed, it appears that no higher rate of interest than ten per cent. can be reserved, and if a greater sum be reserved, then the party loaning the money loses the entire interest, and can recover only his principal, differing from our statute in this: that where a greater sum than eight per cent. is reserved in Ohio the party is remitted to six per cent. The demurrer, admitting the transaction to be as claimed by Van Vleck, must be overruled.

As to the answer of Stearns & Foster, the obligation of guaranty being joint, and not joint and several, the plaintiff cannot be required to take his judgments by fragments. He is entitled to a joint judgment against all for the whole amount. If one cannot pay the whole amount he is entitled to enforce contribution against his co-dependents.

Demurrer sustained.

Collins & Herron, for defendant.

315 GOODS TO EQUIP A HOUSE OF ILL-FAME.

[Hamilton Common Pleas Court, November Term, 1876]

DANIEL KUSWORM v. AUGUST HESS.

Where an execution is levied on chattels, and thereupon they were replevied by a third person, the execution creditor may defeat such replevin by proof that such person's right is founded on a chattel mortgage, given him by the execution debtor to secure the price of furniture sold to equip a house of prostitution. As the debtor could have defeated the replevin on this ground, the same right is transferred to the officer, to whom the execution creditor was substituted.

JOHNSTON, J.

Hess having recovered a judgment against one Belle Johnson, levied on chattel property found in her possession. Kusworm replevied, claiming both ownership and right of possession. Hess answered, denying such right in plaintiff. As a third defense he alleged that plaintiff claimed under a chattel mortgage from Belle Johnson, but that it was given to secure the price and value of furniture sold by him to her for the known purpose of furnishing a house of prostitution, and that no title passed to plaintiff thereby. To this plaintiff demurs. Plaintiff and Belle Johnson being in *pari delicto,* the law will not aid either. It will leave them as it finds them. She at least had the actual possession at the time of levy, and that right, by the levy, was transferred to the officer for whom Hess was substituted. As she could, in this illegal transaction, have withheld possession against plaintiff, that right by the levy became vested in Hess. What the possession of this contraband property may have been worth is not here the subject of inquiry, that being the province of a jury in assessing damages. If plaintiff never could lawfully have taken possession of it, the value of that possession might amount to the value of the property itself. Demurrer overruled, with leave to file reply

Abraham, for plaintiff.
Corbin, for defendant.

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315 MECHANIC'S LIENS—BILL OF PARTICULARS

[Ross Common Pleas Court, November Term, 1876.]

*SCIOTO VALLEY RAILWAY CO. v. DENNIS CRONIN.

1. A mechanic's lien law applicable only to building of railroads is not unconstitutional as being a general law not having a uniform operation throughout the state. This provision of the constitution only refers to the territorial operation of law.
2. A mechanic's lien law, giving a person the means of securing the fruits of the contract he has made, is not in violation of the obligations of a contract.
3. The enforcement of the provisions of the mechanic's lien law of March 31, 1874, as to railroads (71 O. L., 51), may be had before a justice of the peace. The case is not an equity suit to assert a lien on a fund, making all other claimants parties, but is of legal cognizance; no priorities are given, though the claim may be reduced by the presence of other claims on the fund, the company must set this up by answer.

*This decision was affirmed by the supreme court. See opinion, 38 O. S., 122.

4. The bill of particulars before a justice's court is not to be tested by the strict rules applicable to pleadings, but to be liberally construed. The only test applicable is, whether it will admit of proof of sufficient facts to make out the claim.
5. Under the act of March 31, 1874, entitled "An act to secure pay to persons performing labor and furnishing materials in constructing railroads" (71 O. L., 51), a substantial compliance with the conditions of the statute providing for the service of written notice upon the owner of the road is essential to create any obligation on the part of such owner toward the person performing labor or furnishing materials under a contractor or sub-contractor, or to give such person any right of action against such owner.
6. Where from the nature of the action defendant has notice that the plaintiff intends to charge him with the possession of a written instrument, formal notice to produce the same at the trial is not essential as a foundation for the introduction of parol testimony touching its contents.
7. Where a writing is relied on as a foundation of the plaintiff's claim and is in possession of the other party, as where under a mechanic's lien law by a material-man against the owner, after service of notice on the owner to hold the amount claimed as due from the contractor, parol evidence of the contents of the notice may be proved without having given notice to the adverse party to produce it. The pleading itself, stating such notice as part of the plaintiff's claim, is equivalent to a notice to produce the written notice.

MINSHALL, J.

This is a petition in error brought to reverse a judgment rendered by the mayor of Chillicothe, in his official capacity as a justice of the peace, in favor of the defendant in error against the plaintiff in error, on a claim of the defendant for work and labor in grade making, performed by him on the road of the company for Spotts, Frank & Co., contractors for building part of the company's road, of which he claims to have given notice to the company on the 30th of January, 1876, as required by law; and whereby, he claims the company became liable to him for the amount, under the provisions of the law: "To secure pay to persons performing labor or furnishing materials in constructing railroads," passed March 31, 1874. (71 O. L., 51.)

The various assignments of error raise the following question to be determined in disposing of the case:

1. The constutionality of the law.
2. The jurisdiction of the justice.
3. The sufficiency of the bill of particulars.
4. The effect of the provision in the second section of the law, requiring each claimant to prosecute his claim before the proper tribunal within thirty days to final judgment.
5. The sufficiency of the notice of the claim to the company.
6. The admissibility of parol evidence to prove the giving of the notice to the company.

The error assigned on the refusal of the court to direct a non suit turns upon the question whether parol evidence could be received of the giving of the notice; and that assigned on the refusal of the court to charge as requested turns on the proper construction of the clause in the second section of the law just referred to; consequently it is not necessary to go beyond a determination of the questions just stated to dispose of the case.

First, then, is the law unconstitutional?

The very first thing to be considered in determining this question is the rule of construction uniformly adopted and acted on by courts in construing statutes. The repugnance between the statute and the constitution must be clear. If there is any doubt about it, the doubt must be resolved in favor of the statute. As stated by an eminent judge, the opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. Cooley, Constitutional Limitations, 183.

The grounds upon which the conflict of this statute with the fundamental law of the state is placed are (1) that the law is of a general nature, and not uniform in its operation throughout the state; and (2) that it impairs the obligation of contracts.

In reference to the first ground, we may observe that the provision in the constitution of Ohio requiring laws of a general nature to have a uniform opera-

tion throughout the state, has reference only to their territorial operation. It restrains the making of laws of a general nature for sections or counties, but it does not prevent the legislature from making laws to affect only the owners of railroads and those contracting with them, when the laws so made are of uniform operation throughout the state, any more than it inhibits the making of laws for the benefit of "heads of families," as is done by our exemption and homestead laws. Laws must be adapted to the circumstances and condition of people; and this is the peculiar province of a legislature. The legislature has no power to discriminate between persons, considered merely as persons, but it has power to discriminate between the different circumstances and conditions in which persons may voluntarily place themselves, and to make such laws as its wisdom may seem best adapted to such circumstances and conditions. With the policy of a law we have nothing to do; that is wholly for the legislature, so long as it keeps within its constitutional limits.

This is a law adapted to the circumstances of all persons who enter upon the building of railroads, whether as owners, contractors, sub-contractors, laborers, or furnishers of materials, and is limited to no particular section or county in the state. It relates to all and affects all alike who come within its provisions, anywhere throughout the state. It makes the owner of a railroad liable for labor performed of material furnished in its construction, whether performed under a contract with the owner or under a contract with a contractor of an owner, where the labor or material is part of that let to the contractor by the owner, and notice of the claim has been served on the owner within thirty days from ceasing to furnish the materials or perform the labor.

Its object was, and is, to obviate the injustice and wrong practiced upon laborers and material men by contractors, in defrauding them of their just demands after they have performed the labor or furnished the material. It imposes a very simple and equitable duty upon the owner of the road, when certain conditions have been complied with by the laborer or material man, to see that the claim of the latter is satisfied from monies the owner had agreed to pay to another for the performance of such labor or the furnishing of such material. It interferes with the honest intentions of no man, and merely secures rights that could have been made available by activity and vigilance in the prosecution of remedies that existed before the law.

Then, as to the next ground: That it impairs the obligation of contracts. Now, the obligation of a contract is the law which binds the parties to perform the agreement. The law, then, which has this binding obligation must govern and control the contract in every shape in which it is intended to bear upon it, whether it affects its validity, construction or discharge. McCracken v. Hayward, 2 How., 612. This obligation depends upon the laws in existence when the contract is made; these are necessarily referred to in all contracts, and form a part of them. Cooley on Constitutional Limitations, 284. It is not claimed that this law is retrospective, or that it was not in operation at the time that the company made its contract for the construction of the road. We are, therefore, of the opinion that this law is not repugnant to our constitution, upon either of these grounds, nor upon any other ground that appears to the court.

We come, then, to the next question: Had the court power to hear and determine a case of this kind? It is claimed that it had not; that it is in the nature of a suit to assert a lien on a fund, in which all who assert similar claims should be made parties, and the liens marshaled. If this were so it would be of equitable cognizance, and not within the jurisdiction of a justice of the peace. But we are of a different opinion. The character of a claim of a laborer against the owner of a railroad for labor performed, is, under the provisions of this law, a legal one; it is not in the nature of a lien on a fund, but of a claim against a person arising upon the performance of certain things—the doing of certain labor—and the giving of certain notice thereof to the party to be charged. This done, and the demand becomes a legal one, recoverable at law. The judgment may not be for the full amount of the claim, but the reduction in the claim does not result from the existence of prior claims. No priorities are given. If the aggregate indebtedness of the contractor for the labor let by the owner exceeds 90 per cent. of the contract price, then each person performing such labor is to be paid such part of his claim as 90 per cent. of the contract price is of the aggregate amount of such unpaid indebtedness. If the facts exist on which this reduction should be made, they constitute a defense, *pro tanto*, and should be set up by the company in an answer.

Next, as to the sufficiency of the bill of particulars:

The justices' act requires that the bill of particulars must state, in a plain and direct manner, the facts constituting the cause of action, S. & C., 781, section 55, and the evidence on the trial shall be confined to the items set forth in the bill. Section 54.

It never has been the practice, and it would indeed be unreasonable, to test the sufficiency of a bill of particulars by the same rules of pleading that apply to like questions in a court of record. A very liberal practice obtained at an early day in this state, and has been observed by courts ever since in reviewing the proceedings had before justices of the peace, except on questions involving their right of jurisdiction; and which arose from the reason, as stated by the court in Harding v. Trustee of New Haven Township, 3 O., 232, that a different course would not only destroy their usefulness, but render them in a great degree deceptive and mischievous.

In this case the bill of particulars states, in substance, that Spotts, Frank & Co., contractors for building a part of the company's road, was indebted to the plaintiff in the sum of $15.43, for work and labor bestowed in grade making, which amount is due and unpaid. That on the 30th of January he served on the company a notice of such claim in writing, in all respects complying with the requirements of the statute in such case made and provided; that it has not been paid by the company, and asks judgment for the amount. This would certainly have let in proof of all the facts requisite to constitute such a claim against the company under the provisions of the law referred to, to-wit, that Spotts, Frank & Co. was a contractor or sub-contractor of the company; that the labor performed was a part of that let by contract from the company to such contractor or sub-contractor; that it was due and unpaid; the service of a notice in writing upon the secretary or other officer or agent of the company; that it was within thirty days of the time the plaintiff ceased laboring upon the road; the kind and amount of labor performed, the time when performed, the place where performed; the name of the contractor or sub-contractor for whom performed.

And the only rule that can be applied as a test of the sufficiency of a bill of particulars, is whether it will admit of proof of sufficient facts to make out the plaintiff's claim, as the evidence on the trial must be confined to the items set forth in the bill.

Next, and in this connection, we will consider the sufficiency of the notice. This is a question different from that as to the mode of proving it. The question here is whether the notice that the evidence offered tended to show, was sufficient in substance to make defendant liable for the claim of the plaintiff to the plaintiff below. The evidence offered tended to show that a notice of this character was served on the proper officer of the company, and was as follows:

"To the Scioto Valley Railway Co.—You are hereby notified that there is due to me and unpaid from Spotts, Frank & Co., contractors, the sum of $15.43 for work and labor bestowed in grade-making upon the line of said railway between the Scioto River bridge and Main street in the city of Chillicothe. I ceased to bestow said labor on the ——— day of ———, 1876, and less than thirty days from the filing of this notice.

Dated this 28th day of January, 1876.

DENNIS CRONIN."

The law requires that the notice shall state: "The kind of labor performed; the time when; the contractor or sub-contractor for whom, and the section and place where, on the line of the road, said labor was performed * * * and the amount due him therefor." The notice as served was, we think, a substantial compliance with the requirements of the law—waiving for the present all question as to the mode in which the proof was made.

Next, then, as to the question, whether this suit was brought in time; and this turns upon the construction to be given by the proviso act. This proviso must be construed in connection with the language of the section, and the spirit and object of the whole law.

The object as we have said, of the law is to make owners of roads, letting them to contract, liable to persons performing labor so let, though performed under a contract with the contractor of the company and not with the company itself. This is a liability to which every railroad company is subjected under the law, in letting the construction of their roads by contract. It secures payment to the person who performs the labor or furnishes the materials, in preference to one who may be a mere speculator on the labor and materials of others. It does not add to the contract price of the road as let; it merely directs to whom it shall be

paid, when certain conditions have been complied with. We do not think that a legal entity deriving its whole existence from the sovereignty of the state, has any room for complaint.

But then the law justly provides that the contractor shall have at least five days notice of the time the claim will be paid, the notice to be served by the owner of the road as therein provided, and shall have the right on request to examine the claims before they are paid, at any time after the notice is given; and if he dispute any of them, payment shall be withheld on the disputed claims until adjusted. If the matter cannot be adjusted between the parties, it may be submitted to the arbitrament of three disinterested persons, * * * and their decision, or that of any two of them, shall be final and conclusive in the matter submitted. Then follows the proviso: "That the claimant shall in each case be required to prosecute his claim before the proper tribunal within thirty days, and prosecute the same to final judgment without delay."

Now, we think this can only be held to relate to disputes between the contractor and the claimant, and not to controversies between the claimant and the owner of the road. There is much reason for requiring a speedy settlement of all disputes between the claimant and the contractor; as otherwise, moneys due the latter might be tied up for an indefinite period, without any adequate means of redress, as all that is required to stop payment to the contractor is the filing of a claim as required by law. But what adequate reason is there for limiting the bringing of a suit against the company to so short a period of time after all steps have been taken to render it liable as required by the law. Surely a delay works no injustice to the company. After the notice has been filed it becomes the mere custodian of a fund, the payment of which, whether to the contractor or the laborer is, or at least should be, a matter of indifference to it. Then too, the question may very pertinently be asked, if the claim is undisputed by the contractor and the claimant, where is the necessity for a suit against the company, other than simply to recover from it moneys which it holds to the use of another? And why should suits of such character be limited to the short period of thirty days, when, in similar cases, the limitation is six years? We have no doubt that this proviso relates simply to the settlement of disputes between the contractor and the claimant and not to suits by the claimant against the owner of the road.

We come now, to the only remaining question in the case:

Did the court err in admitting parol evidence of the substance of the notice claimed to have been served upon the company?

It must be observed that this notice is a material element in the case, and required by the statute to be in writing. The liability of the owner of the road to one who performs labor for a contractor of the company is not primary; it depends upon the performance of certain things by the laborer, and is consummated by the giving of this written notice within a limited time. It is undoubtedly the general rule that when a party intends to use a written instrument he ought to produce the original, if he has it in his possession; he can not give secondary evidence of writings until all sources of primary evidence have been exhausted. 2 Phillips on Evidence, 510. It is equally true as a general rule, that when the instrument is in possession of the adverse party, before secondary evidence of its contents can be resorted to, such possession must be shown, and also that the party has received notice to produce it. But there are exceptions to this rule, as will appear by the authorities, where from the nature of the proceedings the defendant has notice that the plaintiff means to charge him with possession of the instrument. In such cases, says Phillips, it cannot be necessary to give any other notice than the proceeding itself supplies. 2 Phillips on Evidence, 539; 1 Green on Evidence, section 561. Some of the cases to be found in the notes to Phillips are very much in point, and seem to me very greater departures from the general rule than the cases before us. See note 461 to 1 vol., p. 539.

Thus, in an action of covenant, where one of the breaches alleged was that the defendant had not paid $150 in obligation, and the defendant by his plea took issue on the breach; it was held, that such plea was a sufficient notice to produce notes delivered to the plaintiff pursuant to the covenant to authorize the defendant on their non-production, to give parol evidence of their contents. Hardin v. Kritsinger, 17 John 293. So, when the defendant in an action on a note gave notice along with the plea of the general issue, that he would prove the note usurious, and that the extra interest was contained in a small note which was given to the plaintiff at the same time with the one declared on, it was held that the defendant might give secondary evidence of the small note, without giving the plaintiff notice to produce it. Hammond v. Holbrook, 13 Wend., 505. And, on the

principle of implied notice by the pleadings in England and this country, written notice of the dishonor of a bill may be proved by inferior evidence, without showing notice to produce where the action is on the bill to which the notice relates; and in Leavit v. Sinns, 3 N. H., 15, the decision was not placed solely on the ground of implied notice from the pleadings, but, following other American cases proceeded upon more general ground recognized by those cases as it is stated that more notice to produce a notice is unnecessary.

Now, in this case, not only is the notice an indispensable element in the case, but it is averred in the bill of particulars to have been given to the company on the 30th of January, 1876, and whereby the company became liable to the plaintiff for the amount due him from Spotts, Frank & Co. for the labor bestowed in grade making on the road of the company. Here was direct notice to the company by the pleadings, that the plaintiff relied on the notice to make out his claim; and if in any class of cases notice to produce may be implied from the pleadings, so as to let in inferior evidence of the contents of the notice, this case would seem to come within the distinction on which they are based. The writing to be proved is not only relied on by the pleadings as the foundation of the claim, but is itself a notice to produce which notice is not necessary.

AGENCY—ABSCONDING ATTORNEY. 322

[Hamilton District Court, October Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

*B. T. Stone v. Euretta Davenport et al.

G. and Y. placed money in the hands of their agents, to be loaned upon "first mortgage" on unincumbered real estate, with instructions to act and rely upon the certificate of C. as to the title of the property to be mortgaged, the commission of the agents and the charges of C. to be paid by the borrower. D. desiring a loan of $10,000 upon real estate of hers which was incumbered by a mortgage of $6,000, to be used in paying off the mortgage, and for other purposes, and having learned through C. that such a loan could be obtained through the G. & Y., submitted her title papers to C., who, finding them sufficient, prepared a mortgage and notes to be executed by D. in a form prescribed by the agents of G. & Y., and they were accordingly executed in the presence of C., but in the absence of the agent of G. and Y. When the papers were so executed, C., with D.'s assent, took them away and delivered them to the agents of G. and Y., unaccompanied by any certificate of title. The agents thereupon, and with knowledge of the existence of outstanding mortgage, returned D.'s mortgage to C. for record, and gave C. a check payable to his own order for the entire proceeds of the loan, $9,600. C. took the check and mortgage away, and shortly afterwards returned and delivered to the agents the required certificate of title, in which he certified that the property "is now unincumbered." C. had the mortgage of D. recorded, but he paid no part of the money upon the old mortgage, paid only $3,000 of it to D., and embezzled the remainder.

Held, that C., in receiving the $9,600, was not to be regarded as the agent of D., and that D. should only be charged upon her notes and mortgage with the $3,000 actually received by her with interest.

BURNET, J.

This case came up on appeal. The action was brought to foreclose a mortgage made by defendant to Van Vleck, and assigned to Stone. Gibson & Young, trustees, held another mortgage for $10,000 on the same property, and were made defendants. A decree was rendered in the common pleas for Stone for the foreclosure of his mortgage, and at a subsequent term a decree was rendered upon the issue between Gibson and Young and Mrs. Davenport for the foreclosure of the second mortgage, the decree being rendered only for a portion of the amount

*For common pleas decision, see *ante* 83. The district court was affirmed by the Supreme Court. See opinion, Gibson v. Davenport, 29 O. S., 309.

claimed. From this decree an appeal was taken, and this mortgage is the only matter now in controversy.

The facts in the case were stated in a former report, but they may be briefly rehearsed. J. F. Follett, the attorney of Mrs. Davenport, desiring to effect a loan on this property for his client, partly for the purpose of paying off the Stone mortgage, made application through Charles E. Cist, for a loan of $10,000 from Gibson & Young, whose agent, Hugh McBirney, came with Cist to see Mr. Follett, and at first made objection to consummating the loan on the ground that the borrower being a lady, would not likely be prompt in paying interest notes, but Mr. Follett consenting to endorse the principal and interest notes, it was concluded to make the loan, if the title was good, which Mr. Cist, who had been previously employed by McBirney as the agent of Gibson and Young in the examination of titles, was to look into. The notes and mortgages were executed, and Cist took them and gave them to McBirney, the latter giving him a check for $9,600, payable to Cist's order, the remaining $400 being deductions made of excess of interest over eight per cent., and $100 commission of McBirney and $100 for insurance. Cist on the following day gave Follett his own check for $3,000, stating that this was all that McBirney had on hand belonging to Gibson and Young, but that McBirney would have the residue in a few days. No more ever came to Mrs. Davenport or to Mr. Follett than the $3,000. The mortgage to Stone remained unpaid, and some weeks afterwards Cist absconded.

The question was whether Gibson and Young or Mrs. Davenport was the loser. It is claimed by Gibson and Young that Cist acted in the transaction as the agent of Mrs. Davenport. Mrs. Davenport claims that he was the agent of Gibson and Young, and that the loss must fall on them; that the only amount that can be collected from her on the mortgage is the $3,000 she received, and the interest.

The court remarked that, undoubtedly, for some purposes, Cist was the agent of Gibson and Young, for the purpose of examining the title and in drawing the notes and mortgage. Though ordinarily this is performed by the person who gives the notes and mortgage, yet it was claimed by Gibson and Young that these should be drawn in a particular way by one acting as their attorney, and they were intrusted to Cist to be delivered to the agent of Gibson and Young.

It is not apparent in the evidence that any express commission was given to Cist in reference to the papers after their execution by Follett and Davenport. It was a part of the proposed transaction that out of the money to be advanced the prior mortgage to Stone was to be paid, the lenders not being willing to be placed in the position of second mortgagees. At the time the papers were handed to McBirney he was aware of the existence of the Stone mortgage, and he did not intend that any money should go into the hands of Mrs. Davenport until that mortgage was extinguished, and he put the fund in such a position that nothing could be done with it without the agency of Cist. It is not to be supposed either that McBirney designed the whole amount of the mortgage money should be paid to Mrs. Davenport, and she should be entrusted with the payment of the Stone mortgage, nor that while the Stone mortgage subsisted the residue should be paid over to her. Under these circumstances, as Cist failed to pay over the residue, Mrs. Davenport is not to lose that portion any more than she is to lose the amount of the Stone mortgage.

Decree to be drawn in accordance with the opinion.

Sage & Hinkle, for Gibson and Young.

Judge Hoadley, E. S. Throop and J. F. Follett, for defendant.

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331 [Superior Court of Cincinnati, General Term, October, 1876.]

SCOTT v. REEDY.

For opinion in this case see 5 Dec. R., 388; [s. c. Am. Law Rec., 367.]

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332 [Superior Court of Cincinnati, General Term, October, 1876.]

CINCINNATI AND SPRINGFIELD RAILROAD CO. v. DURBIN WARD.

For opinion in this case see 5 Dec. R., 391; [s. c. 5 Am. Law Rec., 372.]

CREDITORS' BILL. 353

[Hamilton District Court, October Term, 1876.]

Cox, Force, Murdock, Burnet and Avery, JJ.

*W. F. & V. WHITNEY v. MARTIN P. OTT ET AL.

A creditor's bill will reach money earned, or indebtedness existing, whether then due and payable or not, but it will not lie to seize prospectively upon what is to be thereafter earned, or to subject an indebtedness thereafter to arise. Where the debt arises on a building contract, the money earned after such creditor's bill is filed, must be paid to unpaid sub-contractors, who have pursued their remedy to hold it.

BURNET, J.

Petition in error to reverse a judgment of the common pleas, where a suit was brought to subject money due to Ott from the owner of a building, under a contract made with Ott for its erection. At the time the summons was served in this action on the owner nothing was due to the contractor, nor earned by him, the building being then in progress, but subsequently after its completion payments were made to him. The sub-contractors then filed notices of their claims, and the amount in the hands of the owner was not sufficient to pay the first of these claims, which has the priority. As the court construed the section of the Code under which this action was brought, the plaintiffs had no right to maintain this suit.

Where money has been earned under any contract, or an indebtedness exists under any contract, whether the money be then due or payable or not, it can be subjected in such an action as this; but a party can not prospectively seize upon that which is to be hereafter earned, or subject an indebtedness thereafter to arise. In other words, a judgment debtor cannot be compelled to proceed with the contract, and work out the amount of the judgment. The sub-contractor who had pursued his remedy with due diligence was entitled to his claim. Decree granted in favor of Mills & Spellmire.

SUBSEQUENT LEVY BY CONSTABLE. 354

[Cuyahoga Common Pleas Court, 1876.]

†BENEDICT v. DECKAND.

Where a levy has been made upon a stock of goods, by a sheriff, a subsequent levy, made by a constable, creates no lien upon the property, although made with the sheriff's consent.

PRENTISS, J.

On January 14, 1876, Benedict & Co. had an execution placed in the sheriff's hands and levied on a stock of goods. This judgment was recovered at the January term, 1876, of said court. On January 18, 1876, one Sweeney, a constable, levied an execution upon a judgment recovered before a justice of the peace upon the same stock of goods, then in the sheriff's hands, this levy being made with the sheriff's consent. On January 18th, after the constable's levy, an execution upon a judgment recovered at the November, 1875, term of the court of the common pleas, in favor of Stetson, and an execution upon a judgment recovered at the September, 1875, term of said courts, in favor of Boyden and others, were

*The Supreme Court overruled a motion for leave to file a petition in error in this case.

†This decision was reversed by the district court. 4 Dec. R., 163; [s. c. 1 Clev. Rep. 83.]

placed in the sheriff's hands, who, on the same day, after the constable's levy, levied these last two executions upon the same goods, which were still in his possession.

On the 19th of January, Williamson placed in the sheriff's hands two executions, issued on judgments recovered by him at the January, 1876, term of said court, and they were levied the same day, on the same goods.

The sheriff sold the goods which realized about half the amount of the various executions, and the questions arose how those proceeds should be distributed among the various executive creditors.

On a motion for distribution, the court, Prentiss, J., held:

First—That there is no law authorizing a levy by another officer upon goods or property within the hands of the sheriff under a levy by him of execution upon the same and that the sheriff cannot, by consenting to a levy by another officer, give such officer any right or authority so to levy, and that such levy creates no lien upon the property, and that therefore the judgment creditor whose execution was levied by the constable in this case had no right to share in the proceeds of the property sold by the sheriff.

Second—That the levy of Benedict's execution, being the first levy, extended to the whole of the goods levied on, to the amount of Benedict's judgment and costs, which in this case was less than half the amount for which the goods were sold, and that the subsequent levy on the executions of Stetson and Boyden extended to the surplus only after satisfying Benedict's execution, and so also with Williamson's levies.

Third—That Benedict and Williamson must share pro rata if there was not money enough to pay them both in full. And the funds were ordered to be distributed as follows:

First—The amount of Benedict's execution, and costs to be deducted from the fund.

Second—The remainder applied to pay the two executions on the judgment rendered at the September and November terms, 1875, viz.: in favor of Boyden & Co. and Stetson, and if insufficient to pay them both in full then to be applied pro rata between them.

Third—Any balance left after paying Stetson and Boyden & Co. in full to be added to the amount, first deducted on Benedict's execution, and the whole divided between Benedict and Williamson pro rata if insufficient to pay them both in full.

The fund not being sufficient to pay Boyden and Stetson in full, it follows that, by having to pro rata with Williamson, Benedict, although he was the first to levy on the goods to twice the amount of his claim, gets only about half of the debt, while Williamson, who levied last of all on goods already covered by levies to more than their value, gets an equal percentage on his claims.

This decision was made upon careful investigation and consideration of the laws and authorities, and is entitled to great weight as deciding a point upon which no direct decisions are to be found reported, and as determining the rights of parties in a situation that is liable frequently to occur.

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362 [Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

JACOB KNAUBER v. JACOB FRITZ.

For opinion in this case, see 5 Dec. 410; [s. c. 5 Am. Law Rec., 432.]

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363 [Superior Court of Cincinnati, General Term, October, 1876.]

O'Connor, Tilden and Yaple, JJ.

JOSEPH LEVY ET AL. v. ORDER B'NAI B'RITH.

For opinion in this case see 5 Dec. R., 401; [s. c. 5 Am. Law Rec., 410.]

[Superior Court of Cincinnati, General Term, October, 1876.] 364

MARGARETTIA HAHNER v. JOHN KAUFMAN & CO.

For opinion in this case, see 5 Dec. R., 412; [s. c. 5 Am. Law Rec., 439.]

[Superior Court of Cincinnati, Special Term, November, 1876.] 364

ANN CONLEY v. JAMES CREIGHTON.

For opinion in this case, see 5 Dec. R., 402; [s. c. 5 Am. Law Rec., 421.] The case is affirmed in Crowley & Creighton *post* 239.

[Superior Court of Cincinnati, General Term, January, 1877.] 375

LOUIS MAZZA v. MICHAEL HEISTER.

For opinion in this case, see 5 Dec. R., 430; [s. c. 5 Am. Law Rec., 526.]

[Superior Court of Cincinnati, General Term, January, 1877.] 379

PEABODY INSURANCE CO. v. MEMPHIS & ARKANSAS RIVER PACKET CO.

For opinion in this case, see 5 Dec. R., 417; [s. c. 5 Am. Law Rec., 499]. See also, *ante* 30.

[Superior Court of Cincinnati, General Term, January, 1877.] 382

THOMAS G. GAYLORD v. HENRY CASE ET AL.

For opinion in this case see 5 Dec. R., 413; [s. c. 5 Am. Law Rec., 494.]

387 COLLECTION OF ASSESSMENTS BY CONTRACTOR.

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

CITY OF CINCINNATI v. JOHN T. WRIGHT.

The city of Cincinnati delivered to John T. Wright, a contractor, in payment for a public improvement, an assessment upon the abutting property; some of the property holders having refused to pay the amount of the assessment, Wright brought actions against them to enforce its payment, and notified the city of the pendency of the actions with a request that the city solicitor should assist in their trial, which the solicitor declined to do. In these actions the court, without any fraud on the part of Wright, gave judgments in favor of the defendants as to a large part of the assessments, holding that as to a part of the property the assessment was invalid. W., the contractor, then brought an action to recover from the city an amount equal to the assessment found to be so invalid. *Held:* That the judgments rendered in favor of the defendants in the actions on the assessments were conclusive on the city as to the amount which Wright ought to recover from her.

O'CONNOR, J.

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

The defendant in error, John T. Wright, had entered into a contract with the city of Cincinnati to furnish all the materials and do all the work necessary to complete the improvement of Park avenue, from Windsor street to Kemper lane, and to receive in payment the same good and valid assesments upon the property liable by law to pay the costs and expenses of said improvement. The work was done and accepted by the city, and an assessment on the abutting property delivered to the contractor Wright.

Henry Pogue and Samuel Pogue, and D. Rice Kemper and John A. Thompson, abutting property holders, refused to pay the assessment on their lots, and thereupon Wright, the contractor, brought suits against them in the superior court to enforce the assessment, and in those suits the court adjudged that as to 270 feet of the Pogue's property, the assessment, amounting to $3,519.30, was illegal and void and not collectable and that as to Kemper's and Thompson's property, the assessment on 143 feet, amounting to $1,863.70, was illegal and void and not collectable.

The present action below was brought by Wright, the defendant in error, to recover from the city, on his contract, the sum of $5,383.00, being the amount which the court in the former suits had decided he could not collect on his assessment from the defendants in those suits. The case was tried to the court, a jury having been waived, and the contract with the city being proved, the plaintiff rested his right to recover from the city upon the record of the proceedings and judgments in the former suits, claiming that said judgments were conclusive on the city, she having received notice of the pendency and time of trial of said actions, and having been requested to assist the plaintiff therein, which she declined to do.

The court taking the same view, rendered judgment for the plaintiff below, which judgment it is now sought to reverse.

The plaintiff in error contends:

1. That the notice which she received of the pendency and time of trial of the former cases was not sufficiently specific and definite to conclude her by the judgments therein rendered.

2. That even if said notice was as definite as she could require, yet she is not concluded by said judgments, and that she ought now to be permitted to set up any matter in defense to this action, which might have been offered to enforce the assessment against the defendants in the former actions.

If this last position be tenable, it is not necessary to inquire as to the sufficiency of the notice. We shall therefore examine it first.

It is not denied by the city that if the assessments delivered by her to the contractor in payment for his work, cannot be legally enforced, that she is liable over to the contractor, and is therefore a warrantor of their validity. But she claims that they are legally enforcible and valid, and that either the contractor did not properly prosecute his action on the assessment, or that the court erred in not sustaining them.

We may say here that if the record in this case showed that Wright, the contractor, fraudulently permitted the assessment to fail by not offering testimony within his knowledge and power, or if the record showed that he failed to recover on the assessment by reason of his gross carelessness or negligence, or if the prosecution on the assessment by him was not conducted in good faith, having regard to the interests of the city, then the authorities show that he cannot recover in this action. But the record fails to show any of these things; nor was there any effort to show them, or any claim that the assessment failed by reason of them.

If the assessment failed by reason of the error of the court, the plaintiff in error in this case may avail herself of such error, by having the same reversed, and compelling the property holders to pay for the improvement, and thus reimburse herself for the amount of the judgment in this case, should she be compelled to pay it. And if the notice to her of the pendency of the former actions was necessary and sufficient, we think the authorities clearly shows that this is her only remedy.

Freeman on Judgments, section 176, speaking of parties who are bound by a judgment, even in cases where they have received no notice of the pendency of the action, says:

"In many instances, the relation of the nominal parties to the suit to other persons, is such that the latter are conclusively bound by a judgment against the former in the absence of fraud or collusion, although they are not notified of the pendency of the suit, and are not called upon to conduct its prosecution or defense. In respect to the question who are those parties, whose interests are thus inseparably associated, the decisions are often inconsistent; but undoubtedly the general principle sanctioned by a vast preponderance of authority is that every person who has made an unqualified agreement to become responsible for the result of a litigation, or upon whom such a responsibility is cast by operation of law in the absence of any agreement is conclusively bound by the judgment.

This rule will become manifest from an examination of the adjudged cases. Whenever this identity of interest is found to exist, all alike are concluded. Thus, if our covenant for the results or consequences of a suit between others, as if B covenants that a certain mortgage assigned by him shall produce a specific sum, he thereby connects himself in

privity with the proceedings, and the record of the judgment in that suit will be conclusive against him. And the author cites Collins v. Mitchell, 5 Fla. 371; Rapley v. Prince, 4 Hill, 119; Greenleaf on Evidence, 523."

In the case at bar it is not denied that the assessments were delivered or assigned to the contractor with the understanding that they should produce a specific sum, or that the city would be responsible over on the contract. The city, therefore, under the above authorities, connected herself in privity with the proceedings to enforce the assessment, and the judgment is conclusive, until reversed, against her, for the amount due by her to the contractor. This would be even had she not been a nominal party, and had received no notice of the pendency of the actions. But she was a party to the record in those actions. The actions were styled the city of Cincinnati for the use of John T. Wright against Pogue and Kemper. The actions were brought in her name for Wright's use, and Wright's name appeared merely to designate to whom the money should go which might be recovered. The judgments in the cases were for and against her, not for or against Wright, he being the beneficiary and also bound by the result.

The cases are numerous where one not a party to the record, but responsible over to the plaintiff or defendant as an indemnitor, is bound by the judgment, where he has received proper notice of the pendency of the action and has the opportunity to conduct or assist in the conduct of the trial. See Thrashe v. Haines, 2 N. H., 444; Elliot v. Shrelkeld, 16 B. Mon., 341; Chicago v. Robbins, 2 Black, 418; and Robbins v. Chicago, 4 Wall., 657.

The last case would seem to be decisive of every question raised in this case. The city of Chicago brought a suit against Robbins, and alleged that Robbins owned a lot on the corner of Wells and Water streets, and wrongfully dug, opened and made an area in the sidewalk adjoining, and left it so unguarded that one Woodbury fell into it and was severely injured; that Woodbury had recovered, for his injuries, $15,000 damages against the city, which sum the city had paid, and which, though the city was primarily liable for it, Robbins was bound to refund. The city had given notice to Robbins of the pendency of the suit against her, and had requested him to assist in the defense, which he declined to do. The city recovered against Robbins the full amount, which judgment the supreme court of the United States affirmed, holding.

1. "Parties having notice of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their iinterest, and if instead of doing so they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they can not subsequently turn round and evade the consequences which their own conduct and negligence have superinduced."

2. "The term 'parties' as thus used includes all who are directly interested in the subject matter, and who had a right to make defense, control the proceedings, examine and cross-examine and appeal from the judgment."

3. "Express notice to defend is not necessary in order to render a party liable over for the amount of a judgment paid to an injured plaintiff. If the party knew that the suit was pending, and could have defended it, he is concluded by the judgment as to the amount of the damages."

And the court says the reason of the rulings is based on the just and *expedieux axious,* "that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination."

It is unnecessary to cite further authorities, although the plaintiff and defendant have furnished very full briefs.

It appears from the bill of exceptions in this case that while the suits against the property owners were pending, the attorney for the contractor notified the then city solicitor of their pendency and requested the city solicitor to assist in their trial, and that when the cases came on for trial he again talked with the solicitor about them, and again requested his assistance at the trial, which the city solicitor refused to give, but that he gave some valuable suggestions concerning the trial and steps to be taken thereat.

The city now says this notice was not sufficiently specific; that she was not notified that the city would be held responsible for the result of the cases. We think the notice was as definite as it well could be, though not in writing, and that the city was bound to take notice of the legal consequences of not attending to it, without being told.

It is not necessary for us to decide whether the city was entitled to any notice, other than the fact that she was a party to the actions, and that she knew that the judgments therein would be judgments rendered for or against her, although for the use of another. Yet if notice was necessary, we think the notice she received was ample.

For the reasons stated the judgment is affirmed.

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3 CORPORATIONS—BILLS AND NOTES.

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

*UNION CENTRAL LIFE INS. CO. v. BENJAMIN EHRMAN.

1. A life insurance company doing business under the act of April 16, 1867, (S. & S., 218), purchased the assets of another company doing business under the same act, and, in consideration thereof, agreed to assume its risks and to pay its debts. Among the assets was the promissory note of the defendant (plaintiff in error) which was indorsed by the selling to the purchasing company: *Held,*
2. That in an action on the note by the purchasing company, it will be presumed, in the absence of any averment to the contrary, that the agreement between the companies has been performed, or at least that it has not been abandoned.
3. That where the validity of the note is admitted, the fact that the agreement between the companies is unauthorized by their charters, is not a defense by the maker of the note.

This is an action upon a promissory note, dated November 16, 1867, made by defendant, Ehrman, payable on demand to the order of the Home Mutual Life Insurance Company, of Cincinnati, with interest, the principal sum being $800. The Home Mutual Company was then engaged in the business of life insurance, being incorporated under the laws of Ohio. In October, 1871, the company having continuously lost money, and being in embarrassed circumstances, transferred all of its assets, including the note in question, and also including certain real estate, to the Union Central Company, the plaintiff in action. The plaintiff

*This decision was affirmed by the supreme court. See opinion, 35 O. S., 324.

is also incorporated under the Ohio law. After the sale and transfer, the defendant signed a writing, whereby he agreed to pay the note to the Union Central Company in three years from October, 1871, with interest annually.

The contract between the two companies was executed by the delivery of the assets, including the conveyance of the real estate referred to.

Payment of the note having been refused, this action is brought upon the note.

The defendant answers, denying the right of the plaintiff to recover, upon the ground that the contract between the two companies was *ultra vires,* and illegal. The answer sets out the contract in full, attaching a copy as an exhibit. It appears by the contract, that the plaintiff assumed all the liabilities upon the Home Mutual policies, and it is not alleged that it has not discharged them. The contract also makes provisions for the payment in full of all other liabilities of the Home Mutual Company. To this defense plaintiff demurs generally. Cause was argued by counsel for both parties at January term, 1877.

TILDEN, J.

The demurrer which has been argued in this cause presents two question:

1. Was the contract between the two companies invalid at the date of its inception?

2. The first question being answered in the affirmative, does it follow that the fact of such invalidity is available as a defense to this action?

1. The majority of the court is of the opinion that the contract in question is not open to the legal objections which are urged against it.

We recognize the undoubted rule that two or more corporations cannot unite with each other in the exercise of their respective corporate franchises; that they cannot consolidate or amalgamate; but the transaction in question was none of these things. The Home Mutual Company found itself obliged to withdraw from business. The statutes of the state, under which it was incorporated, recognize the propriety of such retirement under certain circumstances, and we may well suppose that inability to proceed in business with safety to either stockholders or policy holders, was one of the conditions in contemplation of the legislature when making these provisions. Being about to retire, therefore, from further prosecution of the business, having a large outstanding indebtedness, and many outstanding policies of insurance upon lives, the transfer of these policies to a solvent company, with the assent of the policy holders, would seem to be not only legal, but commendable. What would have been the rights of stockholders, had they objected at the time, or policy holders, had they objected, it is not necessary for us to consider or decide.

The transfer of the real estate does not connect itself with the transfer of the other assets. The note in question was transferred by indorsement and delivery, and the real estate conveyed by deed duly executed and delivered. Having been so conveyed, it must be regarded as no longer open to question save by the state.

2. We are also of the opinion that the contract between the two insurance companies is fully executed, and that its validity cannot be called in question in this action. The contract requires the assumption of liabilities by the Union Central Company. In consideration of such assumption, the Home Mutual Company agreed to transfer certain property, real and personal. It has made the transfer. It has no further duty to perform in that connection. This action is not brought upon that contract, but upon a contract between the defendant and the Home Mutual Company for the payment of money. It does not avail the defendant that this action is brought to recover a part of the assets of the contract between the two companies. The law is settled that if the contract which is called in question has been executed between the parties to it, either party may lawfully enjoy its fruits, in the absence of some provision of law for a forfeiture at the instance of the injured sovereignty. Raguet v. Roll, 7 O., 76.

The demurrer will be sustained.

YAPLE, J.

I concur in holding that the demurrer to these answers should be sustained upon the following ground: The defendant owed the Home Mutual Life Insurance Company the debt evidenced by the note sued on; he knew of its transfer to the plaintiffs, and does not claim to have been ignorant of the consideration for such assignment, nor of the facts and circumstances under which the same took place; he then arranged with the plaintiff to pay it, the note, in three

years after the time of the assignment, with six per cent. per annum, payable annually—the note originally having been payable on demand, and the parties agreed to such terms and period of extension, the plaintiff indulged the defendant for such period of three years, and then brought this suit. There was a complete novation. The defendant agreed to and did become the debtor of the plaintiff instead of the original payee of the note.

I hold that, after such recognition of the plaintiff's title, after dealing with it as the owner of the note, knowing exactly how it came by it, and securing three years time upon it, the defendant is estopped from denying the plaintiff's legal power to acquire such note. The case, I think, is governed by the principle settled in the case of the Bank v. Renick, 15 O., 322.

Feeling clear that the demurrer should be sustained on the ground above indicated, I have found it unnecessary to consider or make up an opinion on the other questions involved, and which have been so ably argued at bar.

Matthews, Ramsey & Matthews, for plaintiff.

Wilby & Wald, for defendant.

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3 MASTER AND SERVANT—NEGLIGENCE.

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

THE CINCINNATI ICE CO. v. THOMAS P. HIGDON.

1. Two servants of defendant, driving separate wagons, having got into a race with each other to the injury of a third servant, who was a helper on one of the wagons, it was *held:*
2. Whether a servant who was injured by the negligence of another servant was subordinate to the latter, may be left to the jury.
3. That the negligence of a third servant, not a superior over the injured one, and therefore for whose negligence the company was not responsible, contributed to the injury, is no defense.
4. That the injured person did not remonstrate against the conduct resulting in the injury, does not constitute contributory negligence.

YAPLE, J.

This is a petition in error prosecuted here by the Cincinnati Ice Company, a corporation of this state, against Thomas P. Higdon, who was plaintiff below, to reverse the judgment of this court, rendered in special term, in favor of Higdon and against the ice company, for $700 and costs. The action was brought to recover damages for personal injuries, etc., sustained by Higdon, about June 24, 1873.

The plaintiff, Higdon, and one McCraight, were in the employ of the ice company, engaged in hauling and delivering its ice by wagon. McCraight was what was called head man, having charge and control of the team and its driver, and it was his duty to collect the money for ice sold. Higdon was designated "helper." He assisted McCraight in loading and unloading ice, and in delivering it to customers.

The ice company, at the same time, had in its employ and business another wagon and team driven and controlled by one Madden, who was "head man" of such wagon and team, his powers and duties being similar to McCraight's. On the day and at the time of the injury to Higdon, he and McCraight were on their wagon driving down Broadway street, in the city of Cincinnati, south, toward the canal, and Madden was driving the team and wagon of which he had charge, down the same street ahead of McCraight, both going for ice. McCraight tried to pass Madden, and they then began to drive a race, in the progress of which Madden, to prevent McCraight from passing him, drove across to Mc-

Craight's side of the street, and the latter, to avoid or get around and ahead of him, turned out so as to upset the wagon, whereby Higdon was seriously injured. There was no evidence showing that Higdon remonstrated with McCraight, or objected to his driving as he did; but it appears he simply sat quietly on the wagon.

The plaintiff in error claims, first that, at most, the injury to the defendant in error was caused by the joint proximate negligence of Madden and McCraight, the two "head men" in the employ of the ice company, and that as the company is not liable to Higdon for the negligence of Madden, it cannot be held liable at all, though McCraight's negligence may have directly contributed to the injury.

2. That McCraight and Higdon were fellow-servants of the ice company, engaged in a common employment, McCraight having no such right and power of control over the team and wagon, and Higdon no such subordination to him, and no such duty of obedience and want of right to interfere with and object to McCraight's management of the team, as made the one the controlling superior of the other.

3. That Higdon was guilty of contributory negligence, because he did not object to McCraight's driving, or attempt to interfere to prevent him from doing what he did.

In a word, it is claimed, that, admitting all the facts to be proved which the evidence in behalf of Higdon tended to establish, the verdict and judgment should have been for the ice company.

In disposing of these claims, we may say that, where two wrongdoers jointly, by their combined negligence, injure another, and one alone be sued, a recovery may be had against him for the injury. Boyd v. Watt, 27 O. S., 259, 267-271; Field on Damages, 677*n*, 36.

The ice company, it is true, could not be held liable by Higdon for the negligence of Madden. P., Ft. W. & C. Ry. Co. v. Devinney, 17 O. S., 197. But if McCraight was the superior of Higdon, the latter being placed under him, subject to his control and orders, with no right to control or interfere with the conduct and management of the team by McCraight, then the company is liable for the injury to Higdon caused directly by McCraight's negligent driving of the team. Little Miami R. R. Co. v. Stevens, 20 O., 415; Cleveland & C. R. R. Co. v. Keary, 3 O. S., 201. The fact that another's negligence, for which the ice company was not responsible, contributed to the injury, cannot, in this case, affect the question of the company's liability for McCraight's negligence; for, without such negligence, the injury to Higdon could not have occurred.

Whether Higdon ought to have remonstrated with McCraight, or interfered with his driving or not, and whether or not his failure to do so was contributory negligence on his part, depends upon whether he was in the same common employment with, or was subordinate to and under the control of the driver or "head man." The jury have found that he was such subordinate. This was a question of fact properly left by the court to them to determine; and as their finding is not manifestly against the evidence, and as the law was fully and correctly stated to them by the court in its charge, we find ourselves unable to disturb the verdict and judgment. Judgment affirmed.

O'Connor and Tilden, JJ., concur.

McGuffey, Morrill & Strunk, for plaintiff in error.

Kebler & Kebler, for defendant in error.

4 BREACH OF PROMISE—ATTACHMENT.

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

*ANNA 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.

YAPLE, J.

The plaintiff in error brought suit in this court against the defendant in error, to recover damages against him for his breach of promise to marry her, and sued out an attachment on the sole ground that the defendant was a non-resident of the state of Ohio. The defendant moved to dismiss the attachment, because the same was not authorized by law, and the court, in special term, granted the motion and dismissed the attachment, whereupon the plaintiff brought this proceeding in error to reverse such order of the court dismissing the attachment.

The opinion of the court below, in sustaining the motion, is printed in full, in 5 Dec. R., 402 (s. c. 5 Am. Law Rec., 421), which will render it unnecessary for this court to give any extended consideration to the question.

Where parties defendant are not non-residents of the state, or foreign corporations, the rights of plaintiffs to sue out attachments seem to be co-extensive with money demands due, if the conduct of the defendant as prescribed by the statute, has been such as to warrant an attachment. In all such cases the plaintiff is required, as a condition precedent to the obtaining of the order of attachment, to give ample security, to indemnify the defendant in case the attachment be wrongfully obtained.

In attachments obtained against non-residents of the state and foreign corporations, no undertaking or security is required to be given by the plaintiff, and the plaintiff's right to obtain such attachment is much more restricted in respect to the nature of the claim than in the case of resident defendants. Section 191 of the Code, part 9, provides: "But 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."

It is claimed that an action for breach of promise to marry is a "demand arising upon contract," and, as a consequence, an attachment may be sued out in such action on the ground that the defendant is a non-resident of this state.

Such action, however, is only in form an action upon contract. The contract to marry and the breach of such contract must be proved by the plaintiff to authorize a recovery; but, in ascertaining the damages for the breach of such contracts, the rules of law applicable to torts, and

*For opinion of superior court in special term affirmed by this decree, see 5 Dec. R., 402 [s. c. 5 Am. Law Rec., 421.]

not to contracts, as in all other cases of contract, apply. The entire pecuniary compensatory part of the action sounds in tort and not in contract; and it would seem to follow that, for attachment purposes, the rules as to torts should apply, and forbid such attachments on the ground of mere non-resident in this state.

As in actions of tort, the pecuniary ability of the defendant may be given in evidence to enhance damages; also the plaintiff's mental anguish, blighted affections, disappointed hopes, and injury to character directly resulting from the breach—also the seduction of the plaintiff by means of such promise; and the same rule prevails as in torts, and the plaintiff may recover exemplary or punitive damages. Field on Damages, p. 430, etc. The action is, substantially, though not in form, an action of tort. Sedgwick on Damages, p. (369 marg.) 445 top. 6th Ed.; Barnes v. Burk, 1 Lans. N. Y. 228; Thorn v. Knapp, 82 N. Y., 474; Saddlesvene v. Arms, 32 How. Pr., 280. To obtain an attachment, the plaintiff is required only to swear to the amount he or she believes the plaintiff is entitled to recover. In such a case as this, that belief would include all damages sounding in tort, even punitive damages, as well as damages resulting directly from breach of contract.

We hold, therefore, that the judgment at special term must be affirmed.

O'Connor and Tilden, JJ., concur.

E. P. Bradstreet, for plaintiff in error.

Dodds & Wilson, for defendant in error.

EASEMENTS. 4

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

IGNATIUS O'FERRALL ET AL. v. S. P. CHASE'S HEIRS ET AL.

Deeds describing one boundary as a ten-foot alley, grant a right-of-way which is not in gross, but inures to subsequent owners, though there is no actual improved alley there; and such right is not abandoned by mere non-user of it as an alley, and closing of its entrance for over twenty years, it being used for light and air.

YAPLE, J.

This is an action for the recovery of the possession of real property, reserved from special term for decision here upon the testimony and the law.

The action is brought to recover the possession of a strip of ground ten (10) feet wide, fronting on Third street, of Cincinnati (north side), running back along the Henry House, or Shoenberger property, on the east, and the Chase, Longworth and Heister property on the west, north from third ninety-nine and one-half (99½) feet.

The Shoenberger, Chase, Longworth, Heister and the McMicken lots, the last lying west of the Chase property, constituted the whole of the lot 85, in said city, and prior to and during the year of 1810, was in the possession of one John O'Ferrall, the ancestor of the plaintiffs. O'Ferrall died in that year, leaving a will, by which he gave his executors power to sell such real estate at their discretion and to the best pos-

sible advantage. They, having duly qualified after the probate of the will, sold and conveyed all such real estate, with the possible exception of the fee of the strip now in litigation, in parcels to different purchasers. The Shoenberger property they sold and conveyed to one Carr, May 31, 1821, the property including the Chase, McMicken and Longworth property they sold and conveyed to E. Hall on December 18th, 1815, and the Heister lot they sold and conveyed to one Murray, January 12th, 1825. Shoenberger, Chase, Longworth and Heister hold by mediate grants from such grantees of O'Ferrall's executors, except that Chase's heirs have a quit claim, or deed or release, from the grantor of O'Ferrall, which, for the purposes of the decision of this case, it is deemed unnecessary to consider. O'Ferrall's executors conveyed the Shoenberger lot by the following description: "Beginning in the south line of said lot (85) on the east line of a ten (10) foot alley, one hundred (100) feet east of Main street; thence east on Third (3d) street one hundred (100) feet, more or less, to the southeast corner of said lot; thence ninety-nine and one-half (99½) feet, more or less, northerly on the east line of said lot to the northeast corner; thence westwardly on the north line of said lot to the east line of said alley; thence south on the east line of said alley to the place of beginning."

They conveyed the property, which includes the Chase lot, by the following description: "Beginning at the southwest corner of inlot 85, which is the corner of Main and Third streets; thence northwardly on Main street, sixty-eight (68) feet, more or less, to the three-story brick building, which is on the northwest corner of said lot, and extending same width back to an alley ten (10) feet wide; thence south to Third street; thence west on Third street to the place of beginning."

The residue of the inlot 85, on which the three-story brick house stood, was, as his will contemplated it should be, the residence of the widow and family of O'Ferrall, was occupied by them as such, and was the last part of the inlot sold and conveyed by the executors. It includes the Heister lot. It was conveyed by the following description: "Beginning at the northwest corner of said inlot 85, on Main street; thence southwardly on the line of Main street, thirty-one (31) feet, more or less, to the southwest corner of the stone wall which stands on the south side of the premises hereby conveyed, and which forms the foundation on said south side of the house now standing on said premises, and which said corner is the northwest corner of a part of said lot 85, conveyed to Ezekiel Hall, and now, or late, the property of Francis Carr; thence with said Carr's northern boundary line, parallel with Third street, ninety (90) feet to a ten (10) feet alley; thence northerly parallel with Main street, thirty-one (31) feet, more or less, to the north line of said lot No. 85; thence westwardly in a direct line to the beginning."

The ten-foot strip in question is what is called a "ten (10) foot alley" in the above mentioned conveyances, though when such conveyances were made, there was, in fact, no alley there; it was merely ideal, or contemplated when the property should be built upon and occupied by the several owners.

The Chase and Longworth buildings encroach upon the alley two feet, and the Heister building (they all being on the west side of it) six feet; and it is conceded by the plaintiffs that Chase is entitled to hold such two feet, and as suit is not brought against Longworth or Heister, the portions they occupy cannot be considered.

"The testimony establishes that when the Henrie House was built by the Shoenbergers, it was built on the east side of the alley, and the side of the house ran along the east side of the alley ninety-nine and a half feet to the north line of the lot, and that some eighty windows were put in such side of the house, which house and windows have ever since been maintained; that Chase erected a building, which is still there maintained, covering two feet of the ten feet, called an alley, and extending north about thirty-five feet, with doors affording access to the alley way from the building. The Longworth property was also built upon, leaving an eight-foot alley, and the north, or Heister lot also, leaving only a four-foot space between it and the Shoenberger property. Such alley ran back north from Third street 99 1-2 feet, where it terminated in a cul de sac.

This alley-way remained open to and from Third street for some years, when from uses made of it, it became a nuisance, especially to the hotel, the Henrie House. Then, by the permission of Chase and the other property owners whose property abutted upon it, Shoenberger erected an iron gate across the mouth of it at Third street. Subsequently this gate was broken down, and the alley again became a nuisance to the property owners. Then Chase, with the consent of Shoenberger at least, and without objection from any of the other lot owners, some time between 1843 and 1847, erected a small frame structure, or house, across the alley at Third street, the drainage from the alley being allowed to flow under such house, which was built upon timbers laid upon the ground. Chase, and since his death, his heirs, have ever since rented such building from month to month and paid half of the rents to Shoenberger. Subsequently, also, Watson, the tenant of the Henrie House, constructed another story upon the Chase structure, and has used it as part of the Henrie House, but has paid no rent for it other than what he has paid for the hotel proper. All the property owners, whose lots abut on it, except the heirs of Chase, are seeking in this court, or desire to have the building across it removed, and the alley reopened for ingress and egress from and to Third street.

For the plaintiffs it is claimed, first, that, there being no alley when O'Ferrall's executors made any of the deeds before mentioned, such deeds conveyed no right-of-way therein to any of the grantees, or those claiming under them.

2. That at most a mere private right-of-way over such strip was conveyed to such grantees, which was an easement in gross, merely personal, and therefore did not pass to the grantees of such original grantors from O'Ferrall's executors.

3. That the fee simple to the center of such alley was not conveyed to such grantees, but an easement at most, which easement has been abandoned, or lost, for non-use for more than twenty-one years.

Whether the deed beforementioned, executed by O'Ferrall's executors to the grantees on the east and the west sides of this ten-foot strip, conveyed to them, respectively, the fee to the center of the same, or not, we find it unnecessary to determine. As against the plaintiffs and all claiming under O'Ferrall, a private alley was granted to all whose lots bind on such ten-foot strip, and travel to and from Third street is only one of the uses to which said alley may be put. "The grantor and his heirs are estopped from denying that there is a way to the extent of the land on those two sides. We consider this to be not merely a descrip-

tion but an implied covenant, that there is such an alley. O'Linda v. Lothrop, 21 Pick., 297; Parker v. Smith, 17 Mass. These cases properly express the well settled rule, and relieve us from the further elaboration of the point.

Upon the facts of this case, we do not think this right, so granted to these grantees of the alley way, has been lost or forfeited by abandonment or non-user.

"In the first place, there is a marked difference between easements acquired by express grant, and those established by mere user. Mere non-user in the former case, even for more than twenty years, will not destroy the right, if the owner of the servient estate does no act which prevents the use." 2 Washburn, Real Property, 312, Section 32.

It appears that the owners of the lots on the east and the west sides of this alley have not, heretofore, needed it to obtain ingress and egress to their lots from and to Third street, and that it was closed against entrance from Third street by the consent and acquiescence of all of them, to prevent strangers from creating a nuisance to their several properties; but it is still an open space, though not having access to and from the street; the several parties have built and constructed windows and doors with reference to its being kept open, and thus have enjoyed it for light and air, etc. And some of them, without the opposition of any of the other owners, except Chase's heirs, who have objected since his death, he never having done so, are seeking now to have the obstruction removed so as to afford an inlet and outlet to and from Third street.

In view of these facts and the testimony in this case, we are not able to find that the plaintiffs are entitled to recover, and therefore judgment will be entered for the defendants.

O'Connor and Tilden, JJ., concur.

C. W. Cowan and Mallon & Coffee, for plaintiffs.

Wm. Disney, for Chase's heirs.

King, Thompson & Longworth, for Shoenberger.

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5 APPROPRIATION OF PROPERTY—DAMAGES.

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

*City of Cincinnati v. R. D. Kemper.

1. Section 575 of the Municipal Code, which requires that no claimant for damages shall commence any suit until he shall have filed a claim therefor with the clerk of the corporation, and sixty days shall have elapsed thereafter, etc., refers to such damages only as are provided for in section 571 of the said Code, and these are damages to any lot or land not taken by the city, but occasioned by making any improvement by the city, and then in cases only where there has been some defect or omission on the part of the city in the proceedings taken by her in regard to making some public improvement; and said section 575 does not relate to a suit for compensation for land appropriated by the city, without condemnation, to her own use.
2. The measure of compensation for land so appropriated is the full value of the fee-simple of the land, as the city acquires the fee simple by the appropriation as well as by the judgment of the court.

*The supreme court affirmed a decision of the superior court in Cincinnati v. Kemper, without report, March 15, 1887, by refusing leave to file a petition in error. See also decision *post* 251.

O'CONNOR, J.

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

The petition of the plaintiff below contained two causes of action; the first being for damages for unlawfully entering the land of the plaintiff, and taking possession of the same by the city, who has ever since used it; and the second cause of action being for damages generally for the depreciation of value of the remaining property, caused by the unlawful acts of the city.

Both causes of action have relation to land "appropriated without any previous proceedings to condemn the same," for the purpose of completing Park avenue and the bridge in connection therewith over Kember Lane.

At the trial, the court treated the first cause of action as one for compensation for the value of the land appropriated by the city for public uses without previous condemnation. But the second cause was withdrawn from the consideration of the jury, because it was a claim for damages merely, for injury to land which still remained in the possession of the plaintiff, and because the plaintiff had failed to give the city the notice required by section 575, of the Municipal Code, which reads as follows: "Section 575. No claimant for damages shall commence any suit until he shall have filed a claim therefor with the clerk of the corporation, and sixty days shall have elapsed thereafter to enable such corporation to appoint assessors to assess such damages, return the same to the proper officers, and sufficient further time shall have elapsed, not exceeding twenty days after the return of such appraisement, to enable the corporation to pay the assessment."

The defendants below claimed that both causes of action ought to be withdrawn from the jury, because both were claims for damages, and the plaintiffs had failed as to each to give the notice required by said section 575. It was further contended by the defendant, that the city had not appropriated the fee of the land, but only an easement over it, and that, therefore, it was an action for damages for the value of the easement only and not for the compensation for the value of the fee. But the court instructed the jury that the plaintiffs were entitled to the full value of he fee-simple, of so much of the land as the city had appropriated to her own use. To this action of the court, and the refusal of the court to withdraw both causes of action from the jury, the defendant excepted, and a verdict being rendered for the plaintiff for $1,000, and judgment having been rendered thereon, the defendant now seeks to reverse the same.

Section 575, of the Municipal Code, refers only to cases where damages are claimed for injury to land, which land still remains in the possession of the plaintiff, and not to cases where the land is taken from the possession of the plaintiff and appropriated to the use of the city. It applies to cases for damages to any lot or land, not to cases where the land itself is taken. Section 575 must be read in connection with section 571, which provides:

"Where, by reason of any defect or omission in the proceedings herein provided for, the corporation shall be liable in an action for damages to any lot or land, occasioned by making any such improvement, such damages shall be ascertained and assessed by three disinterested freeholders of the corporation to be appointed by the council."

The defect in the proceedings here referred to, has no relation to the appropriation of land, but to the action of the proper city authorities in making the proper advertisement of a proposed improvement, and taking the necessary steps to have a jury sworn to assess the compensation which any owner along the line of the proposed improvement, who has put in his claim, may be entitled to recover for any damage which may be done to its property by reason of the improvement. These proceedings are provided for in section 563, and the following section up to sections 571, by giving the notice required by section 564. The notice required by section 575, is a claim for damages, under section 571, to any lot or land occasioned by making any improvement; not a claim for compensation for land taken by the city for its permanent use. It is for damages to a lot, not for compensation for the lot itself.

We think, therefore, the court did not err in refusing to withdraw from the jury the claim for the value of the land taken.

Nor did we think the court erred in instructing the jury, that the plaintiff was entitled to recover the full value of the fee-simple of the land so appropriated by the city. Both by statute and the decisions, the city acquires the fee-simple in land appropriated for public uses, or in lands which she has appropriated without condemnation, and for which she has been compelled to pay the value by a judgment of the court. The plaintiff has no further rights in the land for which this judgment was rendered; and as he stood by, and did not interfere while the city was making the appropriation, his only remedy was the one he pursued, to-wit, to recover the value of the land. Goodwin v. Canal Co., 18 O. S., 169; Hatch v. C. & I. R. R., 18 O. S., 92.

The judgment is thereby affirmed.

Peck, Gerard & Molony, for plaintiff in error.

Long, Kramer & Kramer, for defendant in error.

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16 **PLEADINGS—FIRE INSURANCE.**

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

*FARMERS' INSURANCE COMPANY v. JOSEPH K. FRICK.

1. A reply to an answer in another case cannot be offered as an admission by the plaintiff therein, when the admission consists merely in an omission to plead a fact.
2. Where the defense to an action on a policy was that proofs of loss were not furnished in time, but the bill of exceptions fails to show what, by the terms of the policy, the effect of the delay was to be, it will not be assumed to be a forfeiture, but at most that payment is not due until they are furnished.
3. Where a defense is made to a policy that the plaintiff did not own the property at the time of the loss, having forfeited it to his landlord for non-payment of rent, it was not error to charge that defendant must satisfy the jury, by the very strictest proof, that every condition of forfeiture must be complied with by the landlord, else there was no loss of title.

YAPLE, J.

This is a petition in error brought to reverse the judgment of this court in special term, rendered for $976 and costs, in favor of the defendant in error against

*For former decision in this case, see 5 Dec. R., 47 (s. c. 2 Am. Law Rec., 336). The supreme court reversed the decision above, and held that the defense of failure to furnish the proofs of loss was not waived. See opinion, 29 O. S., 466.

the plaintiff in error, upon a policy of insurance against loss by fire. The evidence is not all set out in the bill of exceptions, nor is the policy made part of the bill. The case is presented solely upon the points of law, in ruling upon which, it is claimed the court below erred.

The bill of exceptions shows that the policy contained a provision that, in case of loss, the insurer should forthwith give notice thereof in writing to the company, or their agent, and as soon as possible thereafter deliver as particular account of the loss as the nature of the case would admit, the account to be sworn to, etc. But the bill of exceptions does not show that the policy contained any provision as to what should be the effect upon the rights of the insured in case of his failure to give such notice, or furnish such proof of loss. Many American policies contain an express provision that such failure shall forfeit the insured's claim, and many of the English policies simply provide that the insured's claim shall not become due and payable until such proof be furnished. Frequently, the claim is not to become due until a specified time after proof of loss is furnished. In this case, the insured gave immediate notice of his loss, and furnished the proofs thereof in five months thereafter, and before suit was brought. The failure of the insured to furnish the proofs of loss within a reasonable time was pleaded as a defense, and other defenses alleging non-liability of the company for the loss were pleaded. The answer, No. 2, simply sets up the failure to furnish such proof of loss; and there is nothing in the record showing what effect upon the insured's rights such failure would have; therefore, such failure could not forfeit the claim, but, at most, prevent its becoming due until proofs of loss were furnished. This failure then whether pleaded alone, or with other defenses to the merits, amounted to no defense to the action, the policy not having, by its terms, made it so, as the proofs were made before suit brought. The case, therefore, does not call for a reconsideration of the ruling of this court in the Merchants' Ins. Co. v. Frick, 5 Dec. R. 47 (s. c. 2 Am. Law Rec, 336), where it was held that if such failure to furnish proof be relied on as a defense, it must be as the sole defense, and if other defenses to the entire claim be relied on, that of failure to furnish such proof of loss will be waived.

Another error assigned is, that the court, at the trial, refused to permit the defendant to read in evidence to the jury the answer and Frick's reply thereto in the case of Frick against the Merchants' Insurance Company. That answer averred that Frick misrepresented his title to the property insured, he claiming to be the owner when he was only lessee for years, and the reply denied all misrepresentation. The same defense was pleaded in this case, and Frick, who was a witness at the trial, testified that he put up and owned the building insured—that, by agreement between him and his landlord, he had the right to remove them at the end of his term or the landlord might purchase them from him. Afterwards, Frick being present in the courtroom, the defendant asked to read such answer and reply to the jury, as an admission by Frick that such right of removal or obligation to purchase at the end of his term was not the fact, which the court refused. While, as a rule of pleading, Frick might not have been allowed to prove such agreement on the trial of the Merchants' Insurance Company's case, because it was not averred; yet, as to all other parties, such omission to plead the fact was no statement of the existence or non-existence of the fact at all. It would have been unjust to Frick to permit it to be tortured in an admission by him, and the court did not err in refusing to permit it to be done.

Upon the question as to whether the plaintiff owned a part of the property at the time of the loss, or whether he had not forfeited to the landlord by failure to pay the rent, for which it was claimed the landlord had re-rented; we think the court did not err in charging the jury: "If the defendant relies upon the plaintiff's loss of title by reason of a forfeiture, it must satisfy you by the very strictest proof that every condition of forfeiture has been literally complied with by the landlord, otherwise the question of forfeiture cannot affect the case."

All other questions raised by the petition in error are, we think, disposed of adversely to the plaintiff in error, in the case before alluded to of the Merchants' Insurance Company v. Frick, 5 Dec. R., 47 (s. c. 2 Am. Law Rec., 336).

The judgment will be affirmed.

O'Connor and Tilden, JJ., concur.

Matthews, Ramsey & Matthews, for plaintiff in error.

Bates & Bates, for defendant in error.

17 INJUNCTION.

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

CINCINNATI v. CINCINNATI CONSOLIDATED ST. R. R. CO. ET AL.

1. A city which has granted a certain street railroad route, subject to certain conditions as to the manner of operating the same, will not be compelled to seek specific performance of the terms of the grant in case of their violation, but is entitled to an injunction.
2. Mandatory injunction will not be granted on the preliminary hearing, if it amounts to a decree for specific performance and the defendants desire to answer to the merits, and hasty action by the court would incommode more than benefit the public.

YAPEL, J.

This case is before us by reservation from special term, upon a demurrer of the Covington Company to a petition of the plaintiff against it, and upon a motion of the plaintiff for a temporary injunction to restrain such company from running its street cars on the track of the Consolidated Company, the assignee or successor of Route No. 9, from Front street, near the suspension bridge, up Walnut street to and along Fifth street to Vine, and thence down Vine to Front, in the city of Cincinnati, and to require the Consolidated Company to run its street cars over that part of its route—such cars to run without break to and from the canal bridge, in such city, and Front street, and for a single fare of four (4) cents for adults and children for half fare, and to keep and sell packages of tickets for travel on such line, of twenty-five to be sold at 90 cents per package. This entire line of street railway, with a part beyond the canal bridge not finished, and the completion of which is enjoined, but which part is not material to be now considered, is what is known as Route No. 9, the right to construct, operate and maintain which was granted by the city, by contract, to the late Thomas A. Nesmith. He transferred all his beneficial interest in the same to Erasmus Gest, who transferred the same to the Cincinnati Consolidated Street Railroad Company. The petition (second amended) shows, among other things, that Nesmith, in and by his contract with the city, was to run cars along and over the entire route to and from Front street, charging each adult a fare of four (4) cents and each child half that sum, for a single ride, and to keep and sell tickets in packages of twenty-five at ninety cents per package; also that the Consolidated Company only operates, by running its cars over the same, so much of the route as lies between the canal bridge and Fifth street, at Vine, for such fare, while the part between Fifth and Front street is operated by the Covington Company, a corporation created by the laws of Kentucky, which charges and receives five (5) cents fare each way, and also runs its cars up Walnut and down Vine street, instead of up Vine and down Walnut, as the contract with Nesmith requires. The petition then avers that the Consolidated Company "are permitting and conniving with the Covington and Cincinnati Street Railway Company, a corporation under the laws of the state of Kentucy, running to and from Covington, Kentucy, over what is known as the suspension bridge, to use and occupy with their cars, horses and drivers that part of said Route No. 9, on

Fifth street, between Walnut and Vine streets, and on Walnut and Vine, between Fifth and Front streets; that the cars of the said last named company are run over such portion of said Route 9, at intervals of from five to eight minutes between the hours of 6 A. M. and 11:30 P. M., of each day, whereby cars and horses of said company are in Cincinnati continuously between the hours aforesaid. Plaintiff further says that the cars of the Covington and Cincinnati Street Railway Company are being operated as aforesaid upon that portion of Route 9, of Cincinnati street railroad routes, which is described as lying on and south of Fifth street, and are run in a direction opposite and contrary to the one prescribed in the ordinance establishing said route. And plaintiff further says that said cars are being run and operated as aforesaid upon said streets, and route, except as to Front street as aforesaid, without consent of the city of Cincinnati, and without the authoriy of, and contrary to the laws of this state, and the ordinances of Cincinnati; and the said Covington and Cincinnati Street Railway Co. is illegally collecting and receiving fares for the carriage of passengers on and over said streets and route, and is otherwise violating the said contract in the manner and to the extent set forth above. It avers, however, that the operation of said street railroad cars is being done under an arrangement between said Cincinnati Consolidated Street Railroad Company and said Covington and Cincinnati Street Railway Company, whereby the former of the companies last aforesaid guarantees to the latter company the right to run its cars and to collect and receive fares as aforesaid upon the portion of the route aforesaid, until, at least, the Cincinnati Consolidated Street Railway Company shall elect, or be required to run its own cars over said portion of the route," etc., etc.

It is contended on behalf of the Covington Company, that the plaintiff, the city of Cincinnati, has no authority to sue, or right to maintain this action, the remedy, if any, being alone, by *quo warranto* by the state of Ohio.

Second, if there be such right of action in the city, it is not entitled to an injunction, but only to specific performance of the Nesmith contract.

The petition shows that the Covington Company is operating and running its cars as licensee of the Consolidated Company, under a contract between them. The Consolidated Company is the assignee of Gest, who is the assignee of Nesmith as to all the latter's beneficial interest under his contract with the city. The Covington Company, therefore, took and holds its license from the Consolidated Company burdened with all terms of the original Nesmith contract, which the city may enforce against it and the Consolidated Company. It may do this by action, as in this case. The general term of this court so decided in this action on the demurrer of the Consolidated Company to the petition in this case, at the January term, 1875. That decision and this are supported by, and may securely rest upon the case of Campbell v. M. & Cin. R. Co., 23 O. S., 168.

The facts stated in the petition, if not successfully answered and disproved—that is, if they are true, which must be assumed for the purposes of this demurrer—are sufficient to warrant a perpetual injunction against the Covington Company, if such injunction might be necessary to prevent its future continuous use of the streets in the manner complained of. The city is vested with the control of its streets, and has express authority over street railroads within its limits.

The demurrer must be overruled.

The plaintiff, however, claims that the petition shows that cars must be run continuously on this route the entire distance between Front street and the canal bridge, and from such bridge to Front street, carrying single passengers for a fare of four cents each—each way—and children at two cents each, and to sell tickets for travel over said line in packages of twenty-five for ninety cents per package; and that even if the city consents to permit the use of the track to the Covington Company, as now traveled over by it, passengers getting on the cars at Front street, who desire to go over the route beyond Fifth and Vine streets, or who take the cars north of Fifth and Vine streets, and desire to go south beyond such point to or toward Front street, must be carried for such single fare or single ticket all the way, though they change cars at Fifth and Vine streets; and that this court, by temporary mandatory injunction, should require that to be effected and carried out.

The averments of the petition, if fully established, would seem to give the right to such relief by a final decree; but, as mandatory injunctions should be cautiously granted when they are but another name for specific performance; as we are also advised that these defendants desire to answer to the merits of the petition, and as a hasty action on our part might incommode the public more than benefit or convenience it, we think it the safest and soundest exercise of judicial discretion to refrain from granting such injunction at the present time, and remand the case to special term, which is now in session, and have it arranged for an early final hearing of the cause upon its merits against all the defendants. The motion for such injunction is denied, and, the demurrer to the petition being overruled, the cause is remanded to special term to be proceeded in according to law.

O'Connor and Tilden, JJ., concur.

Peck, Gerard & Molony, city solicitors, for plaintiff.

E. A. Ferguson, for Consolidated Co.

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18 APPROPRIATION OF PROPERTY—DAMAGES.

[Superior Court of Cincinnati.]

*City of Cincinnati v. D. R. Kemper.

1. A city acquires the fee simple in lands appropriated to public uses, and this, whether she acquires it by condemnation in court, or by taking the same by having built a street over private property; the plaintiff cannot maintain ejectment, being estopped by acquiescence to pursue any other remedy than an action for its value.
2. The claim for damages, required by section 575 of the Municipal Code to be filed before beginning suit, refers only to such damages as are provided for in section 571, that is, for injury occasioned by improvement; and then only where there is some defect in the proceedings under which the improvement was made. It does not apply where the city has taken land without appropriation in court.

Yaple, J.

If the city, without condemning under the statute as it ought to have done, went out of the line of Park avenue and appropriated Kemper's

*The supreme court affirmed a decision of the superior court in Cincinnati v. Kemper, without report, March 15, 1887, by refusing leave to file a petition in error. See also decision *ante* 246.

land for such avenue, and constructed such avenue upon it at great expense to the public, I do not see how the city can insist that Kemper must bring ejectment and recover the possession of such portion of the avenue as is upon his land, instead of consenting that the city may keep it—that is, hold the title in fee, in trust for such avenue purposes—by paying him its value. The judgment vests the title in the city as fully as a conveyance or condemnation could do. It amounts to an estoppel or disclaimer by record. See Shep. Touch. 218; Nicholson v. Wadsworth, 2 Swamston, 365—370, where all the cases are cited.

Kemper also knew that the city was constructing, at great expense to it, the bridge and avenue upon his lot in part and his acts in evidence show that he led the city authorities to believe that he assented to their doings so, if he should be paid for the land. This, I think, estops him from regaining its possession from the city, and limits him to recovering for its value. I think the case falls fairly within the principle announced in Goodwin v. Cin. & White Wat. Canal Co., 18 O. S., 169, and Hatch v. C. & I. R. R., 18 O. S., 92.

If Kemper still owns the property and has the right to recover its possession, then it inevitably follows that Park avenue to Kemper Lane has never been improved, as this lot binds on Kemper Lane, and the improvement crosses and occupies it. Hence, no assessment for improving such avenue could bind the property abutting on the improvement, or the owners thereof. This is settled by Harbeck v. Connelly, 11 O. S., 227; yet in several cases of the kind, growing out of the improvement of the Grandin road, the Bennett road, and the Walker Mill road, this court has held, following the principle of the Goodwin and Hatch cases in 18 O. S., 169, 92, that the assessments were valid because the road has become public as against the landowners, and did not remain private property as in the Harbeck case in 11 O. S., 227; and the supreme court has refused to grant leave to file petitions in error in the Scarborough case on the Grandin road, and in the Dodson case on the Walker Mill road.

The very question was made by Mrs. Williamson upon the assessment for this very avenue, and decided against her at the present general term.

I think Kemper brought the only action he could sustain, to-wit.: an action to recover the value of his land so taken by the city and so improved with his knowledge and consent.

JUDGMENT—BILLS AND NOTES. 18

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

G. H. Bussing & Co. v. Alexander Scott and Samuel Walker.

In an action against maker and indorser, judgment having been first taken against the indorser, and on a prayer for judgment against the maker, it was argued that it could not be rendered, as the action had abated as to him, or that he must be made a party to the judgment, under section 415 of the Code, section 5366 Revised Statutes, *held*, that the judgment could be given; that there is no objection to taking judgment against one, and continuing the cause as to the other.

Yaple, J.

The plaintiffs brought suit against Walker, as maker, and Scott, as endorser, of a promissory note made by Walker to Scott, and by Scott endorsed to the plaintiff. The note was given for $325, on May 2, 1874,

and was made payable ninety days after date to the order of Scott. For this sum, with interest, judgment is asked; and the motion for judgment has been reversed from special to general term. On January 10, 1876, Walker was personally served with a summons, and has remained in default. On February 5, 1876, Scott was personally served, and, being in default, judgment was taken against him on April 1, 1876; and as to Walker the cause was continued for further order; subsequently, a judgment against Walker, as maker, was prayed for, and it being suggested that as judgment had been taken against Scott, the endorser, the judgment asked for against Walker could not be rendered, as the action against him had abated, or that he must be made a party to the judgment under section 415 of the Code.

The liability of the maker and endorser of a promissory note to the endorsee arises upon distinct contracts—that of the maker upon his promise to pay, and that of the endorser upon a subsequent contract with the indorsee, for a new and sufficient consideration, that he will pay the endorsee if the maker fail to do so, provided he have due notice of the dishonor of the paper.

At common law, the endorsee could not unite the two as defendants in one action, but was required to bring separate actions against them, 1 Swan's Pr. and Prec. 61; but our Code, section 122, authorizes such joinder, as Swan interprets it in his "Pleading and Precedents" under the Code; and the practice has been according to such construction since the adoption of the Code. Wilcox, in his "Practical Forms," also puts the same construction upon the Code; Nash does not appear to have given any form for such action.

Section 122. * * * "When others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties in the action, it shall be necessary to state also the kind of liability of the several parties, and the facts as they may be which fix their liability."

This provision clearly authorizes such joinder, though the facts stated in the pleading to fix the endorser's liability are additional to those necessary to charge the maker, and with them the latter has nothing to do.

The liability of the maker, and that of the endorser to the endorsee, are distinct and several, and the endorsee need not join them in the same action. Code, section 38: "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiff." When one is sued, the other is a mere permissible or proper, not a necessary party. In Allen v. Miller, 11 O. S., 374, the supreme court define the difference between the interests of debtor and assignor, and their respective liabilities to the assignee; and it is there held that where the assignor and the principal debtor reside in different counties, by suing the former in his county, joining the principal debtor in the petition as a defendant, jurisdiction of the latter cannot be obtained by sending a summons to his county and serving him there. Section 415 of the Code provides: "When a judgment is recovered against one or more persons jointly indebted upon contract, promissory note, or other instrument in writing, those who were not originally summoned may be made parties to the judgment by action." This section can have no application, because the maker and endorser are not jointly indebted to the endorsee upon the promis-

sory note endorsed to him. Their respective liabilities are distinct and several. And the maker, Walker, cannot be made a party to the judgment by action, for he was duly summoned before Scott was. The court would clearly have no jurisdiction of such an action. The petition stated independent actions against Walker and Scott, and how could judgment against Scott exhaust the jurisdiction of the court against Walker, as to the separate and independent liability stated against him? The judgment exhausted the liability as to Scott only.

I can see no good reason or necessity for denying the plaintiff judgment against Walker in this action, or for driving him to a new one in which he would state the same facts against Walker that he has here stated, and upon which the court has never yet acted. It seems to me that the case is confounded with a proper case under section 415 of the Code, which provides for making a joint debtor not served a party to a judgment against one or more other joint debtors, by action. If this section governed, as Walker was served with summons and in default for answer before the judgment against Scott was rendered, it is difficult to see how any action could be maintained against Walker, or why he is not forever discharged. Surely it cannot be that the maker of a promissory note can be discharged from liability by any judgment rendered against the endorser of such note.

I see no necessity for a new action against Walker, nor can I perceive any legal reason why he is not entitled to judgment in this.

When the maker and endorser of a promissory note are both sued in one action by the endorsee, I can see no legal objection to taking judgment against one alone and continuing the cause for judgment against the other.

Mallon & Coffee, for plaintiffs; no one for defendant.

LIFE INSURANCE. 19

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

*Union Central Life Insurance Co. v. Emma A. Cheever.

1. A policy of life insurance was issued upon the express agreement that the answers of the applicant for insurance in the application were in all respects true. In answer to the question, "Have you had during the last seven years any sickness or disease? If so, state the particulars and the names of the physician or physicians who prescribed or were consulted," the applicant said: "No." It was admitted he had a tumor on his neck for which he had been treated by several physicians for about nine months, but which had been pronounced fully healed a short time before he made his application, and which tumor had not interfered with his daily business. Evidence was offered tending to show that this tumor was malignant and cancerous, and also evidence that it was an innocent affection of the glands. The court charged the jury that they were to inquire whether the insured had had sickness or disease as those terms were popularly and ordinarily understood: *Held*, that the instruction was right, especially as the medical men could not agree upon a definition of disease.
2. Declarations made by the insured as to his state of health, not to the defendant nor to the medical examiner, nor to the agent at the time of the applica-

*For decision of superior court affirmed by this decision, see 5 Dec. R., 268 (s. c. 4 Am. Law Rec., 155). The decision in a subsequent trial is found *post* 6 Bul. 196 and a judgment of reversal by the supreme court, 36 O. S., 201. The latter is cited, 45 O. S., 470, 484.

tion, are not competent to contradict his answers in the application, he not being a party to the record, nor beneficially interested, nor an agent of the plaintiff at the time. Such declarations are mere hearsay.

3. Although the rule undoubtedly is that justice ought to be done whenever a case is presented, and that a verdict ought to be set aside as often as it is manifestly against the weight of the evidence, yet where there is any doubt which way the evidence inclines, the fact of a second verdict in favor of either party must always have some influence on the result.

O'CONNER, J.

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

The action below was upon a policy of life insurance in the sum of $3,000 on the life of Charles E. Cheever, late husband of the plaintiff below, Emma A. Cheever.

This petition in error is prosecuted to reverse the judgment rendered on a second verdict in favor of the plaintiff below, the first verdict having been set aside by this court upon the reservation of a motion for a new trial.

The errors now assigned are:

1. That the court erred in excluding evidence offered at the trial by the plaintiff in error.

2. That the court erred in its charge to the jury.

3. The court erred in permitting plaintiff's counsel below to read from the defendant's agency book, and comment thereon to the jury.

4. That the verdict is against the evidence.

It will be better to examine first the second assignment of error, "that the court erred in its charge to the jury."

It was admitted at the trial that the plaintiff was entitled to recover, unless the insured, Charles E. Cheever, untruly answered the following question in the application for the policy:

"Have you had during the last seven years any sickness or disease? If so, state the physician or physicians who prescribed, or who were consulted?"

The answer was: "No."

"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 and circumstances of the insured affecting the interests of said company."

By its terms, the policy is also rendered void for misrepresentation, concealment or fraud.

The controversy at the trial turned mainly on the question whether the evidence proved that a tumor on the neck of the insured, which it was admitted he had been treated for by several physicians shortly before the issuing of the policy, was malignant or cancerous, or merely an innocent affection of the glands. At least the great body of the testimony was directed to this inquiry, and the object of the inquiry was to ascertain, whether the insured had had within seven years any sickness or diseases, as those terms are ordinarily understood it being contended by the plaintiff below that if the tumor was merely an innocent glandular affection, the insured being at all times able to attend to his usual business, this did not constitute a sickness or disease, and the defendant contending that even if the tumor was not cancerous, though it was claimed that it was, yet in view of the testimony, it did constitute a disease or sickness. The testimony showed that for some nine months before the issuing of the policy, the insured had been treated for this affection by several physicians; that other physicians were called in from time to time and consultations had; that one surgical operation had been performed, and another advised and paid for, but not performed, when the insured finally consulted a cancer specialist, under whose treatment, in the course of six weeks the tumor was, to all appearances healed, and so remained for about two years, when a similar tumor made its appearance on the shoulder on the same side, which involved the decay of a part of the shoulder blade, and which was pronounced cancerous by all the physicians, and of which the insured finally died. The plaintiff claimed that there was no connection between the first and the second tumor, the one affecting the glandular tissues, and the other affecting the bone, and expert testimony was introduced to sustain and overthrow this view.

It was further claimed by the plaintiff that, even if the insured had had sickness or disease within seven years, yet that the agent of the company, who received the application and was an intimate friend of Cheever, knew all the

circumstances of the tumor, and regarded and waived the same as immaterial, and that the company was therefore estopped to deny the truth of the answer.

The court charged the jury in substance that, under the policy, the answer to the question as to sickness or disease, was a representation, and must be substantially true, or the plaintiff could not recover, unless the defendant was estopped by a waiver on the part of her agent to deny that the answer was true. That in giving the answer, it made no difference what the belief of the insured was, because if the fact was that he had had sickness or disease within seven years before the application, then his answer was untrue and no recovery could be had. It was the fact he was asked for, and not his belief.

We do not understand the plaintiff in error to except to this part of the charge, because, although the court calls the answer a representation, the jury are told, substantially, to regard it as a warranty, and that the answer must be true whether made in good faith or not. The insured had knowledge of some ailment, and he was responsible for the correctness of his judgment as to whether it amounted to a sickness or a disease.

The court further instructed the jury that the question for them to determine was "whether the insured, within seven years preceding the application, had had any ailment or a friction, which, in ordinary and common language, should be called sickness or disease." Special charges were also given to the jury, at the request of the plaintiff, to the same effect. The plaintiff in error assigns these charges and the general charge on the subject as error.

The assured, a non-professional man, was asked whether he had sickness or disease. It must be presumed that he was expected to answer the question in the sense in which these terms are ordinarily understood, and not in the sense of an exact scientific definition. Indeed, the medical witnesses were not agreed as to what did constitute disease, nor could they agree upon a definition of it. It seems, therefore, from the necessity of the case, and what must be presumed as the understanding of the parties at the time the question was asked, that the ordinary sense of the terms sickness and disease was the sense in which the insured was required to answer the question. The jury were called on to decide, not whether the insured, before the application, had suffered from cancer or from an innocent tumor, but whether he had sickness or disease; although, had they found that the tumor was not cancerous, they might have the more readily found that his ailment was not a disease. There can be little, if any, doubt that the jury did find that before the application the insured had not suffered from cancer, because the question of cancer or no cancer, at that time, seemed to be, and was, the burden of the trial. We do not think the court erred in this instruction.

The court charged the jury as follows:

"The plaintiff, by way of confession and avoidance, alleges that even if the answer in the application was untrue in fact, but not fraudulent upon Charles E. Cheever's part, she is still entitled to your verdict, because the defendant, by its general agent, who made the contract, knew all the facts alleged to amount to such sickness or disease and made the contract and delivered the policy, regarding such alleged sickness or disease as immaterial. If you find that Cheever, the insured, had had any sickness or disease within the time specified in the question, you cannot presume that the agent of the company knew of and waived the materiality of the same; that must be proved to you as a fact, which fact can only be established by the weight of all the evidence that you can rely on otherwise the plaintiff will have failed to prove the estopped. If you find what the plaintiff claims in her reply as to such knowledge and waiver to be true, she will be entitled to recover, nothwithstanding such answer was untrue. But, if you find that the answer was given as it was fraudulently by Cheever; that is, knowing that good faith to the company required the facts to be stated, and that the agent joined with him in keeping the truth of the fact from the company, then the plaintiff cannot recover, though such agent knew the facts, sought to make a waiver, and assumed their immateriality."

This charge is assigned for error. It is, in substance, that if the agent of the company, knowing all the facts, in good faith regarded them as immaterial, and so gave the insured, who also acted in good faith, to understand, and in good faith then delivered the policy, the defendant is estopped from denying that the answer is true.

We think there was no error in this charge.

The plaintiff in error finally excepts to the entire charge, as omitting to state to the jury that upon the undisputed facts of the case the plaintiff could not recover.

To have done as here desired, the court would manifestly have denied the plaintiff the benefit of a trial by jury. Whether the insured had had sickness or disease within the seven years, was clearly a question of fact, and the plaintiff made no admissions which raised merely a question of law.

In the course of the trial, a certificate of cure, given by Cheever to Dr. Gratigny, in which Cheever admitted that his ailment had been pronounced cancer, and that the doctor had effected a complete cure, was permitted by the court to be offered in evidence by the defendant, because the plaintiff had asked some questions relating to it, although the court had previously ruled it out when first offered.

This certificate of cure, Dr. Gratigny, with the consent of Cheever, had published as an advertisement, and having been seen by one Haworth, of Iowa, who was supposed to be suffering from cancer, he wrote to Cheever to ascertain the facts. This letter Cheever sent to Dr. Gratigny, with a pencil memorandum thereon that he had sent Haworth one of Dr. Gratigny's books, and had written to him. This letter and memorandum were offered in evidence by the defendant, and were ruled out by the court, on the ground that they were at most a mere narrative of a past transaction, not constituting any part of the *res gestae* of the contract between the insured and the company, and that, so far as the plaintiff was concerned, it was mere hearsay.

The plaintiff in error claims that the letter was not offered to prove the fact of the insured having had cancer; but merely to show that cancer being otherwise proved, the insured had knowledge of its existence. In other words, it is claimed that the letter was competent evidence as an admission on the part of the assured that he knew that he had been afflicted with cancer.

We think the letter was properly excluded as being no part of the transaction which resulted in the contract and the delivering of the policy, the admission, if any, being made by one not beneficially interested, not a party to the record, nor the agent of the plaintiff at the time. The authorities sustain this position.

In the case of the Fraternal Mutual Life Ins. Co. v. Applegate, 7 O. S., 292, it was held: "Where * * * representations in regard to the condition of his health are made by the husband, in his application for the policy, which, by the terms of the policy, are made part, thereof, the subsequent declarations of the husband, made pending his unauthorized negotiations for the surrender of the policy, and tending to show the false or fraudulent character of the misrepresentations upon which the policy issued, are not competent evidence in a suit brought by the wife upon the policy after the husband's death."

The court say "the statements in question are the declarations of a stranger; one who is neither a party to the suit, nor was, at the time of making them, acting as the agent of a party. They are not the declarations of a sick person in relation to his condition at the time of making them; for they relate to transactions and a state of facts long past. They were not admissions against interest, for they could injuriously afflict only his wife's separate property (i. e., the policy, by its terms). They were not the statements of one who had been a witness on the trial, offered to impeach his credit; but were offered and excluded merely as a proof of the facts claimed to have been thus stated. It may be true that they were the declarations of the person who best knew the facts of the case; but whatever weight this consideration might properly give to competent evidence, it cannot remove the objection to its competency. Coming from the witness through whom it was offered, it was still mere hearsay. Nor do the declarations become competent because made by a person deceased, and who cannot, therefore, be produced as a witness upon the trial. This circumstance alone, however unfortunate for a party, will never convert hearsay into competent evidence."

All the considerations here mentioned by the court apply with equal force to the present case.

In Rawls v. American Life Ins. Co., 36 Barb., 357, it was held.

That "the statements of the insured, who was not a party in interest, respecting health, made previously to the insurance, are inadmissible."

In Swift v. Mass. Mutual Life Ins. Co., 2 N. Y. Sup. C., 302, 4 Bigelow Ins. 300, it was held.

That "the statements of the insured as to his health and the cause of his lameness, at any time, except to the defendant and the physician, were incompetent, and ought to have been excluded."

In Washington Life Ins. Co. v. Haney, 10 Kan., 525, the court say: "The party insured is not a party to the record, and, therefore, her declarations are

not admissible on that ground; she is not a party in interest as the whole benefit and interest inures to her husband; she is not the agent and authorized to speak for him nor does she come within any rule by which her declarations can be received against him."

The court refer to, and distinguish two, and only two cases which seem to hold a different rule, Oveson v. Kinnard, 6 East 188, and Kelsey v. Universal Ins. Co., 35 Conn. 225; but in the first, the declarations were made between the application and the issuing of the policy, and in the second, three days prior to the application, and the court say: "In both cases the representations were considered as being so near the application as to be properly a part of the *res gestæ*, and in the first, Lord Ellenborough spoke of the representations as perhaps proper as a sort of cross-examination of the statement made to the medical men.

See also, Evans v. Life Ass. of America, 59 Mo., 429.

It is finally assigned for error that "the court erred in permitting plaintiff's counsel to read from defendant's agency book, and comment thereon to the jury."

It appears from the bill of exceptions that a book of instructions to agents was issued by the defendants, one of which was identified by the secretary and general manager. This book was offered to be put in evidence by the plaintiff to the jury, but upon objection the offer was withdrawn. The counsel for the plaintiff, while addressing the jury in the opening speech, proposed to read to the jury an illustration of his argument, from the book so identified. The defendant objected, and the court overruled the objection and permitted the reading for the purpose named.

We can see no error in this. The book was not read as a proof of any fact, but as the counsel's idea of the persistency with which an insurance agent pursues one whom he desires to become an applicant for insurance. The instructions seem to have been composed by an enthusiast in the matter of life insurance, who could see nothing but moral grandeur in the vocation of a life insurance agent. It required no great imagination to amuse the jury in making known the contests of the book of instructions, but the counsel for the defendant had the opportunity to reply, and to defend the composition if he desired.

It was claimed with confidence in the argument here, that the verdict was manifestly against the weight of the evidence, and that the court erred in not granting a new trial. But we think the issues were properly submitted to the jury, and we cannot say that the verdict is manifestly against the weight of the evidence. Indeed, we think the weight of evidence is that the first ailment of the insured was not cancerous, but what was called an innocent tumor on his neck, which did not interfere with his daily business; and we think the jury was warranted in finding that the existence of such a tumor was not, in ordinary acceptation, a sickness or disease. Besides, this was a second verdict in favor of the plaintiff below, and although undoubtedly justice ought to be done whenever a case is presented, and a verdict ought to be set aside as often as it is manifestly against the weight of the evidence, yet where there is any doubt which way the evidence inclines, the fact of a second verdict in favor of either party must always have some influence on the result. For the reasons stated the judgment is affirmed.

Matthews, Ramsey & Matthews, for plaintiff in error.

Throop & Robertson, for defendant in error.

BILLS AND NOTES—GOOD WILL. 22

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

*Leopold Burkhart v. Frederick Burkhart.

A note given in consideration of the purchase of the good will if the seller has violated his agreement, and a referee has found that he has deprived the maker of the enjoyment of the good will to the extent of three-fourths, and is entitled to this deduction, will only be enforced to the extent of one-fourth, if at all, the good will being an entirety.

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*For a former decision of the superior court, see 5 Dec. R., 185 (s. c. 3 Am Law Rec., 418). See also decisions in 8 Bull. 253 and 14 Bull. 108. The above decision of the superior court was reversed by the supreme court. See opinion, 36 O. S., 261. The opinion of the superior court is cited in 42 O. S., 474, 475, 493; 45 O. S., 368, 375.

YAPLE, J.

This case comes before us upon a motion by the defendant, to confirm the report of the special master commissioner, and upon exceptions filed by the plaintiff to such report. The master, in his report, finds that of the $35,000 included in the note sued on by the defendant for the firm name and the good will of the firm of Burkhardt & Co.; which was composed of the plaintiff and the defendant, the defendant is entitled to a deduction of four-fifths thereof, or $28,000.

We need not give any extended opinion in the case, as it has been fully reported in Burkhardt v. Burkhardt, 5 Dec. R., 185 (s. c. 3 Am. Law Rec., 418); that case and the case of Gottschalk v. Witter, 5 Dec. R., 180 (s. c. 3 Am. Law Rec., 394), cover all the questions involved, and they are sustained by the case of Labouchere v. Dawson, 13 Eq. Cas., 322.

We think that the finding of the master is as favorable to the plaintiff as he is entitled to ask, as the evidence establishes clearly, that by reason of the active and sharp competition and personal opposition of the plaintiff and his agents, the defendant received and enjoyed no part of the good will of the old firm which the plaintiff, by constant exertions to that end, was able to take away from him. Upon the facts in this case, it is doubtful if there was not a refusal on the part of the plaintiff to let defendant have and enjoy such good will, and consequently, whether the plaintiff is not debarred from receiving anything therefor, such good will being an entirety.

In Herbert v. Ford, 29 M. Rep., 547, the party purchasing the good will and giving a series of notes therefor, had enjoyed what he purchased without interruption or molestation by the seller for several years, when the seller interfered and violated his agreement of sale. The last note being sued on, the court left it to the jury to find the amount of the failure of the consideration of such notes, and such was the ruling of this court in Gottschalk v. Witter, above cited; but in a case like this, it is at least doubtful if the court should undertake to determine what portion of the good will the purchaser received and had the benefit of, when the seller did all that lay in his power to prevent him from receiving and enjoying any portion of it. In such case, there is strong reason for holding the good will to be an entirety, and the consideration promised in payment of it as having wholly failed.

The exceptions will be overruled and the report confirmed.

O'Connor and Tilden, JJ., concur.

King, Thompson & Longworth, for plaintiff.

Stallo & Kittredge, and Sage & Hinkle, for defendant.

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22 **MORTGAGES.**

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

JAMES R. CHALLEN AND WIFE v. H. DEB. CLAY ET AL.

A mortgage cancelled, because the debt was supposed to be paid in full, can still be enforced as to any part found to be not paid, except as against purchasers without notice. The fact that this and other property has been devised equally so, that the owners of the other property ought to pay part, cannot interfere with the mortgagee's right to subject it to his debt.

YAPLE, J.

This is a petition in error, prosecuted here to reverse the judgment and decree of this court rendered in special term in favor of Clay and against the plaintiffs in error, and such of the defendants in error as are devisees of Robert Cohoon, deceased, for the sum of $1,820.09, with interest, and for the foreclosure of a mortgage executed by said Cohoon to one E. McAllister, upon certain premises situate in the city of Cincinnati, and also for the sale of such premises. Clay being the assignee

of Scarborough, assignee of McAllister of such mortgage debt, Scarborough, upon the evidence, was clearly purchaser of the mortgage. The premises, subject to the mortgage, were devised by Cohoon to Mrs. Challen and the other children of Cohoon, equally. The original debt was $10,000, drawing ten per cent. interest until paid, it having been executed during the existence of the ten per cent. interest law of this state. Several payments, both of interest and upon the principal, were made from time to time during a series of years, and it was supposed the debt was paid in full. A mistake, however, of $1,000 occurred in the calculation, leaving that sum still due, and for which, with interest, this decree was taken. It appears that sometime after October 1, 1870, satisfaction of the mortgage was entered of record in the recorder's office.

William Johnston was, by supplemental petition, made a defendant to the action, and he answered setting up that he purchased a part of the mortgaged premises after the cancellation of the mortgage upon record, and without notice of its existence, and he prayed to be protected as an innocent purchaser; the plaintiff denied every allegation of his answer. The record does not show that any evidence at all was adduced at the trial upon the issue between him and the plaintiff, and he has brought no petition in error. The decree was for the sale of all the mortgaged premises in case of the non-payment of the debt and costs.

The evidence clearly established the plaintiff's ownership of the note and mortgage, and that the amount found by the court was due thereon. The plaintiff was, therefore, clearly entitled to the decree rendered, and the fact, that, as between Mrs. Challen and the other devisees of Cohoon, some one or more of them ought to pay it, cannot be permitted to interfere with the plaintiff's right to have the property subjected to the payment of his debt, or to delay the collection of his claim.

Johnston may have or have had the right to require the sale of the residue of the property, if sufficient to satisfy the judgment, before his lot could be sold; but, as he is no party to this proceeding in error, we cannot consider his rights.

There is nothing in the record requiring or authorizing us to reverse the judgment of the special term.

The proceedings and judgment are affirmed.

J. R. Challen, for plaintiff in error.

A. B. Champion, for Clay, defendant in error.

ERROR. 22

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

BENJAMIN A. HUNT ET AL v. HENRY C. DAGGETT.

No reversal for erroneous exclusion of a book entry, when it does not tend to prove the party's case, but tends to prove that of the other side.

YAPLE, J.

The judgment in this case must be affirmed, because conceding for purposes of this case the law to be as the plaintiffs in error claim, in relation to the admissibility of a book account in evidence where the en-

tries are made by the party seeking to so introduce it, or by a disinterested person resident in this state, when it covers the very matters involved in the suit, or issue to be tried, in connection with, and as part of the testimony of the witness. Yet the rejection of the book account in this case was not prejudicial, in any manner shown by the record, to the plaintiffs in error, as it showed *prima facie*, that the claim of the plaintiff was valid as and to the extent asserted by him. The ground upon which admission in evidence was claimed, was simply that it tended to prove the defendants' defense, which it did not. It was not claimed below that the entries had been changed by the plaintiff to the apparent prejudice of the defendants, as has been claimed in the argument here, which should have been done to enable the party to ask for its admission on that ground; but the affirmance will be without penalty.

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33 CONTRACTS—REFERENCE.

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

JOHN B. BENEDICT v. CITY OF CINCINNATI.

1. B. contracted with the city to construct a sewer, and to take upon himself all the risk of accidents to the work. The foundation of a stone pier which many years before supported a bridge which crossed the canal, was left in the bed of the canal after the pier had been removed by the city, and was concealed by the sediment of the canal. This foundation was known to the city's engineer of the work, and to the city, but not to the contractor. In excavating the tunnel and sewer under that part of the canal the great weight of this foundation broke through the bed of the canal, and into the tunnel, and causing the water in the canal to flow into the tunnel and sewer, to the great damage of the work. *Held:* that the contract did not require the contractor to anticipate risk from a cause of this kind, nor to provide against it, and that if he incurred additional expense in repairing the damage, under the orders of the authorized agents of the city, he could recover from the city such additional expense.
2. If during the progress of the work, the contractor, from any cause, refuses further to perform his contract, unless he is paid additional compensation, and so informs his employer, and abandons the contract, the employer has the option to sue the contractor for damages for the breach of contract, or to waive the breach and enter into a new contract, or to modify the old one, and such new contract or promise will be enforced in favor of the contractor. This rule applies to municipal corporations as well as to private individuals.
3. Where by the terms of a written contract, no additional compensation shall be claimed for extra work, unless the order for such work, be given in writing, and its value be agreed on in writing before the work is done, such stipulation may be waived by the party for whose benefit it is made, and a verbal order for such work may be enforced.
4. Where the issues of fact and law are submitted to referees for decision, although the conclusions of law by the referees are to be sustained on the facts found by them, and not on facts found from the testimony by the court, yet it is the duty of the court, on a motion to affirm or set aside the referee's report, to examine the testimony, where it is all certified, to ascertain whether the findings of facts by the referees are sustained by the testimony; and in so doing the court may inquire whether the testimony establishes certain facts, which, although not specially found by the referees, sustain the ultimate finding of facts on which the referees' conclusion of law is based. It is the ultimate finding of fact upon which the conclusion of law is based; and the facts which sustain this ultimate finding are but the evidence of its truth.

5. Where the referees find, as an ultimate fact, that the duly authorized agents of the city ordered the contractor to do work and incur expense not required by his contract, the court is required to ascertain from the testimony who the agents were, what was their authority, what orders they gave, and under what circumstances. This inquiry involves the finding of facts by the court, but such facts are merely the evidence of the truth of the ultimate fact found by the referees. As to this ultimate fact, the referees are not required to set out the evidence, any more than a pleader is required to set out the evidence of the ultimate fact to be proved.

O'CONNOR, J.

This case comes here upon the reservation of two motions, one by the plaintiff to confirm the report of the referees and enter judgment for the plaintiff, the other by the defendant to set aside said report and grant a new trial.

The plaintiff states in his petition that on the 29th day of November, 1870, he entered into a contract in writing with the defendant, which contract, among other provisions contains the following:

"That the said John B. Benedict agrees to furnish all the materials, and do all the work of whatever kind necessary to complete, ready for use in every respect, the sewers, drains and appurtenances in Court street, from Broadway to Sycamore street, and from Court to Abigail street, according to the plans and specifications on file in the office of the commissioner of sewers in the city of Cincinnati, which are hereby referred to and made part hereof; and also to furnish all the materials and do all the work reasonably to be implied from said plans and specifications, or which may be necessary to entirely complete the said sewers, drains, and appurtenances ready for use, in strict accordance with such plans and specifications, and also with such explanatory working plans, drawings and instructions as from time to time may be furnished by the engineer of the said commissioners, to the entire satisfaction of the said engineer, at the following rates," etc., and then follows the price to be paid.

"Said Benedict further expressly covenants and agrees that no sum whatever shall be claimed or allowed for any kind of work or materials necessary to complete the work under this contract, unless a price is stipulated for the same in the above schedule; but that the value of all such work or materials shall be conclusively deemed and taken to be included in the prices fixed in said schedule."

That said Benedict "will in particular abide by the decisions of the engineer as to amounts to be allowed or deducted, as final, and will not make any claims nor bring any suit for compensation for any work or materials required in consequence of any alterations made in pursuance of the powers reserved in the contract and specifications, unless the written order of the commissioners making such alterations, and also the written contract or decision of the engineer fixing the price therefor, are produced. It being the clear intention of the parties hereto, that either party claiming any allowance or change in price, in consequence of any alteration, shall make any such claim known before the work is proceeded with, in order that such claim may be adjusted as above specified, and that the party making no claim at the time, shall be forever barred from making it at any subsequent time; but that the city of Cincinnati, in case no claim is made, shall be bound to pay the price stipulated in the schedule above for the kinds of work and materials required by said alteration, for which a price is fixed in such schedule, and no other or further price whatever."

It is provided in the specifications "that the plaintiff will be required to remove any and all obstructions, whether old stone, brick, or wooden sewers, or logs, filth or refuse of any kind that may be encountered in the line of his work, and which may be required to be taken out in order to construct the new work, at his own expense and without any extra charge whatever.

It is further provided in the specifications that "it is understood that the whole of the work, as above specified, is to be done at the contractor's expense and at his risk; and he is to assume the responsibility and risk of all damages to the work, or to property on the line of said work, which may be caused by floods, back-water, caving of the streets, settling of the foundations of buildings, or other causes, and for which a bond will be required in the sum of $50,000, with two sureties, to be approved by the commissioners of sewers."

These being the principal provisions of the contract, the plaintiff states "that under said contract, and by the terms thereof, he assumed all risk of damage to the work by the caving of streets, settling of the foundations of buildings, or other causes; but he avers he entered upon the performance of said contract upon the further understanding and agreement that the said defendant had the right-of-way under said canal, and the power to direct him to construct said tunnel and sewer under the same, and that it had placed no obstructions in said canal of an unusual or extraordinary character, of which it did not advise him, and which were occult, and which would have rendered the performance of the contract by him, even with the exercise of the greatest care; impossible. That in violation of said understanding and agreement, said defendant directed him to construct said tunnel and sewer under said canal, without having any right-of-way or any warrant or authority of law so to do, and said defendant had carelessly and negligently allowed the stone pier of a former bridge over said canal to remain in the same, but wholly invisible, and that said defendant had failed to notify plaintiff of its existence, and that the same nowhere appeared on the plans, drawings or specifications for said work. That said pier was of great weight, and that the defendant had carelessly and negligently laid out the line of said tunnel and sewer through the center of said canal under said pier, and without leaving a sufficient space between the bottom of said pier and the upper portion of said tunnel and sewer to sustain the weight of said pier. That plaintiff was ordered by the engineer of the defendant to proceed under said canal, and when going under that portion of the same in which said pier was situated, said pier, by its great weight, caused the bottom of the canal and the water therein, and all the stone in said pier, to sink down upon and into the tunnel and sewer, to the great injury and destruction of the same, together with the machinery and property being used by plaintiff in the construction of said work. That the repair of said damage would necessitate large expenditures of money on the part of the plaintiff, not contemplated by the contract, and require the taking of possession of and use of a portion of the canal to which the lessees of the board of public works had the exclusive right, and said lessee and their agents, having declined to permit the plaintiff to take the possession of or use said canal or any portion of the same for said purposes, and the said board of sewerage commissioners or the defendant being unable to grant said right to the plaintiff, for these causes and without default or negligence on his part, being unable to proceed with said work, said plaintiff gave notice to the defendant that he would

abandon said work and proceed no further under the same, and did refuse so to proceed.

"Plaintiff says that thereupon the defendant agreed that if he would not abandon the work, but would proceed with and go on and complete the same, and do such other work as was rendered necessary by reason of the caving in of the canal, and save the defendant harmless from all the damages which it would have sustained if he had not so proceeded, the prices for the work as fixed and stipulated in said contract should be altered and changed; and it was thereupon agreed that the board of sewerage commissioners, acting in behalf of said city, should enter into negotiations with the board of public works and its lessees, and go to Columbus for that purpose, and obtain, if possible, the right-of-way under said canal. And it was agreed that, if the defendant succeeded in obtaining said privilege, the plaintiffs should be paid a fair and reasonable price for said work without regard to contract rates, and should, in addition, be paid whatever was reasonable and right for all extra expense, labor, and materials which he might furnish in repairing said damage, as well as all damages which he might sustain by reason of the delay occasioned thereby, and the injury to his work. That the board of sewerage commissioners did thereafter obtain said right-of-way under the canal, and thereupon the plaintiff proceeded to perform such work and furnish labor and materials for the repair of the damages and the construction of said tunnel and sewer.

"Plaintiff states that having proceeded with said work, and having constructed said sewer and tunnel under said canal, and along Sycamore street to Court street, and east on Court street to Cheapside, said defendant was enjoined by the superior court of Cincinnati, at the suit of the lessees of the board of public works; and that he was required to suspend said work for a period of about two weeks, and by reason thereof was put to increased expense in doing said work.

"Plaintiff further states that after said tunnel and sewer had almost been completed, the defendant, through the carelessness of its officers and agents, caused three of its main sewers of said city, and four connecting sewers connecting said main sewers, and the contents thereof, all situated near the corner of Sycamore and Abigail streets, to be let in and discharged upon plaintiff's work, to the great injury thereof; and that the plaintiff was ordered and required by said defendant to remove all of said sewers, and to build a flume to carry off the sewerage therefrom, and to connect the same with another of the sewers of said city; and that by reason thereof the plaintiff was delayed in the prosecution of the work of constructing his said sewer for more than six months, by which he was put to great expense.

"Plaintiff says that said tunnel and sewer were completed about November, 1872, in a good and workmanlike manner, to defendant's entire satisfaction, and was accepted by said defendant, and the plaintiff says there is due him from the defendant, by reason of the premises, the sum of $174,182.92, subject to a credit of $57,199, leaving a balance due of $116,983.92, with interest from November 9, 1872."

The defendant, for answer, says that plaintiff did certain work upon said sewer, in the time and manner chosen by himself, for all which he has long since been paid in full.

Defendant denies that plaintiff was ignorant of the existence of the stone pier mentioned in the petition; denies that it was the duty of the defendant to inform him of the existence of the same, and says that the

prices at which the work was contracted to be done were fixed by a written proposition made by the plaintiff to the defendant. The defendant further denies that there was any contract or agreement made by or between the plaintiff and defendant, with reference to said work, or any part thereof, other than the written agreement first above mentioned; denies that any loss or damage was caused the plaintiff by the negligence or misconduct on the part of the defendant, its officers or agents, and avers that if plaintiff suffered any loss in the prosecution of said work, it was by reason of the careless and negligent manner in which the same was performed by him, or his agents or employes.

The defendant sets up several items of counterclaim for losses which the defendant was compelled to pay to property-holders on the line of the work, occasioned, as is alleged, by the negligence of the plaintiff.

These items of counterclaim the plaintiff denies in his reply.

By consent of the parties, the issues of law and fact were referred to H. D. Paul, Wm. H. Pugh, and Geo. B. Okey for decision and to report their findings to the court. The referees having found several issues of fact and law in favor of the plaintiff, to which exceptions were taken by the defendant, and a motion for a new trial being overruled by the referees, a bill of exceptions containing all the testimony was signed by the referees, who thereupon filed their report in court at special term. Motions were then made by the plaintiff to confirm, and by the defendant to set aside the report, which motions were reserved for decision here.

The principal items of the referees' report relate:

1. To the break in the bed of the canal by reason of the remains of the old pier.

2. To the additional expense to which the plaintiff was put at that part of the canal known as Cheapside.

3. To the construction of the north two hundred feet of the sewer, and the obstructions encountered and overcome by the plaintiff.

As to the first item, the referees find that the plaintiff is entitled to recover, over and above the sum mentioned in his contract, the further sum of $15,911.58.

As to the second item, the referees find that the plaintiff is entitled to recover, beyond his contract price, the sum of $3,789.15.

As to the third item, the referees find that the plaintiff is entitled to recover, over and above the sum mentioned in his contract, the further sum of $36,872.88, from which is to be deducted the sum of $9,700.24 paid the plaintiff on account of said north two hundred feet, leaving the balance thereon, which the plaintiff is entitled to recover $27,172.64. And the referees find that upon all the items found in favor of the plaintiff, there is due to the plaintiff from the defendant, including interest to the 3d day of January, 1876, the sum of $48,689.72, for which sum the referees find that the plaintiff ought to recover judgment.

The report of the referees as to the first item is as follows:

"That in the course of the construction of said sewer a break occurred at the canal in Sycamore street in consequence of the existence of an old pier, which was known to the engineer of the sewerage board, but which was not shown upon the plans or specifications of said work, nor known by the plaintiff. That by the terms of said contract the said plaintiff was not bound to anticipate, nor to provide for any risk or damage on account of the existence of said pier. That by reason of said break the plaintiff suffered damage and incurred expense, in addition

to the amount which he was bound to incur by the terms of his contract, said expense being incurred in the removal of obstructions caused by said break, and in measures taken to prevent its recurrence, under the direction and by the orders of the agents of defendant thereunto duly authorized. The testimony does not enable the referees to distinguish between the amounts of damage and the amounts of expense, which damage and expense amount, with interest to January 3, 1876, to $15,911.58."

To this finding the defendant objects:

1. That a party is bound to complete his contract, and will not be excused therefrom by reason of any accident happening during the progress of the work, whether the accident might have been anticipated or not, and neither will he be entitled to any extra compensation for the work made necessary by such accident. And the defendant cites numerous authorities.

No doubt this is the general rule where the additional expense becomes necessary, by reason of an accident to the work, where the defendant is not in fault; but the rule cannot apply where what is called an accident is the result of the negligence of the defendant, for the defendant cannot contract against liability for his own negligence. The reasonable construction of the referees' report is, that the defendant was guilty of negligence, either in omitting to indicate said pier in the plans and specifications of said work, or in omitting to communicate its existence to the plaintiff, who did not know it, by the engineer or some other person who did know of it. The testimony shows that the pier, or rather the foundation of the pier in question, was what was left of an old pier which once supported a bridge, and which pier had been removed down to the level of the canal bed, leaving this foundation even when the water was out of the canal, concealed by the mud and sediment. The great weight of this old foundation broke through the bed of the canal when the tunnel was being excavated under it. The referees found that the plaintiff was not bound to anticipate nor to provide for any risk or damage on account of the existence of this foundation. This finding, like a verdict of a jury, embraced a finding of law as well as of fact, and we are to give to it the same weight at least as the verdict of a jury, and in so far as it embraces a finding of law, we are to give it the same consideration as to the decision of a competent court. This accident being caused by the remains of a structure erected by the city, she must be presumed to have known of the existence, even had not the referees found as a question of fact that the engineer did know of it, and it is apparent that neither ordinary or extraordinary care on the part of the plaintiff would have informed him of its existence, as there was nothing to bring such a subject to his mind. We think, both as to the law and the fact, the referees did not err in arriving at the conclusion stated, to-wit, that by the terms of said contract the plaintiff was not bound to anticipate nor to provide for any risk or damage on account of the existence of said pier.

It is next objected by the defendant that as to this item, the finding of facts by the referee does not sustain their conclusion of law. That is, that the finding of fact that the break which occurred in the canal in consequence of the existence of an old pier, which was known to the engineer of the sewerage board, and not to the plaintiff, and which pier was not shown on the plans and specifications of the work, and that the expense incurred in the removal of obstructions, caused by said break

and in measures taken to prevent its recurrence, was incurred under the direction and by the order of the agents of the city thereunto duly authorized, does not sustain the conclusion of law that the plaintiff was not bound to anticipate nor provide for any risk or damage on account of said pier, and that he suffered damage and incurred expense thereby in addition to the amount which he was bound to incur by the terms of his contract, and that the city is liable for such increased damage and expense. The defendant contends that the court cannot examine the testimony in the case, to ascerain whether other facts, not found by the referees, sustain this their conclusion of law; but that the conclusion of law must stand or fall on the facts only which have been found by the referees. Otherwise, it is said, the trial of facts would be one by the court and not by the referees. That the province of the court is to ascertain whether the facts found by the referees are sustained by the testimony, and to inquire whether the conclusions of law are sustained by the facts actually found by the referees. And the defendant cites Lawson v. Bissell, 7 O. S., 129; Hambleton v. Dempsey, 20 O., 168; Blake v. Davis, 20 O., 231, and Laech v. Church, 10 O. S., 148. Admitting that the law is as claimed by the defendant, the court is yet at liberty to examine all the testimony in the case, to ascerain whether the full import and true meaning of the facts found by the referees, and whether the testimony sustains such finding.

The referees have found that the expense incurred, in addition to the amount which the plaintiff was bound to incur by his contract, by reason of this break in the canal, was incurred under the direction and by the order of the agents of the defendant thereunto duly authorized. That is, that the agents of the city, duly authorized so to do, ordered the plaintiff to do certain work and incur certain expense, which he was not bound to do or incur by his contract. The first question is, who were these agents of the city? The next question is did they give such orders, and were they authorized to give them? To ascertain who they were, and whether they did give such orders, and whether they were authorized to give such orders so as to bind the city, involves an examination of the testimony as to their identity, and the circumstances under which the orders were given. And if it should appear from the testimony that after the break in the canal, the plaintiff refused to proceed further with the work unless he was paid an additional compensation to that contained in his contract, and that the sewerage commissioners promised that in consideration that he would not abandon the work, but go on, they would pay him the additional compensation, and told him to go on with the work, these facts, which are merely evidence of the ultimate fact found, although not specially found by the referees, would tend to sustain, if not actually sustain, and explain their finding that the agents of the city, duly authorized, ordered the plaintiff to incur expense which he was not bound to incur under his contract, or which at least he had refused to incur unless the additional compensation was promised. We think it is proper, therefore, to examine the testimony, as it is certified that we have all the testimony, to ascertain whether the finding of the referees is sustained as to this iem, and also to ascertain the true and full meaning of such finding of fact. This becomes necessary, also, because the defendant denies that the testimony shows that the agents of the city were duly authorized to give such orders, or, if authorized, that such orders were in fact given.

It appears from the testimony that the city had obtained the right

from the state authorities to extend the sewer up through the basin to Sycamore street, as it was originally contemplated; but that the city changed the plan so as to cause the sewer to go under the Sycamore street bridge, but gave no notice of such change to the state, and that on the day after the break in the canal, a notice was served on the plaintiff by the state authorities that his act and the act of the city were illegal, and forbade him to proceed further, threatening civil and criminal proceedings if he disobeyed. A similar notice was served on the commissioners of sewers.

It is further shown that after receiving this notice, four members of the sewerage board held a regular meeting at its office, and from there went together to the canal bridge, where the break had occurred. At this point the evidence tends to prove that the four members met at the bridge, as a board, to transact, in view of the circumstances, business appertaining to the board, and that, while there, they did give certain orders which could only be given by the board, as the purchase of a pump and the erection of a flume. Without entering into a detail of the testimony of the four commisisoners and others, one of whom testifies that they met at the bridge as a board, we think it is difficult, if not unreasonable, to avoid the conclusion that they met as a board to transact regular business of the board, and so gave the plaintiff to understand. They met to consider what was best to be done. The water from the canal was emptying into the sewer and was finding its way into the adjoining cellars, in one of which, that of the Gambrinus Stock Company, there was stored $70,000 worth of beer, which was in danger of being soured and destroyed.

The city was in danger of being held liable in damages in very large amounts. It was necessary to act promptly. In this emergency the plaintiff informed the four commissioners that they had failed to procure the right-of-way under the canal; that he was blocked; and that he had been losing money daily in endeavoring to comply with the contract, and that he refused to proceed further with the work unless he was paid additional compensation. It was known to all the commissioners that the plaintiff had made a mistake against himself of about $30,000, in giving in his bid, and that his bid, with even the $30,000 added, would have been far less than any other bid made for the work. The evidence tends to prove, and we think establishes, that thereupon the commissioners told him that they knew it was a hard case for him; that they would go to Columbus and procure the right-of-way; that if he would go on with the work he should be paid what it was reasonably worth, and that he should lose nothing, and did order him to go on with the work with this understanding. We think all this testimony sustains the finding of the referees that the agents of the city, if duly authorized, ordered the plaintiff to do work which he was not bound by his contract to do, and which he refused to do except upon the express promise that he should be paid therefor.

It is objected by the defendant that if the promise was made, it was without consideration and does not bind the city, because, at last, the plaintiff in going on with the work did no more than he was bound to do by his contract, and because the sewer when completed was precisely the sewer which the plaintiff had contracted to build. Aside from other reasons, hereafter to be mentioned, it is sufficient to say that if, in completing the sewer contracted for, the plaintiff was put to additional expense through the fault of the city, such additional expense, if in-

curred by order of the city, would be a good consideration for the promise of the city to pay it, whether, as we shall see, the promise was in writing or not.

It is next objected that said promise is not binding on the city because not made in writing, as required in the contract; and because there is no record of any such promise or agreement by the board.

As to the first of these objections, it is well settled that although by the terms of the contract there shall be no claim for extra compensation unless the order for the extra work be given in writing, and the value of such extra work be agreed upon in writing, yet these requirements may be waived, and the parties be bound by a verbal agreement. And this upon the principle that the parties may unmake what they have the power to make. Smith v. Gergerte, 4 Barb., 614; Pierpont v. Bernard, 6 N. Y., 279; Betts v. Perine, 14 Wend., 219; 3 Johns, 528; Grant v. U. S., 5 Ct. Claim., 71; Cameron v. Cincinnati, Sup. Ct. R.

As to the objection that there is no record of such promise in the proceedings of the board, it is sufficient to say that the plaintiff has no control over such records, and is not bound by the omissions of those who have.

It is also objected that the board, under its general powers, was not authorized to make such an agreement or contract. But it is to be remembered that this agreement was made for the very purpose of carrying out a contract already entered into, and was made to meet a sudden emergency, where delay would have been fatal to the interests of the city.

But there is another view of the testimony which sustains the finding of the referees. The testimony shows that after the break in the canal the plaintiff, for the reason already stated, refused to go on with the work and abandoned the contract. This left to the board of commissioners, or rather the city, the option to sue him for damages for a breach of his contract, or to waive the breach and enter into a new contract, or a modification of the old one. And the authorities are to the effect that the abandonment and the refusal to proceed, constitute a good consideration for the new promise of additional compensation. Monroe v. Perkins, 9 Pick., 298; Latimore v. Harsen, 14 Johns., 330; Rand v. Mathers, 11 Cush., 1; Dearborn v. Cross, 7 Cowen, 48; Townsend v. Stone Co., 6 Duer, 208; Greenleaf on Evidence, section 303; Hart v. Lanman, 29 Barb., 217.

And this rule applies to corporations as well as to individuals. Dillon on Municipal Corporations, section 398; Meech v. Buffalo, 29 N. Y., 198; Bean v. Jay, 23 M., 121.

Again, the parties had the right, when the contingency arose, to construe the contract as not requiring the contractor to do this extra work, and if he refused to proceed otherwise, the contract is binding. Stewart v. Kittellas, 36 N. Y., 388; Connor v. Lynde, 10 Ind., 282.

As throwing light upon this part of the case, and upon the whole case, the following certificate, signed by the four commissioners, and addressed to the common council of Cincinnati, is worthy of notice:

"Whereas, We, the undersigned, recognizing the fact that in the construction of the Court and Sycamore street sewer tunnel, Mr. John R. Benedict did, in all things, exhibit undaunted courage, perseverance and skill, under the most trying difficulties and dangers, and gave the authorities in charge, and also the public in general, as little trouble and annoyance as the nature of the accidents and circumstances would permit; and

"Whereas, He was led to believe that he might expect compensation for the extra expense by reason of said accidents and losses in the further prosecution of this work. Now, therefore, while neither admitting nor denying the legality of his claim, yet recognizing it as eminently just and equitable, we hereby renew and urgently recommend the common council to appropriate a sum of money to Mr. Benedict, sufficient to cover his losses, and for his two years of personal services while in the prosecution of this important sewerage work.

(Signed.) "JULIUS LANG, W. P. WILTSEE,
"LEWIS GLENN, CHRISTIAN BOSS."

"Cincinnati, July 21st, 1874."

We conclude that the testimony sustains the findings of the referees as to the fact and the law upon this first item of their report. As to the second item of the report, the referees find, "that by reason of the matters stated in the petition, and upon the requirements of the agents of the defendant thereunto, duly authorized, the plaintiff was put to further additional expense, not contemplated by his contract, at Cheapside, which further expense amounts, with interest to January 3d, 1876, to $3,789.15." This is a finding that the authorized agents of the city required the plaintiff to do work not called for in his contract, to the amount of $3,789.15.

The matters stated in the petition, and which the referees by this finding find to be true, are: "That the plaintiff having proceeded with said work, and having constructed said sewer and tunnel under said canal and along Sycamore street to Court street, and east on Court street to Cheapside, said defendant was enjoined by the superior court of Cincinnati, at the suit of the lessees of the board of public works; and that he was required to suspend said work for a period of about two weeks; and that by reason thereof, and without any fault on his part, but by the fault of said defendant, he was unable to proceed during said time, and, by reason thereof, was put to increased expenses in doing said work, the items of which will appear in the account hereto attached." In so far as this was work not required by the contract, and done by the order of the agents of the city, the same principles will apply which we have considered as to the first item. There was evidence tending to prove the amount of damages which the plaintiff sustained by reason of the delay, and the increased expenses he was put to; and unless we are satisfied that the finding as to the amount of this damage and expense, as well as the cause of them, is manifestly against the weight of the evidence, we cannot set it aside. As we are not so satisfied, the finding as to fact and law must stand.

As to the third item, the referees found:

"That by reason of the matters stated in the petition, and by the carelessness and negligence of the officers and agents of defendant, and without any fault or negligence on the part of the plaintiff, the line of said sewer to be constructed by plaintiff was so located with reference to certain existing sewers near the corner of Sycamore and Abigail streets, that said existing sewers broke in upon the work of said plaintiff, and rendered it necessary to provide for the service of said existing sewers, and to proceed with the construction of the north two hundred feet of said sewer upon a plan and in a manner entirely different from and far more difficult, and involving great additional labor and expense to plaintiff, than the plan and manner contemplated by said contract."

"That the plan and manner of the construction of said north two hundred feet of said sewer, and said provision for the service of said existing sewers, was so far different from the contemplation of said con-

tract, that said contract affords no guide to the value of the services there performed by plaintiff for defendant."

"That said plaintiff had necessarily provided, at great expense, shafts, machinery, tools, implements and fixtures for the performance of the whole of said work under said contract, a great portion of which was necessarily sunk, lost, destroyed and depreciated in value, and which sinkage, loss, destruction and depreciation he ought to and had a right to have contemplated in making his said contract, and as an item of the basis of his bid for the same. That said sinkage, loss, destruction and depreciation necessarily amounts in the construction of said work to $23,560.71, and the work not being contemplated, by reason of the facts aforesaid, by the process for which said plans were prepared, we find $3,000 of the expense of carrying out said plans was incurred and expended on account of said north two hundred feet, and have included that amount for that purpose in the finding for the construction of said two hundred feet."

"That by reason of the premises, in the construction of said two hundred feet, the plaintiff expended time, labor, materials and money for the benefit of defendant of the value of $36,872.88. The plaintiff has received from defendant, on account of said north two hundred feet, certain money, for which defendant is entitled to a credit of $9,700.24, leaving a balance due from defendant to plaintiff, upon account of said north two hundred feet, of $27,172.64."

"That no change was made in the contract price for the construction of said sewer, or any portion of the same, as claimed in the petition, except as to said north two hundred feet, as hereinbefore found."

This finding of the referees is specific and full, and if the testimony sustains the finding, the plaintiff is clearly entitled to recover the amount. It is contended by the defendant, that the additional expense and delay was caused solely by the negligence of the plaintiff. But this was the very issue tried before the referees, and found in favor of the plaintiff. The evidence is quite voluminous, and it would extend this opinion beyond reasonable limits to review it. We think it sustains the finding of the referees; at least it cannot be said that the finding is clearly against the weight of the evidence.

The several matters of counter-claim set up in the defendant's answer, arising, as is alleged, out of the negligence of the plaintiff in the prosecution of the work, have been disallowed by the referees, they finding that the negligence was on the part of the defendant, for the reasons before stated. It is clear that if the plaintiff is entitled to recover as to the three items first considered, he cannot be liable upon these alleged matters of counter-claim.

The last finding of the referees is, "that the voucher issued December 7, 1872, by defendant to plaintiff, for $1,002.93, on account of said contract, has not been paid by defendant, and that upon the surrender of said voucher by plaintiff for cancellation, there will be due to the plaintiff from defendant, on account of said written contract for the construction of said sewer, by reason of the withholding of said item for water pipe, gas pipe, and the amount of said voucher, the further sum of $1,816.35.

This finding, we think, is supported by the evidence.

Finally, the referees find that on account of the premises, there is due from the defendant to the plaintiff the sum of forty-eight thousand six hundred and eighty-nine dollars and seventy-two cents ($48,689.72),

including interest from the third day of January, 1876, and that the plaintiff ought to recover a judgment against the defendant for said sum.

For the reasons stated, the motion of the defendant to set aside the report of the referees and grant a new trial, is overruled, and the motion of the plaintiff is granted, and judgment is rendered for the plaintiff against the defendant for the sum of forty-eight thousand six hundred and eighty-nine dollars and seventy-two cents ($48,689.72), and interest thereon from the 3d day of January, 1876, and for costs.

We may say, in conclusion, that the whole case shows that even with the addition of this judgment to the contract price, the city has received a sewer of first importance, and constructed to her entire satisfaction, for a far less sum than was bid by any one of the plaintiff's competitors. This, of course, is no reason why the plaintiff ought not to be held to his contract after he completed his work. But it does show, in any event, that the city will not be compelled to pay more than the sewer is worth.

Report of the referees confirmed, and judgment for plaintiff.

Yaple and Tilden, JJ., concur.

EXTRADITION WARRANT. 42

[Hamilton Common Pleas Court, 1877.]

EX PARTE MOORE, *alias* A. MONROE, *alias* ROTHSCHILD.

1. Where an extradition warrant, issued by the governor of this state to the sheriff, recites the requisition of the governor of the remanding state, and that a copy of the affidavit making the charge, duly certified as authentic, has been filed, this recital prevails, and a certificate from him that certain papers were filed purporting to be an affidavit, certified as a copy from the court of the demanding state, does not destroy the force of the recital that the warrant was issued on affidavit certified as authentic by the governor of the demanding state.
2. That the affidavit charging the crime charges that the name of the person murdered is unknown to the affiant, does not touch the sufficiency of the charge, though it could have been ascertained.

AVERY, J.

Upon demand made on the governor of this state by the governor of another for the return of a fugitive from justice, and upon producing a copy, certified by such governor as authentic, of the indictment or affidavit charging a crime, it is the duty of the governor of this state to issue his warrant to the sheriff of the county where the fugitive may be found, commanding the arrest of such fugitive, and that he be taken before a judge of the common pleas, or a supreme judge, to be examined on the charge, and that thereupon such judge shall proceed to hear and examine the charge, and, upon proof adjudged by him to be sufficient, shall commit the fugitive, and give notice of the fact to the governor making the demand, and deliver to his authorized agent such fugitive. This is by act of legislature March 23, 1875, entitled "An act to regulate the practice of the delivering of fugitives from justice when demanded by another state or territory."

Under a warrant over the great seal of the state, attested by the secretary of state and signed by the governor, issued to the sheriff of this county, commanding the arrest of A. Moore, alias A. Monroe, alias A. Rothschild, as a fugitive from the state of Texas, charged with murder,

and which warrant recites the fact of requisition, and that a copy of the affidavit making the charge, duly certified as authentic, has been filed, the sheriff has made an arrest, and brought the prisoner before me.

It is objected that the warrant was issued by the governor without an affidavit certified as authentic by the governor of Texas. Proof of this appears, it is claimed, from a certificate over the great seal of Ohio, signed "Rodney Foos, Executive Clerk," to the effect that a certain paper purporting to be an affidavit, certified as sworn to by the officer administering the oath, and certified as a copy from the files of the court in Texas by the clerk, is the affidavit and certificate attached to the requisition. Whether the authority of the governor to issue the warrant can be questioned in this proceeding depends on the nature of the proceeding. Assuming for the present that it may be, and that the certificate of "Rodney Foos" is evidence, such certificate does not destroy the force of the recital in the warrant that an affidavit duly certified as authentic was filed with the governor. It is not required that the affidavit should be certified on its face as authentic, and it is not unusual to embody such certificate in the requisition itself. 106 Mass., 223. The recital in the warrant raises the presumption that such was the fact in this case. The recital therefore prevails.

It is objected again, that the affidavit charging the crime does not allege that the prisoner fled from Texas. It is not required that the charge of being a fugitive should appear in the affidavit charging the crime. Whether a person is a fugitive, is a fact, in the first instance, to be determined by the governor making the requisition, and is a fact also open to the inquiry of the governor of the state upon which the requisition is made. They should be satisfied; but when the requisition has been issued by one governor and the warrant issued by the other, that is proof of such fact. Indeed, where the crime is committed in one state, and shortly after the person charged is found in another, in cases of great crimes, at least, it will be a sufficient showing that he has fled.

It is objected again that the affidavit describes the person killed as a woman unknown, and it is claimed that from the evidence, she was known by the name of the prisoner, as his wife. The affidavit, however, simply charges that the name was unknown to affiant, and nothing appears to show that such was not the fact. Whether the name could not have been ascertained by reasonable inquiry, is a question that might arise on the trial and be relied on as a ground of variance; but it does not touch in any manner whatever the sufficiency of the charge. The affidavit is particular to the fullest extent, charging the time, manner and place of the alleged act of killing. The place is alleged to be in Texas, and if reported cases are to the effect that it must appear that the person has fled, such cases are where the affidavit does not distinctly allege the place of the crime.

Finally, it is objected that the proof is not sufficient to hold the prisoner, and this raises an inquiry into the nature of the proceeding. Is it an examination, such as would be had to determine whether a person charged with committing a crime in this state should be held to answer? Is it a proceeding in the nature of habeas corpus, to inquire into the legality of the warrant? Or is it a proceeding simply to supervise the execution of the warrant by the sheriff, and identify the prisoner? The act of the legislature provides that upon requisition and the necessary

affidavit, the governor shall issue his warrant, and the fugitive be brought before a judge to be examined on the charge, and such judge shall proceed to hear and examine such charge. What charge? If it be the charge of guilt, that would be transferring the trial from the state of Texas to this state. The duty of returning fugitives is imposed by the constitution of the United States, and enforced by the act of congress. It has been held that where congress has legislated on the subject, any legislation by a state to impede or embarrass the operation of the act is unconstitutional. 16 Peters, 540; 14 How., 13; 5 Met., 550. If the act of the legislature means that the judge shall proceed to determine whether the prisoner is guitly or not, it means that he shall pass on a question already passed upon by the proper officers of a state, equally sovereign with our own, and in respect to which a duty is imposed upon this state by the constitution of the United States, enforced by the act of congress. To adopt such a construction of the act of the legislature would be to presume the legislature intended to enact an unconstitutional law. Upon habeas corpus, in some reported cases, inquiry has been made into the sufficiency of the affidavit; but the inquiry has stopped there, and has not gone on to consider whether the plaintiff is guilty under the charge. In habeas corpus, it is true, the legality of a warrant may be inquired into, but the weight of authority, where in pursuance of a requisition the governor of a state has issued his warrant, is that the warrant is conclusive that the demand is conformable to law, and ought to be complied with, unless there is some defect apparent on the record. 106 Mass., 223, and 9 Wend., 212.

The proceeding under the act of the legislature to hear and examine the charge, is not a proceeding in the nature of habeas corpus. A writ of habeas corpus is issued against the warrant under which a prisoner is held in custody. This proceding to hear and examine the charge proceeds under the warrant and depends upon it. It is true it may be shown that the requisition and affidavit necessary to authorize the issue of the warrant did not exist. That, however, would not affect the extent of inquiry to be made by the court, under the power to hear and examine, but would be a question, *in limine*, to ascertain whether the court should proceed to hear and examine at all. The point now under discussion is as to the extent of the power to hear and examine, and the exercise of such power presupposes that the jurisdictional facts, which must precede the warrant of the governor, have been ascertained. The statute, in providing that the judge shall proceed to hear and examine the charge, had no reference to a hearing to determine the legality of the warrant. The question, at this point, being then as to the inquiry into the charge, and that not extending to the question of guilt, nor to the legality of the warrant, can extend to nothing but the execution of the warrant by the sheriff, and the identity of the prisoner. The duty of returning fugitives from justice, under the constitution of the United States and the acts of congress, is a ministerial duty devolving on the governor. He has no discretionary power, except it be to inquire and decide who is the person demanded. 24 How., 66. The act of the legislature could not have been necessary to give the judge of a court of common pleas jurisdiction as in habeas corpus, because that exists by the general law. It is but a step in the discharge of the duty of the governor that the prisoner is brought before the judge, because the duty of the governor under the act of congress is not simply to cause the arrest of the fugitive, but to cause him to be returned. While no power

outside of state legislation can compel the performance of this duty, yet when it has been entered upon by the governor, the act of the legislature can apply only as to the steps to be taken in discharging the duty. The judge, under the act of the legislature in question, sits to perform no such office as under the statutes at large in respect to habeas corpus belongs to him; but simply to complete the discharge of a ministerial office which the act of congress has cast upon the governor.

The question of identity, then, the only question open to inquiry, depends upon the testimony of a single witness. That question is not whether the prisoner committed the crime, but whether he is the person charged and intended by the warrant. The only mode of determining who is charged in the warrant is by reference to the affidavit. Necessarily, then, proof as to the identity of the person named in the warrant involves the production of the affidavit. Considerable embarrassment arises at this point, because of the fact that a certified copy of the affidavit over the great seal of the state is subscribed, not by the secretary of state, but by Rodney Foos, executive clerk. Still, the witness was permitted to testify without objection that this paper so certified was a copy of the affidavit on which the requisition was made and the warrant of the governor of Ohio was issued. Indeed, no objection has been taken to any defect of proof as to the affidavit, but it has been treated throughout as a true copy of the paper. Treating it, then, as a paper both proved by the testimony and admitted by the parties, nothing remains but to inquire whether the testimony identifies the prisoner. The proof consists of circumstances connecting him with the charge. He was in the company of the deceased woman in Jefferson, Marion county, Texas, upon the last occasion when she was seen alive. The woman, within a few days afterward, was seen by the witness dead, and the prisoner had disappeared. The name the prisoner went by in Texas is one of the names charged in the affidavit and warrant. The manner of the death of the woman, as testified by the witness, is the same as that described in the affidavit. These circumstances are sufficient to make out the identification of the prisoner as the person named in the charge. Of course, whether he is to be identified as the person committing the crime will depend upon a trial of the case.

The whole question, both as involving the construction of a statute of our own state, and the rights and duties of the state in relation to each other, is of the utmost importance. The effort of my mind has been so to construe the act of the legislature that it shall be in harmony with the constitution and laws of the United States. At the same time, however, it is an act of the legislature which stands on the statute books by virtue of the sovereign authority of this state. A case so important in its character, and so grave in its consequences to the prisoner, ought to receive, if he desires it, investigation from our supreme court. With a view, therefore, that he may have that opportunity, and proceeding under the statute to fix the time within which the prisoner shall remain in custody pending notice to the governor of Texas, the period will be fixed at twenty days. The order will be that the prisoner be committed to the county jail, there to remain in custody for twenty days, as a reasonable time in which to notify the governor of Texas. At the expiration of that time, unless at an earlier date the supreme court, upon application, shall refuse to review this proceeding, he shall be delivered, upon payment of costs, to the authorized agent of the executive authority of

Texas, to be hence removed to the proper place of prosecution in that state.

C. H. Blackburn, for the prisoner

C. W. Baker, L. Irwin, and Mr. Guthridge, of Texas, contra

[Hamilton Common Pleas, 1877.] 47

FRANK X. MAYER v. AUGUSTA MAYER.

For opinion in this case, see 5 Dec. R., 444 (s. c. 5 Am. Law Rec., 674.)

[Superior Court of Cincinnati, General Term, January, 1877.] 54

JOSEPH FOSTER v. R. H. FENTON, TREAS. OF HAMILTON CO.

For opinion in this case, see 5 Dec. R., 427 (s. c. 5 Am. Law Rec., 523.).

FIRE INSURANCE. 54

[Hamilton Common Pleas, 1877.]

ANDREW COCHRAN v. AMAZON INSURANCE CO.

1. Where, by a part of the conditions of a policy of insurance, it is provided that the interest of the assured in personal property must be absolute, otherwise that it must be made known to the insurer and expressed in the policy at the time it issues. In an action on such policy, the petition not otherwise defining or limiting the extent of the ownership, in order to recover in such action, the assured must prove an absolute ownership in the property—an ownership independent and exclusive of the interest of any other person therein.
2. Where, by such policy, a lot of whisky is insured against fire, and its location is described therein as "contained in a United States bonded warehouse, being the north end basement of a brick distillery, situate on the west bank of the Miami canal, between Dow and Broadway streets, in Tippecanoe City, Ohio," and it appears that by the laws of the United States said warehouse was to be used, and in fact was under the exclusive custody and control of the United States storekeeper during the existence of the policy; and where, in such policy, it is provided that the insurer will not be answerable for any loss if the premises containing the property insured be used for conducting any illicit or unlawful trade or vocation; evidence tending to prove the illicit manufacture of spirits in the distillery portion of said building, but separated from the said warehouse by a partition, and the unlawful removal of such spirits from the cistern room of such distillery, will not be permitted to go to the jury as proof tending to show an illicit or unlawful trade or vocation conducted in the United States warehouse where the property insured was contained.
3. Where, by the conditions of the policy, it is provided that if the insured shall swear falsely to any matter in making his proofs of loss, that he shall thereby forfeit all claims under the policy; to make such a defense avail the insurer, it must be shown that the assured intentionally made such false oath; that it was in a material matter connected with the loss. Hence, where a party, in making claim in good faith for a loss, makes oath that other property was destroyed besides that insured, if all that was insured was actually destroyed, this is not such false swearing as will, within the conditions of the policy defeat a recovery. And this defense imputing to the assured a crime, the insurer must prove such charge beyond a reasonable doubt.

JOHNSTON, J.

GENTLEMEN OF THE JURY:—The plaintiff, Andrew Cochran, seeks to recover of the defendant, the Amazon Insurance Company, a body corporate under the laws of Ohio, the sum of $4,200, with six per

cent. interest thereon from April 1, 1875, by reason of the alleged loss of three hundred and ninety barrels of whisky, covered by two policies of insurance issued to him by defendant. He avers and charges in substance, that one policy was issued to him on the 9th day of October, 1874, for the period of four months thereafter, covering one hundred and thirty-six barrels of said whisky, he paying the defendant as premium the sum of $51.00, and that the defendant insured him thereon in the sum of $1,700 for that period against loss or damage which might come thereto by fire. That the other policy was issued by said defendand to plaintiff August 15, 1875, covering two hundred and fifty-four barrels of whisky, for a period of four (4) months thereafter, which was renewed on the 15th day of December, 1874, in consideration of the further payment of $75.00, and extended for a further period of four months thereafter; and that the defendant thereby insured him, plaintiff, in the sum of $2,500 during said last named period, against loss or damage that might come thereto by fire. Plaintiff alleges that both of said lots of whisky were contained in a government store or bonded warehouse, being the north end basement of brick distillery situate on the west bank of the Miami canal, between Dow and Broadway streets, in Tippecanoe City, Ohio; that on the 5th day of January, 1875, both lots of said whisky were totally destroyed by fire, whilst covered by said policies; that due proof was made of the loss; and that by the terms of said policies, the said sums of insurance being payable in sixty days after proofs of loss, and that having in all other respects complied with the conditions of said policies, there became due to him, and he entitled to recover, the said sums of $1,700 and $2,500 respectively on said policies, being in all $4,200, with interest from April 5, 1875, against the said defendant.

As against the claims of plaintiff under these policies, the defendant, the insurance company, while admitting that said policies were issued to plaintiff on that number of barrels of whisky, at the place and for the time and amounts named, it, however, in substance, by its answers and amended answers, which you will read, denies:

First, that the whisky thus insured was destroyed by said fire of January 5, 1875, for the reason that it had before that time, or the greater part thereof, been removed from said bonded warehouse, for the purpose of defrauding the United States of its taxes due on said whisky.

Second, for that the distillery, wherein the whisky purporting to be covered by said policies was contained, and to which belonged the said bonded warehouse, was used in carrying on unlawfully the business of distilling, with intent to defraud the United States of its taxes upon the whisky insured, together with other whisky or spirits produced in said distillery, and that said whisky, alleged to have been insured, was forfeited to the United States by reason of said fraudulent acts and intents.

Third, for that the plaintiff, in making his proofs of loss under said policies, falsely swore that at the time of the fire there were five hundred and two barrels of whisky in said warehouse, when, in fact, the greater part thereof had before that time been removed therefrom, in violation of the laws of the United States, and for the purpose of defrauding it of its taxes thereon; and

Fourth, for that the plaintiff, Andrew Cochran, was not either at the time of issuing of said policies on said whisky, nor at the time of the alleged burning thereof, the owner of, or had any interest in the same.

All these several charges or defenses are denied by the reply of the plaintiff, which you will read. The defenses appear in the pleading substantially in the order above set forth.

Upon these issues this case has been tried, and it is your peculiar province to determine, from all the evidence introduced in the case and that you have heard, whether the plaintiff has made out his case to your reasonable satisfaction, or whether the defendant has sustained any of its defenses thereto. The testimony in a great measure has been delivered to you through witnesses present in open court. The testimony of other witnesses has been presented to you in the shape of depositions; and again, documentary evidence, letters, bills, notes, and certain pleadings in the case have been introduced in evidence, to sustain the issues respectively presented by the parties. It is your duty carefully to weigh and consider each and every part of this testimony, and guided by the law applicable thereto, as given to you by the court, to return such a verdict as will reflect both the law and the facts.

Considering, gentlemen of the jury, the claim made by the plaintiff, I say to you that if, from all the evidence introduced in the case, you should become satisfied by a fair and reasonable preponderance thereof, that at the time the policies were issued, and at the time of the fire, he was the actual owner of said three hundred and ninety barrels of whisky; that he did nothing after said policies were issued in violation of any of the terms or conditions thereof, but complied with them; and if you should likewise find that said whisky was in fact, on the 5th day of January, 1875, totally destroyed by fire without the consent or direction of said plaintiff, directly or indirectly; that within the time required, and as prescribed by the policies, he made proof of said loss, and you also find that sixty days thereafter elapsed and said defendant did not and has not since paid the loss sustained, then the plaintiff would be entitled to a verdict for the amount of loss he has sustained, not exceeding, however, the sum insured in said policies, together with six per cent. interest thereon from April 5, 1875, up to the 2d day of January, 1877, being the first day of the present term of this court. In arriving at the value of the whisky, you will be governed by the testimony as to the fair cash market value thereof at Tippecanoe, Ohio, at the time of the loss, and you will be governed by the testimony introduced as to the quantity of whisky destroyed.

Before, however, you find anything for the plaintiff, you are carefully to consider the defenses presented by the defendant, the insurance company, to the alleged loss of plaintiff. I have heretofore stated in substance these defenses, and to avoid here repeating them, I will ask you to turn back and read them again. Now there are certain of these defenses, if sustained by the kind and character of proof hereafter to be stated, that will prevent a recovery herein by the plaintiff of any sum.

You may consider first, for convenience, the fourth (4) or last defense hereinbefore set forth, that is, "that Andrew Cochran was not at the time the policies were issued, nor when the alleged loss occurred the actual owner of, or had any interest in said whisky." You may consider this first, for the reason that if you should find this issue against Cochran, it would be unnecessary for you to proceed further in your deliberations. It would be your duty then to return a verdict for the defendant.

In considering the question of ownership, you will consider the evidence introduced for your consideration upon that point. You will

ascertain therefrom what connection, if any, plaintiff ever had with this whisky; what were his means or opportunities of becoming its owner; how the whisky had been treated by him, where it was manufactured, at whose distillery, and how said whisky, as to its ownership, had been treated by the defendant before the loss.

Actual or absolute ownership in property by an individual may be defined to be a title or right in property to the exclusion of every other person, and to become an actual or absolute owner of property, it is not necessary that the purchase price has been paid. If he hold the same by lawful purchase on credit, he is as much the absolute owner as if that price had been fully paid.

You will examine and weigh all the testimony bearing upon this question, and be governed by the weight thereof. If you are reasonably satisfied in the premises—that is, you are not upon this question of ownership to be satisfied that he either was or was not the owner beyond a reasonable doubt—as before charged, if you are reasonably satisfied that plaintiff was not such actual owner, he cannot recover.

If you should find that Andrew Cochran, the plaintiff, was at the time of insurance, and up to and at the time of the loss, the owner of said whisky covered by said policies, you may then consider another defense of defendant—designated as first defense in this charge. You will refer to and read it in this connection. Of course, gentlemen, if you should find, from all the evidence in the case, that after the insurance was effected, either this plaintiff, or some one by his direction or consent, either directly or indirectly, removed the whisky, or any part thereof, from said bonded warehouse, for the purpose of defrauding the United States, or for any other fraudulent purpose, and it was not there at the time of the fire, and not destroyed, the plaintiff would not be entitled to recover. Whether such was the fact, you are to determine from the evidence in the case, and this charge or defense, as well as the other defenses named, having been made by the defendant, it is its duty, and it is incumbent on it to satisfy you of their truth by a fair preponderance of the testimony; and some of them, as I shall hereafter charge you, must be proven beyond a reasonable doubt.

If you should find that said whisky insured was not removed before the loss, as charged in the defense described as *first* in this charge, you may then pass to the defense indicated in this charge as *"second."* You will at this point read it.

I have to say to you as to this defense, that during the trial, all testimony ought to be introduced proving that the whisky was during the existence of the policies being unlawfully distilled in the distillery, in a part of which was located the bonded warehouse, and that it was removed from the distillery cistern in violation of the laws of the United States, was excluded from your consideration, for the reason that the alleged illicit or unlawful acts were not sought to be fixed as taking place in the bonded warehouse where the whisky covered by the policies was stored under the sole charge of the government storekeeper. If any evidence, therefore, has been introduced for your consideration as to this illicit or unlawful manufacture of whisky in the distillery, and not in that part of the premises known as the government bonded warehouse, you cannot consider it in this case. It is your duty only to consider such evidence, if any, as may apply to illicit manufacturing of whisky in

those premises known as the bonded warehouse. If there was any such evidence as to the bonded warehouse, you may consider it, and if it be true, and said illicit or unlawful manufacture of whisky was going on in the said warehouse at the time of the fire, with the knowledge or assent or co-operation of the plaintiff or those acting for him, then he cannot recover on said policies. If, however, such illicit manufacture or distillation of whisky was confined to the distillery and not the government warehouse, or if in the latter, it had ceased long before the fire occurred, then such unlawful or illicit business would not vitiate or render void said policies.

As to the last part of said defense, that the whisky insured had before the fire been forfeited to the United States, and was not, therefore, the property of the plaintiff, I can only say to you that you may duly consider such evidence, if any you find has been introduced in this case. To sustain such defense, it would be necessary to establish such forfeiture by a duly certified record of the proceedings had in the premises. If you find no such evidence in the case, you need not further consider such defense; otherwise you may; and if it should appear that at the time of or before the fire, said whisky insured had been duly and legally forfeited to the United States, divesting the ownership of said plaintiff therein, then the plaintiff cannot recover for the loss of said whisky. I call your attention to this defense, for it appears in the pleadings of the defendant as one of its defenses.

Having disposed of the defense entitled "second," in this charge—that is, as to the illicit or unlawful use of the premises where the whisky alleged to have been lost was stored; if you find that the policies have not by reason of any such illicit or unlawful use of the said premises as heretofore charged, become void, and if you should find that the said whisky had not been forfeited to the government, you will consider the "third" and last of the four defenses stated in this charge.

You will refer to and read it at this point if you desire.

After a loss has occurred, the same good faith should be exercised between the insured and insurer, as before the loss. In very many policies of insurance a condition is attached to and made part of the policy, that if it should appear that in making the proofs of loss there has been false swearing employed, to the knowledge of the insured party, for his gain, he shall forfeit all claims under the policy. There is a clause of this character in the 11th condition on the back of the policies in suit. The proofs of loss have been put in evidence; you will read them in connection with this defense, and consider them in connection with all the other evidence in the case bearing upon the question of the amount of whisky lost by the fire. This false swearing in the making of preliminary proofs of loss, to defeat a recovery of the loss, must be proven to have been made intentionally and with the purpose of defrauding. A claim honestly made, is not invalidated on account of error, or even some degree of exaggeration or overestimating in stating the amount or value of the property destroyed. To sustain the defense here made, it must be shown by the testimony, that the plaintiff knowingly and falsely made oath as to the quantity of whisky destroyed, in a material matter. As the policies in this case only concerned 390 barrels of whisky in the warehouse, it would seem immaterial for the purpose of this case, whether there was a greater quantity in the warehouse. The question for your consideration from the first has been, was the identical whisky (390 barrels) insured in the basement of the warehouse at the time of the fire, and destroyed?

If it was not, or there was but a part of it in said warehouse, and he should knowingly and falsely have sworn that it was all there and destroyed, in such case the defense here made would apply, and he could not recover for the part actually lost. To sustain such a defense, imputing, as it does, a crime against the plaintiff, you must be satisfied that he did so swear beyond any reasonable doubt. In such defenses the same character and degree of proof is required as in criminal cases, and I may here say to you that the same strictness of proof applies to all other defenses in this case that impute to the plaintiff the commission of a crime, either against the laws of the United States or of the state of Ohio; such defenses must be established beyond a reasonable doubt or the party making them fails.

If you should find from the proofs of loss, in connection with all the other testimony in the case, that the 390 barrels of whisky actually insured were lost at the fire, this defense as to false swearing in making proofs of loss cannot prevail.

Gentlemen of the jury, you have received what I believe to be the law applicable to this case, through this and the special charges asked by counsel. You have heard all the evidence, and have had the case in every phase presented to you by the learned counsel of the parties, and it remains for you to determine the issues joined, without reference as to who is plaintiff or defendant, or as to who is interested in the event of this suit, or will be benefited by its result.

If you should find upon the whole case for the plaintiff, you will assess his damages at such sum as you find he has lost by the destruction of the property insured under the policies, with interest from the time you find the loss became due and payable, up to January 2, 1877, at 6 per cent., provided, however, the damages, exclusive of interest, cannot exceed the sum insured. If you, however, find for the defendant upon any of the defenses made by it that, the court has instructed you, would defeat a recovery by plaintiff on said policies, then you will return a general verdict for the defendant, the verdict in either event to be signed by your foreman. Take the case.

(The jury found for the defendant.)

Having been instructed to answer an interrogatory presented to them as to whether plaintiff, at the time the policies issued, was or was not the owner of the whisky, the jury answered, "No."

Warner M. Bateman, J. W. Johnson, for defendant.

E. M. Johnson, Edward Colston, for plaintiff.

61

ELECTIONS.

[Hamilton Common Pleas, 1877.]

THOMAS B. MALLANNEE v. T. W. HILLS ET AL.

1. A pauper having no home elsewhere, and residing in the county infirmary, with the present intention of making it his home, does not thereby lose his right to vote after residence for the proper length of time. Nor does it make any difference that he was an inmate only by sufferance, and not regularly sent there under the law.
2. In the absence of evidence of malice, the damages for the rejection of the vote will be one cent.

HARMON, J.

Defendants were judges of election at the Carthage precinct, Millcreek township, at the general election in October, 1875. Plaintiff offered

his vote which, upon his being challenged and sworn, defendants refused to receive, whereupon this action was brought for damages for such refusal. It appears that plaintiff was born and raised in Anderson township, of this county, but has not voted nor had a residence there since 1854. Since then he has lived in various places in the county, the last being in Cincinnati, where he voted in April and October, 1874. In the latter month he left there with no intention of ever returning, and went to several other places in the county in search of employment, but remained only a few days in each. He finally went to Anderson township, where he remained several days, when, being old, infirm, and crippled by the loss of an arm, he asked and received a note from one of the trustees who knew him, to the superintendent of the county infirmary at Carthage, stating the above facts and requesting the superintendent to admit him. With this he voluntarily went to the infirmary, with the intention of remaining there permanently, having no family whatever, and no other home, and he has remained there ever since, with no intention of removing. Having no settlement in any township, he was not entitled to be, and was not regularly sent or admitted to the infirmary. Plaintiff stated the above facts when sworn by defendants.

Plaintiff having resided in the state, county, and precinct the proper length of time, with the intention of making such residence permanent, is certainly entitled to vote, unless the fact that his residence has been at the county infirmary will prevent it. Most of the inmates, as the evidence shows, have families in the townships from which they came; others came there for temporary purposes only, and, of course, such do not acquire residence; but when a person, having no home elsewhere, comes to the infirmary with the unequivocal intention of making it his home, without any intention of leaving, it is difficult to conceive why he is not entitled to vote in the precinct where the infirmary is located. It is admitted that inmates of institutions of private charity, who reside there permanently, without the intention of leaving, are entitled to vote in the precincts where they are located, and I can see no distinction between institutions of public and those of private charity, so far as this question is concerned.

If the means by which a man is supported were to determine his right to vote, and not the place where his habitation is fixed without the intention of changing it, then the fact that the plaintiff was supported by public charity might prevent his having the right to vote. But that is not the test. When a man, who in his prime may have contributed to the resources of the country by his labor, and to its finances by his taxes, becomes unable to support himself from age or infirmity, the state certainly does not intend, while it gives him the pittance of charity with one hand, to take away the rights of manhood with the other.

Nor does it make any difference that the plaintiff is in this institution only by sufferance, not having been regularly sent there under the law. It is not necessary that he should have the ability to remain there for the rest of his life. It is simply necessary that this was his intention, as it is not necessary that a man, depending on his labor for support, be able to swear that he always will remain in a precinct where he offers to vote. The exigencies of the times may make his residence there short; but so long as he has no present intention to remove, so long he has the right to vote.

But there is no evidence of malice or wilfulness on the part of the defendants, who seem to have acted simply from mistaken judgment. The plaintiff is only entitled to nominal damages, the law in Ohio being different from that in England and some of the states in this country, in which the party whose vote is refused, has no right of action at all, in the absence of wilfulness or malice on the part of judges of election.

Judgment for the plaintiff for one cent damages.

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65 LANDLORD AND TENANT—EVIDENCE.

[Mahoning District Court, 1877.]

Taylor, Meyer and Woodbury, JJ.

*Andrews & Hitchcock v. Deacon Cook.

C. agreed to sell and lease to A. and H. all the coal underlying a certain tract of land, and granted to them the possession of the premises, and the exclusive right to test said land for coal, and to open, mine and remove the same, if discovered in sufficient quantity and quality, the coal mined to be paid for quarterly per ton. They were to test the land by drilling or otherwise within a time stated. Upon failure to commence mining within a period stipulated, they were to pay an agreed sum annually, which was to be treated as an advance on coal thereafter mined. In an action by C. to recover from A. and H. the annual sums agreed to be paid upon failure to mine within the stipulated time. *Held:* That, in order to defeat a recovery in such an action, the burden is upon C. to allege and prove the non-existence of minable coal on said land.

The plaintiffs and defendant entered into a contract commonly known as a coal lease, by the terms whereof Andrews & Hitchcock agreed to explore the lands of Cook, included in the lease, for coal, and if the same was found of sufficient quantity and quality to warrant such action, then they were to make an opening and mine coal, and pay to said Cook, as royalty, for every ton so mined, the sum of fifteen cents. The said mining was to commence before the expiration of one year from the date of completion of a certain railroad, and for every year thereafter wherein Andrews & Hitchcock failed to mine, as aforesaid, they were to pay Cook the sum of one hundred and sixty dollars. That the payments thus made should be treated as advance payments of the royalty falling due upon coal mined under the contract thereafter.

Andrews & Hitchcock failed, within the year after the completion of the rail road, to explore, open and work the premises of Cook, who brought two actions in the court of common pleas, to recover the sum of one hundred and sixty dollars for each of the years of such failure. These actions were afterward consolidated.

A demurrer was filed to the petition, for that the plaintiff below did not allege that there was coal of sufficient quantity and quality underlying the land included in the contract, to warrant the opening and working of a mine by Andrews & Hitchcock. The court below overruled this demurrer, and such overruling is alleged as error.

The district court, upon full consideration, unanimously—

Held: That the court below erred in overruling the demurrer to the petition of plaintiff below; that it was incumbent upon the plaintiff below (Cook) to show that there was coal underlying the land included in the contract, of sufficient quantity and quality to warrant mining, before he was entitled to recover the one hundred and sixty dollars, agreed to be paid for each year defendants below were in default of mining under the provisions of the contract.

T. W. Sanderson, for plaintiff in error.

Jones & Murray, for defendants in error.

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*The decision in this case was reversed by the supreme court. See opinion, 36 O. S., 174.

CONTRACTS. 74

[Hamilton Common Pleas, 1877.]

*W. U. T. Co. v. A. & P. T. Co., THE M. & C. R. R. Co. AND B. & O. R. R Co.

Where a railroad company owning a line of telegraph posts along its roadway, 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.

This case involved questions as to the rights of plaintiff in the telegraph lines upon the Marietta & Cincinnati Railroad, also upon the Baltimore & Ohio Railroad, under long subsisting contracts; said railroad companies claiming the right to allow the Atlantic & Pacific Telegraph Company to use said lines to the serious detriment of the Western Union. The Marietta & Cincinnati Company, without the consent of plaintiff, permitted the Atlantic & Pacific Company, in January last, to string a fourth wire on the poles from Parkersburg to Cincinnati; and early in February the Baltimore & Ohio Railroad Company undertook to eject the plaintiff from the line of telegraph on its road, and to allow the Atlantic & Pacific Company the exclusive use of the same for general through business. The Western Union claimed to own the line of poles from Parkersburg to Baltimore, under a contract for their joint use with the Baltimore & Ohio Company, made 18th June, 1853, between the Western Telegraph Company (of which the plaintiff had become assignee) and the Baltimore & Ohio Company. The Baltimore & Ohio Company claimed that said contract was to continue in force only so long as the said Western Telegraph Company should exist, as a telegraph company, and that as its charter expired on the 4th of February, 1877, the rights of the plaintiff under said company ceased on that day.

In the line on the Marietta & Cincinnati Railroad, plaintiff claimed under a contract made by Amos Kendall and his associates with the Marietta & Cincinnati Railroad, on the 10th of November, 1857, by which wires were to be strung on a line of poles owned by the Marietta & Cincinnati Railroad, and to be used jointly by the plaintiff and the Marietta & Cincinnati Railroad. Plaintiff claimed that by the true construction of this contract, the Marietta & Cincinnati Company had no right to permit another company to put a wire upon these poles to come in competition with plaintiff for through business. The Marietta & Cincinnati Company, among other things, claimed that plaintiff was bound by the said contract to forward dispatches for it, free, over the line from Parkersburgh to Baltimore, and that plaintiff could no longer do this, since its rights on the Baltimore & Ohio road had come to an end by the expiration of the charter of the Western Telegraph Company, under which plaintiff claimed.

The Western Union filed its bill in this case to enjoin the Marietta & Cincinnati Railroad Company from allowing said fourth wire to be put or used by the Atlantic & Pacific Telegraph Company or by the Baltimore & Ohio Company for through business. The case was heard at length on evidence and argument.

*See also 5 Dec. R. 407 (s. c. 5 Am. Law Rec., 429), and 5 Dec. R., 474 (s. c. Law Rec., 117). See also *ante* 163.

BURNET, J.

The plaintiff filed its petition to enjoin the Marietta & Cincinnati Railroad Company, as reorganized, the Baltimore & Ohio Railroad Company, and the Atlantic & Pacific Telegraph Company, from using a fourth wire strung on poles erected on the line on the Marietta road, between Parkersburgh and Cincinnati. The petition contained a prayer to enjoin them from putting up the wire, but before the case came up for hearing, the wire had in fact been already strung and connected with the office of the Atlantic & Pacific Company in this city; so that the prayer for an injunction to prevent the defendants from the use of such wire is now all that is presented to the court.

In the year 1857, the Marietta & Cincinnati Railroad Company, as originally organized, entered into a contract with Amos Kendall and others, partners under the name of The Marietta & Cincinnati Telegraph Company, for the putting up of a wire on the poles, as they already stood on the line of the Marietta & Cincinnati Railroad, from Marietta to Cincinnati, and for the common enjoyment and use of the telegraph line thus to be put up, and of the line that was already strung on these poles. The Marietta & Cincinnati Company at that time owned a line of railroad from Scott's Landing, opposite Marietta, on the Muskingum river, to Loveland, and were using the Little Miami railroad from Loveland to Cincinnati, and a line of poles then belonging to the plaintiff in this action along the line of the L. M. R. R. The contract with Kendall and his associates provided that he should continue the wire from Loveland to Cincinnati on these poles, or if not permitted to do so, that he and his associates should erect a new line of posts. The wire was put up, and subsequently there was a modification of the contract, some slight alterations in the provisions of the original contract, by which the burden of keeping the wires in repair was shifted from the railroad company to the telegraph company; but this matter is not material to the question now before the court.

Subsequently the railroad company determined to continue its line to Cincinnati from Loveland, by the way it now occupies, at least to the Cincinnati, Hamilton & Dayton Junction, and afterward from there by the Baltimore & Cincinnati, which was leased by the Cincinnati & Marietta Railroad Company, and when this new route was opened to the city, the line of telegraph was removed from the Cincinnati, Hamilton & Dayton road, and put on it, this being done not merely at the expense of the railroad company, but at the common expense of the parties to the contract; and, indeed, when the line of the Cincinnati, Hamilton & Dayton road was used, the wires were strung on poles belonging to plaintiff in this action. Subsequently to the agreement with the Cincinnati & Marietta road, Kendall and his associates assigned to the American Telegraph Company their rights, and the contract of the Western Telegraph Company was also assigned to the American Telegraph Company. The original contract between Kendall and his associates and the Marietta & Cincinnati railroad provided, substantially, for the use of the line on the Marietta & Cincinnati road for general through business of telegraphing, to be secured to Kendall and his associates, and all local business was secured to the railroad company, the latter having the right to use for its own business the line of the Western Telegraph from Wheeling to Baltimore, and to send its messages on lines connected with that line. There was an equitable adjust-

ment of the receipts for messages sent over the lines under control of Kendall and his associates beyond the terminal points of the railroad. So that the division seemed to be substantially this: that for all railroad business, the railroad company was to have the use of one wire, and, (on the happening of certain contingencies either might use the other temporarily) to have the use of the wire for its own business, not only on its own road, but also on the line of the Western Telegraph Company, and the use of the wire on its own line of road for other general business. The Telegraph Company was to have the right to use the wire on the line of the Marietta & Cincinnati railroad for all through business, and also, upon paying a proper proportion, the use of the line at the local stations where messages were sent by other lines under the control of the telegraph company connected with the line established on the road. So that, in fact, it was an agreement for the joint or common use of this line of telegraph on the right-of-way of the railway company for the time specified in the contract, to-wit, thirty years—with a provision for the extension of the contract after the expiration of that time, subject to the right of either party to terminate it at one year's notice.

The American Telegraph Company, having purchased of Amos Kendall and associates as well their interest in the Western Telegraph Company, as in this contract, assigned to the plaintiff, so that the plaintiff became possessed of all the rights that subsisted under the original contract, with the capacity of performing all its obligations.

Now, the railroad company has, without consent of plaintiff, permitted and united with other defendants, in putting up a fourth wire.

By the terms of the contract between the Marietta & Cincinnati Railroad Company and Kendall and his associates, the former was secured the wires for all local business, and for their own business the use of the wires all the way to Baltimore. On the other hand, it secured the use of the wires to the telegraph company for all through correspondence. Neither party had the right to violate that contract, or over that line to permit any local or through business to be done inconsistent with the terms of the contract.

It is claimed by the defendants, that the contract originally entered into with the Cincinnati & Marietta Railroad Company is not binding on that company, as reorganized; that the new company never affirmed the contract, nor by any positive agreement made itself a party to it. The court did not think this position was at all tenable. Since the reorganization of the company, which bought the road with the line of telegraph on it, they have acted under the provisions of the contract on both sides. Each party expending money under it, and in all respects recognizing its validity and continuance, it would be inequitable to say either party was not bound by its provisions.

It is claimed, however, by defendants, that the plaintiff is not now in a condition to fulfill its part of the obligation of the contract; that one of the chief purposes for which the agreement was originally made, was that the railroad company might have the use of a telegraph beyond the terminus of the road at Marietta, to Baltimore and to the connections of the Western Telegraph Company beyond that point.

It is claimed, that the right of the Western Telegraph Company, under its contract with the Baltimore & Ohio Company, has ceased: that the contract between them was to subsist only as long as the Western Telegraph Company existed as a telegraph company, and that that

company has expired by the limitations of its charter, and, therefore, the contract is at an end, and that the Western Union Telegraph Company, the assignee of the Western Telegraph Company, has no longer any rights over the line of that road, and cannot transmit the messages of the Cincinnati & Marietta Company over that line, and, therefore, the plaintiff being unable to perform its obligation under the contract, has no right to call on the defendants to perform their obligations, and is not entitled to an injunction.

Here arises the most difficult point of the case. The language of the contract between the Baltimore & Ohio Company and Western Telegraph Company, is to the effect that the parties of the first part (the railroad company), in consideration of the privileges granted by the party of the second part, grant to the party of the second part the right to maintain a line of magnetic telegraph along and within the limits of said road, so long as said telegraph company existed. It is in evidence that on the 4th of February last, the charter of the Western Telegraph expired by limitation. But in the ninth clause of the contract, there is this provision:

"In the event of dissolution of the said telegraph company, or voluntary suspension on their part, then the said railroad company shall take charge of the telegraph and appurtenances until the said telegraph company shall resume operations, and it is expressly understood that no interest in the telegraph company shall be assignable, so as to impair the rights of the railroad company under these articles of agreement."

The articles also provided for the erection of a line of posts and wire by the railroad company, and that when erected they shall be the property of the telegraph company, and the contract seems to contemplate the right on the part of the telegraph company to make an assignment of all its rights under the contract to any other company, which would include the assignment of all the property, posts, wire, etc., on the road; and there is no provision in the contract for the reverting to the company of the property in case of the dissolution of the telegraph company. In construing this contract, the court had to look at the whole of it; although that portion first referred to contains the grant from the railroad company to the telegraph company, yet the construction given by the court to the whole is, that so long as the telegraph company and its assignees shall be able to perform its obligations under this contract, the contract shall subsist. This is the general effect of the contract, for it does contemplate a dissolution of the telegraph company, yet a subsequent continuance of the rights under the contract; for, in case of an assignment, it would not be necessary that the telegraph company should resume. There is evidence tending to show that since the 4th of February, steps have been taken for the reorganization of the Western Telegraph Company. That was one reason why the court held the case until they should hear further from Baltimore.

Judge Collins—We are advised that the reorganization and extension of the charter have been consummated.

Mr. E. M. Johnson—We have no information that it has been so decided. Since the 4th of February, the railroad company has been in possession of the telegraph line.

Court—We have no authentic information on the subject. I construe the effect of the contract to be that, as long as the Western Telegraph Company or its assigns can perform the contract, the contract sub-

sists, so that the plaintiff has the right to claim an injunction against the defendants, to prevent them from using the fourth wire in violation of the contract with Kendall and his associates, for through business.

Mr. Johnson said that the Baltimore & Ohio Company, over two months ago, had ejected the plaintiff from its road.

Judge Collin—That was simply by mob law, and not under a decision of the court.

Court—What is here stated is the result of the combination between the defendants, and the court could not consider that as a difficulty in the way of allowing an injunction.

Mr. Johnson said that practically, since the 4th of February, the Western Union Telegraph Company was unable to comply with its part of the contract.

Court—Perhaps that may be an additional reason for getting damages against the railroad company.

Judge Collins and Judge Coffin, for the plaintiff.

Hoadly & Johnson, for the railroad companies.

Wm. M. Ramsey, for the Atlantic & Pacific Telegraph Company.

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75 [Hamilton District Court, April Term, 1877.]

MATTHEW DUGAN v. MAGGIE O'NEIL.

For opinion in this case, see 5 Dec. R., 459 (s. c. 6 Am. Law Rec., 58).

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76 **EXTRADITION WARRANT.**

[Hamilton District Court, April Term, 1877.]

Burnet, Avery and Johnston, JJ.

IN RE A. G. PAYNE, AN ALLEGED FUGITIVE FROM THE STATE OF ILLINOIS.

An extradition warrant, to which the governor's name was signed by his private secretary, without special instructions, in the absence of the governor, and without his knowledge, but merely on the custom of the office and general instructions of the governor, will not be treated as the warrant of the governor, and the prisoner will not be allowed to be delivered up on it.

BURNET, J.

The question being in relation to the validity of the warrant, signed by Rodney Foos, private secretary of Mr. Hayes, the then governor of Ohio, in the absence of the governor, and in his name. Affidavits were received on the statement of counsel, that he expected to show the warrant was a forgery, and, although he softened the word, afterward, he did not remove substantially the force of it. In permitting the introduction of the affidavits on the statement, the court did not recognize them as necessarily the best or proper evidence, but allowed them to be read for the purpose of determining, whether final action should be postponed in order to receive more authentic evidence, if demanded on the part of the state. The affidavits, if they are taken as evidence, show this state of fact: that a warrant is issued purporting to have the signature of the governor, but not in fact signed by him; that it was issued in his absence from the state, the absence having begun before the requisition was pre-

sented in Ohio, and continued after the warrant was issued and the arrest under it made, the executive of the state having no knowledge whatever of the proceedings, and having taken no steps towards complying with the requisition, but the authority assumed to be exercised by his private secretary, not only without his special instructions, but entirely without his knowledge.

If the genuineness of the signature had not been questioned, I would not, under the ruling in the Rothschild case, in which the supreme court refused to grant a writ of error, have permitted any testimony to go behind the warrant; and I would recognize the validity of the warrant, if it were in evidence that the governor had directed his private secretary to affix his signature to it. But the evidence shows that the governor did not give any such specific direction, and the private secretary assumed to act on what he calls the custom of the office, and the general instructions of the governor, not pretending that the governor had given any instructions in this case. Under these circumstances I cannot treat this paper as the warrant of the governor of Ohio, and I cannot, therefore, allow the prisoner to be delivered up to the authorities of Illinois on this warrant.

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76 **ATTACHMENT.**

[Hamilton District Court, April Term, 1877.]

*GAUGHAN V. SQUIRES & MCDONALD.

A proceeding under section 218 of the Code, against a garnishee for failing to answer satisfactorily, cannot be maintained in any other county than where the garnishee resides, and will be dismissed where the ground of attachment was that the garnishees resided in another state.

JOHNSTON, J.

Johnston, J., announced the opinion in this case, a proceeding in error to reverse a judgment of the common pleas in discharging an order of attachment against Squires & McDonald. A suit had been instituted against M. McKenzie, for work and labor, and Squires & McDonald were served as garnishees. Having answered, and their answer not being satisfactory to Gaughan, he brought suit against the garnishees under section 218 of the Code. They filed a motion to discharge the attachment, on the ground that in such a proceeding an attachment could not be issued against garnishees, non-residents of the state, and the court granted the motion.

It appears that Squires & McDonald were nonresidents of the state at the time the attachment was sued out, and that a fund belonging to them in the hands of the Southern Railroad was garnisheed. This proceeding against the garnishees for failing to answer satisfactorily is a statutory proceeding, and that statute provides that a garnishee cannot be sued for making an unsatisfactory answer in any other place than the county where he resides. The ground of this attachment was that the garnishees did not reside here, but in the state of Kentucky. This action, therefore, under the statute, is not maintainable. The court below did not err in discharging the attachment.

Judgment accordingly affirmed.

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*The supreme court, in Squair & McDonald v. Shea, 26 O. S., 645, overruled a decision of the superior court adverse to the above, and thus sustained this decision.

For decision of the common pleas in the above case, see *ante* 142.

DOWER—PARTITION. 76

[Hamilton District Court, April Term, 1877.]

Cox, Burnet, Avery and Johnston, JJ.

LOUIS RENNER ET AL. v. NICHOLAS BIRD, ADMR.

1. Where a petitioner for dower died before final decree in a partition case, in which she, by answer and cross-petition, asked for sale and dower out of the proceeds, the action may be revived in the name of her administrator, and he would be entitled to whatever the dower would be worth from the time of filing the answer and cross-petition up to her death (S. & S., 311).
2. Commissioners in a partition case, in which the widow of the ancestor concurs in asking sale free of dower and dower out of the proceeds, cannot be authorized by the court to fix the dower; and where they had fixed it, and a sale could not be had at the appraisement, and the appraisement was reduced, but the dower interest was not revalued, there was error to the prejudice of the heirs. This is not a case under the general dower act, where property cannot be divided, but is under S. & S., 311, where the widow asks a sale.

JOHNSTON, J.

This was a petition in error, prosecuted by the heirs of Robert Spees to reverse proceedings in the court below in reference to the dower interest of Barbara Neiman, formerly Barbara Spees, and now known as Barbara Eichner. The proceedings below was for the partition of property of which Robert Spees died seized. The widow of the deceased, who was subsequently married to a party named Neiman, asked that the property might be sold free of her dower, and that her dower might be paid out of the proceeds of the sale. An order of partition issued. Commissioners appraised the property at $5,375, free of dower of the widow, and fixed the dower in gross at $1,235. The report of the commissioners was subsequently confirmed and an order issued for the sale of the property. The property was twice offered, but not meeting with a bid, a revaluation was had at $4,300, and a sale made at $3,275, the value of the dower remaining the same as under the first valuation of the property. In the meantime the widow died, and the action was revived in the name of her administrator. No person objecting, an order was made paying over the value of her dower in gross to the administrator, for the reason that the widow had died before the decree distributing the money was made.

Judge Johnston decided the case. He held that by the supplemental act relating to dower, where a petition for dower is pending and the petitioner shall die before the final decree has been entered, the action may be received in the name of the administrator. This widow did file an answer and cross-petition asserting her right to dower, which would bring her within the provisions of this supplemental act, and her administrator would be entitled to whatever her dower interest might be worth from the time of filing her answer and cross-petition up to the time of her death.

Under the general assignment of error, the court had examined the manner in which the dower had been valued. The court was unable to understand how the commissioners were vested with authority to fix the widow's dower at all. It was not a case under the General Dower Act, where, in case the property could not be divided, the commissioners were authorized to assign the widow one-third the rents and profits; but

a case where the widow had asked that the property might be sold free of dower and her dower taken out of the proceeds of sale. If the commissioners had this authority, injustice was done the heirs, in that when the property was revalued, the commissioners did not revalue the dower interest also. The result is, that the administrator takes from the proceeds of the sale more than one-third, in gross, whereas, if the statute had been pursued limiting the right of dower, all the administrator would be entitled to would be the value of the dower interests from the time she filed her petition up to the time of her death.

There was error, in the opinion of the court, in the order vesting the commissioners with the authority to fix the widow's dower at a gross sum in money, the order confirming it, and the order paying the money to the administrator, to the prejudice of the heirs. Judgment reversed, and cause remanded that the dower interest may be valued as provided by said supplemental act, S. & S., p. 311.

A. A. Clark, for heirs.

Fox & Bird, contra.

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81 [Superior Court of Cincinnati, General Term, January, 1877.]

MARY F. T. ELDER v. RHODA ANN TAYLOR.

For opinion in this case, see 5 Dec. R., 461 (s. c. 6 Am. Law Rec., 73). See also 5 Dec. R., 565 (s. c. 6 Am. Law Rec., 641). The above decision was reversed by the supreme court. See opinion, 39 O. S., 535.

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82 **STREET ASSESSMENTS.**

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

CATHERINE M. COOK v. EURETTA GILPIN ET AL.

Where, pending partition proceedings, a husband, who is seized of a purport of real estate, by virtue of a devise to his wife for life, prior to the Key law defining the separate estate of married women—the property being sold to pay a street assessment—buys it in; before the court will decide whether he holds the title so purchased in trust for the heirs and is liable under 67 O. L., 80, paragraph 541, to pay such assessment in full, the answers and cross-petitions of such fee owners as seek to disaffirm such sale, must be filed.

YAPLE, J.

These cases come before us upon reservation from special term.

The first case is an action, or proceeding, for partition, brought by Catherine M. Cook against many named defendants, among them Joseph McDougal who owns one-thirtieth of the premises, of certain real estate situated in Walnut hills, in this city. McDougal on May 5, 1876, filed an answer and cross-petition, stating certain facts, upon which he claims partition should be denied by the court. Among other things, he avers that as to a large part of the property described in the petition, Mrs. Gilpin had, by the will of her father, a life estate, which life estate by virtue of her marriage with William Gilpin, prior to the passage of the

Key law in 1861, as amended in 1866, became his; that a large assessment for improvements has become a lien on the property, for which William Gilpin, the life tenant, has suffered suits to be brought and large costs to be incurred, when he was bound to pay such assessment under the act of 1870, 67, O. L., 80, sec. 541, which provides:

"Where a special assessment is made on real estate subject to life estate, such assessment shall be payable by the tenant for life, but upon application by said life tenant to a court of proper jurisdiction, by action against the owners of the estate in fee, such court may apportion the cost of said assessment between said life tenant and the owners in fee in proportion to the relative value of said improvements to their estates respectively, to be ascertained and determined by said court on principles of equity."

William Gilpin's answer and cross-petition, and the answer and cross-petition of his wife, Euretta Gilpin, aver that since the filing of McDougal's answer and cross-petition, a part of said premises, to-wit, Lot A, 134 84-100 feet front on the north side of McMillan street, part of lot 3 described in the petition, and running back the same width to the rear of said lot 3, has been sold at sheriff's sale under the judgment and order of the court of common pleas, of Hamilton county, to Wm. Gilpin, to pay such assessment, interest thereon, penalty and costs, and which sale has by such court been confirmed. The proceeds of the sale more than paid such judgment and costs.

The only point argued here by McDougal is, that Wm. Gilpin obtained only the title in trust to such premises by such purchase at sheriff's sale, which trust is for the owners of the fee.

After such sale and confirmation, he filed no supplemental answer and cross-petition, though the same occurred since the filing of his answer and cross-petition.

As the owners of the fee have the right to receive their shares of the purchase money and affirm the sale to Gilpin, or to refuse to do so and claim to hold him as their trustee of the title—he liable, and not they, to discharge such assessment, penalty, interests and costs, it seems to us that before we are authorized to adjudicate the question presented in argument, a supplemental answer and cross-petition should be filed by McDougal and all the fee owners who seek to disaffirm the sale of Gilpin and to hold him as their trustee.

The case must, therefore, be remanded to special term for such further pleadings as will raise the question which it has been sought to present for our decision.

The second action is by McDougal against Gilpin and wife, to obtain relief against the sheriff's sale of the realty above described, and upon the grounds above stated. The realty so sold to Gilpin is part of a lot fronting 281 10-100 feet on the north side of said McMillan street, etc., on which the assessment was $409.96 per front foot; and the 134 84-100 feet front sold to Gilpin for $10,000, which paid off the lien and costs, and left a balance for distribution.

The petition avers that all of the above mentioned realty, on June 6, 1873, "was in possession of William Gilpin, who was seized in the right and during the life of his wife, by virtue of his marriage with her, Euretta Williams, daughter of Thomas Williams, deceased, which took place prior to 1840, said life estate being devised to her by her father." Except that the petition avers that William Gilpin was in possession

of the property as her life estate on June 6, 1873, it is not shown when the estate vested in his wife. The petition merely states the marriage, 1840.

The answer of Gilpin and wife, among others, contains the following averment:

"And the defendant, William H. Gilpin, further denies that he was at the time of said assessment, or at any other time, seized of said real estate in the right of and during the life of his wife by virtue of his marriage with Euretta Williams, daughter of Thomas Williams, deceased, or otherwise."

The answer was demurred to, and the case reserved from special term for decision here upon demurrer to the answer.

The demurrer must be overruled, the answer being good enough for the petition, both stating legal conclusions from facts not specially stated, and therefore only ascertainable upon a trial.

If the life estate vested in the wife, Mrs. Gilpin, since the taking effect of the Key act of 1861, as amended in 1866, the defendant's claim is correct. The life estate would not be the husband's in right of and during the life of his wife but her separate estate. If before that time, the plaintiff's claim is correct. What the fact is, under the pleadings, is matter of proof. We cannot act upon what other cases have disclosed to us, but must be governed solely by the averments of the pleadings in this action, which is entirely independent of all others.

The demurrer to the answer is overruled, and the cause remanded to special term.

Joseph McDougal, for himself.

Coppork & Caldwell, for Gilpin and wife.

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83 RAILROADS—JUDGMENTS.

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

*JAMES REYNOLDS v. P., C. & ST. L. R. R. CO. AND C., H. & D. R. R. CO.

In an action brought against one of two railroad companies for breach of their joint agreement to carry goods from A. to B., the defendant denied that it had agreed to carry or be responsible for the goods, except for part of the distance. The issue thus joined was found for the defendant, and judgment entered thereon. *Held:* That this judgment was a bar to any subsequent action against both companies upon the same contract.

YAPLE, J.

This case comes before us upon demurrer to the reply to the defendants' joint answer, which demurrer was reserved at special term for decision here.

The first named defendant is a foreign, and the railroad an Ohio corporation. The petition avers that they were common carriers of goods for hire, operating a line of railroad between the cities of Cincinnati and Chicago, and about the 19th day of February, 1873, as such common carrier for hire, received from the plaintiff, to be carried by car over such railroads from Cincinnati to Chicago, twenty cases, each case containing one dozen bottles of "Tirosh" (unfermented wine),

*The decision in this case was affirmed by the supreme court. See opinion, 29 O. S., 602.

The supreme court decision was distinguished in Avery v. Vansickle, 35 O. S., 270, 274.

of the value of $240, which they failed to carry and deliver, but which they suffered to become lost, the plaintiff having paid the defendants as freight for such carriage the sum of $11.75. Judgment is asked for $251.75 and costs, etc.

The defendants jointly answered that the plaintiff sued the Cincinnati, Hamilton & Dayton Railroad Company alone for such loss and damages before a justice of the peace, whose judgment was appealed from to the court of common pleas of this county, where a trial was had and judgment rendered for the defendant, which judgment the district court affirmed, and which judgment and affirmance remain in full force.

The reply admits all the statements of the answer, but says that, in that action, the Dayton company admitted its separate liability as a common carrier, and claimed that the same was limited to the end of its road—Richmond, in the state of Indiana—from which point to Chicago it was only a forwarder by the road of the other defendant, to whom it properly and safely delivered the goods for carriage. The reply then avers that both companies comprised what was called the "Green Line," running from Cincinnati to Chicago, and jointly contracted with the plaintiff to carry such goods. To this reply the defendants demur.

If, in the trial before the court of common pleas, the Dayton company had denied that it entered into the contract, or undertook to carry the property as alleged, but had claimed as a defense that the liability, if any, was a joint one of itself and the other railroad company, and had obtained a judgment in its favor, then such judgment would have been no bar to the present action; but the plaintiff in that case claimed and the defendant admitted its several liability, if any existed, for the loss of the goods, and it was adjudged that the Dayton company was not liable from Cincinnati to Chicago, but only for a part of line, to-wit: to Richmond, Indiana. The judgment estops the plaintiff from claiming a joint liability of the Dayton Company for the whole or any part of the line of transit.

The law governing the case will be found laid down in Sloo v. Lea, 18 O., 279, Clinton Bank of Columbus v. Hart, 5 O. S., 33.

The demurrer to the reply is sustained.

A. G. Collins, for plaintiff.

Matthews, Ramsey & Matthews, for defendants.

JUDICIAL SALE. 84

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

MARTHA MILLER v. JOHN P. ERDHOUSE ET AL.

Where, in a foreclosure suit, the summons on the mortgagor and his wife were returned as personally served and judgment by default was regularly taken, the purchaser at the sale will be protected in his title, though after the mortgagor's death his widow seeks to vacate the sale on the ground that the mortgage was as to her a forgery, and that she was not served in the foreclosure suit. The purchaser had a right to rely on the record, and the widow must seek her rights in the purchase money paid by the purchaser to the judgment creditor.

YAPLE, J.

This cause comes before us for decision upon demurrer to the answer of the defendant, John Kebler, reserved from special term.

The plaintiff is the widow of Joseph Miller, deceased, who died in the year 1874. During the marriage, Miller owned real estate on Fifth street and the west side of Sycamore, between Fifth and Sixth streets, in the city of Cincinnati. From time to time, he executed mortgages upon the property, in which and in their acknowledgment, his wife, the plaintiff, purports to have joined him, releasing her right of dower.

The defendant, Erdhouse, the owner of one of the mortgages, brought an action in this court against Miller and wife, making all other

mortgagees and lien holders parties, to foreclose his mortgage. The sheriff made return of the summons in due form, stating that he had personally served the said Martha Miller with a copy of the same.

The mortgagor and his wife, the present plaintiff, being in default, a decree of judgment was taken against them for the mortgage debt, and an order for the sale of the property was made. The property was duly advertised and sold at sheriff's sale, and the defendant, John Kebler, became the purchaser of a part of it, which sale the court confirmed and he received a sheriff's deed for the property purchased.

Afterwards, and after the death of her husband, the plaintiff commenced an action in this court, under section 534 of the Code, to vacate such decree of foreclosure on the grounds that such mortgages were forgeries as to her and that she was not served with process in the foreclosure suit, and had no notice or knowledge of the same until after such sale and confirmation.

Kebler answered, setting up the return of the sheriff, and stating that he purchased relying upon the record, in good faith and without any knowledge or notice of the facts or any of them, stated by the plaintiff as grounds for vacating such judgment. To this answer the plaintiff demurred, and the question so raised between her and Kebler is all that is before us for consideration in general term.

We are all agreed that the plaintiff has no remedy against Kebler, or right of dower in the real estate purchased by him, if his answer be true, even if all the facts stated by her in her original and amended petition be true, and she be entitled to prove them all.

Section 446, of the Code provides: "If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time hereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but in such case, restitution shall be made by the judgment creditor of the moneys for which such lands or tenements were sold, with lawful interest from the day of sale."

If endowable, the plaintiff is to seek her rights in the purchase money paid by Kebler to Erdhouse, from Erdhouse. If the proceedings in foreclosure are void as to her, it is by reason of a fact *dehors* and contradictory of the record, and the purchaser had the right to rely upon the record, and was not bound to enquire whether any statements of fact contained in it might not be false.

Demurrer overruled and cause remanded.

Stacy, Taylor and D. Humphreys, for plaintiff.

Collins and Herron, for defendant.

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85 MUNICIPAL CORPORATIONS—ASSESSMENTS.

[Hamilton Common Pleas, 1877.]

*CITY OF CINCINNATI v. THOMAS B. RICHARDS ET AL.

1. Where a strip of land, ninety-one feet in width, was dedicated for a street, and the municipal authorities improved a street thereon of the width of ninety feet, leaving one foot on one side thereof unused, except in sloping the embankments and excavations, the owners of property abutting on such foot of land are liable to be assessed as owners of property abutting on the improvement.

*The decision in this case was modified by the supreme court. See opinion, 31 O. S., 506.

2. Where lands within a municipal corporation are laid out into lots, streets and alleys, and the streets are dedicated to the public by a deed which contains a condition that the lots shall be exempt from charges for the improvement of the streets, unless a majority of the abutting owners shall assent thereto in writing, such dedication of the lands for streets and alleys will take effect, but the condition is inoperative.

These are a large number of cases, tried together, brought to recover an assessment for grading, done upon Eggleston avenue between the years 1872 and 1875. The work was interrupted in its progress by an injunction granted by the district court in the case of Chatfield & Woods v. the City, and therefore was not completed till 1875.

There having been a defect in the proceedings by virtue of which the improvement was made, the plaintiff could not recover upon the assessment, but only what, at fair and reasonable prices for labor and material, the improvement ought to have cost, not exceeding, of course, the contract price. The proof was, however, that the grading was worth at least as much, if not more, than the contract price per cubic yard.

But it is claimed by the defendants, that the terms of the contract were not complied with in this, that the character and quality of the material used in making the fill were different from and greatly inferior to that required by the contract. It was in testimony that a very large amount of street dirt and garbage, collected in the carts and wagons of the city, was deposited upon the avenue, for which a favorable opportunity offered, there being a very heavy amount of grading to be done, and the work long protracted. It appears that upon the avenue, near Broadway, there had been an accumulation of such filth, which, upon complaint made, the city authorities required the contractors to remove; but there was a very much larger amount deposited along the avenue by the city's own carts and wagons, which was not removed—perhaps more than we can ascertain by the testimony. The books kept by the street cleaning department, produced in evidence, furnish us with an accurate estimate of, at least, part of the street dirt and garbage dumped there. From them it appears that during the progress of the work between 7,000 and 8,000 cart loads and wagon loads were deposited. The city cart is said to hold two-thirds of a cubic yard, and the wagon one yard and a third. The proportion of cart loads and wagon loads was not given, but I do not think it unfavorable to the plaintiff to assume that they were equal, and that, therefore, the average load was a cubic yard.

To the extent that the books of the city show the deposit of this character of material, there will be a deduction from the amount of the assessment. If the city permits to be used in making the grade inferior and improper materials, different from that required by the contract, it is not entitled to be paid for it.

It appearing that the fill upon the intersection of Eighth street and the avenue was included in the estimate furnished by the engineer on which the assessment was made, there will be a deduction for this amount also. The intersections and two per cent. of the whole work must be paid for by the city, and not by the lot owners.

It is claimed by the defendants that many of the lots assessed do not abut upon the avenue, but that there is a strip of land about one foot wide between the front of these lots and the street; that the width of the avenue, as established by the city is ninety feet, fifty-one feet of it being southwest of the line running through the center of the locks, and thirty-nine feet lying northeast of the same center line; and that the limits of the street, thus fixed by the city, exclude the narrow strip referred to.

It seems that when the canal was made the land on the southwest side of it, and appurtenant to it, and belonging to the state, extended to a line thirty-two feet from the center line of the locks; and the deed by the state to the city conveyed the same to be used in making Eggleston avenue. In 1840 a subdivision of lands, lying on both sides of the canal, and extending from Third street nearly to Sixth, was made by the heirs of Martin Baum, on which was designated and in proper form dedicated to the city, among other streets, a strip of twenty feet in width adjacent to the canal on the southwest side thereof, the outer or southwest line of which was fifty-two feet from the center line of the locks. Soon after Clark Williams, in making a subdivision of adjoining lands, lying also on both sides of the canal, and extending northwesterly toward Eighth street, made a similar dedication to the city for a street of a strip of twenty feet, being a continuation of the former, and bounding on the land appurtenant to the canal, and

also extending fifty-two feet from the center line of the locks. Lots were laid out in both subdivisions fronting upon this street (or strip of twenty feet and conveyed to various purchasers. In establishing the avenue, the city has taken only about nineteen feet of this 20-foot strip, thus leaving, as the surveys demonstrate, about one foot between the front of many of the lots as originally laid out and occupied, and the line of the avenue. It was not so with all of the lots, because of encroachments by some of the owners.

It is claimed by some of the defendants that the lots which are separated from the established line of the avenue by such a strip, however narrow, do not abut upon the avenue, and no part of the cost of the improvement can be charged upon them. I cannot assent to this. Either it belongs to the city for street purposes, and is a part of the avenue despite the nominal boundary given in its establishment, or it belongs to the lot owners. The city has taken no formal step to vacate it as a street, and if it should it would not revert to the original dedicators. who would be estopped from setting up such a claim as would debar their grantees from the use of a public street in front of their lots. For the purposes of these cases it is not necessary to determine whether this narrow strip is a part of the street or belongs to the lot owners. It is sufficient to say that it does not prevent the lots belonging to those defendants from abutting upon the avenue.

But it is claimed by the defendants that by the terms of the dedication by the Baum heirs and Clark Williams, the grade of the 20 feet spoken of, as also of the other streets in the subdivision, was not to be altered at the expense of the parties making the subdivisions or their assignees, unless upon the petition of one-half of the lot owners; and if so changed, it must be paid for by the city. The city, having accepted the dedication, has no right to charge the expense upon the property abutting upon the street, which by the terms of the dedication is exempt.

Therefore, after making the deductions specified from the amount of the assessment, namely, for the street dirt and garbage deposited by the city carts and wagons, for the intersection at Eighth street and for the two per cent. to be paid by the city, and also for that part above Chatfield & Woods' property, which was not filled in according to the original plan, there will be an equal assessment made upon the whole property, the same being distributed pro rata upon all the lots abutting upon the avenue. But from the assessment thus distributed to the lots fronting upon the 20-foot strip of street alluded to, must be also deducted one-half the cost of the grading done upon that strip. For the other half, the same deduction per front foot will be made from the amount of the assessment charged upon the lots in the Williams and Baum divisions, fronting on the other side of Eggleston avenue, between Fifth street, on the southeast, and a line drawn from the northeastern terminus of the 20-foot strip, at right angles across the avenue on the northwest.

For remedy against this last deduction the contractors will have to rely upon their recourse against the city.

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86 CUSTOM AND USAGE—EVIDENCE.

[Hamilton District Court, April Term, 1877.]

Burnet, Avery and Longworth, JJ.

*J. B. H. Nolte v. Alfred Hill.

1. The existence of a special custom whereby the rights and obligations of parties to a contract are affected and controlled is in all cases a question for the court to determine. It is the province of the jury to decide as to what may be the usage or manner of dealing among men in like cases, but whether such usage has the force and effect of custom as governing the rights or liabilities of the parties, is purely a matter for the consideration of the court.
2. When the court permits an incompetent question to be put to a witness at the trial, excepted to by the party objecting, but the witness mistaking the object of the question answers, giving testimony which is competent, there is no error which would justify a reversal of the judgment.

Error to the Court of Common Pleas.

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*The decision in this case was reversed by the supreme court. See opinion, 36 O. S., 186.

LONGWORTH, J.

The defendant in error, who was the plaintiff in the court below, filed his petition, setting forth that he was the owner of certain leasehold premises in this city, on which he had built a house; that he made a contract with Nolte, who was digging a cellar on an adjoining lot, whereby Nolte agreed to underpin plaintiff's house so as to prevent it from settling or being injured by the excavation of the cellar; that defendant failed to perform his contract, whereby plaintiff's house settled, fell and was destroyed, to the damage of the plaintiff in the sum of $2,500. The jury found a verdict in favor of the plaintiff, assessing his damages at $2,160. A motion to set aside the verdict was overruled, a remittitur of $50 ordered, and judgment was entered upon the verdict in the sum of $2,110.

To reverse that judgment a petition in error is filed. The grounds of error alleged are, that the court permitted incompetent testimony to be admitted to the prejudice of the defendant below; that the charge of the court was erroneous; that the verdict was contrary to the facts; that there was a fatal variance between the allegations in the petition and the facts submitted to the jury, and that the damages awarded by the jury were excessive.

During the progress of the trial the plaintiff was permitted to ask one of the witnesses, whether or not there was any general custom among contractors in this business, whereby the party undertaking to underpin should be held to guarantee the owner against damage to the house, and by which he was permitted to control the operations of those excavating the adjoining land. The defendant excepted to the action of the court in permitting this question to be asked.

We think the question was incompetent. Although the terms "custom" and "usage" are frequently used as synonymous, this is a confusion liable to lead into grave error. Custom is the thing to be proved; usage is the evidence of it. A custom when properly established has the force and effect of law as between the parties, and it is as improper to ask a witness what is the custom as it would be to ask him what is the law. The witness may testify as to what is in fact the usage, and as to all the circumstances and incidents; but it is for the court to determine, as a question of law, whether such usage shall have the force and effect of a custom.

The witness, however, in answering the question, testified simply as to the usual mode of performing the work by men skilled in that kind of labor. Now this testimony was competent. The issue in this case being whether the loss occurred by the reason of the negligence of the defendant, and the failure to perform his contract properly, it was of course proper to inform the jury as to the manner in which such work was performed by those skilled in the business. The defendant was therefore in no manner prejudiced by the question.

The next objection was that the charge was erroneous. The court charged the jury at great length, and the exception was to the whole charge. Counsel declined or neglected to accede to the request of the court to point out the portions of the charge to which he excepted. The charge, as a whole, was not objectionable, and the exception to it, being as a whole, must be overruled.

It was claimed that the court erred in overruling the motion for a new trial, because the verdict was contrary to the facts. The testimony at the trial was conflicting, and there is nothing to warrant setting aside the verdict on this ground.

The last objection—that the damages awarded were excessive—was upon the ground that plaintiff was not the owner in fee simple of the property upon which the house which he had built stood, but only of a lease; that he, only having a right to inhabit the house until his term expired, therefore could not recover full value of the house, but only the amount of his interest in it. The alleged value of the house was $3,500, while the damages recovered were $2,110. The rule underlying the whole doctrine of damages is that damages are given by way of compensation; that a party injured by the wrongful act of another must be put back in the same situation as he was before the injury occurred. Plaintiff was entitled to receive just the sum of money which would put him in the situation he was in before the wrongful act occurred—namely, the cost of erecting his house again in the same manner as before the injury. What his interest might be in the land was a matter of no importance.

The judgment will be affirmed.

86 **ATTACHMENT.**

[Hamilton District Court, April Term, 1877.]

Burnet, Avery and Longworth, JJ.

HENRY MAWICKE v. JOSEPH WOLF.

To support an attachment issued by a justice of the peace upon an affidavit showing that the defendant so conceals himself that a summons cannot be served upon him, it is not necessary that a summons should be issued in the first instance and returned "not found."

ERROR to the Court of Common Pleas of Hamilton county.

LONGWORTH, J.

The action was originally brought before a justice of the peace to collect a sum of money alleged to be due for rent. A writ of attachment was sued out at the time of bringing suit, upon the ground that the defendant so concealed himself that a summons could not be served upon him (S. & S., 420).

A motion to dissolve the attachment was heard upon affidavits, and was overruled by the justice.

Upon error, it was contended that the writ could not properly issue unless it appeared that a summons had first issued for defendant, and been returned "not found."

The court of common pleas refused to reverse the action of the justice, and the petition in error in this court is presented to obtain a review of the judgment of the common pleas.

We think the court below did not err. The fact that a summons is issued and returned not found, has no tendency to show that the defendant is concealing himself with intent to evade process; and on the other hand, that intent may appear clearly from other facts.

Moreover, the statute provides that the plaintiff shall be entitled to the writ for this cause either "before or after" the commencement of the suit (S. & S., 420). It appears that in no case could he obtain the attachment before, or at the time of bringing the action if it were required to have the summons returned in the first instance.

Judgment affirmed.

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91 [Superior Court of Cincinnati, General Term, January, 1877.]

*J. B. HUMPHREYS, AUDITOR, ETC. v. SAFE DEPOSIT COMPANY.

For opinion in this case, see 5 Dec. R., 464 (s. c. 6 Am. Law Rec., 79).

The judgment in this case was affirmed by the supreme court, by refusing to allow a petition in error to be filed. See opinion, 29 O. S., 608.

DOWER. 92

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

*MARY JANE ABBOTT v. HENRY S. BOSWORTH.

The widow of a deceased husband is not entitled to dower in land held by him during the coverture under a lease for ninety-nine years renewable forever, but of which leasehold estate he did not die in possession.

O'CONNOR, J.

This case was reserved at special term for decision here on the evidence and the law.

The question presented for decision is, whether the plaintiff, who is the widow of Isaac C. Abbott, is entitled to dower in land, which he held during coverture by a lease for ninety-nine years renewable forever, but which he did not hold at the time of his decease.

In 1841, Isaac C. Abbott received an assignment of the lease in question, and a short time thereafter assigned all his interest in the same to another. He died in 1876, leaving the present plaintiff his widow, who now seeks to have dower assigned to her out of the land so held by lease, which lease was acquired by him in 1841 during their coverture. Between 1841 and 1876, when Abbott died, the lease had been transferred to and assigned by a great number of persons, and is now held by Henry S. Bosworth, the present defendant.

The first section of the dower act, under which the plaintiff claims, and which was passed in 1824, and amended 1858, Sw. & Cr., 516, reads as follows:

Section 1. "That the widow of any person dying shall be endowed of one full and equal third part of all the lands tenements and real estate of which her husband was seized as an estate of inheritance at any time during the coverture, and all lands, tenements and real estate of which her husband at his decease held the fee simple in remainder or reversion, and she shall in like manner be endowed of one-third part of all the right, title or interest that her husband at the time of his decease, had in any lands and tenements held by bond, article, lease or other evidence of claim."

This is substantially the same section which was in force in 1805, and ever since.

It is claimed by the plaintiff that a permanent leasehold estate, renewable forever, is an estate of inheritance within the meaning of the dower act, and that the holder of such an estate is seized of an estate of inheritance within the meaning of that act:

First, Because by the act of March 5, 1839, Sw. & Cr., 1142, it is enacted: "That permanent leasehold estates, renewable forever, shall be subject to the same law of descent and distribution as estates in fee are or may be subject to; and sales thereof, upon execution, or by order of decree of court, shall be governed by the same laws that now or may hereafter govern such estates in fee."

And second, because the 20th section of the act regulating descents, and the distribution of personal estate, Sw. & Cr., 505, provides that "Permanent leasehold estate renewable forever, shall be subject to the same law of descent and distribution as estates in fee are subject to by the provisions of this act."

It is to be remarked of these last two acts, that neither of them declares that permanent leasehold estates, renewable forever, are estates of inheritance, but only that for certain specified purposes such estates shall be subject to the same law that estates in fee are subject to. And among these specified purposes dower is not mentioned. It is manifest the legislature did not intend to declare permanent leasehold estates, estates of inheritance. They have not been so declared, nor has their character in any way been affected except in two particulars that, for the purposes of descent and distribution and sales on execution or decree of court, they shall be subject to and governed by the same laws as are applicable to estates in fee. But dower does not come by descent—it is not cast on the

*The decision in this case was affirmed by the supreme court. See opinion, 36 O. S., 605.

widow by the act of the law, but is acquired by her under the law by her own voluntary act, and is, therefore, an acquisition by purchase.

It was held in Murdock v. Reed, 1 Disney, 274, that the husband was entitled to courtesy in the permanent leasehold estate of his deceased wife, because section 20 of the act of descents provided that such estate should be subject to the same law of descent as estates in fee are subject to, and because section 17 of the same act provided that surviving husbands shall be entitled to the estates of their deceased wives by the curtesy. Besides, curtesy under the statute is cast on the surviving husband by operation of law, without any act of his, his only voluntary act being that of marriage, and in this regard curtesy may be said to come to him by descent, and if so, by the statute, his curtesy extends to permanent leaseholds. It is to be observed also that the same section 17 of the act of descents, provides that nothing in the act shall be so construed as to affect the right which any person may have to any estate by the curtesy or in dower, in any estate of any deceased person; and while the section then provides who shall be entitled to curtesy, it is silent as to dower, thus remitting the subject of dower wholly to the special statute thereon.

If there was any doubt as to what we consider the plain effect of the legislation on this subject, our view is sustained by well settled rules of construction. In the case of the State ex rel. v. Goetz, 22 Wis., 365, the court says "there is no rule of construction more reasonable and none better settled than that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict. This rule is thus stated in Dwarris on Statutes, p. 658: "Where a general intention is expressed, and the act also expresses a particular intention incompatible with the general intention, the particular is to be considered in the nature of an exception. While, if a particular thing is given out or limited in the preceding parts of a statute, this shall not be taken away or altered by any subsequent general words of the same statute."

Also, in the case of State ex rel. v. Lee, 21 O. S., 662, it was held, "that the acknowledgment of the certificate of incorporation before a notary public, instead of a justice of the peace, is not in conformity with the statute. The general authority of a notary, under the act of 1856, to take and certify to all acknowledgments cannot be taken as applicable to acknowledgment to certificates of incorporation which a subsequent statute provides shall be made before a justice of the peace."

If there was any incompatibility between the dower act and the subsequent statutes cited, the above rules would apply; but for the reasons given, we see no incompatibility, permanent leasehold estates being affected only as regards descent and sales on execution or decree; and dower clearly does not come by descent.

In the present case, the plaintiff would, under the dower act, be entitled to dower if her husband had died in possession of the permanent leasehold, and in this regard permanent leaseholds or any interests which the husband may have had in lands by lease, are put on the same footing as "all lands, tenements and real estate of which the husband held the fee simple in remainder or reversion, for as to these latter also, to entitle the widow to dower, the husband must have held the fee simple in remainder or reversion at his decease. We cannot see how, by construction, greater dignity is to be given to permanent leaseholds than to real estate of which the husband held the fee simple in remainder or reversion.

It may be said that dower is a favorite of the law, and that statutes are to be construed liberally in favor of the widow. Admitting this, it seems to us that there is little, if any, room for construction here. Permanent leasehold estates are left by the statutes as they always were, except that in two specified cases they are to be treated as estates in fee. And dower does not fall within either of the specified cases. Unless it can be established that dower comes by descent, the act providing that permanent leasehold estates shall be subject to the same laws of descent as estates in fee are subject to, can have no application. Besides, the statute of descents and distribution applies only to something which the deceased had at the time of the decease, and not to what the deceased may have had at any time during coverture.

We think, therefore, judgment must be given for the defendant, which is done.

C. D. Robertson, for plaintiff.

Staughton Lynd and Sage & Hinkle, for defendants.

MARINE INSURANCE. 93

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

OLD DOMINION INSURANCE COMPANY v. J. F. FRANK ET AL.

A defense to a policy of insurance on a steamboat, being that its voyage as made was illegal for want of a licensed pilot (under paragraph 4463 Revised Statutes of the United States, 1869, which provides that no boat carrying passengers shall depart unless she have a full complement), is not good where it is not averred and proved that the boat was carrying passengers.

YAPLE, J.

This is a petition in error, prosecuted here, to reverse the judgment of this court, rendered in special term, in favor of the defendants in error and against the plaintiff in error, for the sum of $3,228.73 and costs.

The action below was to recover for the total loss of the steamboat St. Francis, and for expenses incurred in attempting to recover the boat, which reimbursement of expenses was stipulated for in the policy of insurance. The boat was sunk and lost by striking an obstruction in the St. Francis river, a tributary of the Mississippi river, about a half mile below the town of Madison, on the 15th day of January, 1875. The boat was insured in this company on the 19th day of November, 1874, for one year, in the sum of $2,500, and valued in the policy at $15,000, with permission to insure in all to the amount of $10,000.

Two defenses to the right to recover were set up; first, that the boat, at the time of her loss, while navigating such river, was not riverworthy; and, second, that the navigation of the boat was illegal, she not having, when she left Memphis on the Mississippi river, for a trip to the town of Madison, nor when she left Madison to return to Memphis, nor when she was injured and lost, a full complement of licensed officers.

That the boat had a sufficient force to render her riverworthy, in fact, in conceded, as the verdict of the jury upon the charge of the court, which, as to this branch of the case, is admitted to have been full and correct, and upon the evidence established that fact.

But it is claimed, that when the boat left Madison for Memphis, and from that time until her loss, there was no licensed pilot on board of her, and such was clearly the fact; but the court told the jury that if the boat was seaworthy, and properly and sufficiently manned, in fact, safely to make the trip had no extraordinary peril been encountered, the want of such licensed pilot would not constitute a defense.

This is excepted to. The plaintiff in error relies upon section 4463, of the Revised Statutes of the United States, p. 869, which provides "that no steamer carrying passengers shall depart from any port unless she shall have in her service a full complement of licensed officers, and full crew, sufficient at all times to manage the vessel, including the proper number of watchmen," etc. The owners of the boat accompanied her from the time she left Memphis and Madison, until the happening of the loss.

We are all agreed that the judgment below must be affirmed. The illegality of a voyage must always be averred and proved; it never can be presumed. The answer does not aver, nor is there any evidence in the

case proving that this steamer was "carrying passengers" at any time, on the trip from Memphis to Madison, or when she left Madison to return to Memphis, and was lost. The evidence speaks only of cargo, officers and crew. To raise the question under the statute relied on by the plaintiff in error, the answer should have averred that the boat was carrying "passengers." As that was not stated to be the fact, and as there was no attempt otherwise to show it, the case is not within the prohibition of such statute, and the trip or voyage was not an illegal one.

Judgment affirmed. No penalty.

O'Connor and Tilden, JJ., concur.

Matthews, Ramsey & Matthews, for plaintiffs in error.

Lincoln, Smith & Stephens, for defendants in error.

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93 **DEMURRER.**

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

CHRISTIAN KRUZE v. SOPHINA HEHEMANN, NOW SOPHINA KRUZE.

Where, in a case on demurrer to the petition reserved to general term, the plaintiff's attorney frankly admits in open court that the case made by the petition is not the actual case, the court will not decide the demurrer, as it presents a fictitious, not an actual case, but will remand for amendment.

YAPLE, J.

This case comes before us by reservation from special term upon demurrer by the defendant to the plaintiff's petition.

The petition avers that the defendant is the late widow of Herman Hehemann, deceased, but now the wife of the plaintiff; that she owned real estate and other property in her own name and right; that she was the administratrix of her deceased husband and became the purchaser of his real estate; that to buy the property, the plaintiff loaned her $650.00, for which, on September 14, 1875, she gave him her promissory note, payable to his order, with 8 per cent. interest, one day after date; a copy of the note is set forth, and a personal judgment asked by the husband against his wife.

In argument before us here, the plaintiff's counsel states in open court that the case made in the petition is not the actual case, but that the loan was made and the note given since the marriage of the plaintiff and the defendant, which raises a very different question of law from that presented by the averments of the petition, viz.: whether the money is to be held a gift by the husband to the wife, or whether the money being furnished by him and the title to the purchased realty taken in her name, the land and title are held by her in trust for him.

We can only decide real cases, not "moot," or fictitious ones; and as the plaintiff's counsel frankly admits that the case here presented is of the latter character, we can only remand it to special term, where, if the petition be not amended so as to present the real case as the plaintiff claims it in fact to be, the action will be dismissed.

H. Mrakworth, for plaintiff.

John J. Gasser, for defendant.

ATTACHMENT. 94

[Hamilton District Court, April Term, 1877.]

Burnet, Avery and Longworth, JJ.

JACOB AMMEN v. EDWARD MORRIS.

An action for a commission for selling real estate, where the owner agreed that defendant should have as his commission all that he could sell it for above a certain sum, but on plaintiff's procuring an offer above that sum, refused to comply with his agreement, is a demand arising on contract, for which an attachment on the ground of non-residence may be issued.

ERROR to the Court of Common Pleas.

BURNET, J.

It was claimed in this case that there was error by the common pleas in overruling a motion to discharge an attachment. Morris brought the action to recover $1,000, as commission for the sale of a tract of land in Millcreek township, belonging to the defendant. The allegation was that Ammen agreed with him that he might sell the tract for any sum over $30,000, and whatever the property brought over that he was to receive as his commission. Morris alleges he made a sale for $36,000; that the purchaser tendered the cash payment, according to the terms of the sale, and his notes and mortgage for the balance; that Ammen refused to comply with the contract, whereupon Morris claims there is due to him $1,000.

Ammen was a non-resident of the state, and an attachment was issued against him and levied on his property. It is contended by the plaintiff in error that an attachment is not allowed by the code, on the ground of non-residence, in a case of this kind, and provides it should be allowed only in cases where the debt or demand arises on contract, judgment or decree, attempting to make a distinction where the contract is definitely for the payment of a sum of money, and where the claim to the action arises from a breach of the contract.

There are two kinds of actions known to the Code of Civil Procedure: actions in tort and actions on contract, and all must fall under the one head or the other, unless we include what is known as the old equitable or chancery procedure. The demand in this case certainly arises on contract, and is one of those for which an attachment may issue on the ground of non-residence. The court below did not err in refusing to discharge the attachment.

Judgment affirmed.

BASTARDY. 93

[Hamilton District Court. April Term, 1877.]

Burnet, Avery and Longworth, JJ.

*FRANK GRIEVE v. AMELIA FREYTAG.

In a proceeding under the bastardy act (70 O. L., 111), the transcript and recognizance were filed at the term of the court to which the defendant was recognized, but there was no order continuing the cause either at that term or the next term thereafter, and at the next, being the third term, the recognizance

*The judgment in this case was reversed by the supreme court. See opinion, 31 O. S., 147.

was forfeited, the cause tried, and a verdict of guilty rendered and judgment pronounced against the defendant in his absence: *Held*, that in the absence of anything to the contrary appearing upon the record, it is to be presumed that the cause was so continued, and such continuance shall operate as a renewal of the recognizance, which shall remain in full force until final judgment, and therefore a judgment rendered in the absence of the accused is not void.

AVERY, J.

The plaintiff in error was bound over by a justice of the peace in March, 1876, to the next term of the common pleas court, under a charge of bastardy made by the defendant in error. The next term was June, 1876, but it was not till the January term, 1877, he was called, and not appearing, his bond was forfeited, and the complainant presenting her complaint and testimony to a jury, the jury found a verdict in her favor, and the court entered judgment. It is alleged as error that bond was not forfeited at the term to which it was taken, but at a subsequent term. This, at most, would seem to be matter affecting the surety only. The statute, however, while providing that if the accused does not appear at the term to which he recognized, his recognizance shall be forfeited, also provides that if the complainant be unable to appear, or there be other sufficient reason therefor, the court may continue the cause, and such continuance shall operate as a renewal of the recognizance, which shall remain in full force until final judgment. In the absence of anything to the contrary appearing upon the record, it is to be presumed that this cause was so continued. It is further alleged as error that the cause was tried without issue joined. A proceeding in bastardy is in its nature a civil proceeding. It has many of the forms of a criminal proceeding, among the rest, the form of the plea, "guilty or not guilty." Being a civil proceeding, however, the presence of the accused at the trial is not essential, and for the same reason, a plea is not essential, 45 N. H., 274. It is not, as in the case of a proceeding under the civil form, where, in the absence of an answer, the allegations of the petition will be taken as true; but the complaint upon which the case proceeds before the jury, remains to be inquired into the same without a plea as with a plea. Upon this subject the statute is explicit. It provides that when the accused pleads not guilty, or having been recognized fails to appear, the court shall order the issue to be tried by a jury. It is alleged that the court made no order for the trial of this issue. It would be difficult to understand how the case could have proceeded, in the presence of the court, to be tried by a jury unless the court had made an order. The order is not required to be in writing.

The judgment will be affirmed.

Blackburn & Shay, for the plaintiff.

Buchwalter & Campbell, for defendant.

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94 **ATTACHMENT.**

[Hamilton District Court, April Term, 1877.]

Burnet, Avery and Longworth, JJ.

FITZGERALD ET AL. v. JOHN C. SWEET.

It is a good defense to an action before a justice, that the amount due by defendant had been garnisheed in another action against the plaintiff by third parties, and the order of attachment served on defendant the day before this trial.

BURNET, J.

This is a petition in error to reverse a judgment in the court of common pleas, upon a petition in error affirming a judgment rendered by a justice of the peace. The action before the justice was to recover $34, and was begun on July 8, 1876. Upon the trial, which was had before a jury, defendants proposed to prove by the introduction of

transcripts of judgments rendered by another magistrate, that the amounts due from the defendants to the plaintiff in that action had been garnisheed in two actions brought by creditors of the plaintiff, and that defendants had been served under the orders of attachment in those actions on the day previous to this action. It did appear by parol testimony in the case, that these were the facts; but when the transcripts of the judgments in the two cases referred to were offered in evidence, the justice ruled them out. Defendants asked the justice to charge the jury that the fact that defendants had been garnisheed in the other actions, was a defense against the action of the plaintiff against them. The justice refused to so charge the jury, and on the contrary charged them that the transcripts offered were irrelevant evidence, and that in that case they had nothing to do with the proceedings in the other cases, and that the fact of the garnishment was no defense for the defendants against the claim of the plaintiff. A verdict was accordingly rendered in favor of the plaintiff, and a judgment upon the verdict. Upon a petition in error to the court of common pleas, the judgment of the justice was affirmed. To this a petition in error is now filed.

It cannot be doubted that the garnishment did afford a defense against the demand of the plaintiff, and there was error in the action of the justice in ruling out the evidence to sustain that defense, and in charging the jury as he charged them. The judgment of the court of common pleas ought to have been a judgment of reversal.

The judgment of the court of common pleas will be reversed.

Harrup, for plaintiff.

Pruden, for defendant.

MORTGAGES. 95

[Hamilton District Court, April Term, 1877.]

Burnet, Avery and Longworth, JJ.

J. S. RIGGS v. W. P. HULBERT, TRUSTEE, ET AL.

In a proceeding to foreclose a mortgage, the holder of another mortgage omitted to be made a party, consenting to a judgment without the delay of making him a party, on condition that sale be deferred for a specified time, which is done, it is too late for him after sale to set up the plea of usury against the judgment.

LONGWORTH, J.

Upon October 16, 1875, Hulbert, trustee, filed his petition in error in the court of common pleas, to foreclose a mortgage upon certain property. Gates and wife, Bristol and Gamble and wife were made defendants, as parties having an interest in the property, but the plaintiff in error, Riggs, who held a mortgage thereon, through some oversight, was not made a party to the action. On November 13, 1875, Gates and wife filed their answer and cross-petitioned; on December 13, following, the other defendants filed their answers; and on March 21, 1876, a decree was entered finding the amount due Hulbert upon the mortgage, and ordering a sale. The decree was entered by consent of all parties to the suit, and it appears from the bill of exceptions that it was

entered also by the consent of Riggs, who was not a party to the action at all, but who had a mortgage upon the premises. It seems there were negotiations. Riggs had some thought, at one time, of purchasing this property to save his interest. He afterward gave up that idea, but he proposed to those other parties that they might take this decree without opposition and without the delay which would follow from making him a party, providing they would agree not to issue any order of sale upon it for one hundred and ten days. The decree was so entered. The negotiations failed and at the expiration of the one hundred and ten days, but not before, an order of sale was issued. The property was sold, and Riggs thereupon caused himself to be made a party to the suit, and filed his cross-petition setting up that there was usury included in the amount that was due to Hulbert, and he prayed to have the amount of money deducted. This was at a subsequent term.

Generally the plea of usury is not favored in law, and in this case, where the party, with full knowledge of all proceedings in this suit, with full knowledge that a judgment is to be entered to a certain amount, assents to it upon certain conditions which are complied with, and then at a subsequent term of the court comes in and sets up plea of usury and asks that the judgment of the court be set aside or modified, he comes too late. The decision of the court below, which was that the portion of Riggs' cross-petition setting up usury, should be stricken from the files, thereupon affirming the sale and distributing the proceeds among all the parties, will be affirmed.

J. M. Fitzgerald, for plaintiff.

H. M. Cist, for defendant.

95

JUDGMENT.

[Hamilton District Court, April Term, 1877.]

Burnet, Avery and Longworth, JJ.

CHAS. BUSCHHAUSEN v. JOHN SCHLICK.

A judgment rendered in an action against Charles Buschhausen & Co., doing business under the name of the Brighton Station Ice Co., is not objectionable on the ground that it should have been against Buschhausen & Co., or against the Ice Co., but not against both, it being against the firm known by these names. But the individual, Charles Buschhausen, not having been a defendant below, and against whom there could be no judgment or execution under the statutes of Ohio authorizing suit against a firm in a firm name and service at the place of business, has no standing in court, and a petition in error by him will not be entertained.

BURNET, J.

The original action before a justice was brought by John Schlick against Chas. Buschhausen & Co., doing business under the name of the Brighton Station Ice Company. The case came by appeal to the common pleas, and the defendant making no appearance, judgment was entered by default. It was alleged for error, that the record and finding of the court below does not show that the judgment was rendered against plaintiff in error as Charles Buschhausen & Co., or against the Brighton Station Ice Company, and that it should have been against one or the other, and not against both.

The statute of Ohio authorizes a suit to be brought against an unincorporated association or a partnership doing business in the state of Ohio, by the association name or the partnership name, and the service being made at the place of business of the association or partnership, the judgment will operate solely on the property of the association or partnership, being no lien on the individual property of the members of the firm. The defendant in the action below was Chas. Buschhausen & Co., a firm doing business as the Brighton Station Ice Company. The plaintiff in error is Chas. Buschhausen, who was not defendant in the action below, and against whom there could have been no judgment or execution. He has, therefore, no standing in court, and the judgment will be affirmed.

LANDLORD AND TENANT. 95

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

ADAM STEIFEL v. ADAM METZ.

Neither the lessee nor the assignee of the term can refuse payment of the whole rent, on the ground that by proceeding under the right of eminent domain he has been evicted from part of the premises, and this although the lessor had received compensation in such proceedings and the lessee was not made party thereto.

JOHNSTON, J.

Petition in error to reverse a judgment and proceedings had in the court below, wherein Metz, defendant in error, had instituted a suit against Steifel, plaintiff in error, to recover $140, being for one quarter's rent of certain premises at the corner of Brown and Ravine streets. Metz claimed that in August, 1873, he leased the premises, being a slaughter house, to Dryer & Heckert, for the term of eight years, at an annual rent of $600, payable quarterly, with the privilege of purchase at any time during the lease at the sum of $14,000; that the rent for the quarter ending August 12, 1875, amounting to $150, had become due and payable by the terms of the lease, and that Steifel, assignee of the term originally granted to Dryer & Heckert, had not paid it. As against the demand of Metz, Steifel answered, admitting the lease, and that he had become the assignee thereof, but alleging that before the lease had been given by Metz to Dryer & Heckert, a suit had been instituted by the city of Cincinnati to condemn 16½ feet of this property; that by this appropriation the beneficial use of the property was virtually destroyed or greatly diminished. Having thus, as he claimed, been evicted, Steifel denied any liability upon the covenants of the lease while he was in possession, and sought by a cross-petition to recover damages in the sum of $4,000 against the landlord, Metz. Metz admitted the institution of the condemnation proceedings, but which he claimed became inoperative, and alleged that after Steifel became the assignee of the term, other proceedings were instituted by the city to condemn the same portion of ground, which proceedings were carried into effect, and $2,000 awarded by the jury to Metz for his interest in the property taken. He claimed that while Steifel was not a party to the proceedings, nor his assignors,

Dryer & Heckert, yet in the law the covenants of the lease to pay the rent remained the same as though no such proceedings had been taken, and he therefore maintained that he had a right to recover the $150. The case was fully tried, and it appeared that while the city paid the condemnation money in January, 1875, Steifel continued actually to use and enjoy the property until within a few days of April, 1875, at which time the quarter's rent was claimed to have fallen due. The verdict was in favor of the landlord for the amount of his rent, with interest, and against the counter-claim of Steifel.

When once the relation of landlord and tenant has been proven to exist by express covenant, and where there is an assignee of a term, and he has enjoyed and occupied the premises, he cannot defeat the right of the landlord to recover the whole of the rent provided for in the lease, unless he is able to show that by the acts of the landlord, the lessor, he was evicted from the whole or a portion of the premises, or unless he is able to show that with the consent of the landlord the term had been surrendered, or the landlord had put some other tenant in possession. Otherwise, although the premises may be destroyed by flood or by fire, the tenant still remains liable upon his covenants to pay rent, and the whole of the rent, until the expiration of the term of the lease, unless he otherwise protect himself by a special covenant. Proceedings under the right of eminent domain to appropriate property for public uses whenever the public necessity requires it, are not such a proceeding as will amount to an eviction, or such as will release the tenant from the covenants of the lease. It is not a proceeding encouraged or brought about by the landlord, but is adverse to the landlord. It is by no means the act of a landlord whereby he disturbs the tenant.

When the city condemned this 16½ feet of ground, it only took and appropriated the interest of the reversioner, Mr. Metz, and left the rights of Mr. Steifel to compensation intact. Therefore, the right remained to Mr. Steifel, when the city was proceeding to enter upon the premises and tear down the buildings, to either restrain the city from so doing, or to institute a suit against the city to recover the damages he may have sustained by reason of the appropriation. Although it may be that the lessor has received full compensation for his reversionary interest, yet the act of appropriation not being his act, his right to recover rent for the whole term and the full amount under the lease, remains to him, and the tenant is not absolved from his obligations thereby. He still is bound to pay the full amount of rent during the remainder of his term, his indemnity being in his right to recover against the city of Cincinnati damages for appropriating the premises. The liability to pay full rent during the remainder of his term will form one of the elements of damages to be paid to him by the authority appropriating his property, so that thus the landlord and tenant are protected.

Some four special charges were asked, based upon the claim of the defendant below, that, being evicted, he had the right to recover damages against the landlord, by reason of the tearing down of part of the slaughter-house, and appropriating 16½ feet of ground, and that by reason of the fact of the appropriation, and that Metz had received $2,000, he had no right to recover upon the covenants of the lease any rent at all. The court, for the reason stated, refused to give these charges.

We feel that the court did not err in ruling out the questions put by the defendant below touching the issues sought to be made by error in refusing to give the special charges asked, nor did error intervene in the general charge of the court to the jury. Therefore, we are of opinion that the judgment of the court below upon the verdict of the jury was correct, and that a new trial should not have been awarded, and the proceedings of the court below, and the judgment, should be and are hereby affirmed.

Jacob Wolf, for plaintiff.

Forrest, Cramer & Meyer, for defendant.

LIMITATIONS—MUNICIPAL CORPORATIONS. 96

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

JAMES W. MITCHELL v. CITY OF CINCINNATI.

1. Part payment only prevents the running of the statute of limitations when on a claim founded on contract, and it is no answer to, and a claim for injuries against a municipal corporation, on which it is alleged no suit was brought before, because the corporation had kept the injured party on its weekly pay-rolls, is not taken out of the statute by such payments.
2. Officers of a municipal corporation cannot, in compromise of an injury sustained in its service, entail an annuity or pension upon it. Such a contract would be *ultra vires* as against public policy.

JOHNSTON, J.

Petition in error to reverse the action of the court below in sustaining a demurrer to the petition of the plaintiff in error, and entering judgment dismissing the petition. Mitchell alleged in this petition that in February, 1870, being in the employ of the defendant in the street-cleaning department, he was ordered by one Robertson, chief of the department, to assist in tearing down the Fifth street market-house, and while obeying these instructions the roof fell, and he was carried with it to the pavement, sustaining a fracture of the leg, resulting in partial paralysis of his right side, and such injuries as would probably prove permanent; that the name of Mitchell having been dropped from the pay-rolls of the street-cleaning department, it was, upon recommendation of the common council, in November, 1871, restored by the board of improvements to the pay-rolls; that the pay, which was fixed at $11 per week, dated back to the time at which Mitchell's name was dropped; that he continued to receive this amount until April, 1876, when the board of public works struck his name from the pay-rolls, and he has since received nothing from the city. The petition alleged that these resolutions were passed for the purpose of compromising with Mitchell for his injuries sustained, and that the understanding was that the payment of $11 per week should continue during his natural life. The plaintiff asked damages in the sum of $15,000.

To this petition the city demurred, and the court below sustained the demurrer, and entered judgment for the defendant.

Plaintiff in error now claims to be entitled to damages for the reason that this contract of compromise was broken, and if that be not sufficient ground, then the plaintiff claims damages by reason of the unlawful act and the negligence of the defendant and its officers, whereby he became permanently injured; and plaintiff claims further that these payments of $11 per week saved to him his right of action against the city, and prevented the statute of limitations from barring his right of action against the city.

Court—As to the first proposition that the city is now, or ever was bound by the resolutions passed by these various boards, we are of opinion that taking the language of the resolutions as adopted, they did not constitute or make out a contract. Even if the city or its officers had the right to enter into such a contract, there was lacking that very essential element necessary to the validity of every contract—certainty. The resolutions did not provide whether these payments should continue for four weeks or four years. In that respect the resolutions were indefinite, and even if there had been a provision therein that they should (as Mr. Mitchell claims the understanding was) last during the period of his natural life, such a contract would not, in the opinion of the court, be obligatory upon a municipal corporation. Such a contract might well be said to fall within the definition of a contract *ultra vires*. It would be virtually authorizing the officers of municipal corporations to entail upon the municipality a pension list of persons who might be injured in its service. Such a contract would also be against public policy.

The second proposition claimed by the plaintiff is that these payments of $11 per week had the effect to prevent the statute of limitations from running against the liability incurred by the defendant for the negligence of its officers, more than four years having intervened between the time of receiving the injury and the institution of the suit. In the first place, these payments were not made directly by the defendant for the injury, but, as stated in the petition, they were made by virtue of this alleged compromise or contract. But part payment, to have the effect of preventing the operation of the statute of limitations, must be part payment on a claim arising or founded on a contract. This claim did not arise on a contract. If a claim at all, it was one that accrued to the plaintiff by reason of the negligence and carelessness of the defendant's agents, a claim for personal injuries in the nature of tort. We are of the opinion that these payments did not save the right of action to the plaintiff, and therefore the judgment of the court below in sustaining the demurrer to the petition of the plaintiff was right, and the judgment will therefore be affirmed.

W. T. Forest, for plaintiff.

Peck, Gerard & Molony, for defendant.

SCHOOLS. 96

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

BOARD OF EDUCATION OF SYMMES TOWNSHIP v. W. P. O'HARA.

An action may be maintained, for an unpaid part of his salary, by a teacher who was employed by the directors of a sub-district of a township, against the township board of education. There is no authority given to sustain an action against the local directors of the sub-district.

BURNET, J.

This case, heard before Judges Burnet, Avery, Longworth and Johnston, came up by petition in error to reverse a judgment of the common pleas, affirming a judgment of a justice of the peace, in favor of the defendant in error. O'Hara was employed as a teacher by the directors of a sub-district in the township, at a compensation of $2.75 per day. The contract was indefinite as to time, but contained a provision that upon notice being given by either party for a certain number of days, it should be at an end. It appeared from the evidence that, in consequence of the furnace by which the school-room was heated becoming out of order, so that the place was untenantable for school purposes, no school was held for nine days, the time occupied in having the furnace repaired. On a settlement by the local directors with the defendant in error, they refused payment for nine days, during which, according to their claim, he had rendered no service. He accepted the residue of his wages, protesting, however, that he did not yield his claim, and the trustees still refusing to pay for the nine days, he brought his action against the board of education of the township. A verdict was rendered for the teacher for the full amount of his claim, and the common pleas affirmed the judgment. The claim on behalf of the plaintiffs in error is that the judgment should not have been against them, but against the local directors who employ him.

Judge Burnet announced the opinion. Under the law of Ohio the township forms a district for school purposes, and there are sub-divisions in the townships, which are called sub-districts, and a board of education which has general authority and supervision over the whole township, and authorized to employ teachers. They are made a body corporate, with capacity to sue and be sued. Over the sub-districts there are local directors to whom are given certain powers—among others, to employ teachers for their own sub-district. The power, is, nevertheless, given to the board of education to increase, but not to diminish the rate of wages of the teachers. Under the law as it now exists, there is no authority given to sustain an action against the local directors of the sub-district. Formerly, when a teacher was dismissed without cause by the directors of the sub-district, the law gave him the right to recover damages against them. That law is repealed, and this court is of opinion that the teacher has his right of action to recover whatever claim he had against the board of education of the township. There is no complaint by the plaintiff in error that the justice erred in any ruling in regard to the testimony, or in his charge, in which he told the jury that the plaintiff had no right of action against the board of education; but the jurors seemed to have taken the bit in their teeth, and found for the plaintiff. The judgment would be affirmed.

97 **JUDGMENT BY DEFAULT.**

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

JOHN H. LYONS v. FIDELITY LODGE No. 71, I. O. O. F.

An answer cannot be filed without leave of court where the case is in default and a judgment is ordered and the papers are in the hands of the court for decree, and it was not error for the court to grant a motion to strike from the files an answer so filed.

BURNET, J.

The defendant in error, the plaintiff below, filed a petition to foreclose a mortgage executed by the plaintiff in error. The case became in default for answer, and upon application by the defendant below for leave to file an answer, leave was granted to file within a certain time. The defendant being again in default, the case was again called upon the default docket and ordered to judgment, and the papers were submitted to the court for an entry of a judgment. After this, while the papers were still in the hands of the court, but before decree was entered, the defendant without leave granted, filed an answer, the answer being merely a denial that he was indebted as alleged in the petition to the plaintiff. Upon motion, this answer was stricken from the files, and decree rendered by default. The defendant afterwards moved to set aside the decree and alleged that the amount for which the decree was rendered exceeded by the sum of $100 the amount that was due the plaintiff. The court finding that the amount was in excess, as claimed by the defendant, ordered a *remittitur*, and amending the decree accordingly, permitted it to stand, and overruled a motion to set aside the decree.

It is claimed that the court erred in striking the answer from the files and entering the decree by default, the cause being in default, and properly called and ordered for judgment, an answer could not be filed except by leave of court, and it was open to the court at any time to entertain a motion to strike such an answer from the files, whether the answer were perfect in its form or substance, or not. But certainly where such an answer is filed without leave of court, after default accrued and judgment ordered, it is not error to strike from the files and enter a judgment.

It is alleged, also as error, that instead of ordering the *remittitur*, the court should have granted a new trial. It appears that the court did remit all the defendant claimed to be in excess of the amount due. There is no error in this. The judgment below will be affirmed, and it not appearing that there was good cause for filing a petition in error in this court, a penalty of five per cent. will be allowed.

L. H. Pummill, for plaintiff.

C. F. Seybold, for defendant.

PARTNERSHIP—ATTACHMENT. 97

[Hamilton Common Pleas Court, 1877.]

B. P. CRITCHELL v. J. S. COOK & CO.

A garnishment having been got out in an action against a foreign firm, and the garnishees admitting possession of a sum of money due and judgment rendered, such garnishees cannot, when sued for money by the plaintiff in attachment, defend against payment, on the ground that a foreign firm cannot be sued in its firm name. The court will, if necessary to sustain the judgment, presume that, in the former case, the foreign firm answered and thereby conferred jurisdiction.

AVERY, J.

Plaintiff in error was garnisheed by Cook & Co. in an action against Henry Clark & Son, and he answered admitting a certain sum of money to be in his hands. Judgment being obtained against Clark & Son, Cook & Co. brought their action in the court of common pleas for the money in Critchell's hands as garnishee. To the petition he answered that the suit against Clark & Son was an attachment against them as a non-resident firm, and that they, in fact, resided and did business in London, England. To this there was a demurrer, which was sustained, and the court entered judgment.

Plaintiff in error files a petition to reverse the judgment. The point made is that only firms formed for the purpose of, and doing business in the state of Ohio can be sued in the firm name, and, therefore, that the proceeding against Clark & Son was a nullity. A foreign firm cannot be sued in its firm name, nor could a domestic firm, except for the statute. The reason is that there would be no person upon whom process could be served. It could not be upon the persons composing the firm, because under the rules of certainty, which govern pleadings, they would not be the persons sued, and apart from the persons composing a firm, the firm itself is a mere name, an abstraction. It would be going very far, however, to say that where a foreign firm sued in its firm name, came in and answered, the judgment would be a nullity. If a foreign firm should sue as a plaintiff in the firm name, the act might certainly be regarded against it as the act of the partners composing the firm, and the same reason should apply when, instead of bringing a suit, it should undertake to defend in the firm name. Accordingly, it has been held that when a foreign firm, sued in the firm name, came in and answered and a verdict was taken, it was too late to object. Brownson v. Metcalfe & Co., 1 Handy, 188.

Cook & Co., plaintiffs below, set out their judgment against Clark & Son. The answer did not deny the judgment, nor did it make any allegation to show that jurisdiction had not been obtained. Unless Clark & Son had come in and answered, there would have been no jurisdiction to enter judgment, inasmuch as there could have been no process served. The presumptions that attach to judicial proceedings, are therefore sufficient, in the absence of any allegations to the contrary, to warrant the interference that Clark & Son did answer in the case. Whether this be so as a matter of fact, cannot be inquired into. The sole question is upon the pleadings, the petition, answer and demurrer to answer.

The petition avers the judgment, the answer admits the judgment, and simply alleging that Clark & Son were a non-resident firm, stops short of alleging what was essential, namely: that Clark & Son had not come in and answered. It follows, therefore, that the court of common pleas was right in sustaining the demurrer.

Judgment affirmed.

W. E. Jones, for plaintiff in error.

Granger, for defendant in error.

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97 **REPLEVIN.**

[Lorain District Court, 1877.]

Jones, Barber and Hamilton, JJ.

GEORGE NENBRAND v. CHAS. MYRES.

In an action of replevin, on the issue of whether the plaintiff was entitled to the possession, the defendant, a constable who had levied on the goods, need not aver that the plaintiff had bought the goods to aid the seller to defraud his creditors. Such plea is not necessary in order to submit such question to the jury, for the plaintiff must prove title, not only against his vendor, but also against the defendant, who represents the creditors of the vendor.

JONES, J.

The plaintiff in error was plaintiff below, and the defendant in error was defendant below.

The action below was replevin, for the recovery of certain boots and shoes. The answer denied that the plaintiff was, at the time of the action, the lawful owner of, or entitled to the possession of the property replevied, or any portion thereof; and also set up that defendant was a constable; that prior to the commencement of the action, the goods were the goods of one Luke Nenbrand, brother of the plaintiff, and that defendant had levied upon them by virtue of an execution against said Luke Nenbrand, and held them under said levy.

At the trial "It was agreed," as appears by the bill of exceptions, "that the only question to be submitted to the jury should be, was the plaintiff the owner of the property in the petition mentioned at the time it was replevied by him, or was the property owned by Luke Nenbrand?" The plaintiff offered himself as a witness, and testified that he was the owner of the property in question, and, further (upon cross-examination) gave testimony "tending to show that the sale of said goods was made by Luke Nenbrand to defraud his creditors, and that said plaintiff purchased said goods to aid him in such fraudulent purpose, and said testimony was received without objection." No testimony but that of the plaintiff himself was offered in the case. Thereupon the court charged the jury among other things as follows: "If there was a sale of the goods whose title is in controversy, by Luke Nenbrand to the plaintiff before the levy of the defendant, the plaintiff is entitled to recover, unless you find from the evidence that the sale was made by Luke with the intent to defraud his creditors, and that the plaintiff purchased them with the intent to aid him, Luke, in such fraudulent purpose, in which case he is not entitled to recover." The plaintiff ex-

cepted to the last proposition, and (a verdict and judgment having been given for the defendant) sought to have the judgment reversed, on the ground that if the defendant wished to take advantage of the fraud, if any, in the transfer from Luke Nenbrand to plaintiff, he should have pleaded it in his answer, and that, no issue of fraud having been made in the pleadings, it was error for the court to submit such a question to the jury.

The district court affirmed the judgment below, Jones J., saying we are all agreed that no such plea was necessary. The plaintiff was bound to prove a good title to the property in himself, not only as against the person from whom he bought it, but also as against the defendant in replevin who represented the creditors of the vendor of the plaintiff, and it would be strange if he could rely upon a contract made in fraud of such creditors.

J. M. Hord, for plaintiff in error.

Geo. P. Metcalf, for defendant in error.

NUISANCE—JURISDICTION. 98

[Lorain District Court, 1877.]

Jones, Barber and Hamilton, JJ.

*GEORGE NAGLE v. WILLIAM BROWN.

A person owning lands through which a public road passes, who gives his assent to the cutting down of a tree standing thereon within a few feet of the traveled track, is guilty of obstructing the highway if the tree falls within the road and is suffered to remain therein to the hindrance or inconvenience of travelers, and the court of common pleas has jurisdiction to hear such case.

HAMILTON, J.

The plaintiff in error was defendant below, and the defendant in error was plaintiff below.

The original action was brought in the court of common pleas by the defendant in error against the plaintiff in error, and several others, to recover damages for injury done to himself and his property by reason of the fact that the defendant below had obstructed a certain highway by felling a tree across it, and not removing it therefrom. The plaintiff below, while driving along said road, ran into the tree and his wagon upset, causing the injury complained of.

Judgment was given below for the plaintiff and defendant below filed his petition in error to reverse the judgment upon the ground (among others) that the court of common pleas had no jurisdiction of the case, the statute (S. & S., p. 669). having given exclusive original jurisdiction of such actions to justices of the peace.

The district court (Hamilton, J.) affirmed the judgment holding that the limitation of jurisdiction to justices of the peace applies only to an action by the township trustees (or other person) to recover the penalty provided by the statute for such obstruction.

G. P. Metcalf & L. M. Lean, for plaintiff in error.

C. W. Johnston, for defendant in error.

[Superior Court of Cincinnati, General Term, January, 1877.] 101

LOUISA D. CRACRAFT ET AL. v. CATHERINE ROACH.

For opinion in this case, see 5 Dec. R., 467 (s. c. 6 Am. Law Rec., 83). See also 36 O. S., 549 and 584.

*The decision in this case was affirmed by supreme court. See opinion, 37 O. S., 7.

103 ASSIGNMENT FOR CREDITORS.

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

IN RE HENRY CARTER.

Where the lessee of a hotel assigned all his property for the benefit of creditors, and under an order of the probate court, the assignee kept the hotel open for two months until he sold all the furniture and chattels to a subsequent lessee, a reasonable rent of the hotel is chargeable as part of the costs of the assignment as against a mortgagee of the chattel property, who, though not a party to the proceedings, had notice of them, remained silent, and allowed the sale without objection and asked for payment out of the proceeds, and the sale of the chattels in the hotel to such subsequent lessee undoubtedly had the effect of enhancing the amount of the sale.

JOHNSTON, J.

Carter, being the proprietor of the Merchants' (now the Arlington) Hotel, in this city, and being in embarrassed circumstances, made an assignment of all his property for the benefit of his creditors. The property consisted of the furniture, goods and chattels used in conducting the hotel. The assignee gave bond and entered upon the discharge of his trust. A chattel mortgage upon the greater part of the property was held by Sarah Lewis. At a meeting of the creditors (Sarah Lewis not being present) it was decided to be for the best interests of the trust that the hotel should be kept open, that a more advantageous sale might be effected. The hotel was accordingly, under an order of the probate court, kept open for about two months, when a sale of the entire chattel property and furniture was effected to a subsequent lessee. The question coming up for distribution of the proceeds of the sale, the heirs of Patrick Rogers, deceased, owner of the hotel property, made a claim for rent against the assignee during the time he was in possession of the hotel property, after the assignment and up to the time of sale. This claim for rent was resisted by Sarah Lewis, on the ground that the court had no authority to continue the hotel after the assignment, and that she was not present, and therefore did not assent to the arrangement made by the creditors. She did not contest the sale, but came in for the purpose of receiving the proceeds thereof so far as her mortgage was concerned. The probate court, however, made an order that a reasonable amount of rent for the time during which the assignee had possession, was properly a part of the costs of administering the trust, and that it should be taken out of the proceeds of the property sold. From that order Mrs. Lewis appealed to the common pleas, where it was decided that the claim for rent of the Rogers' heirs was not properly an item of costs to be included in the bill of costs for administering the estate.

The evidence, as it appears by the bill of exceptions, is in the nature of an agreed statement of facts, and from the agreed statement it appears that this mortgage had actual notice that the property covered by her mortgage had been assigned, and the possession thereof delivered to the assignee; that she had actual notice, that the assignee was proceeding to administer the trust, and that she had actual notice of the action taken by the creditors, although from the agreed statement of facts it appears that she was not a party to the proceedings, that she

did not attend the meeting of the creditors, or actually consented that the hotel might be kept open. She does not appear to have taken any part in the case at all until after the sale; but having notice of these proceedings, while she did not directly assent to them, she did not dissent to what was taking place although the property covered by her mortgage had changed possession from the assignor to the assignee. It does not appear from the agreed statement of facts, whether the condition of her mortgage had been broken before the assignment, or not. If it had, she would undoubtedly have had full right, if she were displeased with these proceedings, to have taken immediate possession of the property covered by her mortgage, and disposed of that as she pleased. Or, if the condition of the mortgage had not been broken at the time the assignment was made, it was her right (if there had been the usual provision in her mortgage in regard to changing possession, or placing her security in jeopardy), to have taken possession by writ of replevin, or to have proceeded by way of injunction, to enjoin any disposition of the property that might jeopardize her security. It seems that she did not take any action one way or the other, and although she must have had knowledge of the fact that the possession of the property had changed, she did not elect to take any action adverse to the administering of the trust by the assignee. She remained silent until after the sale had been made by the assignee, which was found by the probate court to have been made for the best interests of the creditors, and then she appeared and asked that the money arising from the sale of the property covered by her mortgage, might be paid to her intact, without any diminution by reason of the rent of the property during the time the trust was being administered.

Again, so far as appears in this case, the property being in the nature of furniture, goods and chattels used for the purpose of conducting that hotel, and it not appearing that the condition of her mortgage had been broken at the time of the assignment, there was in this property a beneficial use that was valuable to the assignors and to the creditors. From the whole record it would seem that the right to the possession and use of the property belongs to the assignor—that the condition of the mortgage had not been broken. It seems that she permitted the assignee, in selling the property covered by her mortgage, to sell with it this beneficial use. That undoubtedly had the effect to enhance the amount of the sale, and the creditors did not seek to have a separation of that interest in the distribution, but only asked that from the gross proceeds of the sale of this property, coupled with this beneficial use, the reasonable rent of the property during the time the trust was being administered should be deducted. Under the circumstances, we think that such reasonable rent ought to form one of the necessary expenses to be included in the bill of costs; and we think, therefore, that the court of common pleas erred in holding that this claim of the heirs of Patrick Rogers should not be included in the bill of costs, but should be classified as the claim of an unsecured creditor.

The judgment, therefore, is reversed, and the cause remanded for a new trial upon that question, for the purpose of ascertaining what would have been a reasonable charge for the use of the premises during the administering of the trust.

J. F. Baldwin, for plaintiff.

Howard Douglass, for defendant.

107 CORPORATIONS.

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

LUCIUS BEEBE v. E. B. THOMAS AND WILLIAM WOODS.

1. A creditor of a corporation, formed in Ohio to do business in New Hampshire taking the note of two stockholders for his debt, with an agreement that it should be credited on their individual liability as stockholders, is estopped to deny the legality of the incorporation, and to claim that it was the note of two partners of a co-partnership.
2. When the judgment creditor of a corporation, which went through bankruptcy, obtained a note for the amount of his debt, from one of the stockholders, on an agreement that it should be a credit to that amount on his liability as stockholder, and his liability as stockholder to other creditors is not yet ascertained, the court interpreted the agreement to mean that such creditor would repay whatever the stockholder might have to pay over what he would have had to pay had the note not been given, and entered a judgment for the amount of the note, adding thereto, however, that such stockholder would be entitled to recover from the creditor any greater sum he shall be compelled to pay beyond his payments if such note had not been given.

YAPLE, J.

This case, which is between Beebe and Woods—Thomas not having been served with process—comes before us for decision upon the law and evidence, by special reservation from special term. The action is founded upon two promissory notes made by E. B. Thomas, and indorsed by the defendant, William Woods, payable to the order of the plaintiff, Lucius Beebe—one for $1,596.02, six months after date, and the other for $1,658.39, twelve months after date, and both dated March 4, 1873. No question of demand upon the maker and notice of dishonor to the indorser arises.

The facts are, that on the 2d day of July, 1868, R. A. Holden, E. B. Thomas, A. F. Worthington, C. W. Beall and Wm. Woods, all residents of Ohio, duly executed and acknowledged a certificate of incorporation, and caused the same to be filed in the recorder's office of Hamilton county, in this state, in the manner prescribed by statute, which certificate stated that they did thereby associate themselves together for the purpose of conducting at Bristol, New Hampshire, the business of manufacturing, by machinery, knit hosiery and other goods, under the laws of Ohio in such cases made and provided, and they thereby declared: First, that the name of the association, and by which the corporation should be known, "is the Merrimac Hosiery Company"; second, that the capital stock of the corporation should be $50,000, divided into fifty shares, of $1,000 each; third, that the principal office of the company "is situate in Cincinnati, Hamilton county, Ohio;" fourth, that the manufacture of such goods should be carried on at Briston, New Hampshire; and fifth, that the annual meeting of directors should be held on the first Monday of July in each year.

At the time the claim of the plaintiff, on account of which said notes were afterwards given, which was against the Merrimac Hosiery Company, arose, there was $38,000 stock taken, of which said Thomas owned $28,000, Woods $5,000, and another person $5,000, and at said time, and ever since, Woods was and has been the only solvent stockholder.

The plaintiff—that is, his firm, consisting of himself and his son, Cyrus G. Beebe—became the creditors of said company to the full amount of the notes now sued on, less the lawful interest on such debt, which is included in said notes.

The Merrimac Hosiery Company became a bankrupt, went or was put into bankruptcy, and its property sold and distributed among its creditors, except the plaintiff, by the assignee appointed in such bankruptcy proceedings.

The co-partnership of Beebe & Son, the name of the firm being Lucius Beebe, sued the hosiery company as a foreign corporation, in foreign attachment, serving it by publication, and obtained a judgment against it for their debt, in the supreme judicial court of New Hampshire, in November, 1872. They did nothing further, as the bankruptcy superseded their remedies upon their judgment.

Stockholders of manufacturing corporations, carrying on the business of such manufacture as the Merrimac Company was formed to do, in Ohio, are individually liable for the corporate debts, contracted while they are stockholders, to the amount of their stock. To ascertain and enforce such liability, a creditor of the insolvent corporation must sue all the stockholders who were such when his debt accrued, and have all the creditors of the corporation brought in that all the debts may be ascertained, and the money paid by all the stockholders divided among the creditors equally, in proportion to the amount of their respective claims; a single creditor cannot sue and recover from a single stockholder on account of the latter's individual liability.

The amount of the unpaid debts of the Merrimac Company is not proved in this case, but, exclusive of Beebe's claim, they are admitted to be more than $5,000—the amount of Wood's stock, and less, with Beebe's claim, than the amount of Thomas' stock, to which amount he is individually liable, and the other stockholder's shares, $5,000, will not change the above amounts of liability of Woods and Thomas.

After such bankruptcy of this company, Beebe procured the promissory notes sued on, at Indianapolis, from Thomas, the maker, with the understanding between them that if Woods would endorse them, Beebe would accept them for the debt, but not otherwise. Beebe came to Cincinnati, where, in the absence of Thomas, he saw Woods, who admitted his individual liability for the debts of the company to the extent of $5,000, and he agreed to endorse the notes if, in case he had them to pay, the amount should go to the liquidation of so much of his individual liability of $5,000, to which Beebe assented, and Woods indorsed the notes. As embracing such understanding, Beebe executed to Woods the following:

"Cincinnati, March 5, 1873.

"We have this day received of Mr. Wm. Woods a consideration to the amount of thirty-two hundred and fifty-four 40-100 dollars ($3,254.40), in full settlement of our claim against him as a stockholder in the Merrimac Hosiery Company, and he is therefore entitled to a credit of that amount on his liability as a stockholder in said company. LUCIUS BEEBE."

On May 6, 1875, James H. Laws & Co., judgment creditors of said Merrimac Hosiery Company for more than $1,000, brought suit in this court, which action is still pending, against such company and the stockholders thereof, including Woods, to enforce the individual liability of the stockholders, and praying, among other things, for the appointment

of a master, to ascertain all the stockholders, their names and places of residence, the transfers of stock, to whom, and when made since the organization of the company, and, also all the debts of the company, their dates, amounts and to whom owing; and, also, what assessments, and upon whom to be made, will be necessary to pay such debts, etc.

Such master has been appointed, but as yet has not made a report to the court. The plaintiff has hitherto and still declines to become a party to such suit, or to claim as a creditor of such company, relying on the notes sued on in this case.

On the date the notes were endorsed by Woods; and the writing above set out given to him by Beebe, the latter promised Woods that he would prove the Beebe claim to the assignee in bankruptcy of the Merrimac Company, and credit the dividends paid upon it upon the notes so endorsed by Woods, which he wholly failed to do; but, upon the evidence, we are not able to find that such promise was part of the consideration on which Woods endorsed the notes, as it may have been subsequent to and independent of such agreement and indorsement.

Whether Woods will ever be required to pay more than the Beebe notes, we have no means of knowing.

1. The plaintiff claims that the Merrimac Hosiery Company was but a co-partnership, composed of the so-called corporators and stockholders, as there was then no law of this state authorizing its citizens to form corporations for such manufacturing as the certificate in this case provided for. S. & S., 166. He, therefore, claims that these are the notes of two of the partners for the debts of the firm. As the plaintiff dealt with the company as a corporation, as he sued and obtained judgment against it as an Ohio corporation, and as he dealt with Woods as a stockholder, having only the liability of a stockholder, and to discharge which to that extent the notes were given and accepted, we think the plaintiff is estopped to deny as against Woods in this action that such company was a corporation.

2. Woods did not indorse for Thomas, whose admitted liability as a stockholder was more than all the debts of the company, including that of Beebe, as Thomas's security; but he endorsed for Thomas upon the express written agreement of Beebe that if he should pay the notes, such payment should satisfy so much of his, Woods's, liability as a stockholder, arising upon all the debts of the company. Beebe accepted the endorsement of Woods upon such express agreement, the effect of which is, that Woods is not to pay in all for the company's debts more than $5,000, the amount of his stock. As other creditors are not to be affected by such agreement, it must be held to be an agreement by Beebe with Woods that all that Woods may have to pay above what he would be obliged to pay had no such agreement been made, Beebe will repay to him. This is the only remedy Woods secured to himself when he endorsed these notes for Thomas to Beebe, instead of requiring the latter to resort to legal proceedings to fix the amount of his liability. We now and here have no means of knowing what amount Woods would have been compelled to pay to the creditors of the company, as such stockholder, if he had never endorsed these notes; nor what other creditors than Beebe can or may compel him to pay.

We think, therefore, that the plaintiff should have a judgment for the amount of the notes, with interest and costs, to which the following

should be added and incorporated as part of the judgment which finally determines the rights of the parties upon the pleadings and evidence: "But it is further ordered and adjudged by court, that, in case the said defendant, William Woods, shall, by the creditors of the Merrimac Hosiery Company, be compelled to pay a greater sum, on account of his individual liability as a stockholder of such corporation, than he would in law, have been legally bound to pay had not the said promissory notes been endorsed by him, and had the plaintiff received from said Woods the portion of his claim for which said Woods would have been individually liable as such stockholder, then said Woods shall be entitled to recover from said Beebe all that he shall have paid to said Beebe above the sum he would have been legally bound to pay to Beebe and the other creditors of said company, had not said notes been endorsed by him.

The reason for this qualification is, that by Beebe's receipt to or agreement with Woods, Beebe took the notes, expressly agreeing that they would entitle Woods "to a credit of that amount on his individual liability as a stockholder in said company," and as this agreement could not affect creditors other than Beebe, it would be meaningless, unless it be held a guaranty by Beebe that it should entitle Woods to such discharge, *pro tanto*, and if the notes should be paid to him by Woods, he would hold Woods safe against increased liability on account of such payment to him.

The defendant's pleadings are mere legal defenses, and as such, will not warrant the addition suggested to be incorporated with the judgment. They may be made to conform to the facts which we have found to be proven, and the prayer for general relief added, and in the form of cross-petition for relief the rights of the defendant found.

Hoadly, Johnson & Colston, for plaintiff.

Hagins & Broadwell and D. M. Hyman, for defendant.

COUNTER-CLAIM—HUSBAND AND WIFE. 110

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

JOHN BECROFT AND ANNA, HIS WIFE, v. A. DOSSMAN, JR., ET AL.

1. It is not error to refuse to consider a counter-claim on which the defendants have already instituted an independent suit then pending.
2. To obtain a judgment against a married woman on a note made by her jointly with her husband, it is necessary to aver that it was given to benefit her separate estate, and a judgment against her, in the absence of such averment, will be reversed, it being presumed, in the absence of a bill of exceptions, that the evidence did not extent beyond the allegations of the petition.

ERROR to the Common Pleas.

JOHNSTON, J.

The plaintiffs in error were sued by Dossman on a note executed by them in favor of L. W. Henke, for $200. The latter having indorsed the note to Dossman before maturity, Dossman instituted a suit before a magistrate against Becroft and wife, and Henke, as endorser. It was appealed to the common pleas, where judgment was rendered against

Becroft and wife, and the case was dismissed as to the endorser. This petition in error is prosecuted by Becroft and wife.

A bill of exceptions was not taken at the trial below, and this court is asked to reverse the judgment for errors appearing on the face of the record. In the common pleas, Anna Becroft demurred to the petition, for the reason that as against her, she being a married woman, a personal judgment could not be taken. That demurrer was sustained. No sooner had her counsel succeeded in getting her out of court, than he put her in again by uniting her with her husband in a joint answer and cross-petition against Dossman and their co-defendant, Henke, in which answer they denied liability, and averred that the note was not transferred before maturity, but to prevent a counter-claim being set up against him for $2,100. The result was that the court gave judgment on the note against Becroft and wife, and finding against them on the counter-claim, for the reason that they had already instituted a suit then pending against Henke to recover on the same cause of action in the superior court.

As to J. Becroft, the husband, this court was unable to find any error that would authorize the judgment to be set aside as to him. Undoubtedly the court below did right in not considering the answer and cross-petition, and remitting the parties to their action in the superior court.

The law has been, until recently, unsettled as to rights and liabilities of married women. It was claimed that by section 28 of the Code, as amended in March, 1874, the right of a married woman to contract, and to be held on her obligations as though she were *femme sole,* was enlarged, but the supreme court has decided in a case that was sent up from this county, that the amendment did not enlarge the rights of married women to make contracts, but only affected the form of remedy against them; and in that decision, 26 O. S., 527, it was held that in a case where a woman was sued on a note of hand jointly with her husband, not only was it necessary to prove that the note was given to benefit her separate estate, or in connection with it, but that the fact should be averred in the petition. Notwithstanding, therefore, the record presents the fact that the case was heard on the pleadings and evidence, we are to consider that the evidence did not extend beyond the allegations in the petition, and the petition failing to allege that the note the wife signed in conjunction with her husband was given for the benefit of her separate property, or had any connection therewith, the court below erred in giving judgment against the wife, and it will therefore be reversed as to her. As to J. Becroft, the judgment will be affirmed.

Blackburn, Dustin & Shay, for plaintiffs in error.

J. B. Von Seggern, for defendants in error.

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113 **FIRE INSURANCE.**

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

*WM. WALL V. COMMERCIAL INSURANCE CO.

1. Where a mortgagee procured insurance on his interest, and, the mortgage having been paid off by the plaintiff, who bought the property, transferred the policy to such owner, the company assenting to the assignment, but with-

*See opinion in Wall v. Insurance Co., *post* 2 Bull. 333.

out being notified that it was on a fee and not on a mortgagee's interest, the policy cannot be enforced.

2. A company insuring a mortgagee is, after payment of loss, subrogated to the mortgagee's claim against the mortgagor; it therefore makes a material difference whether they insure one as the owner or as mortgagee, and on being asked to consent to an assignment of the policy, are not obliged to inquire what the assignee's interest is, but may presume it to be the same as that of the assignor.

O'CONNOR, J.

The plaintiff recovered a verdict at special term, and a motion for a new trial was reserved to this court.

A party named Gillespie, holding a mortgage on mill property in the neighborhood of Piqua, Ohio, was insured by the Commercial Insurance Company to the amount of $1,100, the policy stating expressly that it was his mortgage interest that was insured. Shortly afterwards Wall bought the property and paid off the Gillespie mortgage, and thereupon Gillespie assigned his interest in the policy to Wall, leaving the name of the latter blank. Application was made to the company, through a broker or agent of Wall for their assent to the assignment, and thereupon they endorsed their assent on the policy. It was claimed in behalf of the company, that as the interest of Gillespie had been cancelled by the payment of the mortgage, he had no interest to transfer, and when Wall applied for the insurance, he had not informed the company that he had become the owner, and, therefore, the effect would be that he would be taking out a general insurance, as owner, instead of a special insurance as mortgagee.

If it were not for a further consideration, it would be immaterial to the company whether they insured Wall as owner or as mortgagee. The weight of authority seems to be that where the interest of a mortgagee is insured, and the loss is paid by the company, then the company is subrogated to the rights of the mortgagee against the mortgagor. It made a material difference, then, to the company whether they insured Wall as owner or as mortgagee. If they insured him as owner, they would have no right of subrogation over against the mortgagor. If they insured him as they previously insured Gillespie, they would have the right to collect from the original mortgagor the debt due to the mortgagee.

In the opinion of the court, the company was not bound to inquire of the agent of Wall what interest Wall had in the property, the presumption being that they were requested to do for Wall what they had previously done for Gillespie—to insure his interest as mortgagee. Upon the whole case, the court was of the opinion that the company could not be held under the insurance to pay Wall.

New trial granted, and the case remanded to special term.

Judge Tilden stated he did not concur in the opinion of the majority of the court.

Moulton & Johnson, for plaintiff.

Lincoln, Smith & Stephens, for defendant.

113 **NEW TRIAL.**

[Superior Court of Cincinnati, General Term, January, 1877.]

O'Connor, Tilden and Yaple, JJ.

CLARK v. DELORAC.

Where a defendant has been in default for six or eight months, when his case is tried and a verdict rendered against him in his absence, it does not make a case for a new trial under Code, section 534, on the ground of unavoidable casualty and misfortune, to aver that he was not aware of the trial, and on the next day made a motion for new trial, which was called and continued and on the next motion day, being the last of the term, a messenger was sent up to inquire and was told by the clerk that no court would be held, in consequence of which his attorney did not appear, and the court sat and overruled the motion. The only misfortune was that the attorney acted on incorrect information. Such petition for new trial is demurrable.

O'CONNOR, J.

This case was before the court on reservation of a demurrer to the petition of Delorac, the object of the petition being, under section 534 of the Code, to set aside a judgment after the term at which it was rendered. Delorac set out that by unavoidable casualty and misfortune he was prevented from making a defense to the action.

The record showed that for six or eight months Delorac was in default for answer, and the case coming up for trial on December, 1874, resulted in a verdict for Clark. The petition of Delorac set forth that from November, 1874, to January, 1876, he was confined to bed by sickness, and was not aware that the case had been tried: that on the same day the verdict was rendered, a motion was filed for a new trial by his attorney, on the ground that the damages were excessive, etc. The following Saturday the motion was called and continued, and on the next Saturday, the last motion day of the term, it was again called, and not being answered by Delorac's attorney, judgment was entered on the verdict. On the morning of the last motion day, Delorac sent a body to the court house to enquire of the clerk whether motions would be heard that day, and he was informed there would be no court held, and upon that information the attorney made no appearance. The court, however, was held, and the motion disposed of.

The only unavoidable casualty or misfortune which the court could discover was the incorrect information received by the attorney through his messenger. There was no casualty or misfortune which prevented the filing of an answer for six or eight months; nor does the petition show any unavoidable casualty or misfortune which prevented the attorney from being present at the trial so that the only misfortune was that the attorney acted on incorrect information.

A judgment is too serious a matter to be set aside for the mere convenience of an attorney. It would have been no great hardship for the attorney to have come to the court house himself and ascertained definitely whether the court would be in session or not. The petition did not make out such a case of unavoidable casualty and misfortune as was contemplated by section 34 of the Code, and the demurrer of Clark would therefore be sustained, and judgment rendered.

John Johnston, for Clark.

C. H. Blackburn and N. E. Jordan, for defendant.

JUDGMENT—SCHOOLS. 114

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

STATE OF OHIO EX REL. O'HARA V. BOARD OF EDUCATION OF SYMMES TWP.

A judgment having been had against a township board of education, and the statute forbidding a levy on school property, but there being a balance in the hands of the treasurer to the credit of the sub-district which contracted the claim, a peremptory mandamus will be issued to the board to instruct its treasurer to pay the same.

Application for a mandamus to compel the defendant to pay to the relator $24.75 for nine days' service as school teacher, and $21 as the costs of a proceeding in aid of execution.

JOHNSTON, J.

The relator had pursued his legal remedies complete, and prosecuted his claim to judgment, and that judgment was twice affirmed, and yet he is met by the statute governing common schools, which forbids a levy on any property belonging to the common schools; so that he must resort to the remedy of mandamus or be without remedy. The money was due for services performed, and it was no answer to say that the defendant had not money in his possession to pay his claim. The evidence shows that after he ceased to teach and was paid all that the local directors conceded that he was entitled to, there was still in the hands of the treasurer of the township to the credit of the subdistrict over $100, and out of that he was entitled to receive his claim of $24.75. His right has been established by the decision of three courts, and the local directors not having instructed the payment of the claim. and there being no power to sue them, this court is of the opinion that the board of education should be compelled by a peremptory writ of mandamus to instruct its treasurer to pay his claim and the costs.

Buckingham & Palm, for relator.

A. J. Cunningham, for respondent.

OFFICE AND OFFICER. 114

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

STATE EX REL. ATKINSON V. BOARD OF POLICE COMRS. OF CINCINNATI.

Under an act (73 O. L., 70), constituting a board of police commissioners, and transferring to them from the mayor "the police organization and discipline," and repealing the former act, if the existing organization was transferred to the new board, it was the organization as composed of members of the force at the time, and if a member had been previously improperly discharged, mandamus will not lie against the new board to increase the force by reinstating him.

AVERY, J.

This is an application for a peremptory writ of mandamus against the present board of police commissioners, an alternative writ having been issued by consent, without examination, at the last term of the

court. The relator was a member of the police force under the old board, and when the board was abolished, and the mayor succeeded to the control of the police, he was discharged, as he alleges, without just cause, and without any charges in writing being preferred, or opportunity afforded of his being heard in his defense.

The act appointing the old board of police commissioners gave them entire control of the police force of the city, with full power over the police organization, government and discipline, and the same rights in respect to appointments and removals that had up to that time been exercised by the mayor. It is further provided that the police force organized under the act should be appointed by the commissioners in such numbers not exceeding a certain limit, as might be asked by them and fixed by ordinance of council; that the appointments should be made during good behavior, and no removal be made until written charges were made and notice served on the person charged. The act abolishing the old board provided that the mayor should have control of the police organization and discipline, with all the powers in respect to appointing and removing conferred by the act, and that the appointments should continue during good behavior. The act appointing the present board provided that they should have full power over the police organization, government and discipline, and the same power in respect to removals and appointments as had been vested in the mayor, etc.

As each of these acts repealed the preceding act, it was claimed on the part of the defendant that each repeal vacated the preceding appointments, so that the restriction in respect to removals in each act would apply only to the appointments made under that act. On the part of the relator it was urged that by this construction, each repeal would leave the city without police force until the new appointments were made, and attention was called to the provision that the mayor or police commissioners, as the case might be, should have control of the police organization, from which it was argued that the police organization passed as a body from the old board to the mayor, and from the mayor to the present board. The words are "police organization and discipline," which would seem to make organization refer rather to the mode of organizing than to the body itself. But admitting the argument, the extent of it would be that the organization as existing at the time, is meant. Taking it to be true that the relator was improperly discharged by the mayor, he had ceased to be a member of the police in fact, and was not a member, in fact when the present board came into office. If the existing organization was transferred to the present board, that organization was composed only of those who were members of the force at the time. If the force were too small, the commissioners might fill it up by appointments; if it were large enough they might leave it as it was. They could not be compelled to increase it because at some previous time it had been larger; or to reinstate a man because at some previous time he had been a member, even though he had been improperly discharged. The writ will not lie against the present board of commissioners, even if the relator had been improperly discharged by the mayor. The question, therefore, whether he was improperly discharged or not, will not be discussed.

The writ will be dismissed at the cost of the relator.

McDowell & Strafer, for relator.

H. D. Peck, for respondent.

*NOTICE OF APPEAL.

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

*TAYLOR v. WALLACE.

1. When an act requires that a notice of appeal in an election case shall be filed within twenty days from a certain time, and that day falls on Sunday, Sunday cannot be excluded so as to give until the next day. The rule of the Code is an exception, and only applies to proceedings provided for in the Code itself.
2. Notice of appeal handed to the clerk at his private residence is not a filing, and though entered on the appearance docket the next day as of the preceding day, this is not conclusive, and does not give the appellate court jurisdiction when the time for filing expired on the preceding day.

AVERY, J.

The election law provides that the clerk of the court of common pleas and the two justices whom he takes to his assistance to make an abstract of the returns, shall declare the person having the highest number of votes for sheriff duly elected, subject to appeal to the court of common pleas; provided that notice

The plaintiff in error was a candidate for sheriff at the last October election, court of common pleas. The court below decided that the appeal was too late and the defendant in error being declared elected, he sought to appeal to the and dismissed it, whereupon this petition in error was filed.

of appeal to said court shall be entered with the clerk thereof, within twenty days from the date of declaring it. The declaration of the election in question was dated October 14, and the abstracts were completed, and the footings and the statement of the result made by the clerk on that day; but it was not known to the justices nor was the declaration written out and signed by the clerk and the justices until Monday October 16. Taking October 14 as the day from which to count the time for appeal, it would expire November 3; taking the 16th of October as the day, the time would expire November 5.

On November 3, at half-past 5 o'clock, as the janitor of the clerk's office was about closing up, and the clerk and his deputies had gone home, a young man presented himself with papers from the law office of counsel for Taylor, for filing, which the janitor took and placed, he says, upon the desk of the deputy clerk, and afterward in a pigeon-hole above the desk. The next day, between four and five o'clock in the afternoon, the deputy received a note from the office of counsel, stating that a notice of contest and appeal had been sent up the previous day, and requested the deputy to look the matter up. Not finding the papers, the deputy, when he closed his duties for the day, went to the office of counsel, and met one of the members of the firm, and, after a conversation in which the deputy was requested to go back and search again in the clerk's office, he suggested that they had better see Trevor, the clerk, and the two went to the private residence of Mr. Trevor. Here, upon information that the declaration had, in fact, been made on the 16th of October, a notice of appeal was written out and handed to Trevor a little after 6 o'clock in the evening, and he endorsed it upon the back as filed that date, and put it in his pocket, where it remained until Monday morning, when he placed it upon the files of the clerk's office to be docketed, and it was docketed as of the date of November 4. Meanwhile Trevor, upon Sunday, had visited the clerk's office and examined the pigeon-holes of the desk of the deputy clerk, where papers left for filing were ordinarily kept, and the deputy himself for the last few days of the week, and another deputy, who occupied his desk in his absence, had been especially observant of papers about that desk, because they were expecting to receive a notice of the contest, and the matter had become the talk of the office.

*The decision in this case was affirmed by the supreme court. See opinion, 31 O. S., 151.

Upon Monday morning, the deputy clerk going to his desk, discovered at the first glance, in a pigeon-hole used for old papers, a rubbish box as it was called, some new papers, which, upon examination, proved to be the notice of contest and a notice of appeal in this case. The deputy testified that he did not think those papers were there before; that he could not say how they had come there, and he was positive that they were not there before. The janitor, who filed the affidavit said that he received the papers from the young man, was not called to state in what pigeon-hole he placed them, nor did the young man state what the papers were, except that they were papers in the election cases.

Whether the papers that were left by the young man were the papers that were afterwards found by the deputy clerk, and whether a notice of the appeal was left at the clerk's office on November 3, were questions of the weight of the evidence and were questions exclusively for the court below. The court having found against that notice, the only notice left to be considered is the notice that was handed to Trevor, the clerk, at his private residence, on the evening of November 4.

Two questions arise—first, whether a difference between the date named in the declaration of the clerk and justices and the true date may be shown in favor of a party who had no knowledge of the difference, and who was induced thereby to delay filing of the notice, and second, if so, whether the notice handed to the clerk at his residence was a notice entered with the clerk.

Under the first question, all the members of the court are not prepared to concur in an opinion; upon the second they all concur. To enter a notice of appeal with the clerk requires that the notice should be left at the office of the clerk, with the clerk himself, or his deputy, for entry. This is the natural force of the words: "enter with the clerk." The notice is not to the clerk personally, and, therefore, does not depend upon his acceptance at some other place than his office. It is a notice to whom it may concern, a public notice, and therefore the place must be public; not the private residence of the clerk, but his office. It is the beginning of a legal proceeding in the court of common pleas, and, therefore, must fall under the rule that all proceedings of the court must be begun in the office of the clerk of the court. If entering notice with the clerk is to hand a notice to the clerk at his private residence, then the proceeding would be begun there, and the case would be pending in the court of common pleas before the papers had come to the clerk's office, and while the clerk was carrying them about, no matter for how long, in his coat pocket. The notice of appeal was entered on the appearance docket as of November 4, but the appearance docket is not conclusive. Jurisdiction over the appeal is a question of time; and when the clerk, upon his docket, makes an entry of time, contrary to fact, proof of the fact is not shut out.

The day when this notice should have been entered, taking the 16th of October as the day of declaration, was November 5, which was Sunday; but this does not exclude that day so as to give until the next day. Where a statute directs that an act shall be done within a certain time, Sunday, cannot be excluded from the computation, although it be the last day of the time. Paine v. Mason, 7 O. S., 198. The Code provides that if the last day be Sunday, Sunday shall be excluded; but the rule of the Code is an exception. The Code applies to those proceedings only, which are provided for in the Code itself. Thus, under the Justices' act, where transcripts for appeal must be filed on or before the thirtieth day from the date of the judgment, it has been held in a late case decided by our supreme court, McLees v. Morrison, 29 O. S., 155, that if the thirtieth day fall on Sunday, it is too late to file a transcript on the succeeding day.

The judgment of the court of common pleas, dismissing the appeal, will be affirmed.

Buchwalter & Campbell, and S. W. Warrington, for the plaintiff.

Hoadly, Johnson and Colston, for defendants.

HUSBAND AND WIFE—PLEADING. 122

[Hamilton District Court, April Term, 1877.]

ELIZA A. KURTZ v. MARRY E. MURRAY.

1. A petition to recover a judgment against a married woman need not describe any specific separate property, because it is not necessary by decree to subject any, for now execution goes against any or all separate property; but it must aver that she is the owner of separate property, to warrant judgment by default.
2. A petition averring that said goods were bought for her mercantile business, in which she was engaged on her own account, does not necessarily imply that she was the possessor of her separate property.

This was a petition in error to reverse a judgment rendered by default in the common pleas. The plaintiff in error is a married woman, and the action was upon an account for goods sold and delivered to her.

After making the usual allegations in a petition on an account, the plaintiff adds: "The defendant is a married woman, but said goods and merchandise were purchased for defendant's mercantile business, and were used therein, in which business she was, at the time, engaged of her own account." There being no answer, judgment was rendered by default. The plaintiff in error alleges the judgment should have been for her.

BURNET, J.

This case, probably, stands on the confines of the rules of pleading in cases against married woman, and it has been difficult to determine whether, upon the allegations, a judgment might be rendered against a married woman. At common law, a married woman can make no contract on which a personal judgment could be obtained against her. In equity, however, where the contract was made for the benefit of her separate property, or on the credit thereof, and was for her benefit, the chancellor would by decree charge her separate property, and work out the redress for the party with whom she had dealt. Our statute law, in 1861, and in 1866, enlarged the rights of a married woman in the control over her separate property, and also declared that to be her separate property which was not so before, and has given to the common pleas jurisdiction in a proper case by decree to authorize a married woman to make contracts in the same manner as if she were a *femme sole*, on which she would be liable as such, and have the right to sue. These were the amendments, the innovations introduced into the law governing the rights of married women, and for the purpose of obtaining redress from them. In 1874 the act was passed amending section 28 of the Code. The Code is an act governing the practice of the courts, and providing the methods of procedure in civil actions, and, as the supreme court has held, this amendment has reference only to the methods of procedure against a married woman in cases in which she might make her property liable. It gave no new rights of contract for or against her, but simply indicates the methods by which the rights already subsisting might be worked out. Where she is made a party, her husband must be joined with her, except where the action concerns her separate property, or is brought to set aside a deed or will, or grows out of mercantile business, etc., in which cases she may sue or be sued alone, and in every such case

her separate property is liable to the same extent as if the judgment was rendered against the husband. Under the old chancery practice it was necessary, in the case of a sale of goods to a married woman, not only to allege that she had separate property and intended to charge it, but also to set out a full description of the property alleged to have been charged, which the chancellor by decee subjected, by sequestration of its rents or otherwise, to the payment of the debt. Under the present law it is none the less necessary to aver the possession of separate property, to show the right on her part to incur the debt; but it is not required to set out a description of any specific separate property, because it is not necessary by decree to subject any. For now, upon the rendition of a judgment, execution goes upon the praecipe of the plaintiff, against any or all of her separate property. But in the absence of an averment that she is the owner of separate property, the petition is held to be bad. In this petition there is no such allegation. It was claimed, however, that it was necessarily to be inferred from the allegation that is made, that the property was sold to her to be used in her mercantile business in which she was engaged on her own account. It appears to the majority of the court that the fact that she was engaged in a mercantile business, does not necessarily imply that at the time the goods were sold to her she was the possessor of separate property. The petition is bad for want of the averment that she was the owner of separate property at the time the goods were sold, and, therefore, a judgment rendered by default on the petition, was erroneous.

Judgment reversed.

Healy & Brannan, for plaintiff in error.

J. Johnston contra.

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122 **LANDLORD AND TENANT.**

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

M. S. FORBUS v. DANIEL COLLIER.

To constitute an interference with a tenant which will be a defense to an action for the rent or part of it, the act must be the landlord's, or in some way chargeable to him. Therefore, where property was leased with the right to use a roadway on an adjoining strip, and afterward the lessor granted the use of one end of the strip to a third party, who, in excavating, caused the road to slip, and it remained in that condition for several months, this does not constitute an eviction. One leasing part of his property, does not hold the rest at the risk of being made chargeable for invasion of his tenant's rights by his subsequent grantees.

PETITION IN ERROR.

AVERY, J.

In 1872 Forbus leased to Collier and Daggett for ten years certain wharf property near the foot of Horne street. The property was in two pieces, separated by a strip belonging to Forbus, over which there was a roadway, the use of which was granted by the lease. Collier assigned his interest in the lease to Daggett in 1874, and Daggett remained in possession until June, 1875, when, having failed in business, he aband-

oned the premises, and they lay vacant for two or three months, until they were taken possession of by a third party, who, though he went on the premises, in the first place without permission, has since been sued by Daggett for rent, and so far recognized as a tenant. In the early part of 1875, Daggett being still in possession, Forbus granted all his title in the intervening strip to the trustees of the Cincinnati Southern railroad as a place of deposit for bridge material, and when the use was over, the ground to revert to him, except a parcel sixty feet wide by thirty deep. While excavations were being made for one of the piers of the bridge, the bank slipped and the roadway was carried away and remained in that condition for a period of several months after Daggett had abandoned the premises, and up to the time of the action brought by Forbus in the common pleas. The action was for rent during this interval, and the defense of Collier, he being the only person who was served, was that the destruction of the roadway was an eviction. The court of common pleas rendered judgment in his favor.

Eviction, in the strict sense of the term, is to enter upon lands and expel the tenant. If the tenant held under a lease, and eviction is from part by a third person by title paramount, the rent will be apportioned; but if it is by the landlord himself, he cannot apportion his own wrong, and the entire rent will be suspended unless there be a new agreement. Whether possession retained by the tenant of the remaining part is evidence of such agreement, or whether an action will lie for use and occupation, is a disputed question which it is not necessary to discuss. After Collier assigned his interest, he had no use and occupation, and if liable at all, it is only upon the covenants in the lease. The earlier cases hold the doctrine that, to constitute an eviction, entry and actual expulsion must appear; but the modern authorities are to the effect that if the tenant loses the enjoyment of any part of the leased premises by some act of the landlord of a permanent character, done with the intention of depriving him of the enjoyment, it is an eviction. 17 C. B., 32; 63 Ills., 430. The question of intention is to be determined by the facts and circumstances of the particular case, but the act must be the landlord's, or in some way chargeable to him. The excavation by which the road in the present case was carried away, was not made by Forbus, the lessor, for the bridge materials; but these materials did not obstruct the road, and his grant being only of his right, title and interest, was subject to the roadway. The specified parcel of ground, sixty by thirty feet, did not include the roadway, nor was he chargeable with the erection of the pier that the trustees undertook, much less with the manner in which they did that work. If it was his object to enable them to erect that pier, he did not compel them to do it, nor retain in himself any control over it. By leasing the road over the strip, he did not deprive himself of the use of what remained of the strip. How can it be said that a man leasing a portion of his lands, shall only grant away the remaining portion at the risk of being made chargeable for whatever his grantees may do in invading the rights of his tenant? Action of the court below reversed, and judgment given for the rent accruing in June, September, and December, 1875, with interest.

W. G. Porter, for plaintiff.

Matthews, Ramsey & Matthews, for defendant.

125 MORTGAGE.

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

LANGHORST, ASSIGNEE v. SHUTTELDRYER & CO. ET AL.

Where a mortgage is intended for a certain creditor, but the name of the grantee is not inserted before delivery, but the name is inserted after execution at the time of delivery, at the request of one mortgagor, with the acquiescence of the other, this, though not binding on their wives, who had not authorized its insertion, is binding on such mortgagors and their creditors after record, though the authority to insert the name was given by parol.

LONGWORTH, J.

This cause comes into this court by appeal from final order by the court of common pleas.

The original action was begun by the assignee, for the sale of real estate, to satisfy claims against his assignor. The defendant Springmier filed his cross-petition February 8, 1876, setting up a certain claim upon the property, for money advanced by him to the firm of Shutteldryer & Co., and secured by mortgage upon the premises in question.

To this cross-petition a reply was filed, denying the validity of the mortgage, and averring that the same was wholly without consideration, and had never been executed as the law provides mortgages shall be executed. It appears from the testimony, that the mortgage was draughted by William F. Gray, and signed by Shutteldryer and his wife at the house of Mr. Shutteldryer, and by Schuacker and wife at the house of Schuacker. Mr. Gray was present on both occasions.

The mortgage was properly witnessed, attested and acknowledged; but there is some doubt, from testimony, as to whether it contained the name of any grantee. Springmeir had advanced to Shutteldryer & Co. a sum of money fully equal to the consideration secured in the mortgage, upon the promise of the firm to make such a mortgage as the one in question, to secure the payment of it. We think that this mortgage was, without doubt, drawn with the intent to furnish security to Springmeir. A day or two after the mortgage was executed, it was taken to the sheriff's office, (Springmeir being sheriff of Hamilton county), and handed to Mr. Overaker, the chief deputy, by Mr. Shutteldryer, in the presence of Mr. Springmeir, and Mr. Overaker was requested by Mr. Shutteldryer to insert the name of Springmeir as mortgagee, which was then done, and Springmeir requested Overaker to have the mortgage recorded.

Mr. Overaker says that the name in pencil was not written by him, and we think that perhaps the name was written in pencil at the time that the mortgage was executed and acknowledged.

Those who signed the mortgage are positive in their testimony that the scrivener, Mr. Gray, in reading the mortgage to them before signing, read the name of Springmeir once, if not oftener, and it is certain that the intention of the parties in executing the mortgage, was to make the mortgage to Springmeir, to secure him for his indebtedness.

The mortgage was not delivered for record until some months had passed, owing, as Overaker says, to his forgetfulness; but was delivered

for record on the 6th day of October, 1875, five days before the assignment of Shutteldryer & Co. to the plaintiff.

The important question that arises is, whether this mortgage is a legal mortgage or lien upon the premises in dispute, so as to have priority over the unsecured claims of creditors represented by the assignee.

Admitting that the name of the grantee was not inserted until after the execution of the mortgage, and then inserted by Overaker at the request of one of the mortgagors, and with the acquiescence of the other, we think that such filling in of the name is sufficient to make a valid mortgage.

In the case of Drury v. Foster, 2 Wall., p. 33, the supreme court of the United States uses the following language: "Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient." And in the case of Burnside v. Wayman, 49 Mo., 356, it is decided, that where the name of the trustee in a deed of trust was omitted in making out the deed, but the grantor gave the *cestui que trust* verbal authority to fill up the blank with the name of some suitable person, a court of equity has the power to reform the instrument and supply the name of the trustee.

We think the law at the present day recognizes the validity of a power granted by parol to supply such an omission in a sealed instrument.

Although, unquestionably, the wives who executed this mortgage, (the name of the grantee being in blank) are not bound by the subsequent action of their husbands in causing the grantee's name to be inserted, yet their rights are inchoate, and cannot be asserted until they have accrued, being simply dower interests.

Their husbands have executed a mortgage fully as against themselves, as though the name of the mortgagee had been written in the mortgage in ink at the time they signed it.

It is, therefore, unnecessary for us to determine the fact as to whether the name was written in pencil at the time of execution, or whether such insertion of the name in pencil would have been sufficient to have made the mortgage valid and complete in the first instance.

It is sufficient that parol authority was given to insert the mortgagee's name before the delivery, and that under the law, such parol authority may rightfully be given, and that, under such authority, the name was written. The mortgage to Springmeir being, therefore, valid, and taking effect from the time of its record (October 6, 1875,) and being a lien prior to any claim of creditors represented by the assignee, must be first paid out of the proceeds of the realty sold.

Judgment accordingly.

INCORPORATED SOCIETIES. 125

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

STATE EX REL. SHAEFER v. AURORA RELIEF SOCIETY.

Though the constitution of an incorporated society for the relief of sick members, but which is not shown to have any property, only provided for expulsion for non-payment of dues, or misrepresentation as to age, such society has inherent power to expel for offens- against the duty of a member

as a corporator, and where one of the essential qualifications is that the members shall comply with their duties as Catholics, though on doctrinal points his duties to the church may not be submitted to the society; yet, on a question of the common duties of morality, it is different and if his qualifications in this particular are, on admission, required to be submitted to the society, there is no reason why that supervision should not, within certain limits, continue. Mere informality in the mode of proceeding, the constitution being silent as to the mode, and the member having notice to defend, though a copy of the charge, which were idleness and drunkenness, and sentence to the workhouse for abuse of family, was not served on him, will not warrant interference by mandamus to compel his re-instatement.

AVERY, J.

The defendant is an incorporated society for the relief of sick members and the support of the families of deceased members. The articles of association provide, that any German Catholic between the ages of twenty-one and fifty-five years, who has complied with his duties as a Catholic, and has no bodily infirmity, may become a member on application and on the report of a secret committee appointed to investigate the condition of his health and morality. Each member, during sickness, shall receive five dollars per week, provided the sickness is not caused by his own fault or immoral conduct, and in case of his death, if he has been a member six months and lived up to his obligations, his family shall receive $500. The duties of members are to pay monthly dues and assessments that may be called for on the occasion of the death of a fellow member; and there is no provision for expulsion except for non-payment of dues, or where on application for admission, the member has misrepresented his age.

The relator, being a member, was expelled last September on a charge, as he avers, not warranted by the constitution and by-laws, and without being served with a copy of the charges, or having opportunity to defend himself. The charges were, that he was an idler, and a drunkard, in the habit of causing strife in his family, using the vilest and most blasphemous language in the presence of his wife and children, and breaking the household furniture, and that he had been convicted in the police court for abusing his family and sentenced to the work-house for sixty days. These charges were contained in the report of a committee, made at a meeting at which he was present, and postponed for consideration to the next monthly meeting, at which also he was present, when by the vote of the society he was expelled. Whether he was notified to attend the first meeting was in dispute; but at all events he was there, and heard the charges read and the resolution to postpone to the next meeting. Whether he had an opportunity to defend himself at that next meting, was also in dispute. He stated he arose to speak, but was cut off by the chairman. The weight of the testimony is, that after the charges were read, he was asked if he had anything to say, and he replied that the police court had not treated him right; but he did not desire to produce witnesses, and had nothing further to say, whereupon the society by vote expelled him.

The articles of the association being silent as to the mode of proceeding, the society was left to adopt its own mode. In proceedings to expel a member, the strictness of judicial proceedings will not be required, and mere informality, the case being one for which the society may expel and the member having notice to defend, will not warrant interference by mandamus. The only question is, whether the society had

power to expel for this cause. There is no provision in the articles of the association on the subject, but independent of any positive provision in the constitution and by-laws, a corporation has inherently the power of expulsion in certain cases, this being necessary to the good order and government of corporate bodies. The difficulty is to apply this principle. The cases for the most part, are of a negative character, where the power of expulsion was denied. Thus, in the case of the St. Patrick's Society, 2 Binney, 448, a society established for the relief of immigrants from Ireland to the United States, it was held that the abuse of one member by another did not affect the good order of the society, and the redress must be sought as provided by law in the case of private wrongs. In the case of the Philadelphia Club, 50 Penn. St., 107, it was likewise held that an assault by one member of the club on another, in the club-room, did not justify expulsion; but that was decided by a divided court, and there were circumstances showing that the assault was not altogether unprovoked, beside which the club was owner of valuable property in which the member was entitled to a share. In the case of the Massachusetts Medical Society, 12 Cush., 402, the expulsion of a member, for breach of faith in a contract selling out his practice to a fellow physician, was sustained.

All the authorities agree that in the absence of positive provision in the charter, the only offenses for which a member may be expelled, are three: First, offenses which are indictable at common law, rendering a man infamous and unfit for association; second, offenses against the duty of a member as a corporator; and third, offenses which include a violation of duty as a corporator, and are also indictable at common law. The difficulty is not as to offenses indictable at common law, for these are susceptible of easy definition; but it is in respect to offenses against the duty of a member as a corporator, and the limits and definition of that duty. The nature and purpose for which the corporation was created, must furnish the controlling consideration. In this case the corporation is a co-operative society for mutual benefit, like numbers of others, but it is something more. It is an association of German Catholics, who comply with their duties as Catholics, and this is an essential qualification for membership, a tacit condition annexed to the franchise, for the violation of which a member may be disfranchised. Whether it is a matter that should be left to the church, or is open for inquiry by the society, may be questioned. But while on doctrinal points it may well be that a member is not to be taken to have submitted the duties he owes to the church to the supervision of society, on the question of the common duties of morality it is different. Here, at least, there could be no opportunity for disagreement between laymen and churchmen, and inasmuch as the member is required, in the first instance, to submit his qualifications to the investigation of a committee appointed by the society, there is no reason why that supervision, within certain limits, should not continue. The society in this case is not shown to have any property, and the member, by losing his membership, is deprived merely of the chance of receiving future benefits for himself or family in the contingency of his sickness or death. All the means that the society will have for the payment of such future benefits, depend on future voluntary dues and assessments. These dues are contributed by members for the benefit of each other, and the essential condition is that each shall have complied with the obligation which, by the articles of association,

are assumed.

It is laid down by the supreme court that mandamus will not be awarded in the absence of a clear right of the party asking the writ to the object sought to be obtained by it. The court are of opinion that the relator has not established such a right.

The peremptory writ will be refused, and the action dismissed.

T. A. Logan and Mr. Goodwin, for society.

Glidden & Rothe, for the relator.

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126 TURNPIKES—MUNICIPAL CORPORATIONS.

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

*CINCINNATI & WARSAW TURNPIKE v. CITY OF CINCINNATI.

A municipal corporation has no power, under section 570 of the Municipal Code, to institute proceedings to condemn any less than the whole portion of a turnpike within its limits; but where the turnpike also brought a suit to compel the city to condemn the whole portion of the pike within its limits, and the two suits are consolidated, though they are not such as, under the Code, can be consolidated, yet, if the verdict finds separate values and that the second suit is just, it will be sustained.

The case came into this court upon a bill of review, under section 529 of the Municipal Code. The plaintiff was the owner of a turnpike about three and a half miles in length, extending between this city and Warsaw. The city extended its corporation limits, taking within the corporation two miles of the road. In April, 1876, the company began proceedings to compel the city to condemn that portion of the road brought within the corporation. In January subsequently, the city filed a petition, under section 570 of the Code, seeking to condemn a portion of the pike lying in the corporate limits, namely, the part between the Lower River road and the Walker Mill road. The two cases were consolidated, and the jury directed to return separate verdict, assessing the separate portions of the pike, the subject of the different suits. The jury returned a verdict, finding the value of the pike between the Walker Mill and Lower River roads at $1, finding that portion practically worthless, and also a verdict finding the value of the whole portion condemned at $9,000. Judgment was rendered upon the verdicts, to reverse which judgment these proceedings were commenced in this court.

LONGWORTH, J.

The city does not seek to appropriate that part of the pike lying within its corporate limits, but only a small portion of that portion, and we are of the opinion that, under the Municipal Code, there is no authority for any such proceeding. The city may condemn the whole portion of the pike within its limits, if it sees fit; and another section gives power to the company to insist that it shall condemn the whole of the pike lying within the city limits; but there is no provision giving to the city the power to appropriate any part of the pike to the exclusion of the

*See also decision of superior court, 5 Dec. R., 299 (s. c. 4 Am. Law Rec., 325).

other, and if any such provison were given by implication under the section, it would make it inconsistent with section 598 of the Code as amended. Under this section, the Turnpike Company proceeded against the city to compel it to appropriate the whole of the pike within the city limits, and subsequently the city brought its proceeding to appropriate a portion of the pike, and the two suits were consolidated.

The suits are not in their nature such, as under the Code could be consolidated. But, leaving that out of the question, the city never had the right to bring the suit which it did bring, and the judgment rendered in that suit should be reversed.

If the verdict in the second suit was just, and if upon that judgment right and justice has been done, the company receives compensation for the whole of its line, and is not prejudiced by the reversal of the judgment in the other case. The jury found the value of the portion of the pike within the corporate limits to be $9,000. Evidence was introduced to show that the par value of the capital stock was $18,300, and that for the last few years the dividends were very large, reaching way above ten per cent. per annum, and that therefore the road must be of very great value. Evidence was also introduced showing the receipts and expenditures for the past few years, and as to how much it would reasonably cost to keep the pike in repair. It appeared that it would cost from $1,200 to $1,500 per year to keep it in repair, and during these years $300 or $400 was all that was expended upon it, and that the road at the time of bringing the suit was in a very bad condition. From that it was claimed that the company was allowing the road to go to rack and ruin, knowing that the city must take it, and appropriating all its gains for dividends so as to swell the apparent value of the road.

It also appeared that new streets and roads are being made which connect with the turnpike in question, and serve to compete with it in the travel, being free roads, and also cross streets, which take away the travel from the pike also, or give facilities for the persons traveling it to avoid paying toll, and by as much as they increase, by so much will the revenues of the pike decrease, until, at last, as in the case of that portion lying between the Lower River and Walker Mill roads, the value is absolutely nothing, because no toll can be collected.

The jury, in fixing the amount of this verdict at $9,000, evidently took all this into consideration. They could not have arrived at that amount without taking them into consideration, for the first idea of one who did not reason about it, would be that if the par value was $18,300, and it was paying large dividends, that the road must be worth at least $18,000, and fixing the amount at $9,000, as the jury did, argues that they must have considered all these matters and dismissed them upon a very careful consideration. That consideration makes $9,000, just about what the value of that turnpike ought to be.

The judgment upon that verdict will therefore have to be sustained, and the judgment upon the other verdict reversed. By so doing, right and justice are sustained.

Judgment accordingly.

Smith & Crawford, for the plaintiff.

Peck, Gerard & Molony, for the defendant.

127 EXECUTION—JUDGMENT.

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

*WILSON S. DUNN & CO. v. FERDINAND SPRINGMEIER ET AL.

1. A judgment creditor, though he may direct the officers to collect the debt from part of the judgment debtors, yet the execution must follow the judgment and issue against all. But the execution having been ordered to issue against part of the debtors only, though irregular, is not void, and will not be restrained by injunction.
2. A judgment creditor being paid the amount of his judgment, though he supposes it is paid by one of the judgment debtors, yet if it comes from a third party, to whom his attorney assigns the judgment, and though the creditor has the right to disaffirm the action of his attorney, provided he follows up the disaffirmance by restoring the price, yet, not having done so, the act of the attorney is ratified, and the assignee may issue execution to collect the judgment.

BURNET, J.

The plaintiffs filed a petition to enjoin the collection of an execution levied by the sheriff upon their property. The petition alleged that James Rickey and Wilson S. Dunn, up to the 1st of May, 1875, were partners, engaged in business in the city of Dayton; that on January 1, 1875, the partnership gave a note for $550 to Christian Keel, and also a note to Henry Kline, for a similar amount, both notes being payable one year after date; that after the dissolution of the firm in Dayton, Kline and Keel formed a partnership with Dunn, under the firm name of Wilson S. Dunn & Co., in Cincinnati, and each respectively indorsed these notes to the firm of W. S. Dunn & Co.; that thereupon the firm indorsed the notes to Herman Levy & Co., and that when they fell due they were not paid; that Herman Levy & Co. thereafter sent the notes to the city of Dayton for collection, and there, at the March term, 1876, a judgment was rendered against James Rickey and W. S. Dunn, of the old firm of Rickey & Dunn, and against W. S. Dunn, Christian Keel and Henry Kline, of the new firm of W. S. Dunn & Co., against the former firm as makers and against the latter as endorsers of the notes, for $1,168; that after the rendition of the judgment, the amount was paid by James Rickey to the attorneys of the plaintiffs, and the money remitted to Herman Levy & Co.; that after the payment an execution had nevertheless issued upon the judgment, commanding the sheriff of Hamilton county to collect from the property of W. S. Dunn, Christian Keel and Henry Kline, omitting James Rickey, one of the judgment debtors. The petition set forth that the sheriff had made the levy, and asked that further proceeding upon the judgment be enjoined. James Rickey and L. R. Pfoutz are made defendants, together with Herman Levy & Co., the plaintiffs in the proceeding in which judgment was obtained.

Herman Levy & Co. answered, admitting that they obtained judgment, but averred that it was paid by one of the judgment debtors, and that, therefore, no process could issue for its collection. Rickey answered, denying that the judgment had been paid and alleging that it remained in full force and effect, and had been assigned by Herman Levy

*This case was affirmed by the supreme court, without report, November 7, 1882.

& Co. to L. R. Pfoutz. Pfoutz answered, claiming that the judgment had not been paid, and that he was the owner of it, and entitled to collect.

In disposing of the case, Judge Burnet said it was claimed, in the first place, that there was no assignment of this judgment by the plaintiffs in that case (Herman Levy & Co.); but that whatever assignment was attempted to be made, was only by the attorneys of the said plaintiffs, if, indeed, there was any attempt at an assignment; that it was not ratified by the plaintiffs themselves; that the act of the attorneys was entirely unauthorized, and the assignment was void. The evidence showed that the money was paid by Pfoutz, being the full amount of the judgment, with interest to the time of payment, to the attorneys of the plaintiffs; and that thereupon they remitted the amount thus received to Herman Levy & Co., their clients. It is claimed, and it was testified by one of the attorneys who acted in the matter, that this money was received, not as a consideration for the assignment of the judgment, but as a payment made in behalf of James Rickey, the judgment debtor, residing in Dayton. It is claimed by the plaintiffs and also by the attorneys of Herman Levy & Co., that the money was accepted as coming from James Rickey, being advanced in his behalf by the defendant, L. R. Pfoutz.

Although it appears that Herman Levy & Co., when they originally received the money that had been paid by Pfoutz on account of this judgment, were not aware of the source from which it came, but had reason to suppose that it was paid by the judgment debtor, James Rickey; nevertheless they have never disaffirmed the act of their attorneys, nor offered to refund the money. The court was of the opinion, that while a client might disaffirm the act of his attorney in making an assignment of his judgment, he must follow up his disaffirmance by restoring the price, else his act would ratify the contract of his attorney.

The weight of the evidence was not only not with the plaintiffs who were seeking to restrain the enforcement of an execution issued by a court of competent jurisdiction, but it was against them.

Pfoutz was asked, in the course of his examination, what was his business or profession. He answered that his business was practicing law, merchandizing, borrowing and lending money, buying notes and claims, occasionally administering an estate, and acting as guardian. He was also postmaster, express agent, freight agent and land surveyor, and he added, in answer to another question, that for twenty years he had been buying tax titles. In view of Mr. Pfoutz's professional character and his habit of putting his money where it would do the most good, it was claimed that he would not have made such a purchase without inducement.

The presumptions of law were against the claim of the plaintiffs, and however, unlikely it might be that one would purchase a judgment under such circumstances at its full par value, the evidence of respectable witnesses could not be set aside on that account, and the court must hold that the act of the attorneys was an attempt to sign the judgment to L. R. Pfoutz, who purchased with his own money and for his own use, and who had a right, therefore, to issue an execution.

It was claimed also that there was an irregularity in the execution; that whereas the judgment was against James Rickey and Wilson S. Dunn, the execution had issued against Dunn only, of the original firm of Rickey & Dunn, and the other defendants in the suit, omitting one

of the judgment debtors. It would be competent for a judgment creditor to instruct the officer to collect his debts from one of the judgment debtors, but the execution must issue against all of the judgment debtors. It must follow the judgment, and there was no doubt of the irregularity of the execution, and that, if attacked in the proper way, it could be set aside. It would be improper, though, by a writ of injunction, to undertake to restrain the enforcement of the order of the superior court of Montgomery county, that order itself not being void, but simply irregular.

Judgment for the defendants.

H. Jenney and J. A. Jordan, for plaintiffs.

Sayler & Sayler, for defendants.

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127 APPEAL BOND—HOMESTEAD.

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

*CLEMENS HELLEBUSCH ET AL. v. GOTTLIEB RICHTER ET AL.

1. Where an appeal bond is not perfected by reason of some irregularity, or defect or oversight: Held, that in such case the common pleas court has the right to amend the bond, such amendment being made in furtherance of justice.
2. A claim for exemption in lieu of homestead from the proceeds of sale by an assignee for creditors, need not be made before sale.

PETITION IN ERROR.

JOHNSTON, J.

Franz Schoenfeld, in 1869, being in insolvent circumstances, made an exchange of property, located in Cincinnati, with Charles Hoeffer. Instead of taking the title in his own name to the property he received from Hoeffer in the trade, Schoenfeld directed that it be taken in the name of his wife. This property was a triangular piece, situated at the junction of Broadway, Court street and the canal. There was a balance in favor of Hoeffer in the trade, and a mortgage was executed by Schoenfeld and wife to secure the balance. Another mortgage was executed to James A. S. Clark in the sum of $10,000, and another mortgage thereafter was given, and judgments thereafter were recovered against Franz Schoenfeld. Gottlieb Richter, being a creditor of Schoenfeld, instituted proceedings in the superior court of Cincinnati, for the purpose of having the conveyance to Mrs. Schoenfeld declared null and void under the seventeenth section of the assignment laws as amended. That court held, that at the time of the conveyance, Schoenfeld was insolvent, and that the conveyance to his wife was in fraud of his creditors. An assignee was appointed by order of the probate court to take charge of the property, which, under further order of that court, in October, 1873, was sold for $12,000. Certain undisputed mortgage claims having been paid there remained a balance in the hands of the assignee to meet claims that were disputed, to-wit: the claim of Clark, the claim of Richter and of his counsel, and the claim of Schoenfeld and wife to the benefit of the exemption laws of Ohio. The probate court having decided adversely to the claim of Richter and of his counsel, in April, 1876, he gave notice of an appeal, and the court fixed the appeal bond at $300. Bond in the sum of $200 only was given, but the transcript and papers reached the common pleas court, where the claim of Richter's counsel for prosecuting the case in the superior court, was allowed in the sum of $1,100; the claim of Richter himself was allowed in the sum of $1,000, to be paid after certain recognized liens were paid, while the claim of Clark, the mortgagee under the mortgage of $10,000, that had been assigned to Heman and to Clemens Hellebusch in part, was decided to be null and void, there having been no considera-

*The decision in this case was affirmed by the supreme court. See opinion, 37 O. S. 222. Another decision in this case is found *post* 355. The supreme court decision is cited, 42 O. S., 168, 170.

tion therefor; and the claim of Schoenfeld and wife, or either of them, for exemption under the statutes of the State, in lieu of a homestead, was not allowed.

Exceptions were taken by Hellebusch and by Schoenfeld and wife. The claim of the former had been allowed in the probate court, and he assigned as error that the court of common pleas permitted the appeal bond to be amended. thereby taking jurisdiction. Also that the court erred in holding the Clark mortgage to be void. Schoenfeld and wife complained, for that the court did not allow to either the benefits of the homestead exemption to the amount of $500—also as to the amendment of the bond.

The court thought it necessary to consider but two questions: First, whether the cause was rightfully appealed by Richter to the common pleas court, and whether the common pleas court obtained any jurisdiction over the case; and, second, whether any error intervened in the judgment of the common pleas denying to both Schoenfeld and wife the benefit of an exemption in lieu of a homestead. As to the first error assigned, the statute provides that if an appeal bond be not perfected by reason of some irregularity, or defect or oversight, this court has a right to amend the bond. The only limitation placed upon this power of amendment is, that it must be exercised in furtherance of justice. The appeal was, therefore, properly made, and the common pleas had a right to amend the bond and to entertain and try the cause.

The second cause of error to be considered was to the claim of Frank and Dinah Schoenfeld to exemption in lieu of a homestead under the laws of Ohio. The right of these parties to claim this exemption is attacked by Richter, on the ground that Dinah Schoenfeld, after the property was sold, was in fact the owner of personal property to the extent or more than $1,000, and therefore the husband could not claim the benefit of the exemption laws on the ground that he was not the owner of a homestead. It was also claimed by Richter, that no lawful demand for exemption was ever made by Schoenfeld, or that, if made at all, it was made too late, to-wit, after the property had been sold by the assignee.

The court was of opinion that it was not necessary for either Schoenfeld or his wife to have made any claim until after the sale of the property by the assignee. But in fact it appears that the demand was made before sale by the wife for the husband. The statute provides for the payment of $500 in lieu of a homestead, and this was a species of property against which the lien of a judgment creditor could not attach. It stands absolutely discharged from every lien of judgment creditors, and even a defective mortgage will give the mortgagee a right thereto as against a prior judgment lienholder. Van Thorniley v. Peters, 26 O. S., 471, 475.

The court below erred in not allowing to Schoenfeld, as the head of a family, his exemption to the extent of $500 in lieu of a homestead. The fact that the wife had $1,000 in personal property, or even if the husband had personal property to that extent, that fact would not operate against the right of the husband or the wife, as the case might be, to take a certain amount in lieu of a homestead.

Judgment below reversed, and the case remanded for another trial.

J. R. Challen, and Long, Kramer & Kramer, for plaintiff.

W. Disney, for defendant.

STREET ASSESSMENTS. 128

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

CINCINNATI FOR USE OF FROST, STEARNS & CO. v. JOSEPH SCHOENBERGER ET AL.

1. The conditions of a grant to a turnpike company of its roadway, which afterwards fell into the hands of the county commissioners as an abandoned road, and they assumed to transfer it to another turnpike company, and the city then condemned it as not binding on the city's title to it (Gest street), and where the abutting lot owners permitted the city to pass ordinances and improve the street, they are estopped to refuse to pay the assessment on the ground that the city had no title.
2. Where an assessment for a street improvement was levied at a uniform rate upon the abutting property, the fact that the city, by payment to the contractors, voluntarily relieved part of the property from the assessment above a certain amount, does not render it invalid for inequality.

BURNET, J.

It was claimed by the defendants that the city had no title to the street (Gest) which it improved, and that the assessment is not equal upon the whole property, it being sought by the city to collect $12.50 per front foot upon defendants' lots, whereas upon the line of the same street included in the same contract, only five dollars per front foot was collected by the city from the lot owners.

The court, after reciting the history of the road, showing how it became a street, said: "The city did not take the title which was originally granted by Elbert Marsh to the Cincinnati, Delhi and Cleves Turnpike Company, and there was no privity whatever between the city and its grantors, or the parties against whom they condemned the road and that original turnpike company, for after the road had been constructed by the assignees of that company, it was abandoned, and it fell, at least partially, under the control of the county commissioners as a road abandoned, and as such the county commissioners assumed to transfer it to another turnpike company. So that the title, such as it is, which is taken by the city, is now encumbered with the conditions attached, if there were any, to the original grant made by Marsh, and the city is not precluded by reason of the terms of that grant from charging upon the property the expense of making the improvement, and we think that it does not lie in the mouths of the owners of these lots to object to the assessment on the ground that the city has no title to the property. After the condemnation, the city passed ordinances for this improvement and proceeded to make it, and all this time the owners of these lots, being cognizant of the facts, made no objection, but permitted the improvements to be made; and upon the principle announced by the supreme court in the case of Neff v. Bates, 25 O. S., 169, they are now estopped to object that the cost of the improvements should not be collected from their property. On this ground, therefore, we think that there is no defense against the assessment.

As to the question of inequality, after the improvement had been made, council passed an ordinance to assess the value of the work upon these lots at a uniform rate to-wit: $19 per front foot on all of the lots abutting upon the whole length of the street improved, from Harriet street to the track of the Baltimore & Ohio Railroad Co. Subsequently council made an appropriation by which it paid to the contractors all of the assessment upon these lots and other lots lying between Dalton avenue and the Baltimore & Ohio Railroad track, except $12.50 per front foot; and also, by the same ordinance, made an appropriation by which they paid all of the assessment upon the lots lying east of Dalton avenue, except $5 per front foot. The assessment as made was uniform. The city simply volunteered to relieve the holders of the property on one end of the street to a greater extent than it did the holders of the property at the other end. We think this does not invalidate the assessment, and does not make it un-uniform, and that this defense also is not a good one. A decree will be rendered for the plaintiff in the two cases for the amount claimed.

D. Wulsin and Bates & Perkins, for the city.

J. Kebler and Lotze & Brettinger, for Raible, Schoenberger et al.

ESTOPPEL—LIMITATIONS—NUISANCE. 135

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

R. L. CILLY ET AL. v. CITY OF CINCINNATI.

1. That an adjoining proprietor sees the building of a public institution, without objecting, does not amount to an equitable estoppel to object to sewage being run into a stream flowing into his land, though it may have been reasonable to expect that there would be sewage to dispose of. Nor does the construction of inexpensive drains from the building to the stream, with the knowledge of such owner, constitute such estoppel.
2. An injunction against the sewage of a large city infirmary being run into a brook flowing through plaintiff's land being sought, it was held, that no physical impossibility of disposing of the sewage in some other way being shown, the difficulties of complying do not affect the right to an injunction; and if it were physically impossible, and if, to cease creating a necessity for sewage, would close the infirmary and prejudice the public, yet private property can not be taken for public use without compensation.
3. In such a case, as the providing other disposition of the sewage would require time, an injunction will be suspended in this case for five months, with leave to apply then for further time.
4. Mere delay, though it may deprive a party of the right to an interlocutory injunction, will not, in the case of injuries of a constantly increasing character, deprive him of relief on final hearing.
5. The defense of prescriptive rights is not established where it appears that, before the twenty-one years elapsed, a similar suit to this had been brought in another court, and was pending when this suit was brought, and was dismissed without prejudice to enable this suit to proceed.
6. An injunction will not be granted against taking water out of a brook by an upper proprietor, when it is taken for domestic use, and leaves a sufficiency of water for plaintiffs below, and plaintiffs had seen, without objection, the defendant build a dam and erect a pumping engine to convey such water.

AVERY, J.

This case comes into the district court by appeal. The action in the common pleas was to enjoin the pollution of a stream by casting into it the sewage from the city infirmary. The stream flowed in front of the infirmary, and then on to the land of the plaintiffs, where it unites with another stream, also flowing from the infirmary tract, and known as Congress Run. The sewage includes all the filth of the infirmary, and a number of witnesses testified that the smell was offensive, although they differed as to the extent of it. Some of the plaintiffs' witnesses testified that it could be perceived for the distance of a quarter of a mile. The witnesses for defendant denied that it was observable much beyond the immediate vicinity of the stream. That the water was polluted was undeniable, and for fifteen years at least animals of every kind had refused to drink it. Above the point of confluence with Congress Run a dam has been erected across the run upon the infirmary land, thus cutting off the flow of water to which the plaintiffs' land had been accustomed, and which, perhaps, but for the dam, would be sufficient to cleanse out the filth cast into the run. The defendant claims that the use now made of the stream had continued uninterruptedly since 1852, and that thereby the right to use had been acquired by the prescription. The answer further alleged that the building of the infirmary

had been erected at great expense, and that without drainage it would be comparatively valueless; that the ground presented no facilities for any other system of private drainage; that the county commissioners had not yet opened public ditches, and that an injunction would practically put a stop to the infirmary. It further alleged that while the dam and the pumping engine employed to convey the water from the dam to the infirmary for domestic use were being erected, the plaintiffs stood by without objection.

The court found, that as to the dam the plaintiffs were not entitled to relief, it being merely for the purpose of enabling the infirmary to take the water for domestic use; besides which the plaintiffs had stood by without objection, and, more than all, there was a sufficiency of water for plaintiffs' purposes below the dam, if left unpolluted.

As to the pollution the court found that the prescriptive right set up by the defendant was not sustained, because, even assuming that there was a perceptible injury to the plaintiffs from the sewage as early as 1852, the period of twenty-one years necessary to establish the prescription had not elapsed at the time the plaintiffs brought a similar suit to this in the superior court in 1871, which was pending in that court when this suit was brought, and was dismissed without prejudice to enable this suit to proceed.

Finding that the defendant had no right to pollute the water, the court came to consider whether the plaintiffs were entitled to relief by injunction. The jurisdiction to grant relief in cases of this kind placed by the court on the ground of the necessity of preventing a multiplicity of suits, citing 4 Kay & Johnson, 528.

Referring to cases where a party doing acts which may amount to an equitable estoppel, will be denied relief in equity and compelled to resort to law, as where by standing by one has encouraged extensive improvements, the court held in this case there was no such estoppel. It was true that drains had been constructed from the infirmary to the stream, a distance of 500 feet; but the construction involved very little expense, being simply two or three earthenware pipes and a wooden box, and were easily removed. It was true, also, that the infirmary building was erected at considerable expense, and it may have been reasonable to expect that there would be a certain amount of sewage to dispose of; but the plaintiffs were not bound to suppose that it would be thrown on their land; nor were they estopped from objecting to their land being made a place of deposit for the sewage, because they did not object to the building of the infirmary.

In respect to the question of delay on the part of the plaintiffs, the court held that while delay might deprive a party of his right to injunction upon interlocutory motion, mere delay, especially in the case of injuries of a constantly increasing character, would not deprive him to relief at final hearing, citing 5 Ch. Ap., 583; 4 Ap., 146; 21 N. J. Eq., 576; 13 Allen, 16.

The right of the plaintiffs to an injunction was held not to be affected by the difficulties of complying with it on the part of the defendants, provided it were within the limits of physical possibility. No physical impossibility of disposing of the sewage in some other way than by casting it on the plaintiff's land was shown, for it appeared in the evidence that a sewer might be made along the pike, or through the plaintiff's ground, and if the defendant had not power to appropriate the

land for the purpose, the Legislature must be applied to. If, however, it were physically impossible to dispose of the sewage, it was certainly not impossible to cease creating a necessity for sewage. If it is said that this will close the infirmary and be prejudicial to the public, the answer is that private property cannot be taken for public use without compensation; and if the alternative be that the public shall have the use, or the individual give up his property, the public must cease the use, or appropriate the property by making proper compensation.

The argument is the same as that addressed to the Chancellor in the case of Attorney General v. The Colney Hatch Lunatic Asylum, 4 Ch. Ap., 146, in which the court says: "I am told that three hundred thousand people will be very much inconvenienced if they shall not be permitted to use their neighbor's property without paying for it, and that, therefore, they are to be permitted to use the property without paying for it." The principle on which courts proceed in cases of this nature, is well stated in Attorney General v. Birmingham, 4 Kay & Johnson, 528: "Where the question is between two portions of the community, the court will sometimes balance the inconvenience of the one against the inconvenience of the other, especially where the latter is the more numerous. But when the case is one of an individual claiming rights of private property, and the court finds he has such rights, the only question is whether, looking to the precedents which guide the court in the exercise of judicial discretion, it can interfere to protect him."

Again, L. R., 4 Ch. Ap., 146: "The simplest course for a court to pursue in the administration of justice is to ascertain the exact state of the law which determine the rights of the parties, and when ascertained, to act upon it, without reference to the difficulties of the case on the part of those against whom the court is obliged to decide, leaving them to extricate themselves as best they may from the position in which they have placed themselves, and if escape is otherwise impossible, to cease doing the acts which create the injury."

It is the opinion of this court that with respect to the pollution of the water by the sewage discharged from the infirmary, the plaintiffs are entitled to the relief they claim; but as the difficulty of providing other means of disposing of the sewage may require time, the injunction will be suspended for five months, which will bring it up to the October term, when, if it becomes necessary, the defendant will be at liberty to apply for further time. As to the claim of the plaintiffs in respect to the dam, the petition will be dismissed.

C. W. Cole for plaintiffs.

The City Solicitor, for the city.

EMINENT DOMAIN. 142

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

TRUSTEES OF CINCINNATI SOUTHERN RY. v. WM. O'MEARA ET AL.

1. A corporation having an election to apply either to the probate or common pleas courts, and by proceedings in the probate court condemning land, and being dissatisfied with the verdicts, can not condemn the same land over again, by proceeding de novo in the common pleas. That they proceed in the common pleas against a larger tract, which includes the former, makes no difference; but the proceedings may, however, go on as to the additional land, being dismissed only as to the other part.

2. A municipal corporation need not proceed to appropriate private property by publication in a newspaper.
3. The court will presume a necessity of an appropriation to exist from the fact that the corporation resolved that it was necessary, no abuse being shown, and the fact that they have already condemned a strip for a railway, does not show absence of a necessity to take so as to widen the strip.

Cox, J.

This is an application to appropriate certain property for the northern approach to the bridge of the Southern Railroad over the Ohio river at this point. The defendants answer that this property had already been appropriated by proceedings in the probate court—a portion of it, at any rate—and that a judgment has been rendered in that court fixing the amount of compensation to be paid to a number of the respective owners of the property condemned; and upon that answer they ask that the petition of the plaintiffs be dismissed.

In the probate court proceedings were commenced in March last, to appropriate certain of the property of these same defendants, forming a strip forty feet in width, and running diagonally across their lots. Trials were had and verdicts returned, and judgments entered in favor of Longworth, O'Meara, Mrs. Anderson, J. W. Wayne, J. L. Stettinius, and John Crawford.

The trustees have not paid the amounts due any of these parties, and the judgment still remains there. As to other parties in that process of condemnation, the case was continued for service. The plaintiffs, not being satisfied with the verdicts in that case, have filed an application in this court to condemn the same property which was described in the proceedings there, together with additional property, and the question now comes up as to whether this proceeding can be carried on in this court. A great many questions have been raised on the part of the defendant, and they go minutely into all of them, but I announce my conclusions on only the more important ones.

The law makes the trustees of the Southern Railroad, to all intents and purposes, the corporation. They are the managers and controllers of the corporation. The proceedings may be commenced in their name. They have the right to proceed and appropriate. By the law, as originally passed, the appropriation was to be proceeded with in the same manner as other corporations proceeded under the law of 1852. But by the act of 1873, the trustees were permitted to proceed under the act provided for appropriations by municipal corporations. They have proceeded in accordance with that act.

It is claimed, in the first place, in regard to that, that the trustees can not proceed to appropriate until the question is determined by the court as to the necessity of it. I think when the trustees declare and pass a resolution that it is necessary to appropriate this land for the purposes of the road, the court will presume that that necessity exists, and will not require further proof. There might be a case where, if it were shown that the trustees were proceeding arbitrarily, or abusing their trust in appropriating property that was not necessary for the road, the court might possibly intervene. But upon the suggestion of the parties here as to this elevation of fifty-two feet, and the ground originally appropriated being only forty feet in width to sustain a road of that elevation, I think that that makes out a clear case that the road requires more ground than the trustees originally sought to appropriate. I do not think it necessary to make publication under the municipal Code.

As to the question of personal notice, it is claimed that personal service should be made upon all the parties. I do not think it was in contemplation of the law that a person should be served personally. If they are served at residence, and that is within the jurisdiction of the court, that service will be good; if not within the jurisdiction, publication will be good.

But the main question in the case is as to whether the trustees, having already condemned a portion of this property, and judgments having been obtained fixing the compensation to be paid to the owners, can again proceed in another court to condemn the same property.

Now the law provides that the trustees may apply either to the probate court, or the court of common pleas. It makes these two courts concurrent in jurisdiction upon this question, and the rule is universal that where two courts have concurrent jurisdiction, whichever court has jurisdiction first, has exclusive jurisdiction in the case.

The parties, in so far as the motion is concerned, have appealed to the jurisdiction of the probate court. That jurisdiction this court would not interfere with, and could not interfere with, while they are proceeding there. They have obtained judgments there, and they are binding upon this court, as much as the judgments of this court would be binding upon that court had they originally proceeded here.

It is claimed, however, by the trustees that the judgments there were too great, and that inasmuch as the law does not give to the corporation the right of review or appeal, they have the right to recommence here and have that question tried over again.

Now, the law provides that in condemnation before the probate court, as well as in the condemnation here, that, while the property owners have the right to review or appeal, the corporation has no right. Why the law was so made I cannot understand. I do not understand why the legislature saw proper to exclude the right of review from the probate court in another court as well as the other parties in the case. But that has been fixed by the legislature. They have determined that to be the policy of the law, and to permit the plaintiffs to abandon the proceedings in the probate court and commence proceedings in another court, would be substantially doing that which the legislature refuses—giving them an appeal and the right of review.

It is claimed, in the first place, that the trustees cannot proceed to condemn without a publication in a newspaper. I do not think that the law requires that to be done in the case of a condemnation by a municipal corporation. In the first place, however, as to the status of the trustees of the Southern Railroad in condemnation proceedings.

The law provides that the corporation shall have six months within which to comply with the judgment and pay the condemnation money, and take the property. If they do not take it at the expiration of that time, then they have no right to take it at the compensation fixed by the verdict of the jury.

This judgment was only rendered during the month of May. They have six months nearly within which to decide that question. They say now, that having abandoned the right to take the property at the compensation fixed by the jury, they have the right to treat the whole controversy as abandoned and commence *de novo* in this court.

This question has come up for consideration in 2d Green's Penn. Rep., where the court have held that railroad companies may make exper-

imental surveys at pleasure before finally locating their road, but they can no have experimental suits for the purpose of chaffering with the owners of property for the cheapest route.

It has been also decided in the 43d Missouri in the same way. In that case the court say that the parties can not have repeated trials simply because the verdict does not suit them. They cannot try the case over again and again until they get a verdict to suit them. That is the substance of the decision.

The case of Hayes v. C. & I. R. R. Co. was cited in the 17 O. S. 103, 110. It is supposed to have a bearing on this case. I think the court in that case very clearly intimate that, after a verdict has been had in one court, the parties cannot re-try the case in another court. That case was a case in which the property of Hayes was sought to be appropriated for the purpose of the railway. A judgment was obtained for $3,000 in favor of Hayes. The railroad company declined to take the ground and pay that amount, but changed the route over other lands and abandoned the whole thing. Hayes thought by mandamus to compel the company to pay the amount. The court decided that mandamus would not lie; that the railroad company had the right within six months to pay the money or abandon the land, and when they had done so, the company could not be forced to pay the amount.

The court proceeded further to say: "That the finding of the jury not being complied with, the relator was in *statu quo*, as if no proceedings in the probate court had ever been commenced. They have lost nothing and are not entitled to complain of anything. The railroad company having abandoned all claim to a right-of-way over the land of the relator, it could not thereafter acquire such right-of-way except by the commencement of proceedings *de novo*, and perhaps not even by such means.

The court in that sentence express doubt as to whether by proceedings *de novo* they could acquire a right-of-way but in the next sentence the court seem to me to express their opinion that it could not be done. The court say:

"If there were no express abandonment of the claim to appropriate a right-of-way entered of record in the proceedings in the probate court, the fact that the corporation has constructed its road upon another line not touching the land of the relators, is conclusive evidence and leads to a like result. And we are furthermore of the opinion unanimously, that if there were no express abandonment of the claim in either of these ways, it would be the right of the land owner immediately after verdict and its confirmation, by demanding from the corporation payment of the amount assessed in his favor, to compel it to elect whether it would complete its appropriation by the payment of the money, or on failure to do so promptly, within a reasonable time, submit to be held to have abandoned its claim, and to have subjected itself to whatever consequences are involved in such abandonment."

There is a clear intimation that the land-owner can, within a reasonable time, compel the railroad company to elect whether it will complete its appropriation, or abandon the claim.

Now, the authorities are very decided upon this question, and that is the law as fixed by the statute, that the corporation may abandon the proceedings. They may refuse to pay. But I think it is equally clear that while they may abandon the proceedings and refuse to pay the money fixed by the verdict of the jury as the amount of compensation,

they can not, by a new proceeding, seek to appropriate the same land in another court. I think they must abandon the claim upon the land in order to get rid of the assessment fixed by the first jury.

I think, therefore, that in so far as the property sought to be appropriated, has been passed upon by the probate court, that portion of it can not be entered in this court. As to the other property, the proceedings may go on, and as to those who have not been served, no proceedings are pending against them really until they are served and they may be brought into this court and made parties.

CONTEST OF A WILL. 147

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

AMANDA JOSLYN v. CHARLES T. SEDAM ET AL.

1. Although mere moral depravity does not of itself unfit a man to make a will, yet a jury may consider it as a circumstance casting suspicion upon his soundness of mind.
2. Where a testator believes that all women are prostitutes, and were created simply to gratify the lusts of men, and were therefore able to support themselves out of the wages of sin, and therefore that no provision ought to be made for them, and, acting on such belief, left the bulk of his property to his son, and not to his daughters, this would justify the jury in finding that his will was void.

This was an action to set aside the will of Henry F. Sedam, deceased, on the ground of mental incompetency in the testator, and that the will was procured by undue influence. The testator was a man well known, especially to the older inhabitants of the city; he had held the position of justice of the peace for many years in Storrs township, and was somewhat celebrated on account of his method of dispensing justice. He left an estate of some two or three hundred thousand dollars, most of which was by the provisions of the will devised to his son, Charles, only a small provision being made for the two daughters, of whom plaintiff was one. It was claimed that testator was the victim of monomania on the subject of the chastity of women, and that his son with others had procured the will to be made by undue influence. The trial of the case occupied six weeks and resulted in a verdict for the plaintiff.

LONGWORTH, J.

Gentlemen of the jury, you have listened to the evidence introduced by the parties in this action, and to the arguments of counsel, and it is now your duty to determine what are the rights of the parties, and to do justice between them by your verdict.

Before proceeding, however, to deliberate on what that verdict shall be, it is the province and duty of the court to instruct you upon the law which must govern your deliberations.

Under our system of jurisprudence the jurisdiction to determine what the facts of any case may be rests wholly with the jury. It would be improper, and a breach of duty in the court, to intimate to the jury any opinion on the facts. It would be equally improper for the jury to disregard the instructions of the court upon the law, or to approach the decision of the case without regarding as their first rule of action the law of the land as given to them by the court. They are to lay aside any preconceived ideas as to what may or may not be the justice of the case, when such ideas would interfere or conflict with the rules of law.

The rules of law governing the case at bar are comparatively few and simple. The difficulty lies in the application of them. I shall endeavor to state these rules to you as clearly and simply and briefly as it is in my power to do, to the end that there may be no misunderstanding on your part as to what they are.

The important issue, which it is now your duty to decide, is whether the paper writings, produced before you, and purporting to be the will and testament of Henry F. Sedam, and the codicils thereto, do constitute the last will and testament of him, the said Sedam.

On the 28th day of January, 1867, Henry F. Sedam is said to have executed a paper purporting to be his will, and on the 29th day of April 1870, he is said to have executed another paper, purporting to be a codicil thereto; and on the 20th of November, 1873, he is said to have executed a third paper, also purporting to be a codicil thereto; and on or about the 30th day of June, 1874, said Henry F. Sedam died, leaving three children, Isabella, Charles and Amanda, his sole heirs at law, and who would, under the law, have inherited his estate in equal shares had no will been made.

These papers, which have been shown to you, appear to have been executed with the formalities and requirements of law concerning wills, and have been regularly admitted to probate by the proper court. Upon their face they appear to be the last will and testament of the deceased, and must be so considered by you in the absence of a preponderance of testimony showing the contrary.

The questions submitted to your consideration are these, to-wit:

First—Was Henry F. Sedam, at the time these papers were executed possessed of a sound and disposing mind? and

Second—Did he act of his own volition, or was he under the undue influence or restraint of other persons?

These questions you will consider in their order.

To make a valid will it is not enough that the testator shall subscribe his name to it in the presence of witnesses. He must do so intelligently and voluntarily. It is a matter of experience that juries sometimes set aside a will because they do not approve of its provisions. It is the right of every man, which right cannot be taken from him, to do what he wills with his own, unless the disposition he makes violates some law; and after his death, neither court nor jury have the power to make for him a disposition of his property, different from the disposition which he intended to make, upon any theory that such intended disposition was unjust and wrong.

If, therefore, a man of sound and disposing mind chooses of his own accord to make a capricious, a foolish, or an unjust will, such will must stand, the simple question in such case being whether he was of sound and disposing mind at the time when he made it. If his mind at that time was so feeble, preverted, or inert, whether weakened by age, excesses, disease, or other causes, that its action was not such as it would have been had the mind been in a natural condition, and sound, so that the jury is satisfied that such action does not express the real intent of a sound and disposing mind, then the will, which is the result and product of such action, is not the last will and testament of the testator.

Every one has observed that men in morbid conditions, where the brain is affected by disease, crazed by stimulants or other causes, do things which at other times they would never have thought of doing,

and for which they can hardly be held accountable, either in law or morally. In the eye of the law, a man's feelings, desires and acts, at such times, are not considered to be the feelings, desires and acts of the man.

Again, a man sometimes performs an act intelligently; but, through feebleness of memory, is ignorant of some fact which, if he had known, would have caused him to act very differently. For example, suppose that one desires to divide his property equally among his children, and having three children, is so imbecile in memory as to suppose he has only two, and divides the property between those two, such disposition should not be considered the will of the testator, because it clearly does not express his intention.

To make a will, a man must have capacity to know and understand what property he has, who would naturally receive it, and who he selects to receive it, he must be able to hold in his mind his property, the persons to whom he gives, and those, if any, from whom he withholds; he must be able to understand his true relations to his property, and to the natural objects of his bounty.

If he is not able to understand and comprehend these things, then he is incapable, in law, of making a will.

It is a very difficult thing to enter into the mind of a man and see what is there. It is a difficult thing to determine definitely, from the testimony of others, the true character, thoughts, and feelings which have in times past been the moving-spring of action in one whose body is now turned to dust. Nevertheless, by the light which human testimony gives, the endeavor must be made.

In all cases like the one at bar, the first and not the least important item of evidence bearing upon the condition of the mind of the testator, is the will itself. Although, as I have said, the fact that a will is unjust, or wrong, or absurd, does not of itself prove the incapacity of the testator to make a will, yet it is an item of evidence for the jury to consider as bearing upon the question, and it is for the jury to determine what weight shall be given it.

Again, although mere moral depravity does not of itself unfit a man to make a will, yet the jury has a right to consider the fact of depravity in the testator, if satisfactorily shown, as a circumstance casting suspicion upon his soundness of mind.

The law does not declare that, because a man is dissolute, passionate, unjust and wanting the natural affection and parental instincts, and that he makes such a disposition of his property as he ought not to have made, these facts being found shall invalidate such disposition by will. I say the law does not declare that these things shall make his testament invalid, but it leaves to the jury, and to the jury alone, the right to say how much weight ought to be given to such facts—if they are found to be facts—in determining the condition of the testator's mind. The law very wisely provides that of these matters the jury shall be the sole judges. For whether strong or whether weak, no two human minds are exactly alike. The law does not pretend to furnish a foot rule by which they shall be measured, but declares the few simple rules which I have given to you, and beyond these, leaves the determination of the facts to be governed by those principles of reason and common sense which direct the minds of all just and honest men.

We all know that there are degrees of moral depravity as various as the degrees of moral excellence and virtue, and it may be that moral depravity may result in a perversion of the feelings, affections, inclinations, temper, habits and moral disposition, without any lesion of the intellect or reasoning faculties; and it may be true that some human beings exist who, in consequence of a deficiency of moral organs, are as blind to the dictates of justice, as others are deaf to melody; but whether such or a like condition of mind would amount to unsoundness, is a question of fact rather than of law.

Mere depravity or wickedness, not amounting to mental unsoundness, would not of itself, and standing alone, affect the will of the testator.

It is claimed in this case that Henry F. Sedam was a man morally depraved. I charge you that if you find that Henry F. Sedam did not believe that any woman was virtuous; that all women were prostitutes; that they were created simply for the purpose of gratifying the lusts of man; that they were therefore able to support and maintain themselves out of the wages of sin; and that therefore no provision ought, in any case to be made for them, and that acting on this belief he gave the bulk of his property to his son and not to his daughters, and that he made this disposition of his property by reason of this belief, then you would be justified in finding that this will is void.

However sound or strong the mind of a man might be in other directions, you would be justified in finding that the existence of such belief amounts to insanity or monomania.

I wish to impress upon you, however, what I have stated before, that to justify your setting this will aside upon such a state of facts as this, you must be satisfied that such facts do exist, and of this you should be convinced clearly and satisfactorily. A less degree of moral depravity, although important as an item of evidence touching the question of soundness or unsoundness of the mind of the testator, would not of itself and standing alone render him incapable of making a will; neither would this state of facts justify you in setting aside the will, unless you should find that they amounted to unsoundness of mind.

It is claimed that Henry F. Sedam had, during his life, suffered from severe attacks of disease; that he had been an intemperate drinker, and a man immoral and careless in all his habits of life; that he was peculiar and eccentric in his dress, his speech and his manner. All these facts, if you find them to be facts, you have the right to consider as circumstances bearing upon the question before you. His feelings, his sayings, his doings, the whole history of his life and death, as disclosed by the evidence, are proper testimony for your consideration, and you are the sole judges as to what and how much effect shall be given to any or all of them, keeping in view, however, that the question to be decided by you is narrowed down to this: Do the papers purporting to be the will and codicil, express the true desire and intent of the deceased, or, in other words, are they the act and product of a sound mind?

The next question for your consideration arises upon the claim of the plaintiff that at the time of executing these papers the testator was acting under undue influence, exercised over him by Chas. T. Sedam and others.

The will must be the expression of the wishes and purposes of the party who undertakes to make it; his friends and family may talk with

him, advise him, entreat him and importune him. This they may do, but if, when this is done, he intelligently weighs what they say, and having capacity, intelligently make up his mind, determines his own purposes and declares his own intentions, it is no matter whether his own mind, when made, agrees with their advice or not. If it is his own choice or preference it is no matter whether it originated with himself or was suggested by others. If deceived by fraud, coerced by threats, or worried with importunity, or influenced by the constant pressure of a dominant mind, which constrains him into the execution of such a will as he would not, of his own inclination, have made, then the jury may find that undue influence has been exercised over the mind of the testator.

But in such cases the test is always this: Is the will, the expression of the intent of the testator, or of some other person? Is it his will, or the will which some other man has made for him?

These, gentlemen of the jury, are the two questions which you are called upon to decide, and the responsibility of deciding them truly and justly rests entirely upon you. There is a great conflict of testimony, and a great mass of evidence has been submitted to you. The witnesses seem to have described two different persons; the one corrupt, degraded and depraved, possessing the attributes of the brute, rather than the man, and in whom all manhood, if it ever had existed, had ceased to exist; the other, a man who, although not perhaps affectionate, desired to be just; and though, perhaps, not spotless in life, had no other or greater failings than such as are incident to ordinary humanity, and possessed some virtues not common among men.

It is for you to determine all questions concerning the weight of the evidence and the credibility of the witnesses—using the rules of law, as I have given them to you, as a lamp to guide you in disentangling the complicated instructions which you may find in your way.

Look first at the will. From the face of a coin you may infer the form of the die; when you read an anonymous manuscript you may guess the author; when you see a foot-mark on the sand, you may conceive the animal that made it. So, from this will you may be able to infer something of the mind, whose desires and interests it is said to have expressed; or, you may find in it the expressions and desires of some other man than Henry F. Sedam.

It is not the number of witnesses, but the weight of their testimony that should prevail with you, and of how much weight should be given to any testimony offered you are the sole judges.

If you find from all the evidence that the paper writings, purporting to be the will and codicils of Henry F. Sedam, are the product of the action of a sound and disposing mind, as I have described it to you, that at the time they were executed by him he understood and knew of what property he was possessed, and the persons who would naturally receive it; that he comprehended and understood his true relations to his children, or other natural objects of his bounty, and that at the time of such execution he was not under any undue restraint or coercion, such as I have described to you, then you will find that these papers do constitute the last will and testament of Henry F. Sedam, deceased. If, on the other hand, you find that he was unable to understand or comprehend those things at the time he executed these papers, or that he was unduly influenced or coerced to make the disposition of his

property which he did make, then it is your duty to find these paper writings do not constitute the last will and testament of said Henry F. Sedam.

Isaac M. and J. A. Jordan, for contestants.

L. W. Goss, H. D. Peck and John Coffey, contra.

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152 [Hamilton District Court, April Term, 1877.]

W. U. T. Co. v. M. & C. R. R. Co., B. & O. R. R. Co. AND P. R. R. Co.

For opinion in this case, see 5 Dec. R., 474 (s. c. 6 Am. Law Rec., 117). The judgment in this case was reversed by the supreme court. See opinion, 38 O. S., 24. See also *ante* 163.

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155 **MORTGAGES.**

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

*CLEMENT HELLEBUSH v. GOTLIEB RICHTER ET AL.

A mortgage, unlike negotiable paper, not being freed from equities by assignment, if it is executed by the husband and his wife after a conveyance of the mortgaged property by the husband to his wife, which conveyance and mortgage were held invalid as in fraud of creditors; the bona fide indorsers of the note secured by the mortgagee holds subject to the interest of such creditors and must be postponed until after the creditors are paid.

JOHNSTON, J.

This cause originated in the probate court, being a proceeding to sell the property on the corner of Canal street and Broadway, as the property of F. Schoenfeld, an insolvent debtor, under the assignment law, the conveyance thereof to his wife, Dina, having been declared fraudulent as to creditors, in a suit prosecuted by Richter in the superior court of Cincinnati, and E. P. Bradstreet having been thereafter appointed assignee by the probate court to administer the trust for the benefit of the creditors.

Two questions are presented: First—Whether the common pleas erred in holding that a mortgage from Schoenfeld and wife to one Jas. S. Closh for $10,000, given after the fraudulent transfer to Mrs. Schoenfeld, one of which notes, for $5,000, is held by plaintiff in error, Hellebush, was not a valid mortgage, but was given in fraud of the husband's creditors. Second—Did the court err in holding that Hellebush, a bona fide holder of one of said notes, for value, purchased by him in the usual course of trade before maturity, did as assignee of said mortgage, take nothing thereby as against the creditors of Franz Schoenfeld. If there be error in either finding, then Schoenfeld will not be entitled to any exemption, the note of Hellebush exceeding largely the balance of proceeds of sale of the property, and Schoenfeld and wife both having joined in the mortgage.

*See the decision of the supreme court in Hellebush v. Richter, 37 O. S., 222. See also s. c. *ante* 341.

The court said that if there be any question well settled in the law, it is, that the indorsee for value before maturity and without notice of any existing equities between the parties of a negotiable promissory note, takes such note discharged of any and of all such equities or defenses, and is entitled to recover the full amount. The same rule of law is not, however, applicable to the assignee of a mortgage given to secure such note. A mortgage is a mere incident to the debt. The debt is the principal thing. If there be no debt, there can be no valid mortgage. If the debt be paid, without further act, all interest of the mortgagee or of his assignee in the real estate ceases.

The indorsement of the note, without further act, carries with it the mortgage. The note possesses, in many respects, the attributes of money. It answers the purpose of currency. It passes from hand to hand by delivery, at farthest by a mere indorsement. From time immemorial, bills, foreign and inland, were clothed with the attributes of negotiability, to meet the convenience and demands of commerce, and by the statute, Third and Fourth Anne, promissory notes were placed upon the same footing. In this state, a special statute places bills and notes upon the same footing, and makes them alike negotiable. But neither here nor in England has the mortgage, a mere chose-in-action, been taken from that position, and, by special law, given any attributes of negotiability attending notes and bills. Mortgages are not necessities of commerce. They are the subjects of record, necessarily, and, as securities, require examination into the title of the property represented, thus becoming impracticable in mercantile transactions where promptness and dispatch obtain. Hence the universally acknowledged doctrine ever since it was announced by Lord Thurlow, in 1 Ves., 247, that the purchaser of a chose-in-action "must abide by the case of the person from whom he buys." The mortgagee or his assignee takes no greater rights than those acquired by the assignor. The mortgagee, therefore, takes subject to every equity existing, not only in favor of the mortgagor, but subject even to latent equities or interests in favor of third persons not apparent in the chain of title. The creditors of Shoenfeld had such an interest in the property at the time this mortgage, under which Hellebush holds, was made to Clark. Being insolvent, Schoenfeld held his property for the benefit of his creditors. Clark and every assignee thereafter of the mortgage took subject to this latent equity or interest of the creditors. Upon the note the full amount may be recovered. Upon the proceeds of sale of the real estate of Hellebush is postponed until after the creditors, and the exemption claim be paid, and they will absorb the entire balance. So the judgment as to the Clark mortgage and as to the claim of Hellebush thereunder is affirmed, and, excepting, as to the exemption in favor of Schoenfeld, is in all other respects affirmed, and will be remanded for further proceedings as to said exemption.

Long, Kramer & Kramer and Disney, for plaintiffs in error.

J. R. Challen and Judge Okey, for defendants in error.

[Hamilton District Court, April Term, 1877.] 155

STATE EX REL. CINCINNATI v. THE COMRS. OF HAMILTON CO.

For opinion in this case, see 5 Dec. R., 471 (s. c. 6 Am. Law Rec, 106).

156 **TAXATION.**

[Hamilton District Court, April Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

STATE EX REL. BUSH v. COMRS. OF HAMILTON CO.

Under the act of March 30, 1877 (74 O. L., 424), the commissioners of Hamilton and Clermont counties are to erect a bridge, to be paid for in special proportions; but the act does not provide that a tax must be levied in the first instance, but only to replace the cost; the county commissioners having averred that they have not refused to build the bridge, and the act not defining the time, a mandamus to compel the levy of the tax three months after the passage of the act is premature.

BURNET, J.

This was an application for a writ of mandamus to compel the defendants to levy a tax for the erection of two bridges over the Little Miami river—one at Milwaukee, and the other near Camp Dennison. It is claimed that under the law passed March 30, 1877, it is the duty of the commissioners to levy a tax amounting to three-fourths of $25,000, for the purpose of paying the share of Hamilton county toward the erection of these bridges, one-fourth of the cost to be paid by Clermont county.

The commissioners have filed an answer, which, though premature as an answer, being sworn to, may be treated as an affidavit, showing the cause why the writ should not be allowed. They aver that they have not refused to build the bridges; that they have full authority to build the bridges without first making the levy; that it is not required that the levy should be made for the year 1877.

Under the provisions of the law recently passed, it is necessary there should be a conference between the commissioners of Clermont and Hamilton counties, to enable them to determine upon the manner in which they shall proceed in entering on the duties imposed upon them.

The provisions of the act are peremptory in requiring the commissioners of each county to proceed with the erection of the bridges, but the act does not define the time when such duties shall be performed. The law does not provide that a tax shall be levied in the first instance, but that the cost of the bridges shall be paid out of the bridge fund, or any other fund which may be in the county treasury, and only for the replacement of this fund shall a tax be levied.

For both these reasons a mandamus would now be improper. Mandamus refused.

A. J. Cunningham, for the relator.

Thomas B. Paxton, for the county.

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156 [Hamilton District Court, April Term, 1877.]

JULIA MILLER v. CITY OF CINCINNATI.

For opinion in this case, see 5 Dec. R., 472 (s. c. 6 Am. Law Rec., 107).

CONTEST OF ELECTIONS. 158

[Hamilton Common Pleas Court, June Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

WALTER F. STRAUB v. MOSES F. WILSON.

1. In a contest of election for judge of the police court, which, by the municipal code, is contested as county elections are contested, the notice of appeal to the common pleas from the city clerk was entered more than twenty and less than thirty days after the result was declared by him. Section 42 of the act prior to February 1, 1877, provided for notice within twenty days; this section was repealed by the act of February 1, 1877 (74 O. L., 12), and provided that all matters relative to a contest should be heard by the court wherein they were pending, and that this must be held to give jurisdiction to the court, and entering the notice of appeal being the beginning of the proceedings, if entered in time the case is pending there.
2. This act also provided that in pending cases, and those which may hereafter be pending in any court, the notice should be within thirty days, though this seems to prescribe a rule as to cases hereafter pending, which must be applied before it can be determined whether the case is pending. Yet, when two statutes are irreconcilable, the later repeals the earlier to the extent of the inconsistency. The notice of appeal filed with the clerk before the thirtieth day will give the court jurisdiction.

AVERY, J.

This was a motion by the defendant to dismiss an appeal taken from the decision of the city clerk, declaring Moses F. Wilson re-elected judge of the police court, on the ground that the court had no jurisdiction.

The Municipal Code provides that the election of officers, except members of council, in cities of first-class, having a population of one hundred thousand and upward, may be contested in the manner provided by law for contesting the election of county officers. The manner provided for contesting the election of county officers is by appeal to the common pleas, from the clerk and the two justices whom he calls to his assistance for the purpose of making abstracts of the returns, and as under the Municipal Code the city clerk proceeds in all respects as is required by law of the clerk of the court of common pleas, to ascertain the candidates elected, and deliver their certificates, except that he does not call to his assistance two justices, the right of appeal is secured from him to the common pleas, the same as if the act in relation to county officers on that subject had been incorporated into the Municipal Code. The act in relation to county officers, as it stood prior to February 1, 1877, provided that notice of appeal should be entered with the clerk of the court of common pleas within twenty days after the result of the election was declared and section 42 provided that when the testimony between the parties had been taken, it should be sent to the common pleas, which court should, at the next term, proceed to hear and determine the contest. The supplemental act of February 1, 1877, repealed section 42, and in its place provided that all matters relative to a contest should be heard and determined by the court wherein such matters, or anything pertaining to the case, is or shall be pending. The repeal of section 42, it is claimed, leaves the common pleas without jurisdiction to cause the power to hear and determine can be found nowhert else than in section 42. To enter notice of repeal with the clerk of the common pleas is, however, the

beginning of a proceeding in that court, and if the notice is entered in time, the case is pending there. The supplemental act, therefore, in providing that matters relating to the contest shall be heard by the court in which such matters are pending, by fair and reasonable construction, takes the place of section 42, and gives the common pleas jurisdiction, by reason of the fact that the case is pending there.

The notice of appeal in the present case was entered with the clerk April 29, which was more than twenty days after the result was declared but within thirty days from the date of the election. Whether this was in time, depends on the question as to the effect of the supplemental act in repealing so much of the original act as required notice of appeal to be entered within twenty days after the result was declared. The supplemental act provides, "that in any case now pending, or which may hereafter be pending, in any of the courts of this state, the notice of contest or appeal shall be served or filed on or before the thirtieth day after the election." The meaning of this is difficult to ascertain. It prescribes a rule that is to be observed in cases that may hereafter be pending, and yet the rule is one which it seems must be applied before it can be determined whether the case is pending. It requires notice of appeal to be served or filed, without saying where, and in the light of a statute which provides neither for serving or filing, but for entering. It speaks of notice of contest or appeal, using the words either as if they meant the same thing, which is against the ruling of the supreme court of the state; or if different things, referring to notice of contest, whereas by repeal of section 42 notice of contest is no longer required. At the same time, it must be presumed the legislature intended something by this act, and nothing can be made of the intention but that it was to repeal, for the future at least, so much of the original act as fixed the period for entering the notice of appeal with the clerk at twenty days from the day of declaring the result. Repeals by implication are not favored, and yet when there are two statutes positively irreconcilable, the latter operates to repeal the former to the extent of the inconsistency between them, the same as if an express intention to make such repeal had been declared in the law.

The motion to dismiss the appeal for want of jurisdiction will be overruled.

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158 [Cuyahoga Common Pleas Court, 1877.]

BISHOP GILMOUR v. FREDERICK W. PELTON, TREAS.

For opinion in this case, see 5 Dec. R., 447 (s. c. 6 Am. Law Rec., 26). See also note to that case.

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171 **CONTESTED ELECTIONS.**

[Hamilton Common Pleas Court, June Term, 1877.]

PHILIP KIENBORTH v. LEWIS G. BERNARD.

A notice of appeal in an election case, taken to the clerk's office after it had closed for the day, and handed to the janitor employed by the county commissioners to sweep out the office, is not "entering" with the clerk.

AVERY, J.

Kienborth and Bernard were candidates for the office of clerk of the court of common pleas, at the last October election, and by the declaration of the clerks and justices who made abstracts of the returns, and whom the law appoints for that purpose, Bernard was declared elected. This was subject to appeal to the court of common pleas, provided notice thereof was entered with the clerk of the court within twenty days after the day of declaration; and on the twentieth day from the date of the declaration, after the clerks' office had closed for the day, it is testified that a notice of appeal was handed to the janitor who was sweeping out the office. The paper, however, did not come to the hands of the clerk or any of his deputies until three days afterward; nor was there any want of good faith or diligence on their part, and it is sufficient to say that handing a paper to a janitor, employed by the county commissioners to sweep out the clerk's office, is not entering it with the clerk. To enter notice of appeal with the clerk requires that the notice should be left at the office of the clerk, with him or his deputy.

Upon the same night, about 10 o'clock, another paper was left with the clerk at his private residence, which he marked as filed when received, and brought, on the following morning, to his office and entered on the appearance docket as of the date of the preceding day. The paper was signed by Philip Kienborth, and addressed to Lewis G. Bernard, notifying him of Kienborth's intention to contest his election, and specifying the point of contest. It was indorsed "Philip Kienborth, contestant, against Lewis G. Bernard, contestee," and was entered on appearance docket under that title. It was a notice of contest, and differed from a notice of appeal; but, as a notice of intention to contest, it necessarily conveyed notice of intention to appeal, since a contest could be had in no other mode than by appeal. Being entered by the clerk, the only question, therefore, is, whether it was in time.

It was entered by the clerk on the day he brought it to his office, which was the day after the expiration of twenty days from the date of the declaration, and unless parol proof is admissible to vary the date of the declaration, the entry was too late. The proof offered is that the declaration, was signed by the clerk and justices two days after its date, although the abstracts of votes were made up, and the result was informally announced by the clerk on the day of the date. The proof is not that any fraud was intended; no suspicion of that kind is breathed, nor that it operated as a fraud on the defeated candidate by misleading him. He had no knowledge, so far as appears, of any difference between the date and the signing, and it was the common talk and understanding in the clerk's office, where he was engaged as a deputy, that the twentieth day from the date of the declaration would be the last day.

Upon what ground, then, is the proof to be admitted? Mistakes in the date of an instrument inter partes may be corrected to conform to the intention of the parties. But there is nothing to show that the intention was not to make the declaration as of the exact date which it bears. Besides, the declaration was not an instrument inter partes, but was an official certificate. The argument for the contestant is, that the declaration was not required by law to be in writing. If this were so, nevertheless the declaration was in writing, and as the rules against varying writing by parol would still prevail, the argument would only go

to the point of intention of the law to regard the day of declaration, and not any written date. The intention of the law, however, is to ascertain with certainty the expression of the popular will. Ballots cast at the election are printed or written; the tally-sheets and poll-books are in writing; the abstracts of votes are certified and signed, and it would illy comport with all this, that the final step, which is the end and object of the whole, should be a verbal declaration. Where would it be made, and to whom? And when made, how would the evidence of it be perpetuated and retained? A matter of such importance was surely not intended to be left to the uncertain memory of witnesses; nor would it be reasonable that the evidence of the declaration, in its nature as evidence, should sink below the evidence on which the declaration is based. That the declaration shall be final, unless appealed from within a fixed period from the day of declaration, requires that there should be some record of such day; and while the clerk and justices do not proceed judicially in ascertaining the result of an election, their declaration is an official record. The return of a sheriff is conclusive as to the facts which it recites, between parties and privies, and for a like reason the declaration of the clerk and justices is conclusive. They are officers of the law, acting between the public and the candidates, and between each candidate and every other. Their declaration binds all, because all are privy to it, and in the absence of fraud, or of what against the defeated candidate would operate as such, and in the absence of mistake in putting down one thing where another was intended, the declaration can not be varied.

The same reason does not apply to the entry of notice of appeal made by the clerk on the appearance docket, and although such notice is entered as of the twentieth day from the date of the declaration, parol proof is not admissible to show that it was in fact the next day. Entering notice of appeal is the act of but one of the parties, and noting it on the appearance docket of the clerk is only evidence of such act of that party. Jurisdiction upon appeal can be obtained only within the period fixed for entering notice, and when the question is whether the act on which jurisdiction must rest has been done by the party, an entry by the clerk on the appearance docket does not preclude inquiry into the fact.

The act of the legislature of February 1, 1877, provides "that upon the trial of any contested election, or at the hearing of any preliminary proceeding in such case, any omission, error or defect in declaring or certifying that any person was elected, may be corrected by parol proof." A difference between the signing and the date of a declaration is not a defect; nor, unless it was unintentional, would it be omission or error. Besides, parol proof is to be offered only at the trial of the case or in some preliminary proceeding in it, which presupposes that jurisdiction of the case has been obtained, and therefore renders the provision inapplicable to the question whether jurisdiction has been obtained or not.

The act further provides that in any case pending, or which may hereafter be pending in any of the courts of this state, notice of contest or appeal shall be served or filed on or before the thirtieth day after the election out of which the contest arises. It is difficult to understand this as applying to the notice of appeal which must be entered in order to confer jurisdiction on the court, because the words are that the rule shall be applied "in cases pending or that may hereafter be pending" which would ordinarily imply that jurisdiction of the case had been

obtained. At the same time nothing can be made out of the provisions, but that it was intended by the legislature to repeal so much of the original act as fixed the time for entering notice at twenty days from the date of declaration.

The question is, then, whether the repeal shall have a retroactive effect. By the constitution of the state, the general assembly has no power to pass retroactive laws, and it has been held that, upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed, must be deemed retroactive. 15 O. S., 207.

The declaration of the election of the present incumbent of the clerk's office was final, unless appealed from, and when the twenty days, which the law had provided, passed without entering appeal, the right of the incumbent to the office became complete. The office of clerk of the court of common pleas is established by the constitution, and may not be repealed by legislative act; but even if it were an office created by statute, the incumbent would have a vested right during the continuance of the office, and until the repeal of the law.

If the act in question is to have a retroactive effect, it acts upon vested rights of the officer, and is not simply to assist the defeated candidate in his remedy, but confers a right upon him which, by reason of the lapse of twenty days before entering appeal had been lost. Even if the provision of the original act in respect to the time for entering notice was in analogy to a statute of limitation, the repeal of such statute could not be made to have a retroactive effect upon a title already protected by lapse of time. Cooley Constitutional Limitations, 365.

The motion to dismiss the appeal for want of jurisdiction will be granted.

Long & Kramer, for motion.

Buchwalter & Campbell and J. W. Warrington, contra.

SCHOOLS—STREET ASSESSMENTS.

[Hamilton Common Pleas Court, June Term, 1877.] 184

CITY OF CINCINNATI v. BOARD OF EDUCATION.

The board of education is liable for its proportion of an assessment levied by the city for improving a street in front of school property, and this is not affected by the statutory provisions that public school property shall be exempt from taxation and that the board can only levy taxes for school purposes.

BURNET, J.

This was an action to recover an assessment for the improvement of a street upon which one of the school houses of the city on Walnut Hills abuts. The court remarked that the question is presented whether the board of education of the city of Cincinnati is liable for the payment of such an assessment. That the interest of the board of education in the property is not liable, is clear. The circumstances of the case are these: The property belongs in fee simple to the trustees of Lane Seminary. They made a perpetual lease of it, in which the lessee

assumed the payment of all taxes and assessments. Our general law provides that property held by the board of education for school purposes shall be exempt from taxation, and it can not be taken and sold on execution, or by order of sale. The city, however, makes a contract with private contractors for the improvement of a street, and it agrees to give the contractor the assessments upon the property in payment of the contract price. The city is liable, as a matter of course, for all the excess of assessments above that which can be levied upon the property, that is for all above 25 per cent of its value. The city is liable for all intersections where the improvement made is abutted by other streets or alleys, which are properly belonging to the city itself, or where the improvement made is abutted by any other public property, the title of which is in the city. But here is property which stands in the name of the board of education, which the city, as a municipal corporation, has no control over.

Now, it seems to the court, although the board of education is authorized to levy taxes only for school purposes, yet it ought to be required to pay this assessment. The board of education may levy taxes for the building of school-houses, for the purchase of lots upon which the school-houses are to be built, and for the improvement or repair of its school-houses, and for all the expenses incidental to the use and ownership of school houses. Now, on the ground that the public streets are peculiarly useful and beneficial to the owners of property abutting upon the streets who have a proprietary right in the streets themselves by virtue of their easement upon the streets, the expense of the improvement of streets is levied upon the abutting property. But public property can not be taken for the purpose of paying the contract price. Payment must be worked out, therefore, by the obligation resting upon the board, which owns the property, the representative of the public. We think, therefore, there ought to be a judgment against the board of education for the amount of this assessment, and if it can not be made by execution, and the board refuses to levy a tax, there is a way of reaching it.

This would be the law applicable to the board of education if it were the owner in fee-simple of the property. Primarily the trustees of Lane Seminary, or rather their interest in the land, is liable, they holding the fee-simple. By covenant between the trustees of Lane Seminary and their lessees, the lessees have undertaken to perform the obligations of the trustees in this respect, and in the district court we have decided that in such case the city might, in the first instance, pursue the lessee who had undertaken by his covenant to pay this obligation. It is, therefore, a matter of contract resting upon the board of education of the city of Cincinnati to pay. On this ground the board of education is directly liable.

Judgment for the plaintiff for the amount claimed.

Paxton & Warrington, for the plaintiff.

City Solicitor, for defendant.

EMINENT DOMAIN. 187

[Warren Probate Court.]

L. E. A. & W. R. R. Co. v. A. & G. W. R. R. Co.

The fact that the owner of property sought to be condemned has agreed with the railroad company seeking its appropriation, on the term of a right-of-way, on a different part of the property, is no defense to the appropriation on a different line as to which they can not agree.

In view of the fact that the question of the right of one railroad company to cross the track of another at whatever point of crossing they may select, without reference to the damage of the road crossed, has been much questioned, but never before decided in Ohio under existing statutes, and the importance of the question involved, we have procured the opinion, in full, of Judge Yeomans, for publication.

The decision was given in the suit for appropriation brought in the probate court of Trumbull county by the Lake Erie, Alliance & Wheeling Railroad Company v. The Atlantic & Great Western Railroad Company, and occupied the time of the court for nearly a week.

Some of the most eminent railroad engineers in Ohio gave evidence in the case. It was argued at length by Judge George M. Tuttle and Mr. Ammerman, of Alliance, for the Lake Erie Company and by Mr. Russell, of Otis, Adams & Russell, of Cleveland, and Hon. L. C. Jones for the Atlantic & Great Western Company.

YEOMANS, J.

This is an appropriation proceeding instituted by the Lake Erie, Alliance & Wheeling Railroad Company, to appropriate a right-of-way across, and the right to cross the right-of-way and track of the Atlantic & Great Western Railroad Company, at a point designated in the petition, in the township of Braceville, in Trumbull county. The petition alleges that the petitioner is an incorporated railroad company; that it has legal right to make appropriations as asked; that it is unable to agree with the owners of the property or rights sought to be appropriated; that the appropriation sought is necessary; that said property is owned by the defendant, the Atlantic & Great Western Railroad Company, and that John H. Devereux, receiver, who is joined as a defendant, has some interest therein.

To which petition the Atlantic & Great Western Railroad Company and John H. Devereux jointly answer, and deny the corporate existence of plaintiff's company; its legal right to make appropriations as asked, and the necessity for the appropriation or use by petitioner of that property and right asked in the petition. Defendants further allege that plaintiff was able to agree and did agree with defendant upon the terms of a more suitable, safer, and proper crossing of defendant's railroad by that of plaintiff in place of the one sought to be appropriated; that the crossing sought in this proceeding is unnecessary and improper; that in operation it would be extremely dangerous to property and to human life; that it would be an abuse of the power of appropriation oppressive and in bad faith.

Upon trial, the evidence shows that the plaintiff is a legally-organized railroad company; that it has a right to make appropriations under

the laws of Ohio; that they have made their examinations and surveys, and have located their railroads upon the lands and across defendant's railroad at the place mentioned in the petition; that by the judgment and determination of said company in locating their line, the land and crossing sought by them is adjudged necessary for the construction of their railroad, and that the land and right asked is no more than would be necessary for a crossing at that place. It is also by the evidence shown that the crossing sought to be appropriated is at a point on defendant's railroad 2,157 feet west of defendant's station at Braceville, at which station defendant's railroad is upon level grade; from the station west for 1,600 feet the grade rises 22 65-100 feet per mile, for the next 2,600 feet at 48 5-100 feet per mile, for the next 400 feet at 26 40-100 per mile, after which for some distance is a slight descent westward; that at the proposed place of crossing, defendant's road is on a curve, which by the testimony of competent engineers, is an additional obstruction, in all equal to an up grade of 56 feet per mile in going west, being the heaviest grade in that direction upon this division of defendant's road; that the carrying power of defendant's trains in going west over this division, will be dismissed at least 1-16 part by reason of the crossing, if made at the point proposed; that the wear and injury to the defendant's track and rolling stock, and the risk of accidents to persons and property while being transported on either of said railroads, would be much greater by crossing at the proposed point than by crossing at said less or level grade; that there is nothing in the topography of the country to prevent so locating and constructing plaintiff's railroad as to cross at the level grade, or on the 22 65-100 grade, near defendant's station, that a survey made in the general line of plaintiff's road as located, and crossing upon said 22 65-100 grade, gave plaintiff a road of shorter line, more easy construction, better curves, and lighter grades, than their located line, but the right of way over adjacent lands would be more expensive.

That a writing was made about December 1, 1876, signed by the respective presidents of the plaintiff's company, of the defendant's company and of the Cleveland & Mahoning Railroad Company, whose track is also crossed by the line of the plaintiff's railroad, respecting such crossing, in which no definite point for crossing defendant's railroad is specified, other than "at or near their Braceville station;" that the points referred to in conversation, in pursuance of which said writing was made, were at said station, and a point on the 22 65-100 grade next west of the station; that said writing, after it was signed by the president of defendant's company, that officer hesitated about or declined to deliver said writing to plaintiff, and had not delivered the same at the time of commencement of these proceedings. That plaintiffs had graded their road from the south to near the now proposed crossing, when defendants first learned of the location of said crossing, and that defendants, by proceedings in Trumbull county common pleas, immediately enjoined plaintiffs from so crossing, and have ever since refused to allow a crossing at that place, or to negotiate therefor.

The two questions upon which this contest is really made, and which the court is to determine, are: "The inability of the corporation to agree with the owners of the property sought to be appropriated," and "the necessity for the appropriation."

As to the inability to agree—

It is alleged in the answer and contended by defendant upon the trial, that an agreement was made by the corporation seeking to appropriate with the owners of the property, providing for a permit to cross defendant's railroad at a different point than the one now sought, and agreeing upon the terms thereof. It is unnecessary for us to here determine the validity of an alleged agreement. It is not claimed by the defendant that it was an agreement for the same property now sought to be appropriated, and the evidence clearly shows that the plaintiff has not agreed, and has been unable to agree with the owners for the property now asked for, to-wit; the crossing upon plaintiff's line at the point mentioned in its petition.

As to the necessity for the appropriation—

This raises the question, into what may we inquire, and how far does our jurisdiction extend? The right of eminent domain, or the sovereign right of the state to take private property for public use, is only to be exercised when required by the public necessity; the power to determine that necessity, is entrusted to the general assembly, and may be exercised directly by that body or through subordinate agencies.

It is claimed by the plaintiff, that the general assembly of Ohio has delegated to the railroad companies the right to locate their road and to determine upon what line and of what land it is necessary that they make appropriations; that the determination by them is conclusive and final, and can not be reviewed or interfered with by any court, except by a court of general jurisdiction, when the company exceeds its authority or acts in bad faith, and that the jurisdiction of the probate court upon the question of necessity is to determine the amount of property only which is necessary to be appropriated. While by the defendants it is claimed that the probate court is the tribunal to which the general assembly has delegated the power to determine the entire question of the necessity for the appropriation.

For the better understanding of this question, let us look carefully to the acts of our general assembly, and see how and to whom they have heretofore delegated this power, and where it now rests; by the act of February 11, 1848, regulating appropriation and procedure, section 9 provides: "Such corporation is authorized to enter upon any land for the purpose of examining and surveying its railroad line, and may appropriate so much thereof as may be deemed necessary for its railroad." The language is not so much as they may deem necessary, but so much as may be deemed necessary, without saying by whom it is to be deemed necessary, or expressly delegating the power to determine the necessity to the railroad company or to the owner of the land. But the same section, in providing the manner of appropriation, provides that the corporation forthwith deposit with a "Court of record of the county where the land lies, a description of the rights of interests intended to be appropriated, and such land, rights and interests shall belong to said company to use for the purposes specified, upon making payments or giving security therefor as hereinafter provided." This provision of the statute, by implication at least, gives the railroad company the power to determine the necessity, for it provides that they shall file in court a description of the property which they intend to appropriate, and declares that thereupon that property shall belong to said company to use for the purpose specified, by making or securing payment therefor. The section then provides for the appointment of a committee, whose sole power is to assess compensation.

The same act, referring to the appropriation by railroad companies of public ways and grounds, section 11, after reciting if it shall be necessary in the location of any railroad to occupy any street, public highway or ground, if the authorities having charge thereof and the corporation can not agree, that application be filed by the company in the court of common pleas, and provides that "the court shall appoint at least three judicious, disinterested freeholders of the county, who shall proceed to determine whether such appropriation is necessary, and if necessary, the manner and terms upon which the same shall be used;" expressly making the freeholders appointed by court the agents in this case to determine the necessity for the appropriation, and in both cases delegating the power to determine the necessity, not in that part of the statute which declares that the corporation may appropriate, but in that part which provides the manner and proceedings of making such appropriation.

On the 30th of April, 1852, the general assembly of Ohio passed an act providing for the manner of making appropriation of private property to public use by proceedings in probate court, wherein the powers and duties of the probate judge are plainly declared, and in which no power is delegated to him to determine the necessity for the appropriation asked, but in which the corporation is authorized to file a statement describing the property sought to be appropriated, and after the compensation has been assessed by a jury, the court, by section 11, "shall render a judgment to the effect that said corporation shall hold the property in the proceedings mentioned for the purposes for which the same was appropriated, and enter the same upon record, and thereupon such corporation shall hold the same accordingly."

On the next day, May 1, 1852, the general assembly re-enacted that portion of the law of 1848, by which a railroad company is authorized to enter upon any land for the purpose of examining and surveying its line, and may appropriate so much of it as may be deemed necessary for its railroad, omitting all that relates to proceedings to appropriate, and providing by section 12 that public ways and grounds may be appropriated in the same manner as property of individuals.

Under these acts of the general assembly, for a period of twenty years, from 1852 until 1872, the power of determining the necessity for the appropriation of all railroad right-of-way was held by the corporation seeking to make the appropriation.

It was under the statutes that the case of Geisy v. C., W. & Z. Co., 4 O. S., 308, which is cited and relied upon by counsel for both parties was in this case decided, in which Judge Ranney, in giving the opinion of the court, while recognizing this power as held by the corporation, says: "It would seem to me much more consistent with a proper regard for private rights, that the question of necessity as well as compensation, should here, as well as in England, be determined by some impartial public tribunal."

Has a tribunal for that purpose been created, or does the power yet rest with the corporation?

The act of April 28, 1872, provides, "That all appropriations of private property by and to the use of any and every corporation now existing or that may hereafter be created by or under the laws of this state, shall be made and conducted in accordance with the provisions of this act."

And as amended March 23, 1875, it further provides: "the probate judge shall proceed to inquire and determine the question of the corporate existence of the corporation, its legal right to make appropriation under this act, the inability of such corporation to agree with the owner or owners of the property sought, and the necessity for the appropriation upon all which questions any of the property owners may be heard, and the corporation shall satisfy the court affirmatively by satisfactory proof."

Section 26. The repealing clause, after naming certain acts, says: "And all acts and parts of acts contradictory to or inconsistent with the provisions of this act, be and the same are hereby repealed."

It appears to have been the intention of the legislature to change the former statute. The power to determine this question can not reside in the corporation and in the probate judge at the same time. The language of this act is plain, and its demand is imperative. The probate judge shall proceed to inquire and determine the necessity for appropriation; and, without stopping to question the wisdom of the legislature, upon a careful investigation, I am satisfied that the power of determining this necessity was taken from the corporation seeking to make the appropriation, and that the probate court of the state is the tribunal to which it is by the general assembly now delegated.

Has the necessity for this appropriation been established by satisfactory proof? The necessity mentioned in the statute is not to be constructed in the sense of being absolutely indispensable, but rather in that sense in which an impartial tribunal would say there was a reasonable necessity under the circumstances surrounding the case. It must be borne in mind, that railroad companies are by statute given the right to enter upon all lands and make their examination and surveys; that it is essential for the accomplishment of the very object for which they are formed that they conclude upon and locate the line of their road; that in so doing their own interests will lead them to adopt such a line as will be advantageous to themselves; that so long as they pay a just regard to the rights and interest of others, and more especially of the public, it is right and proper that they exercise their own judgment and discretion in determining what line they will adopt, and having so adopted a line, their judgment is entitled to respect, and it is no answer or defense to the necessity of appropriation to show that other lands upon another route equally good could be obtained by purchase or otherwise. It must also be borne in mind that the right of eminent domain can only be exercised for the public good, and that the interest and safety of the public is never to be lost sight of in determining the necessity for an appropriation.

The railroad companies, plaintiff and defendant, stand upon the same footing. Both are considered highways in which the public have interests and rights.

Defendants acquired their rights and constructed their roads some years ago, and it is now one of the leading thoroughfares of the country. plaintiffs now organize their company and seek to construct their road, and in doing so they wish to cross the defendant's track. It is right they should do so. Both corporations stand equal before the law. But in so crossing, the latter company must not destroy or unreasonably interfere with the former. Nor may they unnecessarily impair the efficiency or usefulness of defendant's road. It is the public interest which

allows them to proceed, and in proceeding they must not unnecessarily impair the interests and rights of the public in the road already constructed. As it is for the interest of the public that private property may be taken, so the interest of the public may be considered higher than the interest of private persons in determining the necessity of appropriation. It is by the application of these principles to the evidence before the court, that this question is to be determined.

The testimony clearly shows that by crossing at the point proposed by plaintiff, the defendant's road will be unreasonably interfered with and injured; that its efficiency will be greatly and unnecessarily impaired, and that the hazard of the traveling public will be unwarrantably increased. The survey, in evidence, shows that difficulties and dangers can to a very great extent be easily avoided by the plaintiff, with no loss to itself, except some additional cost of right-of-way, while in all other material respects its own condition would by the change be improved. And, with due regard to that evidence, to the rights of the parties, and to the interest and safety of the public, I cannot say that the necessity for the appropriation of the crossing at the point asked has been satisfactorily proved.

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197 **MASTER AND SERVANT.**

[Hamilton Common Pleas Court, June Term, 1877.]

LOUIS LEFKOWITCH, ADMR., v. WM. W. HARPER.

A livery-stable keeper who furnishes horses and a hack to one who procures a number and license as a hack-driver, and has sole control over the management of the hack, as where it shall stand, how many persons he should carry, how much to charge, and how long to remain on the streets, and who pays one-half his earnings as rent, and has a privilege of purchasing the hack, is not the employer or master of such hack-driver, and is not liable for the negligent running over of a person by such driver.

JOHNSTON, J.

Sally Goodman, plaintiff's intestate, having died of injuries received by being run over by a hack alleged to belong to defendant, and to have been driven by defendant's servant, this suit is instituted by her administrator to recover damages under the statute, for the benefit of her next of kin. She was a domestic, unmarried, and her kindred all reside in Europe. Upon the trial there was a verdict of $500 damages. Defendant moved for a new trial, relying solely on the ground that the verdict was contrary to law and to the evidence. There is no doubt but that the deceased came to her death through the negligence of the driver of the hack, but the question of importance in the case is, did the relation of master and servant exist between defendant and the driver of the hack at the time the injury was done? The evidence touching this question is very meager. The defendant offered no testimony in his behalf, but he was called to the stand by the plaintiff in chief, and gave the only testimony there was upon the relation existing between them, and in substance as follows: That being a livery proprietor in the city, and having a number of idle horses, one Hanley, an adept in hacking about the city, being out of employment, proposed that if defendant would furnish the horses and hack, that he (Hanley) would procure a number and license, and that without any care or attention whatever on the part of Mr. Harper, he would engage in hacking it about the city, Han-

ley paying half of the receipt daily to Harper for use of the team and hack, and retaining the other half for himself. There was no evidence as to who was to pay for feeding and caring for the horses, but they were fed and kept at defendant's stable. It was also the agreement that Hanley had the privilege of purchasing the hack while thus operating it. Further, defendant testified that he never hired Hanley to drive for him, and never agreed to and never did pay him for service as a driver or otherwise. It was while thus operating the hack, that Hanley, driving the team on Central avenue and Elizabeth street, with passengers, at an immoderate rate, run over the deceased, injuring her so that she died.

If Harper may be held responsible, it is upon the principle of respondent superior. This rule obtains only where the relation of superior and subordinate exists, as between master and servant, or principal and agent, and the rule ceases when the relation ceases to exist. Its application is found wherever the power of control and direction is retained by one person over another, and the person has the right to exercise it, and for the safety of others he is bound to exercise it over subordinates.

Whether Hanley was the servant or subordinate of Harper is to be determined by the terms of the contract between him and the law arising thereon. It is not every employment of another to do a particular thing that constitutes that other the agent, so as to bind the employer by his acts. Take the familiar case of a contractor, who engages to erect for the owner of his lot a house complete for a given sum, the contractor furnishing all labor and materials. Any person injured through carelessness or negligence of the contractor, or his employes, during the progress of the work, can not hold the owner. The employment is separate and independent. The owner cannot dismiss the contractor at any time for misconduct. He can not exercise control either over the contractor, or his men or the work. He simply has the right to require the work to be such as the contract has provided for. If it falls short of this, he has his remedy against the contractor. If, however, the owner by the terms of his contract retains the power of superintending the work and directing the mode and manner in which it is to be carried forward, then he does become responsible for all damages any third person may sustain by reason of the negligence of the contractor, or his subordinates, in the prosecution of the work. This has been repeatedly held to be the law by our supreme court. Carmen v. Railroad Co., 4 O. S., 399; Cincinnati v. Stone, 5 O. S., 38; Clark v. Fry, 8 O. S., 358; Pickens v. Diecker, 21 O. S., 212, 215.

Now, the evidence nowhere discloses that Harper was to have or exercise any control over Hanley while away from the stable with the hack. What stand was he to occupy, to what points he should drive parties, how many should be carried at a time, what amount should be charged, and how long he should remain on the streets each day, were all matters over which so far as the testimony discloses, Hanley had sole control. Hanley observing his agreement fully, can it be successfully claimed that Harper could at any time have taken the hack from Hanley while upon the streets with it? Could he have successfully maintained an action of replevin? It would seem that as long as Hanley observed the contract upon his part fully, he had sole and exclusive control and use of hack and horses every day for the purposes named.

There was no evidence that he had lost the right before the injury was done deceased, hence at the time, by virtue of the arrangement under which he was operating the hack, he was *"pro hac vice"* the owner thereof.

But it is claimed, that because the defendant was to receive a share of the earnings each day, he retained such an interest in and occupied such a relation to the property and the driver, as would authorize a verdict against him as owner or master.

The case of Venables v. Smith, 25 Weekly Rep., at first imperfectly reported, seemed to sustain the position. There a cab proprietor let a cab to a driver at sixteen shillings a day, the driver to retain all over the sum received for his compensation. Having finished for the day, he chose to drive off the regular route home to procure some snuff for his own use, and on the way ran over the plaintiff. Cockburn, C. J., in announcing the opinion, said: "The relation of the proprietor and the driver of a cab *quoad* the public, is that of master and servant, by virtue of an act of parliament. Independent of the acts of parliament, the relation *inter se* is that of bailor and bailee, and Powles v. Hider, 4 W. R., 492, is cited in support of the position. But there are several cases in this country that meet the question fully as to the relation existing between the hirer and the owner of a chattel where a share of the earnings is received by the owner for the use; in 4 Greenleaf, 264, 22 Ver., 173, 15 Mass., 370; 16 do., 336,, and 6 Pick., 335, are cases of this character, where in hiring or chartering a vessel for a time, the owner to be paid for the use by a proportion of the net earnings, it has been uniformly held that the relation of master and servant was not thereby created between them, nor the relation of co-partners. In the case in 6 Pick., the owner sent with the vessel and paid individually the wages of one of the men. The case in 22 Vt., is very similar to the case at the bar—a person having received an injury on a ferry while being operated by the hirer, the owners receiving weekly half the net earnings for the use of the ferry, and paying for half of the repairs, the ground of these decisions being that the control being vested solely in the hirer, he became in each case the owner *pro hac vice,* and alone responsible for loss of goods or injuries received during the voyage.

From evidence given by Harper, and in the light of the decisions cited, I am unable to discover that any other relation existed between Harper and Hanley at the time the injury ensued to deceased, than that of bailor and bailee; or Hanley at the farthest being engaged at the time in the execution of an independent employment, the control and the mode and manner of conducting it being left solely to Hanley, with which Harper had nothing to do. Harper agreeing to receive a share of the daily earnings was but a means adopted to fix the value of the use or hire of his property. Hanley, it does not appear, agreed to pay any expenses or bear any losses. In my opinion, the verdict is contrary to the law of the case, and a new trial is granted on payment of the costs of the term by defendant.

Bradstreet & Milligan, for plaintiff.

Shay & Paxton, for defendant.

FIRE INSURANCE—PARTIES. 223

[Cuyahoga Common Pleas Court, September Term, 1877.]

J. W. SYKORA ET AL. v. FOREST CITY MUTUAL INS. CO.

HENRY HUNTINGTON v. BUCKEYE MUTUAL FIRE INS. CO.

1. Where a policy of a mutual company provides that applications must be made to the home office for insurance, and, if approved there, shall be the basis of the contract, and that no agent can waive any of their conditions, the agents having no power to effect insurance can not impose a liability not arising under such applications, this is a mere proposition and an allegation. That such agent was truthfully told of the state of the insured's title, but fraudulently misrepresented it in the application, does not aver facts binding on the company.
2. In an action by the assignee of an insurance policy for reformation and enforcement, the assignor is a necessary party, as he made the contract, and demurrer for want of such party must be sustained.

The above actions were founded on two separate policies of insurance issued respectively by the defendants, and covering the same property. The policies were issued upon written applications, made by one Frank Pival. In these applications the following question was asked: "Are you the sole owner in fee simple of the premises?" to which Pival answered "Yes." While the policies were in force, a fire occurred, consuming the premises, and after the proofs of loss were made, Pival assigned his interest in the policies to the plaintiffs.

The petitions, after setting forth the policies and applications, averred that at the time the applications were taken, Pival represented to the agent of the companies that he owned the property by land contract; that he did not state that he owned it in fee simple; that Pival was an ignorant man and did not understand, and could not speak the English language; that he signed the applications without knowing what they contained; that he did not then, in fact, own the property in fee simple, but only owned it on land contract, by which he was to receive a conveyance upon performance of the contract; that the defendants, their agents and servants, knew at the time said applications were made and said policies issued, that Pival did not own the land in fee simple, but only owned it by land contract; that the misrepresentation occurred through the fraud of the defendants, and the mistake and ignorance of Pival; that the defendants fraudulently wrote in their policies a clause making the applications warranties; that it was no part of the agreement that the applications should be warranties. The petitions prayed for a reformation of the policies so as to exclude the warranty clause, and of the applications so as to state that Pival owned the property by land contract, instead of fee simple, so that the contracts should be as was contemplated and understood at the time by the parties, and for judgments against the defendants. Pival, the assignor, was not made a party.

To these petitions demurrers were interposed because of defect of parties, and because the petitions did not state facts sufficient to constitute a cause of action or ground of relief.

Wilson and Sykora, for plaintiffs.

Brewer and Wilcox, for defendants.

CADWELL, J.

Held, that Pival, the assignor, was a necessary party, as the court was asked to reform a contract made by him; that the case differed from an ordinary suit by an assignee upon a chose in action, and the demurrers were, therefore, sustained on the first point.

As to the second point. The policies provided, besides the clause respecting warranty, that if the interest of the assured in the premises be not truly stated in the applications, then the policies to be void; that if the interest of the assured in the premises be other than the entire unconditional and sole ownership, the policies to be void. The policies further provided that persons desiring to obtain insurance should make written applications therefor and forward to the home office; that such applications, if approved by the risk committee, should constitute the basis of the contracts, and the policies issued thereon should be dated and take effect at noon on the day of approval. The policies further provided that no agent was authorized to waive any of their conditions.

The court decided that the policies could not be reformed; that to make the reformation prayed for would be to make new contracts, in substance imposing a liability which the companies never assumed That all policy holders were interested in the truth of the statement as to ownership, and it could not be assumed that the risk committees would have acceped the risk if the true condition of the title had been disclosed. That the agents of the companies, having no power to effect insurance, but only to take and forward applications, could not bind the companies or impose a liability which did not arise under the written applications and the contracts made in writing by the parties; that the applications were nothing but propositions which the companies had a right to accept or reject; and when they were accepted, they could not be modified in such a material respect; that the petitions did not, therefore, state facts sufficient to constitute a cause of action. The demurrers were also sustained on the second point.

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239 [Hamilton District Court, June Term, 1877.]

WM. J. BERNE v. ISAAC BRITTON.

For opinion in this case, see 5 Dec. R., 487 (s. c. 6 Am. Law Rec., 263).

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240 [Hamilton District Court, June Term, 1877.]

W. C. MITCHELL v. CINCINNATI & INDIANA RAILROAD CO. ET AL.

For opinion in this case, see 5 Dec. R., 488 (s. c. 6 Am. Law Rec., 265).

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240 [Hamilton District Court, June Term, 1877.]

JOSEPH GHIRADELLI v. LEVERONE.

For opinion in this case, see 5 Dec. R., 486 (s. c. 6 Am. Law Rec., 255).

[Hamilton District Court, June Term, 1877.] 240

CITY OF CINCINNATI FOR THE USE OF v. ANNA M. MCDERMOTT ET AL.

For opinion in this case, see 5 Dec. R., 494 (s. c. 6 Am. Law Rec., 285).

COSTS—JURISDICTION. 241

[Hamilton District Court, June Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

GEORGE C. MILLER & SONS v. HARRIET TRUMAN.

1. Where the record does not show that a dismissal at plaintiff's costs is for want of jurisdiction, the judgment should be affirmed as to costs.
2. Where, on appeal from the judgment of a justice against a married woman, she demurs generally as well as for want of jurisdiction, her general demurrer in the common pleas is a submission to the jurisdiction. If she had desired to raise the question, she should have filed a motion to dismiss for want of jurisdiction.

JOHNSTON, J.

The court delivered the opinion in this case, which came up by petition in error. The plaintiffs in error brought suit before a magistrate on a note for $50, signed by the defendant. She claimed that she was not liable, being a married woman, and that the court had no jurisdiction of the case. A judgment was rendered against her, and a bill of exceptions taken. There were several errors assigned. In the common pleas, the judgment of the justice was reversed, and the case retained for trial and final judgment, as in cases of appeal, as authorized by section 552 of the Code of Civil Procedure. The judgment of the common pleas was a general judgment of reversal. To this judgment exceptions were taken. The plaintiffs filed a petition, as in cases of appeal, declaring on this note, alleging that the plaintiff was a married woman, that a carriage had been sold to her, and that she gave a note to bind her separate estate and other necessary averments.

After this petition was filed, Harriet Truman filed a general demurrer, and before it was disposed of, filed a motion to make the petition more definite and certain, and thereafter obtained leave to amend the demurrer by making it general and special—special in that the court had not jurisdiction of the plaintiff or the subject matter. That special demurrer was sustained, and the petition of the plaintiffs dismissed at their costs. The petition in error was prosecuted to reverse that judgment.

The judgment of the common pleas would be affirmed as to the costs, the record not showing that the reversal was on the ground of want of jurisdiction. But the plaintiff in error further claims that the court erred in sustaining the special demurrer and dismissing the suit for want of jurisdiction.

If the court had not jurisdiction before that time, for the reason that the justice of the peace had not jurisdiction, the filing of the gen-

eral demurrer brought Mrs. Truman within the jurisdiction; and she being a married woman, the court had jurisdiction in such case, and a right to determine the question whether she, being a married woman, bound her separate estate. It has been decided by the supreme court, in several cases, that where a justice of the peace has not jurisdiction, and the case is appealed and issue joined by the parties, it is too late after answer and before trial for the defendant to ask to have the case dismissed for want of jurisdiction. By filing a general demurrer, she as effectually entered her appearance in the common pleas as though she had filed an answer. If she had desired to raise the question of jurisdiction she should have, upon the judgment of reversal or at furthest, when the petition was filed, filed a motion to dismiss for want of jurisdiction. By demurring generally she consented that the common pleas might take jurisdiction.

This court is of opinion that error intervened in sustaining the special demurrer, and ordering the case dismissed for want of jurisdiction.

Judgment reversed.

Wilby & Ward, for plaintiff in error.

G. W. Williams, for defendant in error.

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245 [Hamilton District Court, June Term, 1877.]

BIEDINGER & HOF v. TERESA GOEBEL.

For opinion in this case, see 5 Dec. R., 492 (s. c. 6 Am. Law Rec., 282).

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246 [Hamilton District Court, June Term, 1877.]

HERMAN GOEPPER, ASSIGNEE v. CHRISTIAN HECKLE, SAME v. ELIZABETH HEROLD.

For opinion in this case, see 5 Dec. R., 493 (s. c. 6 Am. Law Rec., 284). It was affirmed by the supreme court without report.

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247 [Hamilton District Court, June Term, 1877.]

ROBERT W. BADGELY v. DANIEL G. H. BADGLEY ET AL.

For opinion in this case, see 5 Dec. R., 495 (s. c. 6 Am. Law Rec., 286).

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249 [Superior Court of Cincinnati, General Term, October, 1877.]

HARRIET A. ELLIS, EXECUTRIX, v. I., C. & L. R. R. CO.

For opinion in this case, see 5 Dec. R., 497 (s. c. 6 Am. Law Rec., 288).

[Hamilton District Court, June Term, 1877.] 251

JOHN RYAN AND JOHN J. RYAN, PARTNERS v. CITY OF CINCINNATI.

For opinion in this case, see 5 Dec. R., 489 (s. c. 6 Am. Law Rec., 279). The decision was affirmed by the supreme court. See opinion, 26 O. S., 109.

[Superior Court of Cincinnati, General Term, October, 1877.] 253

CITY OF CINCINNATI v. HENRY P. DIEKMEYER.

For opinion in this case, see 5 Dec. R., 501 (s. c. 6 Am. Law Rec., 334). It was affirmed by supreme court. See opinion, 31 O. S., 242.

[Superior Court of Cincinnati, General Term, October, 1877.] 253

CHAS. P. WILLIAMS v. HENRY F. PULTZE.

For opinion in this case, see 5 Dec. R., 503 (s. c. 6 Am. Law Rec., 337).

[Superior Court of Cincinnati, General Term, October, 1877.] 254

ALBERT STEIN v. CROSLEY, ADMR. OF BENSON.

For opinion in this case, see 5 Dec. R., 505 (s. c. 6 Am. Law Rec., 340). It was reversed by the supreme court. See Benson v. Stein, 34 O. S., 294.

ANIMALS. 258

[Hamilton District Court.]

PHILLIP NORDECK v. JOHANNA LOEFFLER.

Whether the defendant harbored and kept the dog that bit the plaintiff, or it belonged to a boarder at his house who had gone away, leaving the dog in his charge, is for the jury to determine.

Cox, J.

Judge Cox delivered the opinion in this case, a petition in error to the overruling of a motion for a new trial in the common pleas. The suit was brought by Johanna Loeffler to recover damages for being bitten by Nordeck's dog. The jury rendered a verdict for the plaintiff for $600, and the court reduced the judgment to $400, and overruled the defendant's motion for a new trial.

The principal question was, whether Nordeck, the defendant, harbored and kept the dog within the meaning of the statute, it being claimed on his behalf that the animal belonged to another party, who boarded with him. The evidence was conflicting on this point, some of the witnesses stating that he kept the dog about his premises for two or three years, and others testifying that it belonged to his boarder, who had gone to Lawrenceburg, leaving the dog in his charge at the time the biting occurred. It was for the jury to determine the question, and the testimony seemed to warrant the verdict.

Judgment affirmed.

261 [Superior Court of Cincinnati, General Term, October, 1877.]

DEWEY, VANCE & CO. v. SWIFT'S IRON & STEEL WORKS.

For opinion in this case, see 5 Dec. R., 514 (s. c. 6 Am. Law Rec., 364). It was affirmed by the supreme court, 37 O. S., 242.

[Superior Court of Cincinnati, General Term, October, 1877.]

JACOB KNAUBER v. WM. WUNDER ET AL.

For opinion in this case, see 5 Dec. R., 516 (s. c. 6 Am. Law Rec., 366.)

[Hamilton District Court, April Term, 1877.]

JACOB BROCH v. AUGUST BECHER.

For opinion in this case, see 5 Dec. R., 519 (s. c. 6 Am. Law Rec., 380). See also 6 Dec. R., 1009 (s. c. 9 Am. Law Rec., 482).

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263 **INTEREST AND USURY.**

[Superior Court of Cincinnati, General Term, October, 1877.]

FRANCIS M. CHASE v. CHAMBERS, STEVENS & CO.

Tilden, Yaple and Force, JJ.

A written agreement made January 1, 1858, by a partner, to pay the firm ten per cent., compound semi-annually, for $9,000 of his share of the capital stock withdrawn, until repayment, is not usurious and will be allowed until repayment or dissolution of the firm.

YAPLE, J.

These cases came before us on exceptions to the reports of the special master commissioner; reversed at special term for decision here. The report in the first case, No. 29614, is affirmed.

In the second case, No. 29615, we hold that the agreement of Chase, made in writing on January 1, 1858, agreeing to pay the firm ten per cent., compounded semi-annually, for $9,000, of his share of the capital stock withdrawn and to be withdrawn until repayment, was not usurious, but was to stand in lieu of such amount of capital stock until repaid to the firm of which he was a member. Interest upon $9,000 at the rate of ten per cent. per annum, compounded semi-annually, should be allowed the firm as against Chase, until repayment, or had it not been paid sooner, until the dissolution of the firm. The report of the master in all other respects will be confirmed.

Counsel, we suppose, can make the correction without a re-reference; and when that is done, we shall decide as to cost, and as to how the master's fee shall be paid by the parties. The master's charge for his fee has not been contested here, but orally assented to as reasonable and correct by both parties. His charge of $500 in each case is allowed.

Tilden and Force, JJ., concur.

Simbal & Hosea, for plaintiff.

Hoadly, Johnson & Colston, for defendants.

[Hamilton District Court, October Term, 1877.] 263

DENNIS J. FOLEY v. WILLIAM M. PETERS.

For opinion in this case, see 5 Dec. R., 517 (s. c. 6 Am. Law Rec., 377).

[Hamilton District Court, October Term, 1877.] 264

WM. KIRKUP v. DAVID H. STICKNEY.

For opinion in this case, see 5 Dec. R., 499 (s. c. 6 Am. Law Rec., 300).

[Hamilton District Court, October Term, 1877.] 264

JOHN A. POMEROY v. C. G. PEARCE ET AL.

For opinion in this case, see 5 Dec. R., 518 (s. c. 6 Am. Law Rec., 379). It was affirmed by the supreme court. See opinion, 31 O. S., 247.

[Superior Court of Cincinnati, General Term, October, 1877.] 265

SILAS H. BASCOM v. JOHN SHILLITO & CO.

For opinion in this case, see 5 Dec. R., 511 (s. c. 6 Am. Law Rec., 359). It was reversed by the supreme court. See opinion, 37 O. S., 431.

INJUNCTION—EVIDENCE. 266

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

MCMURRAY ET AL. v. F. B. WILLIAMS.

1. A man's recollection as to a date four years ago is not a binding warranty.
2. The clear evidence as to the identity of certain property with which a party is restrained from interfering with another's possession and enjoyment cannot be set aside by discrepancy in the name of a long day past.

FORCE, J.

McMurray obtained an injunction restraining Williams from interfering with McMurray's possession and enjoyment of the Loewen Garden, and the fixtures and chattels therein, describing the chattels and fixtures as those which he had bought from one Winterholer, and which Williams set up a claim to.

A month after the injunction was allowed, McMurray went to parts unknown and the injunction was dissolved. Meanwhile most of the chattels had disappeared.

Williams thereupon brought the present action on the injunction bond, making the sureties defendants. Judgment was given to plaintiff, and now it is sought to reverse that judgment.

272 Coffin v. Marratta and Isham.

The only question presented is on the identity of the property lost, with the property concerning which the injunction was allowed. The proof seems ample to identify the property. But Williams in testifying stated that his property, having been taken by him away from the Loewen Garden for a time, was returned there by him, on the day before he was served with the order of injunction While the record shows that the petition for injunction was filed on the 24th of May, and the order was served on the 27th of May Hence it is claimed that the property described as being in the Loewen Garden on the 24th of May could not be the same as that which was taken then on the 26th.

But Williams' testimony as to the date is uncertain. He fixes it in another part of his testimony as returned on the 24th of May. But a man's recollection as to a date four years ago is not a binding warranty. The clear evidence as to the identity of the property can not be set aside by discrepancy in the name of a long day past.

Judgment affirmed.

J. Johnston, for plaintiff.

I. J. Miller, for defendant.

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266 [Superior Court of Cincinnati, General Term, October, 1877.]

CHARLES BUCKHEIMER v. SAMUEL S. ASHCRAFT.

For opinion in this case, see 5 Dec. R., 526 (s. c. 6 Am. Law Rec., 440).

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269 [Hamilton District Court, October, 1877.]

UNION CENTRAL LIFE INS. CO. v. MUTUAL BENEFIT LIFE INS. CO.

For opinion in this case, see 5 Dec. R., 521 (s. c. 6 Am. Law Rec., 382).

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272 **PLEADINGS—APPEAL.**

[Hamilton District Court, October Term, 1877.]

GEORGE W. COFFIN v. JAMES H. MARRATTA AND JOHN J. ISHAM.

1. Where plaintiff's petition demanded a money judgment on a note, and defendant's answer claimed that by reason of prior agreements between the parties, there was nothing due on the note, and asked that it be cancelled, such answer not being a cross-petition, but merely stating an equitable defense, the case was one for petition on error and not appeal.
2. That the controversy arose from the parties having formerly been joint owners in a steamboat, does not make it a partnership matter so as to be of equitable cognizance.

JOHNSTON, J.

This case came up on a motion to dismiss an appeal, on the ground that the case was one in which a petition in error was the proper method of getting the case into this court. The parties to the suit were owners of interests in the steamboat Emma No. 3, which was destroyed by fire and sinking. Prior to the loss of the boat, Coffin had sold his interest to Marratta, who became the owner of three-fourths of the vessel and master. Marratta gave him a note for $787, signed for the boat and owners, per James M. Marratta, master. The note was given to the plaintiff for money advanced during the time the plaintiff was part owner of the boat, a copy of the account being attached to the

petition. The note also included an item for money advanced in the purchase of a shaft for the boat, to enable it to continue its business, which was also attached to the petition. The petition simply asked for a money judgment on the note. The defendants, by answer, admitted many of the facts set forth in the petition, and then averred that at the time the note was given, Coffin was indebted to the boat in a greater sum than the amount of the note, and that after the loss of the boat, under an agreement with Coffin, they had paid off the liabilities of the boat with the insurance money, and there was nothing left. Defendants asked that the note be cancelled and surrendered.

Judge Johnston decided the case. He remarked that the pleadings of a case determined its character, as to whether it is to be tried by a jury, or tried by the court, or whether the party aggrieved has his remedy in this court by error or appeal. The petition filed by Coffin was one at law in which he sought to recover a money judgment. It is not in the power of a defendant, where the plaintiff has brought his action at law, by simply presenting an equitable defense, and not an equitable cause of action by way of cross-petition, to deprive the plaintiff of his right to have his cause of action tried by a jury. Where facts make out upon paper simply a case at law, and the defendant by cross-petition sets up facts asking equitable relief, the supreme court has decided that the question as to the right of the defendant to his equitable relief may first be tried, and if he succeeds against the claim of the plaintiff, then the aggrieved party has his remedy by appeal to this court, and the action upon his petition at law is suspended until the equitable relief is fully determined by the reviewing court.

If Marratta had alleged that Coffin was part owner of the vessel, or that the affairs of the joint owners had never been fully settled, and had prayed an account, and had alleged in addition thereto a necessary allegation that Coffin was insolvent, then perhaps the case should have been tried alone to the court upon the cross-petition of Marratta, and in the event that Marratta succeeded, or in the event of his failure, it would be his right to appeal to this court to have that question determined as to whether or not the affairs of the joint owners had been settled, as to whether Coffin was insolvent, and whether it would be just and equitable to allow Coffin to recover against the joint owners the amount of this note. But such is not the answer of either of the defendants. They simply tender an equitable defense involving matters of fact, which, with all the facts in the case, were submitted to the jury and found against the defendant.

The fact that the relation of joint owners may have existed between the parties at the time the note was given, did not necessarily make the action of Coffin against the defendant, even with the answers as filed, an equitable one. The joint owners of a vessel are not generally, nor necessarily, partners. They may become so by the manner in which they deal with third persons, or the manner in which they have entered into the enterprise; but the fact of their being joint owners does not make them liable as partners, and even if the parties in this case were partners in the transaction, it was within their power to make the advances of Coffin a separate subject-matter, insular as the books put it, from the affairs of the partnership, so that if it were a co-partnership and still in existence at the time the note fell due, it was the

right of Coffin to have maintained the action against the co-partners, if such had been their relations, although at the time the note was given the parties, or the parties to the case, as it may be, were of the opinion that there might not have been that much due to Coffin on a settlement of their joint transactions or partnership affairs. The allegations of the defendant that Coffin was indebted to the boat in a sum greater than the amount of the note, was not a defense to his suit.

Motion to dismiss the appeal will be granted.

Coffin & Mitchell, for plaintiff.

Strickland & Foster, for defendant.

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272 **LANDLORD AND TENANT—SEWERS.**

[Hamilton District Court, October Term, 1877.]

F. B. WILLIAMS v. MACREADY & CO.

It is no defense against the liability of the owner of premises for a defective sewer, whereby water percolated into adjoining premises, that his premises are in the control of a tenant, where such owner had control of the sewer, though a tenant may have control of the premises.

Cox, J.

Judge Cox delivered the opinion in this case, a petition in error, Macready & Co. having brought the suit in the common pleas to recover damages by reason of the insufficiency of a sewer constructed by Williams, in connection with a public sewer on Walnut street, the plaintiffs below claiming that the water from the Williams sewer percolated through the adjoining cellars into their premises.

Williams set up that he employed every precaution a prudent man could in the construction of the sewer; that the premises were occupied by a tenant who had control of the same; and he claimed that the damages did not result from any defect in the sewer, but were the result of water leaking through the sewer of Macready & Co. A verdict was returned against Williams, and it is claimed in this proceeding that the court erred in refusing certain special charges, and in giving others, and that the verdict was against the law and the evidence.

This court was of opinion there was no error in the charges given by the court below; and with reference to the claim that the tenant was in exclusive possession of the property, and the landlord therefore not liable, said this claim might have been sustained but for the testimony of Williams himself. From all his evidence he seemed to have had control of the sewer himself, while the tenant had control of the property. He testified that his tenants were his slaves, evidently putting himself with reference to his tenants in the position of master and servant.

Judgment affirmed.

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273 [Superior Court of Cincinnati, General Term, October, 1877.]

LUCINDA F. PIATT ET AL. v. DAVID SINTON.

For opinion in this case, see 5 Dec. R., 547; (s. c. 6 Am. Law Rec., 483). Affirmed by the supreme court. See opinion, 37 O. S., 353.

274 **FRAUDS—LIMITATIONS.**

[Superior Court of Cincinnati, General Term, October, 1877.]

Yaple, Tilden and Force, JJ.

*BOHM BROTHERS & CO. v. MICHAEL H. CUNNINGHAM.

1. The term "discovery of the fraud" in the statute of limitations, means where the party defrauded ought, by the exercise of due diligence, after facts sufficient to put him on inquiry have come to his notice, have discovered the fraud. Such facts are knowledge, and, after four years, the party claiming not to be bound by the lapse of time must show such diligence.
2. Where the defendant, who had recommended to plaintiffs a customer, who afterwards was delinquent, received from such customer a sum of money to pay over to plaintiffs for his first bill of goods bought, and defendant never paid the money to plaintiffs, and seven years afterwards plaintiffs began their action to recover it, claiming that this non-delivery and defendant's fraudulent concealment of the fact of his having such money for plaintiffs' use, prevented the bar of the statute of limitations. As proper diligence should have led the plaintiffs to call the customer's attention to the fact of the first bill of goods having been unpaid, in which case it is fair to presume he would have told them he had left the money in defendant's hands, the non-discovery of the alleged fraud results from want of due diligence, and is not taken out of the statute.

YAPLE, J.

The plaintiffs in error, who were plaintiffs below, prosecute here this petition in error to reverse the judgment of this court in special term, rendered against them in favor of the defendant in error, who was the defendant in the action below.

Bohm Bros. & Co. brought suit against Cunningham upon two causes of action, to the joinder of which no objection was made by the defendant.

They were, during all the time covered by the transactions involved in the suit, and at the time of the trial, large wholesale merchants in the city of Cincinnati. The defendant, prior to April, 1869, and down to July, 1874, was in their employ as a salesman. Their first cause of action was founded upon the alleged false and fraudulent recommendation to them of one S. H. Hervey, a stranger to them, but well-known to the defendant, a wholesale peddler, as entirely responsible for all goods that he might purchase from them; and upon which representation they relied, and sold to Hervey, from April 10, 1869, to some time in the year 1874, at different times, a number of bills of goods, amounting in all to $15,300, for which he has failed to pay about the sum of $1,500, alleging also that the defendant continued to make such representations during the entire time Hervey so dealt with them; yet, Hervey was during all such time worthless, which fact the defendant well knew.

Their second cause of action was, that about April 10, 1869, the defendant's brother, Thomas Cunningham, began to purchase goods from them upon the recommendation of the defendant; and on that day Thomas Cunningham, who had bargained for a bill of goods from them left with the defendant $300 to be paid to them as a part of the price for such bill of goods, which on demand, the defendant neglected and refused to pay over to them, etc.

*This case was cited in Stephenson v. Reeder, *post* 411.

They then aver that they failed to discover the fraud of the defendand it falsely representing the credit and standing of Hervey, and his, the defendant's, fraud in concealing from them the receipt by him for them of the $300 from Thos. Cunningham, until within eighteen months before suit brought; and suit was brought on March 15, 1876.

They also claim that Hervey was to pay and did pay to the defendant, commission on all the goods sold to him, in pursuance of a secret and fraudulent agreement between them; and that the defendant recommended Hervey to them to enable Hervey to pay another brother of the defendant $1,100, a debt which he owed that brother, and which Hervey did pay out of the proceeds of the goods so sold to him by the plaintiffs.

The defendant in his answer denied all the substantial allegations of the petition, and pleaded the statute of limitations of four years as to the first cause of action, and of six years as to the second. The cause was tried to the court, a jury being waived by the parties, and the court found generally for the defendant, and rendered judgment accordingly. A motion made by the plaintiffs to vacate the judgment and for a new trial being overruled, the plaintiffs took a bill of exceptions embodying all the evidence, and filed this, their petition in error here, to reverse said judgment. The evidence shows that Hervey dealt with the firm for the period of near five years, and paid them, from time to time, nearly $14,000.00 upon his various purchases, amounting to $15,-300; also, that he was frequently at the store of the plaintiffs and talked with one or more of the principal members of the firm about his business and affairs; also that after his failure, the plaintiffs took him in their employ as a salesman in their store; and that there was a financial crisis before Hervey's failure, which began in the fall of 1873.

The Code, section 15, provides that "an action for relief on the ground of fraud," can only be brought within four years after the right of action shall have accrued; but that "the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud."

The term "discovery of the fraud," means when the party defrauded ought, by the exercise of due diligence, after facts sufficient to put him on inquiry have come to his notice, to have made such discovery. Such facts are knowledge—discovery, and after four years, it is for the party claiming that he is not bound to show such diligence. Badger v. Badger, 2 Wal. 87. In relation to the discovery of fraud, the Code is to be construed by the rules of chancery practice. As to all sales within four years before suit brought, the court was justified in finding that the plaintiffs knew as much of the responsibility and affairs of Hervey as the defendant did.

If the second cause of action be treated as one founded upon an implied contract, one which before the Code would have been for money had and received, then it was barred by section 14 of the Code, limiting the right to bring such an action to six years. If it be for fraudulently concealing from the plaintiffs the receipt for them of the $300, then the evidence showed that the first bill of goods, upon which it was alleged to have been delivered to the defendant by Thomas Cunningham to pay, was to be paid in thirty or sixty days. It was not so paid for, but it and the second bill purchased, were when both became due, left unpaid

by Thomas Cunningham, by about $300. Now, business rules, (and the plaintiffs were experienced business men), would have required the plaintiffs to call Thomas Cunningham's attention to this unpaid balance. Had they done so, it is fair to presume that he would have informed them that he had placed it in the hands of the defendant, his brother and their salesman, as it is claimed he did when written to by them as to the balance of his unpaid account in September, 1874.

Want of due diligence, then, on the part of the plaintiffs in making the discovery of such alleged fraudulent concealments by the defendant soon after it took place, places this cause of action, in the better view of it, upon the same legal ground as the first cause of action. Suit was brought upon neither until within a few days of seven years after the cause of action had both accrued.

We are then unable to find upon the evidence and the record that the court below erred in finding for and rendering a judgment in favor of the defendant.

The judgment is affirmed with costs.

Tilden and Force, JJ., concur.

J. A. Jordan and Jordan, Jordan & Williams, for plaintiffs in error.

Lincoln, Smith & Stephens, for defendant in error.

[Superior Court of Cincinnati, General Term, October, 1877.] 277

IGNATZ DROEGE v. A. IPSHARDING AND F. J. MEYER.

For opinion in this case, see 5 Dec. R., 543; [s. c. 6 Am. Law Rec. 478.]

[Superior Court of Cincinnati, General Term, October, 1877.] 277

MARIA PLANT v. JOHN MURPHY ET AL., TRUSTEES.

For opinion in this case, see 5 Dec. R., 544; [s. c. 6 Am. Law Rec. 479.]

PARTITION—MORTGAGE—PARTIES. 281

[Hamilton District Court, October Term, 1877.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

CHARLES E. CALLAHAN v. BARBARA ROSE ET AL.

1. Where in partition proceedings, a parcener elects to take the property, and a deed is made to him by order of court, and he omits to have the taxes discharged before taking the title, and he, or his vendee, has to pay them, such payment of taxes can not be set up as a lien and recouped against notes and mortgage given for the deferred payments in the partition proceedings.
2. In an action to foreclose a mortgage on land held in the name of a married woman, it is no defense that her husband is not made a defendant. He is not a necessary defendant, if it is her separate property, and if in her name it is her separate property.

JOHNSTON, J.

This case came up on the defendant's appeal from the decision of the common pleas, where a judgment was rendered in favor of Callahan for the amount of a mortgage note, and in favor of others, heirs, for the amount of mortgage notes held by them.

The defendant, Mrs. Rose, set up at the time of the institution of the suit below against her, that she was a married woman, and still is, and the plaintiff having failed to make her husband a party to the suit, and

that act being proven, she maintains this suit should be dismissed as against her. She also claims that the property is not her separate property, but held as trustee for her husband by her. She also claims, that if the action be maintained against her in this shape, she is entitled to recoup the amount of taxes that were a lien upon the property at the time she took the title.

As to the first question, as to whether it is necessary to make the husband of Barbara Rose, a defendant, we are of the opinion that section 1, of the statute of 1861, as amended in 1866, applies; and the amendment of March, 1874, to the act of civil procedure, clearly provides that in all actions against a married woman concerning her separate property, it is not necessary to unite the husband as a defendant. Any property held by a married woman since the passage of these acts, whether legal or equitable, shall be and remain her separate property.

The only other defense remaining was as to the question of taxes, that Mrs. Rose alleges she had to pay after the title was vested in her, and that were a lien upon the property at the time Mrs. Ray elected to take it in partition. It is a well settled principle of law, that where a party takes title to real estate, or purchases it under and by virtue of judicial proceedings, the rule of *caveat emptor* applies with all its rigor. It was the right of Mrs. Ray to have had the taxes discharged before she took the title. She did not do so, and therefore took title subject to the taxes and must pay them. So far as the evidence shows, Mrs. Rose, by the conveyance from Mrs. Ray, did not become vested with any greater rights as against the heirs who had received these notes from Mrs. Ray, than Mrs. Ray had. Therefore, she will not be entitled in this proceeding as against the plaintiff or the heirs, defendants in this proceeding, to have recouped the amount of taxes payable by Mrs. Ray.

We find, therefore, that the equities of the case are in favor of Callahan as to his note and his right to foreclosure to pay the same, and find the equities in favor of the heirs, who have filed answers and cross-petition seeking to have the property sold to discharge and pay the amount of their notes.

Decree accordingly.

Carr & Callahan, for plaintiff.

Hoadly, Johnson & Colston, for defendant.

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282 **MECHANIC'S LIEN.**

[Superior Court of Cincinnati, General Term, October, 1877.]

Yaple, Tilden and Force, JJ.

GREENLEES, RANSOM & CO. v. RICHARD SHINNICK ET AL.

Where the contractor of a public building for another state becoming involved, his sureties on his bond to such state, for the performance of the contract, by agreement with him, advance money to carry on the contract, and are to receive from the state all moneys due the contractor, all of which is done, such sureties not being bound to the sub-contractors by any privity of contract, become, by such agreement, bound to them only to the extent they receive money from the state, advancements by such sureties being postponed to the pro rata claims of sub-contractors, but they in so far as they are sub-contractors receiving a pro rata share; and where, the contractor becoming

still further involved, and the state threatening to take the work out of his hands unless finished by a certain date, the sureties by agreement with him take the contract out of his hands and finish the building themselves, this being beneficial to the sub-contractors, they have no ground to hold the sureties for more than their pro rata share of the money received.

YAPLE, J.

This case is now presented to the court for final decision upon the report and additional report of the special master commissioner, R. D. Jones, heretofore appointed herein, and the exceptions filed thereto by the defendants. The master was ordered to report.

First—What advances were made by McCullum, Greenwood, Dale and Warner, or any of them, by cash payment, or endorsement, or otherwise, on account of said building.

Second—What amount of money was received on account of said building after August 4, 1871, by said defendants or any of them, from the state of Illinois, and how, and to whom paid out or appropriated, and upon what account.

Third—What amounts were paid to sub-contractors after August 4, 1874, by whom, and how much remains unpaid to the sub-contractors.

The master has reported fully on all these points, and the court finds such report correct. The master was not authorized to report upon the legal rights of any of the parties, nor has he attempted to do so. Such rights are to be determined by the court upon the facts found by the master and the evidence in the case, from which such report was made.

On July 21, 1870, the defendant, Richard Shinnick, as principal, with Greenwood, McCullum & Co., S. H. Dunning, James Dale, J. H. Story, Warren Warner and one T. G. Quinn & Co., as sureties, contracted in writing with the proper authorities of the state of Illinois to construct within a specified time the north wing of the insane asylum, at Anna, Union county, Illinois, for the sum of $115,000; and a bond was executed by the same parties to the state for the fulfillment of the contract. Shinnick proceeded with the work, having incurred large liabilities in the meantime, to sub-contractors, among whom were the plaintiffs, Greenleess, Ronsom & Co., until about August 4th, 1871, when he became embarrassed, was likely to fail in the performance of his contract, and involve his sureties in a liability for damages to the state of Illinois, where on that day, McCullum & Co., Greenwood, and Warner agreed with each other and with Shinnick to advance to him the money necessary to carry on the contract, and Hugh McCullum was appointed agent for all the parties to receive all money due Shinnick from the state of Illinois under the contract, and to disburse the same to parties doing work upon the building or furnishing material therefor upon Shinnick's order, and this contract was to cease when they and the said Shinnick should so agree. The expressed object of this agreement was to protect and enable Shinnick to complete the building and perform his contract with the state of Illinois. Up to this time such sureties and the plaintiffs had no privity with, and were under no legal obligation to each other, but the plaintiffs and Shinnick alone had contract obligations to each other.

Shinnick continued work upon the building under the contract, McCullum, or he, with McCullum's assent, receiving the dividends, ninety per cent. of the estimates, until October, 1872, when, he, Shin-

nick, became unable to complete the building according to contract. The authorities of the state of Illinois as early as August 23, 1872, notified the sureties in writing that the building must be completed by October 10, 1872, or, in case of failure, all work should be discontinued, possession given to such authorities, who would take charge of the same and finish the work at the cost of Shinnick and his sureties, and all payments after the August estimate were to stop. In this state of case, Greenwood, Warner, Dale and Dunning, on the 8th of October, 1872, gave Hugh McCullum a power of attorney to act for them in the premises, and he took charge of the work and had the same completed and received the pay therefor from the state of Illinois.

The plaintiffs were sub-contractors, under a contract between them and Shinnick, for part of the woodwork of the building. The first bill ordered March 25, 1871, amounted to $9,175. Their other bills extended from August 12, 1871, to July 29, 1872, and amounted to $756.37 or to $10,934.37 in all.

These orders were filled by the plaintiffs by the subsequent delivery, from time to time, of the material and work therein specified.

The plaintiffs have been paid the entire amount of their claim, except $1,675, for which they took judgment against Shinnick in this court on June 2d, 1873.

McCullum & Co., Greenwood and Dale were also sub-contractors under Shinnick, McCullum & Co., to the amount of $4,439.50, of which $754.10 is still unpaid; Greenwood $10,298 47-100, of which $4,147.74 is unpaid; and Dale $5,643.60, of which $2,168.60 is unpaid. Haynes & Bro., sub-contractors to the amount of $4,560, have not been paid by $935.10; and Hall & Cook, sub-contractors, to the amount of $5,440, have yet due them $1,400. The last two parties are upon the same legal footing as the plaintiffs.

Of the money received for the building, there is in the hands of Hugh McCullum only $2,208.38.

Prior to October 12, 1872, when the sureties of Shinnick took control of the work to save themselves as far as possible from loss and from liability for damages to the state of Illinois on account of Shinnick's liability to perform his contract, but $5,300 were advanced to Shinnick under the arrangement of August 4, 1871, $300 of which was by Dale, and the residue by McCullum and Greenwood, Dale and Warner by endorsements for Shinnick. Up to August 4, 1871, Shinnick had paid the plaintiffs about $1,500, out of which they satisfied an old indebtedness of his to them, amounting to $642.50, and gave him a credit on their sub-contract with him of $859.38. From that time to September 10, 1872, McCullum, Greenwood, Dale and Warner, by themselves, or through Shinnick, paid the plaintiffs on account of the materials, etc., furnished under his sub-contract, $7,805.56, and have paid them nothing since. If the full $1,500 paid by Shinnick, prior to August 4, 1871, be added to this, as it would have to be so far as these defendants are concerned, it makes the amount received by the plaintiffs $9,305.56, or within $1,629 41-100 of their entire claim, at which they settled with Shinnick as the amount due them and for which they took judgment against him for $1,675, and out of this sum the defendants would be entitled, as between them and the plaintiffs, to have the old debt of $642.50 deducted. After October 8, 1872, when the sureties took charge of the work, they made large advances to complete the contract, not to

Shinnick, but for the work, Shinnick only figuring because the Illinois authorities would release no part or term of their contract and the sureties, therefore, had to act under a power of attorney from him to draw the money falling due under the contract, the Illinois authorities treating against him. The result is that $11,080.54 still remains due to the several sub-contractors and material men hereinbefore named and only $2,208.38 in McCullum's hands to pay on such indebtedness.

Now, at the preliminary hearing, the court, while holding that there was no privity of contract between the plaintiffs and the sureties, but that the plaintiffs were bound to look to Shinnick alone for pay, held, that when the arrangement of August 4, 1871, was made, and while it continued, these sureties as they were to get all the money coming due to Shinnick, and had agreed to apply it to the payment of sub-contractors and for materials, were liable to the extent of the money received by them to sub-contractors and material men, pro rata, and that the payment of advancements made by them under such arrangements would be postponed to the claims of such sub-contractors and material men, they as sub-contractors being entitled to their pro rata with other sub-contractors. This, I felt satisfied, was correct, but that arrangement could not be carried out, owing to Shinnick's failure; it broke down; and if these sureties had let matters rest there, the plaintiffs would have been able to get no more than they have already been paid; but the sureties would have been subjected to heavy liabilities to the state of Illinois. This they sought to avoid, and in doing so, have in no way prejudiced the plaintiffs, who could only have looked to Shinnick. No mechanic's lien can be taken on such a public building as this insane asylum was. These defendants, or Shinnick for them, between August 4, 1871, and October 12, 1872, paid to the plaintiffs their full *pro rata* share of the money received on account of the building, independently of repaying to themselves during such period. The plaintiffs have no right to complain; they have no case. The evidence and the master's report show clearly that they did so pay; the plaintiffs even received at times slight over-estimates and thus got more than the work furnished by them would have warranted had it been estimated correctly.

Judgment must be rendered for the defendants; the costs of the master's fee will be taxed one-half to the plaintiffs and one-half to the defendants, the residue of the defendants' costs to be taxed to the plaintiffs.

[Superior Court of Cincinnati, General Term, October, 1877.] 283

CYNTHIANA SIMMONS v. CINCINNATI SAVINGS SOCIETY.

For opinion in this case, see 5 Dec. R., 527 (s. c. 6 Am. Law Rec., 441). Affirmed by supreme court. See opinion, 31 O. S., 457. Cited 43 O. S., 462-47.

CONTRACT—DAMAGES—EVIDENCE. 283

[Superior Court of Cincinnati, General Term, October, 1877.]

*JAMES CULLEN AND CHARLES B. RUSSELL v. EZRA BIMM ET AL.

1. In an action to recover damages for breach of contract, plaintiff is entitled to recover only such damages which have accrued before the commencement of the action, and therefore where the act complained of, which is the origin

*The decision in this case was affirmed by the supreme court. See opinion, 37 O. S., 236.

of the damage, took place after suit was brought, it can not be given in evidence. No aid can be derived from anything occurring after the commencement of the action.

2. If a vendee refuse to accept personal property tendered in accordance with the terms of the contract of sale, he is liable; in damages for the difference between the contract price and its market value; but where the property has no market value, the real value is to be ascertained from such elements of value as are attainable.

3. Where a person refuses to receive the articles contracted for, the seller has at least two remedies, either of which he may pursue. He can treat the property as his own, and if its market value, at the time of the breach, is less than the contract price, he may, by action, recover the difference and a sum equal to the interest; or, after notice to the buyer, he can sell the ice, on the theory that the property in but not the possession of the ice had passed to him, and if the amount thus realized was less than the contract price, he can by action recover such deficiency and a sum equal to the interest thereon.

4. In an action for the refusal to accept a lot of merchantable ice sold to defendant, the defense being that the ice was not merchantable, a letter to the seller was offered in evidence to show a request to the purchaser to examine the ice. The letter contained a statement that the ice was not merchantable, which statement was corrected in a subsequent letter of the seller, also properly in evidence. *Held,* that the reception of evidence offered by the seller to show on what information the first letter was written, afforded no ground for a reversal of the judgment.

5. In an action for refusing to accept a lot of ice, containing several hundred thousand cubic feet, which, by the terms of the contract of sale, was to be merchantable, the court charged the jury that the plaintiff could not recover unless it appeared that the ice, as a lot, was merchantable quality, "fit for the ordinary uses to which ice is put," and such as would "fairly pass in market": *Held,* that, in refusing to charge that all (that is, every part) of the ice should be merchantable, the court did not err.

The defendants in error, who were plaintiffs below, brought their action against the plaintiffs in error for their refusal to receive and pay for a quantity of ice, which they had purchased from the defendants in error, and agreed to receive under a written contract signed by both parties, and dated on the 14th of July, 1871. The provisions of this contract, as set forth in the petition and so far as they are material to the questions which have been brought before us by the petition in error, are these: Bimm & Co., the defendants in error, stipulated on their part, so far as practicable, to fill their two ice houses at Dayton, Ohio, from their artificial lake, with merchantable ice, commencing with ice not less than 6½ inches thick, and to pack the same in a suitable manner; and this they were to do for two consecutive years, i. e., for the seasons of 1871-2 and 1872-3, commencing on the 1st of November of each year, or as soon thereafter as the ice on the lake should reach the required thickness of 6½ inches; and they were to have the same in readiness by the 1st of March in each year. It was mutually stipulated that, in order to ascertain how many cubic feet the ice houses would contain, the ice should be measured, and that if either party should refuse to attend such measurement, on being notified by the other, then the party attending should make the measurement, and the measurement so made should determine the quantity of ice to be paid for by Cullen & Co., the plaintiffs in error. The keys of the ice houses were to be delivered to Cullen & Co., on the 1st of March in each year, and to be returned to Bimm & Co., on the 1st of November, and during the interval Cullen & Co. were to remove such quantities of the ice as they might wish to take. Any portion of the ice which should remain in the ice houses on the 1st of November of either year should become the property of Bimm & Co., at 30 cents a ton, to be credited to Cullen & Co., under the contract, and form part of the crop of the succeeding year; and Cullen & Co. stipulated on their part to pay for the ice at the rate of one dollar and twenty-five cents for each 50 cubic feet and to make such payments on the 1st of March in each year one-third in money and the balance by the delivery of their negotiable promissory notes.

It is alleged in the petition that the contract, so far as it was designed to have operation during the first year, i. e., the season of 1871-2, was fully executed by both parties, and, as to the season of 1872-3, it is averred that the contract was fully performed on the part of Bimm & Co., they having filled the ice houses

with merchantable ice, not less than 6½ inches thick, and having packed the same in a suitable manner, and had the same in readiness on the 1st of March, 1873. It is further set forth that Bimm & Co., on the 1st of March (Cullen & Co., though previously notified, having refused to so attend) caused the ice to be measured, and the keys to be tendered to Cullen & Co., who refused to receive the same, or pay for the ice, or otherwise perform the contract on their part. The petition proceeds further to state that in June, 1873, upon notice to Cullen & Co., and in pursuance of public advertisements, the ice was sold by public auction, at 30 cents per ton, the sale producing the sum of $2,375.93, being less than the amount, at the contract price, by $7,523.44, besides the costs and expenses of the sale, and for the amount of this difference, together with that of these costs and expenses, the petition demanded judgment.

The petition was filed on the 8th of August, 1872, and on the 2nd of February, 1874, Cullen & Co. put in their answer, in which they admitted the execution, and the terms of the contract, as set forth in the petition, but by a general denial, and by special denials, put in issue all the other allegations of the petition which were material to the claim of Bimm & Co. to recover under the contract. This answer was accompanied by a counter-claim, preferred by Cullen & Co., arising out of the transactions which took place under the contract in 1872, and in which a cross-recovery was sought on the ground, first, that the ice delivered and paid for in that year was deficient in quantity to the extent of about 360 tons at the value of about $450; and on the ground, 2nd, that the ice which was known by Bimm & Co. to have been purchased for a particular purpose, and a particular market was unmerchantable and unsuitable for such purpose and such market, having been, in several particulars, impure and of greatly less value than merchantable ice, and by reason of which premises also it occurred that Cullen & Co. had in part to supply their customers with an inferior quality of ice, when they were subjected to a loss in their trade of $5,000. And for this sum, and for the $360, the counter-claim demanded judgment. The averments of the counter-claim were put in issue by the reply, and the case stood on all the issues unacted on until the 21st of March, 1874, when Cullen & Co. filed a supplemental answer.

The supplemental answer stated, that after the original answer was filed Cullen & Co., received information that Bimm & Co. had become themselves the purchasers of the ice at the auction sale made by them in June, 1873, and that such sale was colorable merely and irregular in several particulars which were set forth. The supplemental answer then proceeded in these words: "And without withdrawing the averment of their original answer as to the merchantable quality of said ice, they, the defendants, say that if it shall appear and be found that said ice was and is merchantable, its market value is now as much or more than the price and amount agreed by these defendants to be paid therefor by the contract set up by the plaintiffs; and that they (the defendants) are entitled in equity to have the plaintiffs held and adjudged to be, and have been, the agents of these defendants, for and in the purchase of said ice at said sale, and to have it adjudged and decreed that the plaintiffs now hold so much of said ice as is now on hand, and the proceeds of so much thereof as has been sold, as trustees for these defendants." The cross-petition then particularized several points respecting which a discovery was necessary, and referred to annexed interrogatories, to which answers were required on oath. There was no averment that they had ever been, in any part, paid for, otherwise than from the proceeds of any sales which might have been made by Bimm & Co., after June, 1873; nor was there any averment of any offer ever having been made to pay. The relief demanded was made to be contingent upon the subsequent findings of the court, and was in the alternative. If the court should find the facts to be such as to maintain the theory of an agency and a trust, and to authorize equitable relief, then on account of the trust property, or should that be refused, then a judgment declaring that Bimm & Co. had sustained no actual damage, were the mode of specified relief demanded; and this demand was supplemented by a further one for general relief.

In this state of the pleadings the cause came on to be tried before the court and a jury at the March term, 1877, and during the progress of the trial, and presumably at an early stage of it, an entry was made upon the journal of the court, reciting that the cause came on to be heard upon the second counter-claim of the defendants' answer, and that thereupon the defendants below offered testimony in support of the same.

The court refused to receive the testimony under the pleadings as they stood, and refused to allow the defendants below to prove any other than nominal dam-

ages, to which rulings the defendants excepted. The defendants then obtained leave to file an amendment to their counter-claim, and the court with the consent of the plaintiffs, ordered the counter-claim as amended, to be docketed as a separate action, in which the defendants were to be made plaintiffs and the plaintiffs defendants, and leave was given to answer.

In the further progress of the trial the plaintiffs offered evidence which was admitted against the objection of the defendants below, and evidence, offered by them, was excluded on the objection of the plaintiff below, and to the rulings of the court below on both occasions, exceptions were taken by the defendants below. Exceptions were taken by them to the refusal to give certain special charges, which were asked by them, and to the general charge. The trial resulted in a verdict in favor of the plaintiffs below in the sum of $7,142. A motion was then made by the defendants below for a new trial, on the ground that the verdict was against the evidence, and against the law, and against the charge of the court, and on the ground of misdirection in the charges given, and of error in the refusal to charge as requested, and on the further ground of error in the admission of testimony. This motion was overruled, and judgment was entered upon the verdict.

TILDEN, J.

1. The petition which brings these proceedings under review, contains ten distinct assignments of error. The objections raised by the first, second, third, seventh and ninth are, in substance, that the verdict was against the evidence, against the law, and against the charge of the court; that the judgment should have been in favor of the defendants below, and that the court erred in overruling the motion for a new trial. All these questions involve a consideration of the weight of the evidence, and for this purpose we must have all the evidence which was so given. Otherwise it is impossible for us to say that the verdict did not conform to the evidence, or to the law, or the charge of the court, or that the defendants below were entitled to a new trial, or to a judgment in their favor. The bill of exceptions not only does not purport to contain all the evidence which was given at the trial, but on several material points, does purport to give only the tendency of the evidence. This mode of statement is, undoubtedly, sufficient, if the materiality of the proposed evidence appear, to raise, in the revising court, objections to the rulings of the court below upon the questions of law produced by the facts which the evidence tends to prove. It is presumable that it was with these views that the statements of the evidence in the bill of exceptions were abridged, and, perhaps, other evidence omitted, and, for these reasons we abstain from the expression of any opinion upon the arguments above referred to, and we will confine our judgment to the other assignments; and in the order in which the questions were to be determined occurred in the court below.

2. The tenth and last assignment is that the court erred in sustaining the plaintiffs' demurrer to the defendants' supplemental answer. We find among the files a demurrer which we support to be the one here referred to but, no transcript having been sent up containing the proceedings of the court below, and the draft of the order sustaining the demurrer, if such an order was ever made, having disappeared from the files, we can only presume that this question is, in fact, properly before us. Should we assume it to be so before us, we should, probably, be inclined to hold that the demurrer was well taken. But this question is purely an abstract one here for another reason. The supplemental answer against which the demurrer was directed, was identically the same as that which was the foundation of the case which the court below ordered to be docketed as a separate action. That order was not, and perhaps, could not have been excepted to, and it has not been set aside or reversed, and we are of opinion that when the case made by the supplemental answer, parted company with this case, it carried with it every question raised by the demurrer, and the order sustaining the demurrer, if that was made before the severance of the cases, and that if error intervened, or afterwards occurred in the action of the court upon the demurrer, such error must be corrected by proceeding in that case, or by proceedings founded on a judgment in that case, and not in the present one.

3. The next assignment to be considered is the sixth, viz.: That the court erred in admitting incompetent testimony offered by the plaintiffs below. The circumstances under which this evidence was offered and thought by the court to be competent, were these;—the plaintiffs below, in making out their case, offered in evidence a letter, written by one of themselves, and addressed to the defendants below and in these words:

"Dayton, O., December 4, 1871.

"Messrs. James Cullen & Co., Cincinnati, O., Gents: My son reports the ice being six (6) inches thick in the park or pond of E. Bimm. I am told it's not very clean; could not be called merchantable. My opinion is that it would be well to secure the early ice for this season, and I think it will pay you to come up by first train tomorrow and see the ice and its condition. Mr. Bimm is of the same opinion. Yours in haste, C. HERCHELRODE."

"We may secure this ice on our account should you not agree to have it put up in its present condition. We want to know immediately. Should you not come, answer by mail. Truly yours,

E. BIMM & CO."

No objection was made to the introduction of this letter, for the reason probably, that it contained an important admission which the defendants below would desire to prove when they should go into their defense.

The defendants below then called Christian Herchelrode, one of such plaintiffs, who testified, without objection, that he had no personal knowledge of the condition of the ice at the date of the letter, but obtained the information upon which the letter was founded from his son, John W. Herchelrode. The son was then called, and having testified that he knew nothing about the writing of the letter, except that his father told him he had written it, was asked the following question: "What was the information you gave your father upon which this letter was written?" The question was objected to, but permitted to be put and answered, and the answer was this: "I stated that about fifteen or twenty feet from the shore there was this dock seed collected there; that I supposed the ice was not in good condition. I told him it was 6 or 6½ inches thick at that time. I examined the ice shortly after. Made no statement to Mr. Bimm. Didn't suggest to my father to write to Cincinnati."

It will have been observed that the letter itself contained evidence favorable to the defendants below, and adverse to the plaintiffs below, namely, the admission which tended to prove that the ice was unmerchantable, and not such as the plaintiffs below had undertaken to deliver under the contract. According to logical order, and according to the order usually observed in such cases, the letter would not have appeared in the history of the trial until offered by the defendants below as part of their case. In point of fact, it was offered by the plaintiffs below as part of their case in chief. It was clearly incompetent as evidence when offered by them, since it consisted solely of their own declarations though not in favor of their own interest, and it became evidence only by the consent of the defendants below to be implied from their silence. The reason for this exceptional course or proceeding was probably such, if we knew what it was, that we would not regard the circumstance as having been at all curious. This question of mere order, however, although calculated, perhaps, to induce some confusion in the mind, has no necessary relation to the question raised by the objection to the evidence; and that question is to be regarded as being precisely the same as it would have been if the letter had been put in evidence by the defendants below, and as if the plaintiffs had then, by way of rebuttal, called for the declarations of John W. Herchelrode. The competency of the evidence sought by the question is, therefore, sufficiently before us and must be determined. But the question did not call for any statement by the witness and he made none respecting the actual condition and quality of the ice. Had that been the purport of the question, it is perfectly clear that it would have been inadmissible as being in conflict with the rule which excludes hearsay testimony. But the question was, what statements respecting the quality and condition of the ice were made by the witness just previously to writing the letter, already in evidence when the question was put. The admission contained in the letter was not made under circumstances to make it operate as an estoppel, and it was entirely competent to disprove the fact admitted. One mode of doing so would be by the production of direct and affirmative evidence, proving that the ice was merchantable and free from the impurities imputed to it, and this mode was actually resorted to at the trial. But the plaintiffs below were not confined to this mode by any rule of law which is known to us, and we are of opinion that it was competent for them to lessen or overcome, if they could, the force of the admission, by showing that it was made upon the statement of others which were afterward ascertained not to be true. We do not, therefore, regard the question which was put to the witness, as having been intended or calculated to call from the witness the statement of any facts which bore upon, or could

have been used to the prejudice of the defendants below, as evidence under the issues in the case, and it is certain that the answer of the witness did not contain any such facts. We regard the statement which he made to his father simply as a circumstance attending the act of writing the letter, and as part of the *res gesta*. They were made just preceding the act itself, and it was testified by Christian Herchelrode that they were the sole inducement to it, he having no knowledge or information respecting the ice except that which he had so derived from his son. We conclude, then, that the court below did not err in permitting the question to be asked and answered.

4. The fourth assignment is general, i. e., that the court erred in its charge to the jury; but the objection intended to be raised is rendered sufficiently certain by the terms of the exception which was taken to the charge at the trial, and which was limited to that part of the charge which excluded from the consideration of the jury the prices for the ice which were obtained in 1874. By referring, however, to the charge itself, we find that the language of the exception is not strictly correct. The court did charge that "the history of the ice as it afterwards appeared in the testimony, was allowed to be introduced to fix its quality and its relative price in the market." We suppose that this language had reference to the sales made in 1874, as also, perhaps, to other circumstances which were in evidence, and if so, it is plain that the attention of the jury was called to the fact to be considered for the purpose stated in the charge. We infer, then, that it was the design of the exception, and of the assignment, to form a basis for the claim which was forcibly insisted on in the argument in behalf of the plaintiffs in error, that the prices at which the ice was sold in 1874, were, as a matter of law, those which the court was bound to instruct the jury to adopt in estimating the amount to be allowed by way of compensation of the demand of the plaintiffs below. In acting upon this proposition, we have, in the first place, to say that if sales had been made before the commencement of the action, or if the action had been postponed until after the sales of 1874, it would be our duty to consider the claim now made.

It is, however, in our opinion, a fatal objection to it that it did not accrue until after the commencement of the action. The reason for this opinion is essentially the same as that of the rule which limits the recovery of a plaintiff to damages which have accrued before the commencement of the action. The rule is perfectly clear and imperative, that where the act complained of, which is the origin of the damage, took place after suit brought, it can not be given in evidence. No aid can be derived from anything occurring after the commencement of the action. Sedgwick on Damages, 115. The supreme court of Massachusetts say that "the cases are decisive that by common law the plaintiff can recover damages only to the time of bringing the action, and that in this respect there is no distinction between actions of covenant and of tort." Powers v. Ware, 4 Pick., 106, and see Warner v. Bacon, 8 Gray, 397; Gerdon v. Brewster, 7 Wis. 355; Cole v. Sproul, 35 Me., 161; Lanabee v. Lambut, 36 Me., 440. There are certainly some exceptions to this rule, but as the present case does not, in our judgment, come within any of them, we deem it unnecessary to consider them. Sedgwick, 119, and citations.

5. It is objected by the eighth assignment that the court refused to receive testimony in support of the second counter-claim of the answer of the defendants below. This refusal does not appear in the bill of exceptions, but in the journal entry directing the case made by this counter-claim to be docketed as a separate action. Exception to the refusal to receive the testimony was taken, and included in the entry, and it has not been claimed that this is not a proper way by which to make the question and the facts which raised it, part of the proceedings at the trial. To the objection itself, however, we think there is a conclusive answer on either of two grounds. One is that the order directing the counter-claim to be made the foundation of a separate action, and to be docketed as such, had the effect of withdrawing it from the case which remained to be tried, and to leave no issue to which the proposed testimony could be applied. The other ground is that, according to the record, as it now actually appears before us, the case, on the answer, stood on a demurrer for insufficiency, and presented a pure question of law. If the demurrer was sustained, as we suppose it was, then the case on the counter-claim was out of court by judgment of law, and could not have been restored, except by amendment on leave. In either respect then we are of opinion that the proposed evidence was properly rejected.

6. The evidence having been concluded, the defendants below asked the court to give four special charges. One of these (the first) was given, and one (the

fourth) was refused without qualification, and two (the second and third) were refused on the ground that they were misleading.

The second of these charges was in these words: "If the jury can not ascertain from the proof what the market value of merchantable ice was in the city of Dayton on March 1, 1873, when sold in quantity similar to that contained in the ice houses known as the Herchelrode Houses, then their verdict must be for the defendants."

The tendency of the evidence was to prove that there had been no sales in Dayton in quantities greater than a car or canal boat, and therefore that there was no market price there for ice in the quantities assumed by the charge, and, if the charge had been given, it is manifest that the plaintiffs below must have been turned out of court by the verdict of the jury. But there was evidence before the jury on the subject of damages, and of the effect of that the law made them exclusively the judges. They had before them the written contract between the parties, and this contained a clause conclusively fixing the price of the ice on the ensuing 1st of December at 30 cents a ton. It appeared that the highest bid which could be obtained from anybody except the plaintiffs below was 25 cents a ton, and sales were made in 1874 at a rate as high as four dollars a ton. The character of the season of 1872-73 and other circumstances having some tendency to explain the causes, and show the extent of the fluctuations in the ice market, at the dates and during the periods above referred to, were in evidence before the jury, and the court, plainly referring to this evidence, having stated the rule of damages to be the difference between the contract price and the market price at Dayton, on the 1st of March, told the jury to ascertain such price on all the evidence before them, excluding, however, the history of the ice after the 1st of March, except for the single purpose of fixing the quality of the ice, and its relative value in the market. These charges were not excepted to and we suppose we are to receive the law as thus given as the law of the present case. The special charge, then, certainly was calculated to divert the attention of the jury from the evidence on which the charge of the court was based, and to lead them to disregard the charge hypothecated on the evidence. Indeed the special charge went far beyond this.

It required the jury to disregard the charge and the evidence to which it referred, and to adopt the prices of 1874, as the sole basis of their finding. We do not understand the rule of law which compares the contract with the market price for the purpose of measuring damages under a contract of a sale of chattels, to be imperative or thus inflexible. The rule itself is founded on the presumption, in favor of the buyer that he can buy, and of the seller that he can sell in the market at market price, and thus obtain compensation, which is all that the law professedly gives, and he obtains the compensation in the way presumed to have been contemplated by the parties. The rule, therefore, necessarily ceases with the reasons on which it is founded and to contend that the market value of a commodity is an inflexible standard of comparison, where it is shown that the commodity has no market value, or none when offered in a given quantity, is the same, in substance, as to affirm that a party who has been admittedly damaged by a breach of the contract of sale, is practically without any remedy in the law to repair his loss. But such is supposed not to be the result of the supposed contingency, or of that which actually occurred in this case. We understand the law on this subject to be now settled to be that where the property has no market value, the real value is to be ascertained from such elements of value as are attainable. Murray v. Stanton, 99 Mass., 345. Kounts v. Kirkpatrick, 72 Penn. St., 376.

7. The third special charge was in these words: "Unless the plaintiffs have proved, by a fair preponderance of testimony, that all the ice contained in the ice houses of the plaintiffs at Dayton, and tendered to the defendants, and by them refused was, on March 1, 1873, merchantable ice, they can not recover in this case."

This charge, taken literally, would have prevented a recovery on proof that a single cake of the ice was unmerchantable, and the charge should have been refused on that ground alone, unless it can be maintained on a sound construction of the contract. In giving a construction to it, it does not appear to be material to inquire whether it imported a warranty or a description only. On either hypothesis the defendants below were entitled to claim that, on the 1st of March, 1873, the ice houses should be filled with merchantable ice, and if it turned out not to be such, they were not bound on that day to receive the keys or accept the ice and pay for it. The two upper layers of the ice contained impurities of various kinds, which manifestly rendered the ice composing them

unmerchantable, but the quality of the residue and great mass of the ice was such that the jury found it to have been merchantable within the rule which was laid down on that subject in charge of the court. The question then is, whether the defective quality of the two upper layers rendered the ice contained in the ice houses on the 1st of March, 1873, unmerchantable within the provisions of the contract and according to the intention of the parties to it, to be ascertained from the language of the whole contract, and such extrinsic circumstances as the parties may reasonably be presumed to have had in contemplation in entering into it. By an express provision of the contract, the property in the ice was to have become vested in the defendants below on the 1st of March, 1873. After that they were to have exclusive possession of the ice houses, with authority to remove from time to time such portions of the ice as they might desire to take, until the 1st of November, and then the remainder of the ice was to revest in the plaintiffs below at an agreed price to be accounted for to the defendants below. By another provision of the contract the plaintiffs below stipulated to pack the ice in a suitable manner, and the evidence tended to prove that the two top courses were laid flat, so as to cover the cracks formed by the body of the ice which was packed in courses placed on edge, the object of this mode of packing, which is usual and suitable, being to lessen the waste by melting in the body of the ice which, in the season which intervenes between March and November, is always very great. In view of these facts, and without enforcing by an argument at any length the reasons which lead us to attach importance to them, we state our opinion to be that, whilst the upper layers of ice may not, perhaps, have been properly included, if they were in fact included, in the measurement of the ice to the defendants below. Yet, if the residue of the ice was merchantable, the plaintiffs below were entitled to recover notwithstanding that the two upper layers were not so. The use of the impure ice, in forming the upper layers may, we think, be regarded as having been a proper mode of performance of the stipulation in the contract, which made it the duty of the plaintiffs below suitably to pack the ice, and the stipulation itself was one which must have been introduced in the contract for the benefit of the defendants below.

The contents of the ice houses were on the 1st of March to become theirs, and after that the loss from waste was devolved, by the contract, on them; and to them was reserved the right to remove and place the ice on the market in Cincinnati, in such quantities and at such times in the course of the ensuing summer and fall as they should think proper; and it was possible, and even probable, that such removal would take place, or, perhaps, not be commenced until the occurrence of hot weather in summer, when there would be increased tendency in the ice to melt, and an increased demand for it in the market, and when as the process of melting begins at the top of the body of ice, and proceeds downward, it might have been anticipated that the two upper layers would mainly or wholly disappear. It was not important to the defendants whether these layers, which were the means of protection of the body of the ice lying below, should be composed of merchantable ice or that which was not so. Ice of either sort would have afforded the protection which the parties may be assumed to have had mainly in view; both were equally subject to the causes which wasted the ice while in the ice house, and the consequences of such waste were, by the stipulations of the contract, thrown upon the defendants below. We cannot persuade ourselves, then, that the parties, in adopting the descriptive word contained in the contract, expected that every cake of ice or the two protecting courses which should be placed above the mass of it would be merchantable, and we do not feel at liberty to adopt a construction which would require it to have been so. And yet this is the very construction which we are required to adopt to warrant us in holding, as the third special charge calls upon to do, that unless all the ice was merchantable the plaintiffs below were not entitled to recover. We are unable so to hold, and conclude that the special charge was properly refused.

8. The fourth and last special charge was hypothecated upon these facts: That on the 6th of March, 1873, the plaintiffs gave notice to the defendants below that they would hold them to the performance of the contract; that in June, 1873, the plaintiffs below sold the ice to themselves, and the action was brought after the sale of the ice, i. e., in August, 1873. The legal result of these facts was affirmed by the special charge to be, that the plaintiffs were not entitled to recover in the action.

In considering this proposition, it seems proper to promise that this sale did not take place in consequence of any rescision of the contract which would have discharged the defendants below from liability under it. Nor are the conse-

quences of it to be determined upon the principle of law which entitles a vendor to elect to keep the property and sell it on account of the vendee. That right arises contemporaneously with the refusal of the vendee to receive the property and pay for it; and had the sale even been made with a view to enforce this right, still whatever question there may have been as to the adoption of a day in June on which to ascertain the market price in the previous March, it is clear that this sale did not take away the right to require payment under the contract, or discharge the obligation to pay; and this was the right asserted, and this was the obligation sought to be enforced in the ensuing August by the action then brought. Similar and exactly the same consequences would have resulted from the election of the vendor to treat the property as having passed to the vendee, he then retaining the possession as bailee, and as subservient first to the lien of the vendor, and, after that to the claims of the vendee. In the enforcement of such a lien by the act of the vendor himself, disputed questions may of course arise; but these must relate to the regularity of the sale, or to the title conferred by it, or the application of the proceeds of it, and not at all to the obligation of the vendee to perform his promise. In the facts themselves, then, as they are propounded in the special charge, we find no reason for holding that there was anything to form any impediment to the commencement of the action in August, 1873, or to its maintenance at the trial, if, on other grounds, a right of recovery was established. If, in the order of occurrence of the facts, or otherwise, any other reason is afforded for a different conclusion, we have not been able to discover it.

On the whole case then we conclude that the judgment in special term must be affirmed, with costs, but without penalty.

Morrell & Hoadly, for plaintiff in error.

Stallo & Kittredge, for defendants in error.

APPROPRIATION OF PROPERTY—DAMAGES. 287

[Hamilton Common Pleas Court, November Term, 1877.]

*TRUSTEES OF CINCINNATI SOUTHERN R. R. v. DAVID BANNING.

In a proceeding to condemn lands for a railway, where the lands are platted, the inquiry, as to the depreciation of the lands not taken should be confined to the remainder of the lots taken, and not to those not touched by the land sought to be appropriated.

This case came into court by petition in error to review the proceedings had in the probate court. A proceeding was instituted in that court to condemn certain property on Seventh and Eighth streets, west of Anderson street, forty feet in width, for the purpose of the Southern Railway. David Banning, who owned the property on the north side of Seventh street, near Anderson, and the heirs of Bocklage and Mr. Hohne, who owned property on the south side of Eighth street, were made defendants. All these parties owned other property. Banning owned other lots on either side of the forty feet sought to be appropriated. Bocklage and Hohne owned property adjoining that appropriated, but not touching it. Banning owned 300 feet, all made up of lots 25 feet front. The strip sought to be appropriated passed diagonallly through four of these lots, not entirely appropriating any one of the four, but leaving parts unappropriated. The same in substance was true of the lots of Bocklage and Hohne. These lots had been regularly laid out, and numbered, and platted, according to the statute covering town plats. The case coming on to be heard before the jury, the owners of the property, for the purpose of showing the value of the ground taken and of that left after the appropriation of the forty feet, did not limit the inquiry to the remaining portions of the lots, parts of which were taken, but the question was put and permitted to go to the jury, and to be answered as to the effect upon other lots, fifty, seventy-five and one hundred feet off, not touched by the portion sought to be appropriated, and evidence went to the jury that the depreciation in the value of the lots not touched by this appropriation amounted to twenty-five or thirty per cent., diminution of value.

*This decision was affirmed by the district court; see *post* 3 B., 965.

JOHNSTON, J.

It was impossible to find evidence to sustain the verdict given without including damage to lots fifty, seventy-five and one hundred feet away from the property condemned, because, taking the weight of the evidence, the four lots (parts of which were taken from Banning), amounting to one hundred feet frontage altogether if the entire lots were taken, the damage could not, according to the weight of evidence, have exceeded $75 a foot, making $7,500, whereas the verdict was for $9,000. The court understood it to be the law undoubtedly that where property was in bulk, and not subdivided into lots, it was proper, where a corporation sought to appropriate a portion of it for any use, to show, not only the value of the part taken, but the damage done to the remainder of the land not appropriated.

It was the opinion of the court, therefore, that in introducing evidence in the probate court touching the damage to the four lots belonging to Banning, parts of which were taken, the inquiry should have been confined to the value of the ground actually taken, and then as to the value of those portions of the four lots not appropriated, and the same inquiry should have been made as to the Bocklage and Hohne property. Error therefore intervened in the probate court to the prejudice of the plaintiff in admitting evidence to show a diminution in value to lots of land not touched by the portion appropriated by the railroad for its purposes.

The judgment would therefore be reversed.

W. T. Porter, for plaintiff in error.

Long, Kramer & Kramer, Alex. Huston and John R. Von Seggern, for defendant in error.

SEWER ASSESSMENTS. 287

[Hamilton Common Pleas Court, November Term, 1877.]

VILLAGE OF HARTWELL v. HAMILTON CO. HOUSE BUILDING ASSN.

A petition against property owners to collect an assessment levied for the cost of a main sewer, need not allege that the lots need local sewerage. The Municipal Code (66 O. L., 253, Sec. 613) applies only when the city or village has adopted a general system of sewerage, and not where it desires to construct a single sewer. In every such case the sewer is a main sewer. The general powers given by section 199 are not taken away by chapter 50.

LONGWORTH, J.

The village of Hartwell, by its council, decided on the 11th of December, 1876, to improve a street within its limits by constructing a sewer, the expense thereof to be assessed upon the abutting property per foot front. This resolution was published for the time and in the manner required by law; an ordinance was regularly passed and approved by the mayor, January 8, 1877. Bids for the work were advertised for, and one John Sellins being the lowest and best bidder, a contract was entered into with him. The clerk certified that there were sufficient funds in the treasury and the council, on the 26th of April, 1877, passed an ordinance assessing the cost upon the abutting property.

The defendants are the owners of certain lands abutting upon the street, and have been sued for the assessment.

The petition sets forth in full all the proceedings preliminary to the assessment. To this petition the defendants have demurred generally.

The point urged in support of the demurrer is, that section 613 of the Municipal Code makes it a condition precedent to the right to assess abutting lots for a main sewer that the lots should need local sewerage and that the petition does not allege this as a fact.

Section 199, of the Municipal Code, as amended March 29, 1875, (O. L., vol. 72 107), provides, that "all cities and incorporated villages shall have the general powers hereinafter mentioned, and may provide by ordinance for the exercise of the same, viz.:—(among others section 21)—to open, construct, keep in order and repair sewers, ditches and drains."

This section gives to a village the power to open and construct any sewer within its corporate limits, which, in the opinion of its council, may be desirable.

Section 576 (O. L., vol. 67, p. 82), provides a method of collecting the cost of constructing such sewer by levying a tax upon the bounding and abutting property, as has been done in this case.

Chapter 50 of the Municipal Code (66 O. L., 251), gives power to any city or village, to provide for and establish a general system of sewerage, whenever in the opinion of the council it shall become necessary to establish such a system, and provides the manner in which such a system shall be established; how the city or villages shall be divided into sewer districts; how the main or trunk sewers and all their branches shall be constructed, and how the cost shall be collected.

The section relied on by the defendants as exonerating them from liability is a portion of this chapter (66 O. L., 253, section 613). It is manifest that it can apply only where the city or village has adopted a general system of sewerage, and not to cases where the corporation desires to construct a single sewer, or drain. In every such case the sewer is a main sewer, and to say that the cost of it could not be collected in the manner provided by section 576, would be to repeal that section by judicial legislation. It might lead us into the further absurdity of deciding that wherever a city or village desires to lay a pipe or a drain, it must adopt the option given it by chapter 50, and assume all the manifold burdens imposed thereby.

This chapter does not in any manner, either expressly or by implication, take away any of the powers given by section 199, but is simply cumulative and is intended to give powers not given by the provisions of that section.

The demurrers will be overruled.

[Superior Court of Cincinnati, General Term, October, 1877.] 293

JAMES S. VINE v. WILLIAM S. MUNSON.

For opinion in this case, see 5 Dec. R., 480 (s. c. 6 Am. Law Rec., 240).

[Superior Court of Cincinnati, General Term, October, 1877.] 294

HULBERT, TRUSTEE, v. NOLTE ET AL.

For opinion in this case, see 5 Dec. R., 485 (s. c. 6 Am. Law Rec., 246). Affirmed by the supreme court. See opinion, 37 O. S., 415.

297 ELECTIONS.

IN RE CAPPELLAR.

The duties of the clerks and justices constituting the board to count the votes given in an election are purely ministerial, and they have no authority to determine whether the returns are valid or invalid.

Argument of Mr. Jordan before the board of canvassers on the interesting question involved, mainly on account of the exhaustive array of authorities, is as follows:

ARGUMENT OF ISAAC JORDAN, ESQ., FOR WM. S. CAPPELLAR.

Gentlemen—The counsel for Mr. Hoffman, and I also believe, for Mr. Fratz, claim:

First—That wherever it may appear in this proceeding that more votes have been counted by the judges of the election for the several candidates, for one office, than there are names and numbers of votes in the poll-books, it is within your power, and at the same time your duty to throw out the entire precinct where such fact occurs.

In the several precincts where this occurs, Mr. Cappellar's majority over Mr. Hoffman is but a few votes more than it is over the other candidates.

The attempt, therefore, is made, not to get rid of the votes in excess in the ballot-box, but the attempt is to get rid of all the votes from such precincts, and to defeat the will of the people.

On behalf of Mr. Cappellar we desire to present some reasons why this cannot be done:

1. The powers of this board are purely ministerial and are limited to merely examining the returns and abstracting from them the votes which appear on the face of them; that you have no judicial authority, and that you can not even determine whether the returns are valid or invalid, but must count them as they are.

Let us examine the statute under which you are now acting. Sections 20 and 21. So far as it affects your duty, the statute is in these words:

"In making the abstracts of votes aforesaid, the justices and clerk shall not decide in the validity of the returns, but shall be governed by the number of votes stated in the poll-books."

This is plain enough to be easily understood if we want to understand it. This board has no authority to subpoena witnesses, and to hear testimony, and has none of the functions, powers or responsibilities of a court. The legislature of the state in its wisdom, did not see fit to clothe it with any power, except simply to discharge a mere ministerial or clerical duty to abstract or take off the votes as they appear on the returns.

But this interpretation of this law does not depend upon any *ipse dixit*. It has been interpreted by the Supreme Court of this state. In the case of Ingerson v. Berry, 14 O. St. R., 315, 322, Judge Scott, in deciding the case, said:

"In considering this question it may be assumed that the duty of the clerk and justices, the performance of which are here sought to be

enforced, are of a ministerial character. The general election laws of this state direct the clerk, with two justices of the peace called to his assistance, to open and make abstracts of the several returns which shall have been made to his office, and they provide that in making such abstracts of votes, the justices and clerks shall not decide on the validity of the returns, but shall be governed by the number of votes stated in the poll-books, and that no election shall be set aside for want of form in the poll-books, provided they contained the substance. S. & C. Statutes, 536 and 539.

"The clerk is also required to make out for each person who has the highest number of votes given, a certificate of his election, and deliver the same to him without fee. S. & C. Statutes, 540.

"The aggregate results of the returns, exhibited by the several poll-books, are to be ascertained by arithmetical calculation, and cannot be controlled by the discretion of the persons performing the duty. Such counting of votes, making of abstracts which exhibits the result, and giving the certificates accordingly, are duties which fall within the province of a clerk and accountant; they admit of no discretion, and are in their nature ministerial. 20 Pick., 484.

"The performance of such duties may, therefore, be enforced without assuming to control judicial discretion."

Again, in the case of Phelps v. Schroder, in 26 O. S., 549, 554, Judge Gilmore, announcing the opinion of the court, used the following language: "The ground upon which Schroder contested the election, as appears from his notice of contest, was, in substance, that the clerk and justices erred in not placing the abstract of the vote of the county and certifying thereto, the votes cast for him for the office of probate judge in Perrysburg township, and in neglecting and refusing to count and certify the vote so given, and in declaring Phelps elected. We are all of the opinion that the action of the clerk and justices in rejecting the poll-book and vote of Perrysburg township was wholly unauthorized and illegal. The poll-book in form anad substance complied with the requirements of the statute. The provisions of the statute defining the duties of these officers as canvassers, are plain and unmistakable. In making the abstracts of votes aforesaid, the justices and clerk shall not decide on the validity of the returns aforesaid, but shall be governed by the number of votes stated in the poll-books. S. & C., 536, section 34. The justices and clerks are not clothed with the power of determining questions of illegality or fraud in elections. Where, as in this instance, the poll-books on its face was in form and substance regular, their only duty was to abstract and certify the vote.

This is no new question in this country. Most of the states have statutes substantially like ours, and the records of the highest courts of these states show many attempts by partisan canvassing and returning boards to throw out returns, in order that their friends might get into office; but the decisions of the courts in these suits also bear witness to the fact that these attempts have been in almost every instance absortive, and have been rebuked by the court.

In the case of the State of Iowa ex rel. v. County Judge of Marshal county, 7 Ia., 187, the court decided under a statute similar to ours, the proposition I have contended for above. In the syllabus of that case, the court says: "The duties of the canvassers of the election, are not a judicial, but a ministerial act, in the performance of which there is no

discretion to be exercised. A board of canvassers of an election, possesses no power or authority to judge of the validity of returns or of votes. The canvassers are only to receive the returns and to count them, leaving all questions as to their validity or deficiency to another tribunal. Where a board of canvassers of a county election rejected the returns from these townships, because they did not show that the elective officers were sworn: *Held*, that the board possessed no such power."

In deciding the case, on page 199, the court used this language: "Another point is, that the duty to be performed is not a judicial one. It is ministerial. Neither is there, properly speaking, a discretion to be exercised. In respect to this, there is a widespread error among the civil officers and among the people generally. It is not correct to suppose that a board of canvassers, such as the county board in the present instance, possesses the power or authority to judge of the validity of returns or of votes. This duty or power belongs to that tribunal which is appointed by law for the ultimate trial of contested elections, or to a court before which the case may be brought in any manner recognized by law. The canvassers are only to receive the returns and to count them, leaving all questions of their sufficiency to another tribunal," and cited the following cases in support of the decision: The People v. Cook, 4 Seld., 67, 89; Same v. Same, 14 Barb., 285; The People v. Van Slyck, 4 Cow., 297; *Ex parte* Heath, 3 Hill, 42; Bacon v. York Co. Comrs., 26 Me., 491; Opinion of Court, 25 Ib., 467; Brower v. O'Brien, 2 Carter, Ind., 423; The People v. Kilduff, 15 Ill., 392, and cases therein cited.

In the same volume of reports, on page 401 and 402, in the case of State of Iowa ex rel. Byers v. Bailey, County Judge et al., the court said: "And it is not within the discretion of the canvassers to receive or reject the returns. If they may be known as returns, it is their duty to receive them and to count the votes. To decide what votes or returns shall be rejected and not counted, belongs solely to that tribunal which is empowered to determine ultimately upon a disputed election. This is sometimes a board, constituted by law for the trial of a contested election, or it may be a court of justice, before which the question may be brought in a manner recognized by law.

In the case of Brower v. O'Brien, 2 Ind., 423, 430, the supreme court of that state said: "The duties of both the board of canvassers and the clerk in making the statement and declaration required by law are purely ministerial. It is not within their province to consider or determine any question relative to the validity of the election held, or of the votes received by the persons voted for. They are simply to cast all the votes given for each person from the proper election documents, and to declare the person, who, upon the face of these documents, appears to have received the highest number of the votes given, duly elected to the office voted for."

In the Felt case in 11 Ab. Pr. Rep., 205, the court say: "They (the board of canvassers) are then required to make a statement of the canvass and a determination of the result. These are ministerial acts; nothing is committed to the judgment or discretion of the board. Their duty is arithmetical merely. They are to cast up the votes appearing upon the returns of the district inspectors which are produced before them. * * * The board of canvassers are not authorized to institute

any inquiry as to the authenticity of the returns, but are to take those produced before them, 'if they are regular on their face.'"

The commanding, or even sanctioning, by the courts of the exercise by the board of canvassers of any powers to reject returns or to change the result appearing from them, would be fraught with danger, far more, in my judgment, than is likely to proceed from the frauds or counts of district inspectors.

"Admit the former, what is to limit or regulate its exercise? Upon what evidence are returns to be regulated or altered. In what manner are the parties interested to be heard? A little reflection on the answers to be given to these questions will show the dangers alluded to. Considering, also, the lack of publicity attending the exercise of such a power, the constant and powerful temptation to the abuse of it, and the immunity with which the law shields acts of a judicial nature alone of public officers, the apprehension might reasonably arise, that in time the former might become subversive of the rights of citizens and fatal to the suffrage of the people."

In the case of the State ex rel. v. Steers, 44 Me., 226, the court used this language: "The statute requires that within eight days after the close of each election, the clerk of each county shall take to his assistance two justices of the peace of his county, or two justices of the county court, and examine and cast up the votes given to each candidate, and give to those having the highest number of votes a certificate of election. There is no discretion given, no power to pass upon or adjudge whether votes are legal or illegal, but the simple ministerial duty to cast up and award the certificate to the person having the highest number of votes. If the clerk had sufficient mathematical ability to correctly count up the returns, he is perfectly qualified for his office, for that is the only duty devolved upon him by law. To determine upon the legality of votes, is a judicial proceeding before a court competent to hear and adjudicate, where the parties interested can appear and present their respective claims. To allow a ministerial officer arbitrarily to reject returns, at his mere caprice or pleasure, is to infringe or destroy the rights of parties, without notice or opportunity to be heard, a thing which the law abhors and prohibits. Admit the power and there will be no uniformity. The canvassing officer will reject for one thing, and another for a different matter, and no man can tell whether he is legally elected to an office until he consults the notions of a canvasser. The exercise of such a power is subversive of the rights of the citizen, and dangerous and fatal to the elective franchise. But it is enough to say that the claim is utterly unauthorized. The law has provided tribunals with ample power to hear and determine all questions pertaining to elections, and pass upon the validity of votes, where parties interested can appear and have a fair trial upon pleadings and proof.

"When a ministerial officer leaves his proper sphere and attempts to exercise judicial functions, he is exceeding the limits of the law and is guilty of usurpation. In this case it would have been more decent and secure for the clerk to have confined himself to a discharge of the duties pointed out by law, and not to have attempted the exercise of powers which are never entrusted to him."

The court on page 228 says, "I have examined with a good deal of research the authorities, and have never been able to find a single one that held otherwise than that the canvassers acted ministerially; but

they are unanimous and decisive in declaring him to be a ministerial officer and nothing else," citing 10 Mo. 629; 38 Mo., 540; 43 Mo. 256; 8 Hill, 42; 29 Ill., 413; 19 Ind., 337; 14 Barb., 250; 13 Shep., 491; 9 Ala., 338; 15 Ill., 492; 2 Minn., 180; 1 Mich., 362; 22 Barb., 72; 4 Cow., 297; 10 Ia., 212; 4 Seld., 67; 32 Barb., 55; 4 Wis., 567; 4 Wis., 420; 1 Deutcher, 331; 1 Do., 354; 2 Swan., 68; 27 N. Y., 45; 25 Ill., 325.

The cases containing the above view are almost too numerous for citation. We cite in addition to the above, the following: 16 O. S., p. 192; Howard v. Shields, 16 Kan., 102; 4 Neb., 509; 20 Wend., 14; 26 Ark., 100.

If these authorities are not decisive on this question; if they are not sufficient in number, if in fact they do not convince you that you have no authority to reject these returns; if they do not convince you that in rejecting them you would violate the oaths you have taken, then indeed I am unable to understand what argument can be addressed to you.

As a second reason why you cannot reject these votes, I desire to further consider the point to which I briefly referred the other day, viz.: that the poll-books mentioned in the statute, does not include merely the paper signed by the judges, showing the names and numbers of the votes, but also the paper known as the tally sheet and which shows the votes cast for the respective candidates, for if I am correct in this, the tally sheet and certificate of the judge show the number of votes cast for each candidate, and these are conclusive on you, under that section of the statute, which says you shall be governed by the number of votes on the poll-book. To prove this, see:

1. The form of the poll-book as made by the statute. This includes the list and the name of the owner, and the names of each candidate and his votes.

2. The 19th section of the statute provides, that after canvassing the votes in the manner aforesaid, the clerk or justice before they disperse, shall put under cover, one of the poll-books, seal the same and direct it to the clerk of the court of common pleas of the county where the return is to be made, and the poll-book thus sealed and directed, shall be conveyed by one of the judges to the clerk of the court of common pleas of the county at his office within two days from the day of election, there to remain for the use of the persons who may choose to inspect the same. Now observe that this section says, the poll-books shall be returned; there is not a word in the statute that mentions that the names of the persons voted for, or the votes cast for each candidate, shall be sent to the clerk at all, nor would they have to be sent at all if they were not included in the word "poll-books." If the tally sheet and the list of the candidates or the vote for each is not a part of the poll-book, then it need not be sent up at all. Nor, indeed, is there any provision of law for it. If those things are not included in the ward poll-book, then I defy you to show me that you have anything to do with the candidates or the votes received by each, as the poll-book alone is ordered to be returned. Section 20 does not say that the poll-books shall be opened, but calls them returns after they are made to the clerk, and says that these returns shall be opened, and abstracts of votes cast for the different parties made. Now, if the returns consisted only of the list of voters and names, this could never be done, because that list does not show what candidates were voted for, nor the number of votes cast for each. The section fur-

ther provides that the clerk shall proceed to open the several returns which shall have been made to his office under this or any other statute. (Now, remember that there is no statute, nothing under heaven, that ever provides that any returns shall be made to him of any kind, unless the word poll-book embraces them), and to make abstracts of the votes in the following manner, that is as provided in section 31, and the abstracts shall be on one sheet. In making the abstracts of the votes aforesaid, the justices and clerk shall not decide on the validity of the returns aforesaid, but shall be governed by the number of votes stated in the poll-books. Now, this does not mean the mere list of voters, but it means on whatever makes up the poll-books, list tally and sheet tally.

As a third reason why you cannot reject the vote, we would add, that you have in the tally sheet in the numbering of the votes by the judges and in the certificate, the exact number of votes cast for each candidate. This is conclusive on you and would be *prima facie* evidence before the court. In Howard v. Shields, 16 O. S., 184, 189, Judge Welch of our supreme court said: "In rejecting these papers (the tally sheets), the court erred. The tally sheet alone makes a prima facie case." It is upon the tally sheets alone that the county canvassers declare the result. 61 O. L., 92, section 17. * * * If the tally is good before them it should be good before the court. The policy of the law seems to be, that until the contrary is shown, the tally sheet shall be taken and considered as a true statement of the number of legal votes cast for each candidate.

In the above case, on page 190, the court says as follows: "In this case the tally sheet and poll-book were both defective. The tally sheet has the proper recitals in its caption, of the time, place and military organization, and of the names of the judges and clerks, but it is not signed by the judges and clerks. The poll-book is properly signed by the judge and clerks, but it has no recitals in the caption, the blank spaces being unfilled. Each, taken separately, is substantially defective, and yet both, taken together, show all the necessary facts."

Now, in order to show that these votes were legal, the court looked into what is called the paper containing the lists of votes and the tally sheets. It examined them both, and found that the two together were perfect and made valid returns.

But if we are wrong in all the propositions above, then we claim that if you reject any of the votes, you can only reject the excess of votes shown by the tally over the votes shown by the poll-books. The proposition is sustained by an authority which I find in the state of Michigan, in the case of the People v. Cicatt, 16 Mich., 314.

On page 314, Judge ———— said. As to the excess of 9 ballots in the 6th and 7 in the 7th ward beyond the number of votes shown in the poll list, we are agreed that for this excess the whole vote of these wards is not to be rejected. The electors should not be disfranchised for this error of the inspectors.

The syllabus of the case on page 283 is as follows: "Where ballots are found in any ward or township in excess of the names on the poll lists, and the inspectors fail to draw them out as required by S. 62 Comp. L., they should, on the trial of the cause, be so apportioned, that each candidate shall have deducted a share of them, proportioned according to the whole number of votes in his favor—the probability being

that the legal and illegal votes have been cast ratably for the several candidates.

That such mistakes are not fraudulent, but likely to occur, see Judge Cooley's remarks on page 322, in 16 Michigan, above cited.

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299 [Hamilton District Court, October Term, 1877.]

JACOB BROCK v. AUGUST BECHER.

For opinion in this case, see 5 Dec. R., 519 (s. c. 6 Am. Law Rec., 380).

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304 [Superior Court of Cincinnati, General Term, October, 1877.]

MICHAEL HEISTER v. ENTERPRISE INSURANCE CO.

For opinion in this case, see 5 Dec. R., 479 (s. c. 6 Am. Law Rec., 238).

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323 [Superior Court of Cincinnati, Special Term, December, 1877.]

MOORE v. MOULTON.

For opinion in this case, see 5 Dec. R., 534 (s. c. 6 Am. Law Rec., 466).

MUNICIPAL CORPORATIONS—DAMAGES.

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

Tilden, Yaple and Force, JJ.

J. W. R. KRIEGE v. CITY OF CINCINNATI.

Under section 564 of the Municipal Code, requiring persons claiming damages by any improvement to file their claim within two weeks after the publication of the resolution declaring the necessity for such improvement, the omission to file such claim in time waives all right to damages, although there was no actual notice. That a claim was filed afterward, but before the city had incurred any liability on account of the proposed improvement, does not satisfy the statute.

YAPLE, J.

The plaintiff in error was the plaintiff below, and he prosecutes a petition in error here to reverse a judgment of this court, rendered in special term upon the pleadings in favor of the defendant in error, the defendant in the original action.

The plaintiff sued the city to recover $5,000 for alleged damages occasioned to his property, abutting on East Sixth street, by the improvement by the city of such street. He averred that the grade of the street had been fixed by the city many years ago, and that the same had been improved at the cost of the abutting property and property owners, and that his buildings upon his lot were erected with reference to such previous grade; that the city changed such grade and improved the street according to such changed grade, by which a very heavy fill was made in front of his property, which compelled him to tear down his buildings, fill his lot and rebuild.

The city answered among other things, that on February 12, 1873, a resolution was duly passed in the city council of said city, declaring it

necessary to improve that portion of Sixth street, and that such resolution was duly published for more than two consecutive weeks in a newspaper of general circulation in the corporation, and all plans and profiles relating to such improvement were duly recorded and kept on file in the office of the city civil engineer, open to the inspection of all parties interested; but that the plaintiff neglected to file any claim for damages by reason of said improvement within the time limited by law.

In his reply the plaintiff denied every allegation of such answer, and stated that he had no actual notice of the proceedings of the city, until near the 1st of September, 1872, when he made out his claim and account for damages, according to law, and presented the same to the city clerk, who refused to receive it, because not presented in time; and he then presented a like claim, at its first meeting thereafter, to the city council, which also rejected his claim; and that all this was done before the city had incurred any liability on account of the improvement.

The defendant amended the answer, stating the date of the passage of the resolution to improve as February 9, 1872, instead of February 12, 1873, and that the same was published for two consecutive weeks, the first insertion being on February 12, 1872. To this answer, as amended, the plaintiff waived a reply, and filed none. Thereupon, on the pleadings, the court rendered judgment for the defendant. Exception was taken and a motion for a new trial made by the plaintiff, which was overruled by the court.

Section 563, of the Municipal Code, as amended April 18, 1870, provides that, "when it shall be deemed necessary by any city or incorporated village to make any public improvement, not otherwise specially provided for, it shall be the duty of the council to declare, by resolution, the necessity of such improvement, and to publish such resolution for not less than two, nor more than four consecutive weeks, in some newspaper published, or of general circulation, in the corporation," etc.

And section 564 provides that, "any owner or owners of lots or lands, bounding or abutting upon the proposed improvement, claiming damages therefor, shall file a claim, in writing, with the clerk of the corporation, setting forth the amount of damages claimed, together with a description of the property owned for which the claim is made, within two weeks after the expiration of the time required for the publication of said notice; and all such owners as shall fail or neglect to file their claims for damages aforesaid, within the time aforesaid, shall be deemed to have waived the same, and be forever barred from filing any claim or receiving any damages therefor."

These sections do not make actual notice to the claimant of damages necessary, but require him, at his peril, to take notice of the publication of the resolution declaring it necessary to improve; nor do they make it material that the corporation should incur expense or liability before being able to defend against such claim for damages, made after the time prescribed by statute. And, as no fraud on the part of the city, nor any accident or mistake is averred as a ground of relief against the statute, we do not see upon what ground the plaintiff can be entitled to recover. The law seems to be well settled. See Cupp v. Commissioners, 19 O. S., 173; Reckner v. Warner, 22 O. S., 275, and Anderson v. McKinney, 24 O. S., 467.

Upon the face of the pleadings, then, it appeared that this plaintiff had forever waived his right to claim damages for injuries to his premises

on account of this improvement, and that the court did not err in rendering judgment against him.

Judgment affirmed.

Tilden and Force, JJ., concur.

Louis French, for plaintiff in error.

Bates & Perkins, city solicitors, for defendant in error.

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333 **ERROR.**

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

Tilden, Yaple and Force, JJ.

HENRY EILERS v. NATIONAL LIFE INSURANCE CO.

1. Whether an assignment of error, that the court erred in giving judgment for plaintiff and against the defendant, can be construed as a claim that the finding and judgment were against the evidence.
2. A reviewing court should not review alleged errors in the rulings of the trial court, which the bill of exception does not show were excepted to at the time, for it will presume that the court below would have corrected them had its attention been called thereto.

YAPLE, J.

The defendant in error sued the plaintiff in error, as the indorser of a promissory note for $236, dated September 27, 1875, payable one year after date, to the order of the defendant in error, and signed by H. W. Sabine, as maker; and recovered a judgment, in special term, against the plaintiff in error for the amount of the note, interest and costs, the maker, Sabine, having died before suit brought.

Eilers, in his answer, claimed that his signature upon the back of the note was a forgery, or if not, that Sabine procured his signature, without any negligence or fault on his part, by falsely representing that it was for the purpose of certifying to his, Sabine's character and capacity as a business man, each paper so signed being larger than the alleged note sued on.

The errors assigned are:

1. That the court at the trial erred in admitting certain evidence of the plaintiff, to which Eilers objected.

2. That the court erred in ruling out certain evidence offered by Eilers on the trial.

3. That the court erred in the application of the law of the case.

4. That the court erred in giving judgment for the plaintiff, and against the defendant.

The bill of exceptions sets forth all the evidence.

As to the first two assignments of error, it is enough to say that the bill of exceptions shows that all the evidence, on both sides, was received without any objection from either, and it fails to show what rules of law the court applied to the case, except that, upon the entire testimony, the plaintiff was entitled to recover as prayed for in the petition, which brings the third within the fourth assignment of error. If any error on the part of the court intervened, as complained of in the first three assignments of error, the defendant should have pointed out the

same at the trial, and excepted; and not having done so, he has waived all right here to assign such errors; for, if error, it will be now and here presumed that the court below would have corrected the same had its attention been called thereto; and the time and labors of a court of errors should not be taken up with considering what, if called to the attention of the inferior court, would, presumably, have been properly determined, and thus have avoided the necessity of burdening an appellate tribunal with an appeal for relief which the party could have had by the mere asking from the trial court.

If the fourth and last assignment of error can properly be construed as claiming that the finding and judgment below were manifestly against the evidence, which is questionable to say the least, it is not well founded. Eilers testified that he admitted that the signature upon the back of the note looked like his own handwriting, and he did not say or intimate that it was not. He admitted that his signature was attached to two papers, admitted as a basis for comparison, and an expert swore, that in his opinion, the same hand that wrote those signatures, wrote the endorsement on the note, and there was no evidence introduced to question, much less to contradict such testimony. It was proved that the plaintiff took the note in good faith, before it was due, relying upon the name of Eilers, and was wholly ignorant of any of the matters of defense set up in the answer.

The note was made from a printed blank note, such as are struck and sold in small book form, and could never have formed part of a larger piece of paper. So while Eilers has probably forgotten the endorsement of this note, and only remembers an entirely distinct transaction, which he confounds with it, we are all satisfied that he did endorse the paper.

The judgment is therefore affirmed.

Tilden and Force, JJ., concur.

Taft & Lloyd, for plaintiff in error.

C. D. Robertson, for defendant in error.

FIRE INSURANCE—ASSIGNMENT OF POLICY. 333

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

Tilden, Yaple and Force, JJ.

*William Wall v. Amazon Insurance Co.

A policy of insurance issued to a mortgagee contained a stipulation that the insurance might be terminated at any time at the request of the assured, the company only retaining customary short rates; also, that if any change took place in the title or possession, the policy should be void. Without the knowledge of the company, the owner sold and conveyed the property and satisfied the mortgage: *Held,* that a subsequent assignment of the policy by the mortgagee to the purchaser, and a verbal agreement between the latter and an agent of the company, having power to make contracts and issue policies, that such assigned policies shall have the force and effect of a new policy to the purchaser, will bind the company.

*This decision was affirmed by the supreme court. See opinion, 31 O. S. 628. See opinion in Wall v. Insurance Co., *ante* 323.

YAPLE, J.

This case comes here for decision by reservation, upon the law and the evidence, from special term.

The plaintiff brought his action to correct a mistake in the date of a policy of insurance against fire, issued by the defendant on the 15th day of May, 1875, to run until the 15th day of April, 1876; but which was dated May 15, 1876; to expire on April 15, 1877; and to recover upon the corrected policy, for loss by fire of the insured property, the sum of $2,500, with interest from June 5, 1876. The mistake, as claimed by the plaintiff, is clearly made out by the testimony, and is in fact admitted by the defendant. The facts clearly established by the testimony are, that at the date of insurance, one James Hamilton was the owner of one frame paper mill building, situate on the east bank of the Miami Canal, in the village of Lockington, Shelby county, Ohio, and fixed and movable machinery, engines, boilers, belts, belting, tubs, tanks and connections, all contained in such building; that one D. K. Gillespie, as assignee of the Summit Paper Co., held a mortgage for a large sum of money against Hamilton upon all said property; that on May 15, 1875, in consideration of $83.13-190 premium paid, by a policy of insurance signed by the president, secretary, and Wm. S. Parker, agent of the defendant, containing the mistakes complained of, that is 1876 for 1875, and 1877 instead of 1876, the defendant insured Gillespie as follows, against loss or damage by fire or lightning: "To the amount of $2,500, for the term of 11 months, from the 15th day of May, 1876, (5) at 12 o'clock noon, unto the 15th day of April, 1877, (6) at 12 o'clock noon, upon the property hereinafter named, i. e., seventy-five dollars on his mortgage interest, as assignee of the Summit Paper Company, on the frame paper mill building, situate on the east bank of the Miami Canal, in the village of Lockington, Shelby county, Ohio; and $2,425 on fixed and movable machinery, engine and boiler, belts, belting, tubs, tanks and connections, all contained in above named building, privilege of further insurance without notice until required."

Afterwards the plaintiff, Wall, purchased from Hamilton this paper-mill property, and assumed to and did take up the Gillespie mortgage, who took, in lieu thereof, a mortgage upon a farm, distinct from the paper-mill property; that it was agreed between Wall, Gillespie and Hamilton, as part of the transaction of the sale to Wall, and assumption by him of the mortgage, that he should have the benefit, for the unexpired time, of Gillespie's insurance, he having further insured his mortgage interest in other companies; that on October 15, 1875, Wall and Gillespie, with the policy, went to Wm. S. Parker, at Piqua, Ohio, who assumed to act as the agent of the defendant, and there the following assignments were endorsed upon the policy:

"The property hereby insured having been purchased by Wm. Wall, the Amazon Insurance Co. consents that the interest of D. K. Gillespie in the within policy may be assigned to said purchaser, subject, nevertheless, to all the terms and conditions therein mentioned and referred to. Dated at Piqua, O., this 15th day of October, 1875. (Signed) Wm. S. Parker, Agent."

"For value received, I hereby transfer, assign and set over unto Wm. Wall and his assigns, all my right, title and interest in this policy of insurance, and all benefit and advantage to be derived therefrom. Witness my hand and seal, this 15th day of October, 1875." (Signed) "D. K. Gillespie, Assignee." That the policy so endorsed and assigned was delivered to Wall: that the property mentioned in the policy was destroyed by fire on February 23, 1876, and immediate notice thereof given to the company; that full proofs of loss were made to the defendant as soon as the same could be done; and that the defendant sent its adjuster of losses to the scene of the fire, who, after inspecting the policy and endorsement thereon and assignment thereof, to Wall, denied the liability of the defendant for any part of the loss, which denial the defendant adopted and has ever since refused to pay anything therefor, though the time fixed for such payment expired before suit brought.

There are but two questions in the case which are fairly subjects for dispute The first is whether Wm. S. Parker, in the transaction between him, Wall and Gillespie, was the agent of the defendant; and the second is, whether the transaction amounted to more than the mere insurance of the Gillespie mortgage debt, which was extinguished by Wall, and left, therefore, nothing to insure.

We have no difficulty, upon the evidence, in finding that Parker was the agent of the company. He effected the original insurance, and signed and delivered the policy, as such agent. His commission as agent was lost when

he gave his deposition, but he testified that it conferred the same powers as are contained in a printed form for agents of the Andes Insurance Co., among them the following: "With full power to receive proposals for insurance * * * to act as surveyor, or to appoint surveyors for property to be insured * * * and insurance thereon to make by policies of said insurance company, countersigned by said agent, and to renew the same, grant assent to assignments or transfers, and in all other matters and things to attend to the business and duties of said agency, in manner and form prescribed by the company." The president of the company, Mr. Gano, testifies that Parker exercised for the company the foregoing powers, so there can be no question of Parker's general agency for the defendant.

Upon the other question, both Wall and Gillespie swear that they fully explained to such agent all the facts and circumstances of the case; and that he, before the yet unearned premium, agreed to insure the property for Wall, as owner, during the time the policy had to run; and that the agent told them it would be unnecessary to issue a policy for such time, but that his endorsement and the assignment hereinbefore set out would answer every purpose. Parker simply fails to recollect whether he was so informed by them, but he states that he supposed the mortgage was satisfied, and that he intended to insure the property for Wall, as the owner. This he states, again and again, in his deposition. He says that now, however, since this dispute has arisen, he, if all the facts were stated to him, would probably take advice before making such an endorsement and accepting such assignment. This cannot affect the case.

Apart from any consideration of the effect of such endorsement and assignment, the plaintiff in his petition and evidence, makes this case: The agent of the defendant agreed with Wall, for the unearned premium paid upon the Gillespie policy, to insure the property for Wall as its owner for the period that the policy had then to run; but that no policy should be issued to Wall, because of the shortness of the period of the insurance.

The only question then is, whether the plaintiff can recover upon such a contract. The law, notwithstanding a remark of the judge pronouncing the opinion of the court, in Cockerill v. Cin. Mut. Ins. Co., 16 O., 148, is conclusively settled that such recovery may be had. Elstner v. Cin. Eq. Ins. Co., 1 Dis., pp. 412, 420; Flanders on Fire Insurance, pp. 118-124, and cases there cited.

May on Insurance, p. 41. "The policy as we have seen, is not essential to its validity. It is but the form and embodiment, the expression and evidence of what has already been agreed upon, adding nothing thereto and detracting nothing therefrom."

This case is entirely different from the case of Wall v. Commercial Ins. Co., decided at a previous term of this court, *ante* 323. In that case the policy of insurance of Gillespie's mortgage debt upon this paper-mill property, assigned by Gillespie to Wall, was sent to the company to obtain the endorsement of its approval of the assignment, but without a word of explanation. The company did not know that Wall had become the owner of the mortgaged property, but supposed, when it indorsed its approval of the assignment, that Wall had only purchased from Gillespie such mortgage. And, as the weight of the authority (the question never having been decided by our supreme court), seems to be, that, where a mortgagee insures his mortgage debt, the insurer, if he pay the loss, will be entitled to subrogation to the rights of the mortgagee, this right would have been destroyed if the company would have consented to insure Wall, as the owner of the property who had satisfied the mortgagee. This would have been to the prejudice of the insurer; and being wholly ignorant of the facts, a majority of this court held that Wall could not recover upon that policy. That case then is clearly distinguishable from the one at bar.

A judgment will be rendered for the plaintiff. The amount, as there are other insurances upon the property destroyed, can be made up by counsel, and they will reckon interest upon such amount, and it will be incorporated in the judgment.

Tilden and Force, JJ., concur.

Moulton, Johnson & Levy, for plaintiff.

Long, Kramer & Kramer, for defendant.

335 FRAUDULENT CONVEYANCE—PLEADING—LIMITATIONS.

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

*HENRY W. STEPHENSON ET AL. v. EDEN B. REEDER ET AL.

1. An action to set aside a fraudulent conveyance is barred by the four years limitation of the Code, unless the fraud was not earlier discovered. Such action is different from a creditor's bill, in that there is no equity in the debtor as between himself and the rest of the world, whereas, in the creditor's bill, there is such equity in the debtor.
2. The old rule of chancery practice, where one seeks to avoid the effect of lapse of time, that he should set forth specifically the impediments to an earlier prosecution of his claim, how he came to be so long ignorant of his rights, and the means used by the respondent fraudulently to keep him in ignorance, and how when he first came to a knowledge of the facts, is supplanted by the Code rule, that to avoid the bar of the statute of limitations in case of fraud, he need merely aver ignorance and that due diligence would have been ineffectual to discover the fraud.
3. A pleading under the liberal construction of the Code, averring, in avoidance of the statute of limitations, that the fraud complained of was not discovered until within four years, etc., instead of that it could not, by the exercise of due diligence have been discoverd, etc., will be held sufficient, and if met by an answer denying plaintiff's ignorance within that time, it will then devolve on the plaintiff to prove, not merely the fact of ignorance, but that due diligence would have been ineffectual.
4. Whether a personal judgment in an action to foreclose a mortgage, without prayer for personal judgment, where the relief by foreclosure of the mortgage could not be granted, is good or not for want of service of summons, as on a personal judgment action, such purported judgment is good as an award of execution.

YAPLE, J.

This case was reserved from special term for decision here, upon a demurrer to the second amended petition of the plaintiffs. The demurrer insists that the petition does not state facts sufficient to constitute a cause of action, and that such petition shows affirmatively that the alleged cause of action is barred by the statute of limitations.

The plaintiffs, whose testator, William Stephenson, was a creditor, prior to July, 1844, of Eden B. Reeder, seek to set aside a conveyance of certain described real estate, by Reeder to Adam N. Riddle, in trust for Jane E. Reeder, since deceased, and Ann E. Donohue and Caroline R. Mallary, daughters of Eden B. Reeder, on the ground that the same was made to hinder, delay and defraud the creditors of him, Eden B. Reeder. The deed was made on July 24, 1844, and recorded on the 27th day of September, 1853. William Stephenson died since April, 1872, and he and Reeder had frequent interviews, for many years, concerning Reeder's indebtedness to him. The petition avers that ever since the conveyance, Reeder has been in possession and has the use and control of the property. The petition further states that on Nov. 3, 1837, Reeder made his promissory note to Charles Fox, or order, for the sum of $1,100, payable in one year after date, and executed a mortgage on premises other than those here in question, to secure such

*See also opinion of district court in Reeder v. Stephenson, *post* 3 B. 1120.

note; that Charles Fox afterwards sold and assigned the note and mortgage to said William Stephenson; that on September 14, 1840, Fox filed a bill in chancery, in the court of common pleas, of Hamilton county, to foreclose the mortgage and to obtain an order of sale of the mortgaged property to satisfy the mortgage debt; that, on February 23, 1841, Reeder filed his answer making Stephenson a party, he being the assignee of the note and mortgage; that in such court a decree of foreclosure and sale was had, whereupon Reeder appealed the cause to the supreme court, where, at the April term, 1842, that court found that there was due from Reeder to Stephenson on the note, $1,475, for which a decree of foreclosure and an order of sale of the premises was rendered; that from that time ever since Reeder has been much embarrassed, and requested and induced Stephenson, until in 1869, not to enforce the decree or collect the money, during which year Stephenson caused an order of sale to be issued; that between the bringing of the suit and date of issuing such order of sale Reeder had sold and conveyed the mortgaged property to divers purchasers for value, all of whom appeared in such action then pending by proper transfer in the district court of Hamilton county as the successor of the former supreme court, and filed cross-petitions, asking to be protected against such former decree, and to hold the property free from the same; that upon such cross-petitions, such purchasers from Reeder were decreed by such court, at its April term, 1872, to hold the property free and discharged from such decree, mortgage and mortgage debt; but that the court, in such decree rendered a personal judgment in favor of Stephenson, and against Reeder, for the amount of the mortgage debt and interest, to-wit: for $4,145.55 and costs, upon which, before the bringing of this action, an execution was duly issued and returned "no goods, chattels, lands or tenements found whereon to levy." The petition, which was filed on May 12, 1877, the date of the commencement of this suit, then prays that the conveyance from Reeder to Riddle may be declared void, and that the property described therein be subjected to the payment of Reeder's debts, all persons in interest being properly made parties It may also be proper to state that the decree of the district court in favor of the rights of the purchasers from Reeder, during the pendency of the foreclosure suit brought by Fox, was affirmed by the supreme court commission, in the case of Fox v. Reeder, 28 O. S., 181. That case goes on further than to protect such purchasers from the mortgage claim and lien; it in no way decides that Reeder himself is discharged from liability; on the contrary, the idea of his exemption is clearly negatived by the authorities cited in the report of the decision, Hunter v. Earl of Hopetown, 4 McQueen, 972. "A suit though asleep, continues *in pendente* till disposed of, and the parties are still at issue, though the *lis* may have been for years comatose." The court say, p. 185, "but in this case, no rights of third parties had intervened to which the principles of *lis pendente* could apply."

In the case at bar, the petition avers, and the demurrer admits the same for the purpose of determining the legal sufficiency of such petition, that the long delay was given to Reeder, at his request, and upon the faith of his continued promises to pay the debt; and it is also averred that he has been in possession, and has had the use and benefit of the property, alleged to have been so conveyed in fraud of the rights of creditors, ever since the same was made.

The first ground taken in behalf of defendant, Reeder, upon the demurrer is, that the personal judgment, rendered by the district court against him in 1872, was void, and not merely voidable, it having been taken without an amendment of the bill praying a personal judgment, upon an issue tried between Stephenson and such cross-petitioners, and without the service of a summons upon the defendant, Reeder. It is replied to this, that if service of a summons was necessary, it will be presumed to have been made, the record not showing that such service was not made; that as the mortgaged land was not subject to the decree of foreclosure in the hands of such purchasers, there was a right to issue execution against Reeder for the amount due, without any personal judgment being taken against him; and that such personal judgment was, at most, only voidable and not void, and hence its validity can not be inquired into, collaterally, in this suit, but can only be impeached by proceedings in error, prosecuted directly to reverse such judgment. The demurrant rejoins that the petition purports to set out at all that was done in the district court, in relation to the matter, and it does not claim that a summons was issued, or served, and, hence, that there can be no presumption of service upon Reeder before the rendition of the judgment.

Upon the case as presented by this record, we deem it unnecessary to decide between the parties, as to which is correct in their respective legal positions. Stephenson was, beyond any question, upon the facts stated in the petition, a creditor of Reeder, and his decree of foreclosure being wholly unavailable, owing to his laches, caused by Reeder's importunities, enabled him to have an award of execution for the entire debt, and the alleged judgment may fairly be construed as having, at least, the effect of such award of execution. Besides, since the passage of the act of February 12, 1863, (S. & S., p. 397), amending the 17th section of the act of 1859, "regulating the mode of administering assignments in trust for the benefit of creditors," these plaintiffs, being creditors of Reeder, had the right to institute an action, to set aside any conveyance made by him to hinder, delay and defraud his creditors, whether actually or only constructively fraudulent.

This court, in the case of Combs v. Watson, 2 Cin. S. C. R., 523, has decided, that, under said section 17, as amended in 1863, any creditor, simple contract as well as judgment, may maintain an action to set aside a fraudulent conveyance: otherwise such creditors could not come into such an action by cross-petition, as they are required to do, in order to obtain a pro rata share of the proceeds of the fraudulently conveyed property, for one who can not bring an action, can not be a plaintiff by cross-petition. And that section, being remedial, applies to fraudulent conveyances made before its passage, as well as to those executed afterwards. Stanton v. Keyes, 14 O. S., 443. And it applies to conveyances constructively, as well as to such as are actually fraudulent. Jamison v. McNally, 21 O. S., 295. For a stronger reason it must apply to a case like the present, where there exists a right to issue execution for the amount of money that can not be made out of mortgage property upon a decree of foreclosure.

As to the statute of limitations, it is settled, under our code, that where a pleading shows affirmatively a claim barred by the statute of limitations, the bar may be taken advantage of by a general demurrer;

and the present being an action by a creditor to have declared void and set aside a conveyance as fraudulent, is governed by section 15 of the code, which is as follows: "Within four years * * * an action for relief on the ground of fraud; the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." This can not be taken as an action to subject to the payment of the plaintiffs' debt an "equitable interest which he (Reeder) may have in real estate" under section 458 of the Code. That section applies only to cases in which the debtor, as between himself and the world, has such equitable interest. In cases of conveyances fraudulent as against creditors, the debtor, as between himself and the grantee, and all the world besides, except creditors, has no legal or equitable title to the property conveyed, and creditors under the above mentioned 17th section must, by action, have the conveyance declared void, on the ground of fraud, actual or constructive When, then, the debtor's real interest and property in premises so conveyed, can only be reached by creditors setting aside a conveyance as fraudulent as to creditors, section 458, in relation to actions to subject equities, can not apply. This is fairly deducible from the case of Jamison v. McNally, above cited, which was a conveyance constructively fraudulent, and if the debtor's interest had been the equitable one contemplated by section 458 of the Code, the creditor would have acquired a prior lien by bringing suit, and the judgment would not have been reversed to let in all creditors, pro rata, under the section 17, as amended in 1863.

The question for our decision, then, is whether upon a demurrer raising the question of bar by the statute of limitations, a petition which avers that the plaintiff did not discover the alleged fraud until within four years before suit brought, will, under the provisions of the Code, requiring all pleadings to be liberally construed, and making the intendment in favor of and not against the pleading, be held as stating, in effect, that the party could not by the exercise of due diligence have discovered the fraud, or facts sufficient to put him on inquiry, which would amount to notice or discovery of the fraud. This, purely a question of pleading, has never, so far as we are advised, been decided in Ohio. But we think that such is the legal scope of the pleading, and that a petition containing such an averment, if controverted, ought to be met with an answer denying the plaintiff's ignorance of the facts constituting the alleged fraud until within four years prior to the suit brought. Then, at the trial, it would devolve upon the plaintiff to prove, not only his ignorance in fact, but that he used due diligence under all the circumstances, and that by such diligence he could not have discovered the facts constituting the fraud. And we may say here that the recording of a fraudulent deed is not of itself, in this class of cases, notice or knowledge or discovery, so as to set the statute of limitations running. It is actual discovery, or what might, by the exercise of due diligence, have been discovered, alone that will cause the statute to begin to run. But such recording may be a proper circumstance to be given in evidence, to be considered for what it may be worth, upon the question of laches or diligence. See Piatt v. Longworth, 27 O. S., 159, 198.

The 15th section, above quoted, embodies the old chancery rule, except as to the pleadings. See Combs v. Watson, *supra;* also, Bohm Bros. & Co. v. Cunningham, *ante,* 381, see Badger v. Badger, 2 Wal.,

p. 95, where the court quote, "Long acquiescence and laches by the parties out of possession are productive of much hardship and injustice to others, and can not be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor. The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer."

Under the Code, upon an issue raised by averments such as this petition contains, and an answer such as we have assumed, the above matters are circumstances for the plaintiff to prove at the trial, and are not, as in a bill in chancery, to be pleaded.

The present suit could have been brought in 1863, and was not brought until 1877; but it is averred that the fraud was not discovered until 1876, and we think, as we have said, that this is equivalent to an averment that, by reasonable diligence, the facts constituting the alleged fraud could not have been discovered. The demurrer will be overruled, and the cause remanded to special term, with leave to the defendant, if he desires, to answer.

Demurrer overruled.

Tilden and Force, JJ., concur.

Fox & Bird, for plaintiff.

J. J. Glidden, for defendant.

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337 **STREET ASSESSMENTS.**

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

CITY OF CINCINNATI, FOR THE USE OF v. WM. M. CORRY.

1. Where part of the terms of annexation of a special road district to a city were that all grades of streets theretofore established should be respected, but could be altered by consent of property holders, an assessment for street improvement, where there was a change of grade, can not be resisted unless the property holders are shown to have objected to change of grade.
2. Where an assessment by a city for a street improvement is without authority of law (in this case for want of the resolution declaring it necessary to improve), and therefore void, it is not such irregularity or defect as is contemplated in the curative proviso in section 550 of the Municipal Code.
3. Although the Municipal Code, section 542, seems only to allow the assessing for street improvements of land in bulk only to the average depth of lots in the neighborhood when the assessment is by the tax valuation, yet an assessment by the front foot is to be restricted to such depth also when there are lots in the neighborhood.
4. Where a street called Hammond street, laid out by an owner in subdividing is practically continued by McLean street in another subdivision, there being a jog, or offset, of a few feet at their junction, but forming a continuous line of travel, a municipal corporation can proceed to improve them both in the same proceedings as one work, calling it the improvement of Hammond and McLean streets, and an assessment can not be defeated on that ground.

YAPLE, J.

This action comes here for decision upon the law and the facts by reservation from special term.

The action was brought to recover an assessment for the improvement of Hammond and McLean streets, in this city, formerly Corryville, in the Walnut Hills, Mt. Auburn and Clintonville special road district. The assessment is $6.15. $9.53355-10,000 per front foot upon blocks 28 and 29, owned by the defendant, each block abutting upon the improved Hammond street 400 feet. Hammond street runs east and west, and block 28 lies south, and 29 north of the street. Hammond street, Marshall street, Boon street and Eden avenue bind on the four sides of No. 28, and Hammond street, Marshall street, Eden avenue and Wayne street bind on the four sides of No. 29. Both blocks are 400 feet square, and none of such streets, except Hammond street and Eden avenue past No. 28, were improved at the date of this assessment of over $8 per foot front made by the city. Eden avenue, along No. 29, will be costly to improve owing to the great depth of the fill to the established grade, and Boon and Wayne streets will both be expensive improvements.

The first ground upon which the plaintiff claims exemption from liability is, that Corryville, it being then part of such special road district, was annexed to the city of Cincinnati before this improvement was authorized; that by the compact of annexation the city agreed, "that all grades of streets heretofore established within, and by the proper authorities of said village, shall be respected; but the same may be altered with the consent of the property-holders, or on payment of damages that may be agreed upon or ascertained by law;" and that the grade of Hammond street had been duly established before such annexation and the street improved, and the costs thereof assessed upon the abutting property. From which he insists that section 560 of the Municipal Code applies and exempts the land in question from this assessment. That section is as follows:

Section 550. "Whenever any street, alley, public highway, wharf, or landing, within the corporation, shall have been graded, or pavements shall have been constructed in conformity to grades established by the authorities of the corporation, and the expense thereof shall have been assessed on the lots or lands bounded by or abutting upon such street, alley, public highway, wharf or landing, the owner or owners of such lots or lands shall not be subject to any special assessment occasioned by any subsequent change of grade in such pavement, street, alley, public highway, wharf or landing, unless such changes is asked for by a majority of the owners of such lots or lands; but the expense of all improvements occasioned by such change of grade shall be chargeable to the general fund of the corporation."

We have no doubt but that the above section applies to streets of established grades, improved in the manner therein specified, that is, by assessment on the abutting property, in municipal corporations, after annexation to another municipal corporation, and we hold such streets, after annexation, are, to all intents and purposes, streets of the latter, and governed by the same laws as to subsequent changes of grade and improvement. The compact of annexation, in this case, also places them on that footing, and as it is not set up in this case by the defendant,

that the owners refused to consent to such change of grade; or claimed any damages on account thereof, we can safely hold the law and the agreement of annexation to be one and the same for the purposes of the present case.

Was, then, the assessment by the special road district valid? It is an agreed fact, that, "In an action brought by Eugene Buckley, the contractor, against the defendant to enforce said assessment, the defendant by the consideration of the Hamilton county district court, recovered a judgment in his favor, for costs, on the ground that said assessment was declared invalid, for the reason that said improvement was petitioned for by property-owners to be made thirty feet in width, and was, in fact, made sixty feet in width."

There was then no valid previous assessment made for improving this street prior to the present one, as has been adjudged by a court of competent jurisdiction, whose adjudication was invoked by the defendant himself. This renders it unnecessary to inquire whether there is any evidence that the improvement in question was petitioned for by a majority of the abutting property-owners, or not. The claim of the defendant for exemption on this ground is not tenable.

It is next claimed by the defendant that all the city's proceedings are void for uncertainty and for want of power to make the improvement as a whole. It is proved that Hammond street, as originally laid out, graded and improved, runs east along to the west side of Eden avenue; and that, from the east side of Eden avenue, McLean street begins, and runs thence east to the end of and beyond the improvement in question. And the north side of McLean street is some feet further south than the north line of Hammond street was laid out by the Corry heirs, and McLean street by Burnett and Reeder when they made their sub-division, they not regarding the streets laid out in the Corry subdivision. But it is also a fact that Hammond street and McLean street, with the crossing of Eden avenue, there improved, form one continuous route of travel. The proceedings and assessment were for the improvement of Hammond and McLean streets. We hold that the work was substantially one work; the street, one street; and that the proceedings and assessment can not be invalidated on this ground.

It is next claimed as a ground for exempting all but a part of blocks Nos. 28 and 29, that, in May, 1875, before the city contracted for such improvement of the street, the defendant sub-divided a part of both blocks into lots, according to law, and that such sub-division was duly approved, March 22, 1877, after the assessment (see 72 O. L., 25—Peck's Municipal Code, p. 418, section 6.) On lot 28, beginning at Eden avenue, the defendant platted four lots, each twenty-five feet front on Eden avenue, and running west the same width, two hundred feet, and from the west end of such two hundred feet, he platted eight lots, twenty-five feet front on Hammond street, and running back the same width south, one hundred feet; and on block 29, he laid off four similar lots, two hundred feet deep, fronting on Eden avenue, and eight one hundred feet deep lots, fronting on Hammond street. We hold that this subdivision only became valid from the time of its approval, and can not be made to relate back to the time it was presented to the proper authorities for approval and acceptance. It is then out of the case.

The defendant next insists that the law will not presume all of the land contained in these blocks to be benefited by the improvement of the one street, but only to the depth of the fair average of other lots in the neighborhood, and will limit the twenty-five per cent. value to be charged on the land to twenty-five per cent. of the value of such average depth of other lots in the neighborhood. He claims that the law presumes, when blocks 28 and 29 come to be subdivided into lots, such lots will not be more than the average depth of other lots in the neighborhood, from Hammond street, and that all other lots laid out in such blocks will be entirely cut off from such street, and can in no way abut upon it.

He insists that if one-quarter of the value of block 29, after the improvement is made, can be charged with the improvement of Hammond street, it may be for Eden avenue, for Marshall and for Wayne streets, and thus the whole property be taken for such improvements, and the same as to block 28; while only the four corners, when subdivided into lots, can have the benefit of two streets, and be charged for improving two streets, and none of it for four, and but little for more than one; and that the inner lots, having no frontage on any of such four streets, will be chargeable for such as may be laid out binding upon them. He claims, that in assessing lots according to their valuation for taxation which is never, or rarely ever, as great as the actual value, which is considered in assessing according to the foot front, the statute recognizes this view of the presumed limits of benefit. Municipal Code, section 542. "In making a special assessment according to valuation, the council shall be governed by the assessed value of lots where the land is sub-divided, 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 the lots in the neighborhood."

The defendant contends, that while this section may literally apply only to assessments according to the value assessed for taxation, yet it is not designed to charge less land in bulk for improvements that when the assessment is by the foot fronting according to actual value; that both are modes only, it being contemplated that the same amount of land will be charged in each case, the supposed benefit being presumed to extend in either case, to precisely the same quantity of land; that when the charge is by the foot front to the average depths of lots in the neighborhood, the value is as easily ascertained as if the lots were numbered and recorded, while it is difficult to get the proportion of the value returned for taxation, and hence the necessity for legislation in the last case, and not in the first.

We hold that the claims of the defendant made on these grounds are valid, even if the section quoted applies only to land charged according to its taxable value; for the second sentence of the section may be much broader than the first, and apply to cases like the present, where the charge is according to the front foot.

The evidence before us is not sufficient to enable us to render a judgment upon the basis just indicated. We will, therefore, remand the

cause to the special term to give the parties an opportunity to prove what ought to be the depth of these blocks to be charged; that is, what should be the fair average depth of the lots to be laid out along Hammond street, supposing all to front upon it, having reference to lots numbered and recorded in the neighborhood; and the charge will be confined to such strips on blocks 28 and 29, the value of which can be proven. The defendant further claims that there is no proof of the resolution to improve. But if this be so, it has no other effect than to bring the case within the section 550 of the Municipal Code, and as the cause must be remanded, the plaintiff may supply such proof if it can do so.

Cause remanded to special term for further proceedings.

Tilden, J., concurs. Force, J., dissents to the last proposition, holding that the blocks should be charged half their depth, i. e., 200 feet each.

Long, Kramer & Kramer, for plaintiff.

J. J. Glidden, for defendant.

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338 **ASSIGNMENT FOR CREDITORS.**

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

C. F. Adae & Co. v. Oscar F. Moses, Assignee, Etc.

Where a firm draws drafts for amounts due it, and plaintiff discounts the drafts, it being agreed that such indorsements should transfer all the firm's claims against which the draft was drawn; but before plaintiff gives notice to the drawees, who have not accepted the drafts, of the fact of their being assigned to him, such firm made an assignment for the benefit of creditors; money collected by the assignee on account of such claims, from the drawees of such drafts, belongs to plaintiffs. The assignee for creditors has no better title than his assignor, and the law of Ohio does not require notice to be given to the debtor of the fact of assignment in order to perfect it as between the assignor and the assignee.

Yaple, J.

This case comes before us upon demurrer to the petition. The petition, among other things, states that the plaintiffs discounted seven specified drafts, drawn by J. H. Feldwisch & Co., upon various persons to whom such firm had sold furniture upon orders, and to whom they had consigned furniture to be sold on commission, such drafts being for the entire claims of Feldwisch & Co., upon such respective drawees for such furniture. The firm endorsed and delivered the drafts to the plaintiffs; and the petition avers that Feldwisch & Co., gave such drawees notice of such transfers of the drafts to the plaintiffs; but it is not stated that the plainiffs ever gave such notice, nor did the drawees ever accept such drafts. The petition then states that all such drafts were transferred and endorsed by Feldwisch & Co. to the plaintiffs, upon their explicit assurance and agreement that such endorsement was and should be a transfer to the plaintiffs of the several claims of Feldwisch & Co., against the respective drawees of the drafts on account of and for the furniture ordered by or shipped to them which they were intended to cover. Feldwisch & Co. made an assignment for the benefit of creditors according to the insolvent act, to the defendant, Oscar F. Moore.

By an arrangement between the plaintiffs and such assignee, the latter collected the money and now holds it, as such assignee, he and the plaintiffs having, before such collection, agreed to submit their respective rights to judicial determination. There is then the prayer for account and judgment.

We are all clear that the demurrer should be overruled. It is well settled, that, in cases like this, the assignee stands in the shoes of the insolvent, and is affected by every equity in the assigned property which third persons may have, that would affect the property right of the insolvent himself. Then, if Feldwisch & Co. had collected the money on these drafts, could they, in view of their agreement, retain it against the plaintiffs? We hold not; that the agreement between the plaintiffs and Feldwisch & Co. operated as an equitable assignment, at least, of claims for furniture held by them against the persons upon whom the drafts were drawn for such claims. In fact, in this state, under the Code, it might be claimed that such endorsement, under the agreement, transferred the legal title to the plaintiffs. See Masury v. Southworth, 9 O. S., 340; Allen v. Miller, 11 O. S., 374; Shanklin v. Madison County, 21 O. S., 575; Porter v. Dunlap, 17 O. S., 591.

We do not think the law of Ohio requires notice to be given the debtor of an assignment of a case in action, whatever the rule may be in England and in some states, in order to make an equitable assignment complete. Of course, if such debtor pay the original creditor without notice of the assignment, the debtor can not be compelled to again pay the debt to the equitable assignee. And if the creditor makes a subsequent transfer of the claim to another than the first assignee, and such last holder notify the debtor of the transfer to him, the first not having done so, the last assignment will have precedence of the earlier one.

The demurrer is overruled. The defendant may submit here to judgment, or have the cause remanded to special term for further proceedings.

Tilden and Force, JJ., concur.

John Kepler & Son, for the plaintiff.

Durbin Ward, for defendant.

EASEMENTS. 5

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

WM. S. HOYT & WIFE ET AL. v. MICHAEL HEISTER ET AL.

1. A motion to a cross-petition separately docketed as a distinct case, can only be granted where there is a misjoinder of actions, and a demurrer therefor has been granted. It does not lie where plaintiff has brought an action against the owners of the various abutting lots to have an alley opened and to remove obstructions, and one of the abutting owners, by cross-petition, concurs in the prayer of the petition and asks removal of the obstructions.
2. Whether a description of a lot as bounding on an alley be an implied covenant that there is an alley, or an estoppel to deny it, as between grantor and grantee, it is of no avail, as either in favor of other abutting owners on the alley who are seeking the removal of obstructions in it; the deed is, however, competent evidence for such third persons as an admission.

3. That an abutting owner on an alley which it is sought by the action to have opened and removed obstructions, has leased his property for ninety-nine years, renewable forever, does not prevent such owner from also urging a right to have the alley opened; otherwise the acquiescence of the lessee would bar such owner by limitations. Such owner is still owner of the general fee, and the lease may become forfeited.

YAPLE, J.

This case comes here upon petition in error, to reverse a judgment or decree rendered in special term in favor of Heister and Mrs. Anderson against the plaintiffs in error and the Schoenbergers. The judgment, in which the Schoenbergers acquiesce, ordered the plaintiffs in error to cause to be removed, by July 1, 1877, a certain building occupied by Mazza as the tenant of Mrs. Sprague and Mrs. Hoyt, erected across the mouth of an alley on the north side of Third street, in this city, between what is known as the Chase Building and the Henrie House. The alley is a *cul-de-sac* on the east side; Schoenberger's property binds upon it its whole length, and on the west side Chase's, Mrs. Anderson's and Heister's lots bind upon it its entire length. The alley is eight feet wide from Third street north to the south line running east and west of Heister's lots, and four feet wide along the entire east end of his property. All these respective owners, and those under whom they claim, have been in the exclusive adverse possession of their respective lots, claiming title thereto, for more than twenty-one years before suit was brought. Mrs. Anderson's property was under lease to tenants for ninety-nine years, renewable forever. The action was originally brought by Heister against Mazza and Watson; but the general term, in an error case brought before it by Mazza against Heister, ordered the Chase heirs, Mrs. Sprague and Hoyt, Mrs. Anderson and the Schoenbergers to be made parties defendant, to which order no exception was taken, and that was done. The petition claimed that the plaintiff was entitled to the use, etc., of such alley, and that the defendants, Mazza and Watson, and Chase's heirs, had unlawfully taken possession of the same, and had erected and were maintaining buildings thereon, thereby wholly obstructing it and keeping the plaintiff out of its possession and use, to his damage, etc., and praying for an order to remove such obstruction and for damages. It was also alleged, that Mrs. Anderson and the Schoenberger's had interest in the matter by reason of the ownership of their lots binding upon the alley, and asking that they by answer be required to set up the same, and that the alley be opened, etc.

Chase's heirs, Mrs. Sprague and Mrs. Hoyt answered, denying plaintiff's ownership of the lot he claimed, to the depth of ninety-six feet, and denying that they unlawfully obstructed the alley; that plaintiff's right of action did not accrue within twenty-one years before suit brought; that the plaintiff's lot is thirty-one feet front on Main street, and runs back east only ninety feet, the additional six feet, occupied by him upon the ground as belonging to the supposed alley, was appropriated by the plaintiff when he built upon his lot in 1874; and that they are the owners in fee of the ground covered by the alleged alley.

Mrs. Anderson filed an answer and cross-petition, setting up that she owned, in fee, thirty-three feet front on Main street, running back the same width to this alley, sixteen and a half feet of which were conveyed to her by the executors of her father, Nicholas Longworth, and

sixteen and a half feet, conveyed on March 15, 1864, by Salmon P. Chase to the executors of Nicholas Longworth, deceased; that said Chase sold and conveyed the lot as bounding upon the alley, eight feet wide, and that the executors of Nicholas Longworth have since conveyed to her, in fee; and she joints with the plaintiff in asking for the removal of such obstructions and the opening of the alley.

When her answer was filed, a motion was made on behalf of Chase's heirs, to strike it from the files, which motion was overruled, and then a motion was made to have her action; set forth in her answer and cross-petition, separately docketed and tried as a separate case from the plaintiff's, which motion was also overruled; and to the overruling of both motions exceptions were taken. The Chase heirs then answered the cross-petition of Mrs. Anderson, denying that their ancestor, Salmon P. Chase, made any agreement as to such alley, or as to removing any obstructions thereto, and claiming to own the ground covered by such alleged alley; and they further say, that, on July 1, 1867, before they conveyed to Mrs. Anderson, the executors leased all the said thirty-three feet lot to one William Parvin and John H. Johnson for ninety-nine years, renewable forever, at a certain rent per annum. The Schoenbergers disclaim any right to obstruct the alley, and consent to the removal of the obstruction and to its being opened.

Watson, who was Schoenberger's tenant of the Henrie House, has conveyed all his interest to the heirs of Chase.

Mazza claims under the heirs of Chase as their tenant.

All of this property, including the alleyway, is part of in-lot 85, the whole of which was once owned, in fee, by Belinde Hind, who, with her husband, on April 28, 1810, conveyed the entire in-lot to John O'Farrell; but it is claimed that the acknowledgment of the deed was so defective as to convey only the curtesy of Mrs. Hind's husband to the premises, and that S. P. Chase, on May 13, 1838, after Mr. Hind's and Mrs. Hind's death, obtained a quit-claim deed from Mrs. Hind's heirs for the entire in-lot; and upon this deed Chase's heirs claims the fee of this alleyway. The in-lot was ninety-nine feet front on Main, by two hundred feet on Third street.

O'Farrell died in 1810, and, under his will his executors sub-divided the in-lot, laying out this alley. On January 18, 1815, O'Farrell's executors deeded sixty-eight feet on the corner of Main and Third streets, running back ninety feet to this ten foot alley, to Ezekiel Hall, leaving only the present lot of Heister, on the west side of the alley, in the hands of the O'Farrell estate. On June 28, 1825, they deeded the remainder on the west side of the alley—that is, this Heister lot—thirty-one feet on Main, beginning sixty-eight feet north of Third street, and running back ninety feet to this ten foot alley, to Bernard Murray.

On May 3, 1821, they deeded all the land on the east side of the ten foot alley to Francis Carr, and it is through him that the Schoenbergers obtained the Henrie House property.

The legal effect of these conveyances was to give Hall and Murray on the west, and Carr on the east side of the alley, the fee to the center of the alley; that is, each opposite proprietor owned five feet in width of it, in fee, the Murray, now Heister lot, being the farthest north from Third street, giving all the others access to the rear of their respective lots from Third street; whether Murray had an alley in the rear of his lot or not seems to have been doubtful, and rendered Carr willing to part with

one foot in width, of his five in the alley, and, on April 10, 1830, he deeded, by release, to Murray all his interest in six feet in width, on the west side of the alley, in the rear of Murray's lot, to Murray.

On June 1, 1838, Salmon P. Chase quit-claimed to Murray the title to his thirty-one foot lot, running back ninety feet to this ten foot alley. Chase obtained his title from Hall and by a quit-claim deed from Mrs. Hind's heirs; Mrs. Anderson obtained her's through Hall; and Heister his through Murray, he having obtained a conveyance of it from Slevins, Murray's grantee, in 1874.

In 1839, the Henrie House was built on the east side of the alley; in 1839, Chase built his "Chase building," thirty-two by thirty-six feet, sixty feet east of Main street, taking into the building two feet of this ten foot alley, and making doors and windows opening upon it; and all the other proprietors on the west side took in two feet of the alley up to the Heister lot, the owners of which have claimed the right to take in six feet on its west side. In fact, all the conveyances from Hall and Murray down to the present proprietors have designated this as an eight feet alley to the Heister lot, and as a four feet alley in the rear of that. This alley being open and used by the lot owners, whose property bounded upon it, became, from the uses made of it by outside persons, a nuisance, and by agreement between Schoenberger and Chase, and with the acquiescence of the other owners, about the year 1840, Schoenberger placed an iron gate across it at Third street to keep strangers out of it. This gate, in a few years, was broken down, and Chase, before the year 1846, placed the one-story frame building occupied by Mazza, across it at Third street, the frame being built upon timbers placed across the alley, and permitting drainage through the alley under the building. Chase and the Schoenbergers divided equally, the rents of the building until after the death of Chase and the demand for the removal of the obstruction, when the Schoenbergers refused to receive any more rent, disclaimed title, and consented to such removal. Watson, Schoenberger's tenant of the Henrie House, within twenty-one years before suit was brought, built upon the one story two other stories, and occupied them as a part of the Henrie House without paying additional rent. He has left the Henrie House, and as has been stated, conveyed all his interest to Chase's heirs.

Governor Chase, in 1864, was secretary of the treasury of the United States, and finding the salary of his office inadequate to his support, instructed his agent and formerly for many years his law partner, Hon. Flamen Ball, who occupied their old office in the Chase building, bounding on this alley, to sell any part of his, Chase's real estate, to raise money to enable Chase to continue to hold and discharge the duties of his office. Mr. Ball, as Chase's agent, bargained with the executors of Longworth to sell them the sixteen and one-half feet, since conveyed by them, in fee, to Mrs. Anderson. At the time he was asked by them as to the obstruction of this alley by the Mazza building, as they would desire the use of the alley, and Mr. Ball stated to them that the building was only temporary, erected to prevent the alley being made a nuisance by strangers, and would be opened at any time the property owners desired. They then bought, and Chase executed to them a deed for the premises, in which deed he described the lot as bounded on the east side by an eight foot alley.

To the introduction in evidence of each and all the deeds, except the

quit-claim from Mrs. Hind's heirs to Chase, for the entire lot, which was put in evidence on behalf of Chase's heirs, they objected and excepted to their admission in evidence by the court against such objection. The defendants did not call Mr. Ball as a witness, but Mrs. Anderson did, to prove what was said between him and Joseph Longworth, an executor and one of the heirs at law of Nicholas Longworth, deceased, at the time Ball, as Chase's agent, bargained to sell the lot to such executors, in relation to the building obstructing the alley; and he testified, substantially, as above stated. She then called Joseph Longworth as a witness, who testified, substantially, as did Mr. Ball. To his competency as a witness objection was made on behalf of Chase's heirs, which objection was overruled by the court and the witness permitted to testify, to which exception was taken.

And it is objected to the decree, that, if in other respects correct, it is erroneous in not ordering the alley to be opened eight feet wide in the rear of Heister's lot, upon six feet of which his new brick building stands.

The motion made to strike Mrs. Anderson's answer and cross-petition from the files, was properly overruled. All the owners of real estate binding upon the alley were as necessary parties defendant as were Chase's heirs, they each having the right to object, if any objection they had, to Heister's having it opened and to travel up and down it to and from his premises.

The motion to have her cross-petition separately docketed and tried as a distinct case was also properly overruled. Such a motion is only allowable where there has been a misjoinder of causes of action and a demurrer sustained because of such misjoinder. Had Mrs. Anderson brought the suit, she would have been required to make all the other parties in this case parties defendant. To have granted the motion would have required two trials between all these parties instead of one, when Mrs. Anderson had only one right to relief additional to Heister's. Being properly made a defendant by Heister in his action, being, in fact a necessary defendant, she had a right to make default, or to join with the Chase heirs in denying his right of action, or to admit it and claim such right of relief as she herself had against any or all the parties.

The deeds were all properly admitted in evidence. They showed the nature and extent of each party's claim, and the quit-claim deed of Chase to Murray, of June, 1838, of the Heister lot after he had obtained a quit-claim for the entire lot from the Hind heirs, which Murray deed called for an eight foot alley at the east end of the lot, was competent. If Chase became the legal owner of the entire in-lot by his Hind's heirs' deed, that deed at least operated to estop him from denying the existence of, and a right to use such alley-way by the grantee and his assigns. 3 Washburn on Real Property, 412. But it was then open as a way, and such call became an implied covenant on Chase's part of the existence of such way against any adverse claim of his own (Id.).

The deed of Chase to Longworth's executors, calling for an eight foot alley in the rear of the property south of Heister's, which he conveyed to them, was no estoppel against Chase in favor of Heister, because he was a stranger to it. Nor could it be an implied covenant in his favor; but it was an admission of the fact by Chase, much more deliberate and solemn than if he had verbally declared the fact to any third person. Yet, such a declaration, had it been made, could have

been offered in evidence by Heister. This declaration was made in 1864. In Mrs. Anderson's favor it amounted to an estoppel against Chase as above explained, even if it was not an implied covenant of the existence of the alley, the property being city property and the alley laid out in the sub-division of the entire in-lot, and sold in such sub-divisions with reference to such alley, (ib. id.)

It is claimed that Joseph Longworth was incompetent by virtue of the provisions of section 313 and 314 of the Code, to testify as a witness in favor of Mrs. Anderson, he being an heir at law of Nicholas Longworth, deceased, for whose estate he bought the property, the facts having transpired before the death of Judge Chase; and that, by assigning to Mrs. Anderson he could not become a competent witness for her against the heirs of Chase. He was executor of the will of his ancestor, and such will was not in evidence, so that we cannot determine whether, by its terms, he had any beneficial interest in the purchase or not; and one who has dealt solely in a fiduciary capacity with a deceased person, may testify to the transaction against that person's heirs after such decease, even though such fiduciary person be the party adverse to such heirs. This was so at common law, and the rule has not been restricted by the Code. But section 313 of the Code provides: "2. In actions upon contracts made by deceased persons through agents, and in which the agent shall testify, a party may testify to all that transpired between him and the agent in relation to such contracts and the making thereof, and in relation to any conversations or transactions between himself and such agent, testified to by the agent."

Mr. Longworth's testimony related solely to his conversation with Mr. Ball, the agent of Chase, at the time the latter sold the lot to the former, in relation to the obstruction of the alley and the right of such purchaser to have it removed. Chase's heirs had the right to call Mr. Ball as a witness, and he and Mr. Longworth were the only persons that ever heard such conversation. The danger of allowing one party to testify to what took place between him and a deceased party, provided against by the Code, cannot exist in such a case as this; for here is the deceased party's agent, knowing all the facts, testifying to them all. The fact that the opposite party called him as a witness makes no difference, as the Code does not provide that it shall. When all who know of a transaction are living and present to testify, the evidence of such transaction should not be lost, because some one who never was a competent witness to such matter, is dead; and when his representatives fail to examine as a witness a competent witness who acted in the business for them, provided the other party shall call and examine him.

Longworth's testimony was, however, the same as Mr. Ball's; and both were unnecessary as witnesses in view of the deeds of Chase to Murray in 1838, and to Longworth's executors in 1864, calling for this alley in the rear of the two lots.

See Kilbourne v. Fury, 26 O. S., 153, 161. The court say: "She was incompetent to testify to such admissions. As there was other competent testimony sufficient to establish the same facts, the exclusion of her testimony could not have affected the result." This is in point, as there was no evidence offered to disprove a single matter stated by Mr. Ball. We think, too, that the evidence of Ball and Longworth was, in its nature and substance, competent in behalf of Mrs. Anderson. Ball was empowered to sell any portion of Chase's real estate. He sold this

lot running back to this alley. The alley was obstructed by a building in the possession of Chase's tenant; and Ball stated that such building had no right to stand against the right of the purchaser to open the alley—that it was merely temporary, etc. This was the statement of a fact in regard to a named easement of the real estate he was selling, and which easement his principal alone was then interfering with. It was not admitted as enlarging, in any way, the implied covenant of the existence of such alley, contained in Chase's deed subsequently executed.

The fact that Mrs. Anderson was not in possession of her lots, they having been before leased upon perpetual lease, she having the fee, did not deprive her of the right to seek and obtain the relief granted to her. A lease for ninety-nine years renewable forever is only in some respects real estate; the lessor still owns the general fee; and the tenants may have been willing to acquiesce in the closing of the alley under a claim of rights, which in twenty-one years would bar Mrs. Anderson of her right of action; and thereafter she could not have the alley opened even though the lease should become forfeited.

Nor do we think the Chase heirs can compel Heister to tear down his building and open the alley ten, or eight feet wide. In 1830, Carr owned to the center of the alley, that is the east five feet of it along the entire east end of the Heister lot, and Murray owned the west five feet, when Carr released to him the west six feet in the width of the alley, which deed was duly recorded, thus granting a foot wide of his, Carr's, part of the same. The other western lot owners narrowed the alley to two feet on the west side; and all this has ever since been acquiesced in by all the parties. We are warranted, at this late day, in presuming from these facts, that the narrowing of the alley was by the agreement and acquiescence of all the lot owners.

Upon the whole record, we are satisfied that the judgment below should be affirmed. We are satisfied that all these property owners, Mr. Chase included, always regarded this building as temporary, to be removed at any time the property owners might desire. Mr. Ball understood this to be the state of fact during the many years he was in business with Mr. Chase. The Schoenbergers always so understood it. We cannot think that Mr. Chase, who, when an ejectment suit was brought by O'Farrell's heirs to recover this alley, instructed Mr. Ball to take no advantage of the statute of limitations for him, ever intended by silence and secrecy to appropriate this alley to himself to obtain a small rent, and to deprive others, who understood it to be but temporarily closed to save the premises of all from nuisance, of its use. His daughters, who have not resided here since their infancy, can have little knowledge of the facts. They are right in desiring to keep the property if it is theirs; and we think we may say for them, that they no more, than their father did, desire anything that does not in justice and right belong to them.

Affirmed, no penalty.

Tilden, J., concurs; Force, J., did not sit in the case.

Wm. Disny, for plaintiff in error.

Stallo & Kittridge, for Heister.

Thos. McDougall, for Mrs. Anderson.

King, Thompson and Maxwell, for Schoenberger.

ERROR. 7

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

CHRISTIAN KRUSE v. SOPHIA KRUSE.

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 asked final judgment on the demurrer, for, as amendment is still possible, there is no final judgment.

It will conduce to a better understanding of the nature of the controversy involved in this case, at special term, to state, briefly, the facts presented by the pleadings. The plaintiff is the husband of the defendant, who, at one time, was a widow, and the administratrix of her then deceased husband. From the statement contained in an amended petition, it must be inferred that she was about to marry the plaintiff. The statement is, that in order to prevent the appointment of an administrator in her place, as also to avoid a sale of real estate for the payment of the debts of her intestate, the plaintiff was induced to lend her the sum of $650 in money, for which she delivered to him her promissory note, payable one day after date, and bearing interest at the rate of 8 per cent. This money is stated in the original petition to have been loaned for the purpose of being employed in the purchase of certain real estate by the defendant. On these facts a personal judgment was demanded for the amount of the note, with interest. The petition was demurred to for insufficiency, and the question of the right of the plaintiff to recover was then brought here by certificate of reservation. It is recited in a journal entry made here that it appeared that the facts of the case, as stated in open court, were at variance with those stated in the petition; and for this reason the case was sent back to special term, with leave to amend the petition, and with an order to dismiss the action with costs on failure to amend in twenty days.

On the return of the case into special term, an amended petition was accordingly filed, reiterating the former allegations, and stating further that the note was given after the marriage of the parties; that the amount of the money loaned was charged in the accounts of the defendant as administratrix, and thus used for her benefit; that at the time the loan was made she was the owner of real estate in her own right and standing in her own name; and that in giving the note, it was the intention of the defendant to charge her real estate. To this petition also a demurrer was taken, and this time the demurrer was heard and determined in special term, and was disposed of by an order sustaining it. No further steps were taken in the case in special term, so far as appears from the record, the plaintiff not having asked leave to amend, and the defendant having failed to demand final judgment upon the demurrer. It is against this order sustaining the demurrer that this proceeding in error is directed, the proposition involved in it being that, in law, it should have been overruled and the right of action sustained.

It would certainly be desirable, considering the circuity and delay which has incumbered this case, if we could convince ourselves that we had authority now to entertain the question of the rights of the parties, and, by final adjudication, put an end to the further litigation of them

in this court. Rules of procedure and practice prescribed by statute, which leave no discretion to the judge, are imperative, however, and must be observed. And a court is especially without excuse, even for allowing itself to be controlled by any consideration of convenience, where the rule is express and plain, and well known to those who practice before it. Such is the character of the rule now involved. The remedy by petition in error is expressly restricted to adjudications which are in their nature final and conclusive of the substantial rights of the parties. Code, sections 511, 512, 514. And an order either sustaining or overruling a demurrer, not followed by a judgment finally disposing of the whole case, or of that portion of it to which the demurrer extends, is not a final order in the sense of these provisions, or, indeed, in any sense. Notwithstanding such order, the case still remains in court and subject to its further adjudication. The party whose pleading is defective, is in a situation to apply for leave to amend, and unless he refuses, or unreasonably delays his application for, or the court declines to give, leave to amend, the opposite party is not entitled to demand judgment. So long as the judgment remains suspended, and until the expiration of the very last moment of the judgment term, the proceedings are pending and in *fieri* and under the exclusive control of the court whose proceedings they are. If, before this point is reached, irregularities occur, or errors are committed which ought to be corrected before judgment, the means of correction are to be found in appropriate remedies, of which that by petition in error is not one. Under proceeding in error, too, these preliminary irregularities and errors will, if they affect substantial rights and are not waived by some subsequent step forward in the cause, be corrected, and the party injured restored to the position in which he stood when the first error intervened. There are errors of course, which the parties can not waive, and a substantial defect in the pleading stating the cause of action or grounds of defense is one of them. But in errors of both classes, in order to authorize a resort to the remedy in question, it must appear that the court having original jurisdiction of the cause has lost its control over it by some act under the Code, which amounts to a final order or judgment. That in a case which appears to us, on the facts, to be so very plain, it should be thought to be permissible to invoke this remedy at all, has appeared to us to have rendered it not improper, as it may not, perhaps, be wholly unprofitable, to accompany our ruling with this general statement of the grounds upon which we place it.

The proceedings will be simply dismissed.

Markworth, for plaintiff.

Gasser, for defendant.

CORPORATIONS—INTEREST AND USURY. 8

[Superior Court of Cincinnati, General Term, October, 1877.]

Tilden, Yaple and Force, JJ.

ISAAC WEST, SR., v. ROBERT ALLISON.

1. The court suggest that where a usurious security taken by a corporation loaning money, is void as being *ultra vires*, it may be that the corporation could recover in an action founded, not on the void security, but on the loan.

2. Where a lender takes a principal note and separate interest notes, calculated at eight per cent. on the amount of the principal note, maturing at intervals, but the whole amount of the principal note is not given to the borrower, so that the whole contract is usurious, and in an action on the interest notes maturing before the principal note is matured, the court reducing the interest to six per cent., the fact that the contract is usurious does not render the agreement to pay in installments void, so that no recovery of the six per cent. interest can be had until the principal is matured; but recovery can be had on the interest notes as reduced as they severally mature.

In March, 1875, Allison agreed to make to West a loan of money, and he did so on the 17th, West then receiving the sum of $4,140, and delivering to Allison, in exchange therefor, his nine negotiable promissory notes, one for $4,500, payable four years after date, with interest at 8 per cent. after maturity, and eight notes, each for the sum of $180, payable at intervals of six months between each, until the maturity of the last at the end of four years, and each with interest at 8 per cent. after maturity. The payment of these notes was secured by a mortgage made by West and wife. The first matured on the 20th of September, 1876, and being unpaid, Allison, on the 26th, brought his action to enforce the mortgage for the amount of it, with interest at eight per cent. after its maturity. West, by an answer, set up that the notes and mortgages were given upon a loan of money; that the amount so loaned was $4,140 only; that the large note of $4,500 included 360 dollars as interest at 8 per cent. for one of the years, not on the amount loaned, but on the amount of the note itself, and that the smaller notes of $180 each were given and received also, in lieu of interest, at 8 per cent., to accrue during the period of the loan. Allison filed a reply denying the statements of the answer, and claiming as an innocent purchaser in the open market for value and without notice. Another of the small notes matured on the 20th of March, 1877, and on the 30th of June, Allison applied by supplemental petition to have this note, with interest at 8 per cent. after maturity, included in the judgment to be rendered upon the original petition.

At the hearing in special term, the judge incorporated his findings of fact into the entry of judgment, and, no bill of exceptions containing the evidence having been taken, these are not now contested. It was thus found that the transaction was one by way of loan, the amount of the loan having been $4,140, and not $4,500, as expressed in the large note; and that this note should be reduced to $4,140; that the smaller notes were given by way of interest at 8 per cent. on $4,500; and they were reduced to $124.20, being for the amount for interest on $4,140 at 6 per cent. The amount due for principal and interest on account of the two interest notes which had matured was found to be $252.23, and for this amount final judgment was rendered in favor of Allison, directing a sale of the mortgaged premises.

It is now assigned for error generally, that the court gave judgment in favor of Allison, whereas, on the facts found by the court, judgment should by law, have been given in favor of West. It is contended in the argument in support of this assignment that the law makes the eight interest notes absolutely void, because, as it is said, as interest at 8 per cent. was not expressed upon the face of the principal note, as provided for in the statute on that subject, and as the principal note will not, according to its terms, bear interest on the loan at all until after maturity, therefore that the interest notes were given without consideration. If

this argument is sound, and such as to justify this conclusion, it is clear that no amount whatever had accrued and become due to Allison, and for that reason alone the judgment would have to be reversed. Another result would be to enable West to retain the use of the principal sum loaned, for the entire period of the loan, without being liable to the payment of any interest at all; and it would involve the affirmance of the contract for purposes beneficial to West, and set it aside under the statute for all purposes beneficial to Allison, except for the single one of enabling him to reclaim his money at the end of four years.

The court below took, we think, a more consistent, as well as a more just view of the subject. The $360 included in the principal note was restored to West as of the date of the loan, and the actual amount of the loan was ascertained and West made liable only for the repayment of that. The parties had agreed, as it was lawful for them to do, upon the rate of interest reserved, or to be paid upon the loan, but had failed to express such rate upon the face of the securities, and because they had thus failed to make the rate eight per cent., under the statute, the court cut the rate down to six, for which independently of the statute the parties were perfectly competent to contract. The transaction was obnoxious to no other objection. It had no taint, and violated no statute, and no rule of public policy, and the court, by its judgment, simply enforced it by requiring the semi-annual payment of interest at an authorized rate, and required the payment of the principal at the maturity of the note. In a word, the judgment was made to operate so as to give effect in a just and equitable manner, to the provisions of the statute, and for the rest, and so far only as legal, carried the contract into execution according to the terms. We are aware that, in a case where the party claiming to enforce payment of the principal sum loaned, notwithstanding the objection of the reservation of excess interest, is a corporation, a more stringent rule has been applied, the result being the forfeiture of the principal demand. A corporation is the mere creature of positive law, and has no powers, express or implied, except those with which it is thus endowed; and from the beginning of legislation in this country on the subject of business corporations, it has been the constant practice of the court, in ascertaining the extent of their powers, to apply strict rules of construction; and the application of this principle has been so constant and so uniform, that it has come to be a maxim that a corporation has no powers except such as are expressly granted, or such as may reasonably and fairly be implied as the necessary means of execution of delegated powers, in which case the power to employ such means is itself regarded as being expressly granted power. In accordance with this principal of construction it has been held in the courts of this state, that a power delegated to a bank to loan money or discount commercial paper at a prescribed rate of interest or discount, is a strictly limited and qualified power. It is a power to loan or discount at a prescribed rate only. A loan or discount at a higher rate is not the exercise of the same, but of a different and substantive power, and not having been expressly granted, it is to be deemed not to exist, and the result is that the transaction of loan and discount is simply void. This principle is perfectly settled in actions founded on written securities, discounted at an excessive rate of interest, by a bank whose authority is, in this respect, restricted. Whether in an action against the borrower, founded on the loan of the money, and not on the

security given for its repayment, is a question which has not been directly settled by any reported case. But in either view has the principle, or the reason of the principle, any application to a transaction in which the lender is a natural person. A natural person has power to enter into any contract, and to agree upon any terms he may think proper, not against the common law and not prohibited by some positive statute, and he will be bound by it. The contract in the present instance is free from objection on both grounds, and the judgment complained of was, in our opinion, a proper application of the law governing the case presented upon it.

Judgment affirmed with costs.

Hunter, for plaintiff in error.

Long, Kramer & Kramer, for defendant in error.

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11 **ERROR.**

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

Tilden, Yaple and Force, JJ.

NEAL MACNEALE v. GEORGE W. FACKLER.

A supersedeas bond to stay a judgment against three, conditioned "to pay the condemnation money and costs which might be adjudged against them in case the judgment of the court of common pleas should be affirmed in whole or in part," where the judgment was affirmed in whole, but only against one, and reversed as to the others, secures the payment of such judgment. The statute refers to the petitioners in error by a word in the singular number. A plaintiff in error is a legal entity, whether including one or several persons, and an affirmative as to one or as to all is an affirmance as to the plaintiff in error, and the words of this bond must be construed according to the nature of the object.

The defendant in error, in January, 1876, recovered a judgment in the court of common pleas of Hamilton county, against Wm. L. Evans, John H. Law and Henry K. Lindsay, for the sum of $3,752.62 and costs. Subsequently the cause was carried to the district court by petition in error, and the execution of the judgment was stayed by an undertaking under the statute, regularly entered into by the plaintiff in error, and by Evans and one Joseph Chester, and by which they bound themselves that the defendants, Evans, Law & Lindsay, "would abide the judgment of the district court, and could pay the condemnation money and costs which might be adjudged against them, in case the judgment of the court of common pleas should be affirmed in whole or in part." In the district court the judgment was reversed as to Law and Lindsay, and affirmed as to Evans, against whom an execution was subsequently issued, which was returned unsatisfied, and thereupon this action was brought upon the undertaking. To the petition filed in this action, containing the facts above stated, there was a demurrer for insufficiency, which on consideration was overruled. The plaintiff in error and Chester then filed an answer, to which there was also a demurrer for insufficiency, and this was sustained. The pleadings terminated at this point, and all the defendants being in default, judgment was rendered against all of them for the amount recovered in the common pleas against Evans, with interest, and to this all the defendants excepted. The petition in error was brought, and is being prosecuted in the name of MacNeale alone.

TILDEN, J.

In the argument in this court, the objections which were raised by the demurrer to the answer have been withdrawn, and our attention has therefore been confined, as the argument of counsel have been, to those involved in the demurrrer to the petition.

The general question thus presented for our consideration is this: Where there is a joint judgment against three, and all of them unite in removing the case to an appellate court by petition in error, and in that court the judgment is reversed as to two, and affirmed, for the full amount, as to the third, are the sureties of all upon an undertaking executed under section 510 of the Code of civil practice, liable for the payment of the judgment?

We are reminded in the argument for the plaintiff in error, that sureties are favorites of courts, and are required to ascertain whether or not, as he is admittedly before the court in that character, he has, according to the strict letter of his undertaking, incurred a legal liability. State v. Medary, 17 O., 544, 565; Lang v. Pike, 27 O. S., 498, 507. That is obviously a question of construction, and it is manifest, also, that such construction must be wholly irrespective of the character of the liability involved in it. The written undertaking of a surety is necessarily open to interpretation, as all other written expressions of intention are. When the words of the writing come to be considered, their actual sense and meaning must be ascertained, and the rules and principles to be applied for that purpose are essentially, if not strictly, the same as those which govern the legal interpretation of language in general. There is no special set of rules, strict and technical in their nature, by which words, phrases, and covenants of a surety have a different meaning from that which they bear when used by others in a contract. While nothing is implied against a surety, and he has a right to stand on the very words of his bond, yet his contract as expressed in it, means the same in legal contemplation, as if he were principal, and not a surety.

It results from this, and is, moreover, authoritatively laid down, that where the language whose legal effect is to be determined, whether it be that of a principal, or of a surety, occurs in an instrument of writing, intended to be executed pursuant to a statute, the provisions of the statute itself, so far as they afford any aid, may be properly referred to for the purpose of ascertaining its nature, object and operation. Secrest et al. v. Barbee et al., 17 O. S., 426, 427.

The judgment in the common pleas was against Law, Lindsay & Evans, and all of them joined in prosecuting the proceedings in error. Only one of them, however, i. e., Evans, united in the execution of the undertaking, and it was as to him that the judgment was affirmed. The undertaking was executed by him and by Chester and MacNeale, the sureties, binding them, as set forth in the petition, that Law, Lindsay & Evans would abide the judgment of the district court, and pay the condemnation and costs which might be adjudged against them, in case the judgment of the common pleas should be affirmed in whole or in part. It is now contended, on a strict construction in favor of sureties, that there was no breach of the undertaking, because it is said, and is certainly verbally true, that the affirmance of a judgment as to one of several defendants, is not an affirmance as to all of them: and if this reading of the language of the condition is what is required by the rule of

strict construction contended for, it may, perhaps, be doubtful whether any liability whatever has been incurred by the undertaking. For, if it be correct to say, as we have already said, and as the authorities appear to show, that there is no legal difference in the reading of the written language of a surety and of a principal, it must logically follow that the adoption of the defense insisted on in behalf of the surety would also result in the discharge of Evans, the principal against whom the judgment was affirmed.

The condition in the present undertaking, to abide the judgment of the common pleas, was an unnecessary interpolation. That condition is prescribed by subdivision 2 of section 519 of the Code, and is, in terms, confined to a judgment which directs the execution of a conveyance or other instrument. The judgment sought to be reversed by the proceedings now under consideration, was not which only directed the payment of money, and in that case, the undertaking expressly required as "to the effect that the plaintiff in error will pay the condemnation money and costs in case the judgment or final order shall be affirmed in whole or in part." Here, too, the draughtsman, not satisfied to follow the plain language of the statute, has interpolated language of his own, and it is precisely this language that occasions the present contention. The interpolation occurs next afterwards, "condemnation money and costs," and the interpolated words are these, "that might be adjudged against them." It might be, perhaps, to push the office of construction too far to reject these words altogether, thus leaving the condition in the plain language of the statute. But it would not necessarily be so to cut down the general words and limit the operation of the words of reference; and it would not be so at all if such a construction should appear to be required by the legal sense of the words, and the intent of the parties in using them. The statute itself, in every instance, refers to the petitioners in error by a word framed in the singular number.

Whether the petition in error is brought by one person alone, or by any number of persons, such person or persons, as the case may be, being regarded in their real character of action in setting the proceedings in motion, are referred to generally as the "plaintiff in error." The undertaking must be executed "on the part of the plaintiff in error." It is "the plaintiff in error" who is to pay the condemnation money and costs. It is the plaintiff in error who is to abide the judgment, and who, under subdivision 3, whilst retaining possession of the property recovered by the judgment to be reviewed, will not *commit* waste, and will account for pending use and occupation, etc.

In a word, a plaintiff in error is, in a strict sense, a legal entity or potential person, created by the statute itself, and existing for all the purposes of the security exacted by it, wholly irrespective of the names and numbers of persons who, in point of fact, set in motion and carry on the proceedings in error, and of the legal relations existing among themselves *inter se-se*. It is the plaintiff in error, whatever interest may happen to appear and whatever relations may exist among individuals, who, in contemplation of law, prosecutes the proceedings in error, and from whom is required, by an undertaking executed by approved individuals as sureties, an indemnity against the contingency of the affirmance of the judgment. This may reasonably be supposed to be understood when entering into the undertaking, and the undertaking itself when executed, if framed in conformity to the statute, imposes upon those

who sign it, the principals, and the sureties as well, a joint obligation. This obligation becomes absolute whenever the judgment is affirmed against the plaintiff in error in the sense already explained, and it is so affirmed when affirmed as to any one of several principals in such an undertaking, and this is so because the primary liability being joint, the indemnity flowing from it extends to the acts of each of several, as well as to the acts of all combined. A judgment, then, which is affirmed as to any one of several, is affirmed as to the plaintiff in error, and is affirmed in whole within the meaning of the statute. If the affirmance be for part only of the amount recovered, the judgment is affirmed in part, and the undertakers are liable only for part, i. e. for the amount of the condemnation money and costs. One of the phrases used in the statute and in the undertaking, refers, we think, to the subject-matter included in the judgment complained of; the other to the measure of responsibility assumed by the undertakers. Such, we suppose, are the fair results of construction in the light afforded by statute. We are not, however, to be understood as intending to concede that a legal liability would not arise upon a construction of the undertaking alone. It is, however, unnecessary to consider that question in the view which we have taken of the subject.

In the consideration of this subject we have been very little aided by the direct authority of decided cases. Of those which have been cited in the argument we have been able to appreciate, as having any material bearing, only Ewers v. Rutledge, 4 O. S., 210; Bentley v. Dorcas, 11 O. S., 398; Burrell v. Vanderbilt, 1 Bosworth, 637; and Secus v. Morgan, 3 Keys, 636. These cases, so far as they can be considered to apply, appear to us to support the conclusions which we have reached. The question, however, in the present state of the authorities must rest, mainly, on general reasoning, and we cannot better conclude what we have to say in this direction, than by quoting from the language of a standard author (Broom's Legal Maxims, page 501). The *subject matter* of an agreement, he says (W. B.) is to be considered in construing the terms of it, and they are to be understood in the sense most agreeable to the nature of the agreement. If a deed relates to a particular subject only, general words in it shall be confined to that subject; otherwise they shall be taken in their general sense. The words of the condition of a bond can not be taken at large, but must be tied up to the particulars of the recital, unless, indeed, the condition itself is manifestly designed to be extended beyond the recital. What is generally spoken shall be generally understood, unless it be qualified by some special subsequent words, as it may be, and general words are sufficient where the certainty lies within the defendant's knowledge. In construing the words of any instrument, then, it is proper to consider, first, what is their meaning in the largest sense which, according to the common use of language, belongs to them; and if it appear that the sense is larger than the sense in which they must be understood in the instrument in question; then, secondly, what is the object for which they are used? They ought not to be extended beyond their ordinary sense in order to comprehend a case within their object, for that would be to give effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object and within their ordinary sense, without violating the fundamental rule, which requires that effect should be given to such intention of the parties as they have used fit words to express.

Judgment affirmed, with costs.

[Cuyahoga Common Pleas, January Term, 1878.] 51

WM. A. FISHER ET AL. V. ELLEN MCMAHON.

For opinion, see 4 Dec. R., 93 (s. c. 1 Clev. Rep., 18.)

[Cuyahoga Common Pleas, January Term, 1878.] 52

WM. A. FISHER ET AL. V. MORTIMER MCMAHON.

For opinion, see 4 Dec. R., 87 (s. c. 1 Clev. Rep., 14.)

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

WILLIAM H. HARKER V. A. H. SMITH, EXECUTOR.

For opinion, see 5 Dec. R., 560 (s. c. 6 Am. Rec., 564). See note to the opinion.

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57 [Cuyahoga Common Pleas, January Term, 1878.]

JOHN HICKS V. M. E. CHURCH AND HICKS CLASS, ETC.

For opinion, see 4 Dec. R., 85 (s. c. 1 Clev. Rep., 14).

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113 BUILDING ASSOCIATIONS.

[Cuyahoga Common Pleas, January Term, 1878.]

PEOPLES' SAVINGS AND LOAN ASSN. V. EDWIN A. STEVENS ET AL.

A premium bid for the right of precedence in taking a loan cannot be collected after the maturity of the loan—the loan being in this case for a specified time and the premium a percentage on the amount payable periodically, nor though the time of payment be extended by renewal or forbearance.

BARBER, J.

The plaintiff is a Building and Loan Association, organized under the laws relating to Homestead Building Associations (S. & S., 194). On the 17th day of September, 1874, the defendants were depositors with the plaintiff, and being desirous of obtaining a loan of $5,000 from the funds of the association, bid to pay a premium of two per cent. for the right of precedence in taking the loan, and they being the highest and best bidders, that sum was struck off to them. Thereupon they executed and delivered to the plaintiff their joint note for $5,000, and a mortgage to secure the same, and received from the plaintiff the sum of $5,000. The note reads as follows:

"Cleveland, O., September 17, 1874.

"One year after date we promise to pay to the order of the People's Savings and Loan Association, five thousand dollars, for value received, with interest at the rate of eight per cent. per annum, and premium at the rate of two per cent., both payable semi-annually on the 15th days of June and December, until paid. The principal to become due on failure to pay the interest or premium punctually as above stipulated. (Signed),

JOS. BAILEY,

"5,000. EDWIN A. STEVENS."

The premium was paid, as stipulated, until the maturity of the note, but no longer. This action was brought November 24, 1877, to collect the amount due upon the note, including, in addition to the principal and

interest as stipulated, two per cent, premium from the maturity of the note, and interest on the unpaid installments. No defense is made to the principal sum and the interest thereon; but as to the claim for the premium on the loan after the maturity of the note and the interest on the unpaid installments thereof, a demurrer is interposed. *Held:*

That associations organized under the law relating to Homestead Building Associations, S. & S., 195, on loans, the premium bid for which is fixed by a rate per cent., cannot recover premium for a longer period than that fixed in the contract of loan. If the time of payment of the loan is extended either by a renewal of the note, or mere forbearance to collect, no premium can be collected after the maturity of the note and mortgage.

No authority is given such associations to take interest on premiums. Forest City U. L. & B. Association, Gallagher, 25 O. S., 208.

The contract bid for in this case is for one year. No premium can be collected for a longer period.

Demurrer sustained.

LANDLORD AND TENANT. 114

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

Tilden, Yaple and Force, JJ.

PATRICK KIRLAND v. SIMON H. WOLF.

1. K. and W. entered into a contract for a lease by K. to W., of a lot and store building thereon, for one year from a stipulated future date, at a specified annual rent, to be paid monthly. K. was to make certain improvements of the store building before the time of W.'s term was to begin, and to erect an addition to the building as soon as possible after W.'s term should begin. Before such time K. had nearly completed the improvements to the store, and could and would have done so, but for the refusal of W. to perform his contract, and he could and would, but for such cause, have erected the addition to the store building, according to the contract. Before the time fixed for the commencement of the term, W. refused to take the lease or property, of which fact he notified K. in writing. K. thereupon ceased his efforts to complete the store, or to build such addition; tried to rent the property, which he succeeded in doing after some months, and after the expiration of the year, during which the lease was to continue, sued W. for damages for breach of the contract of such lease.

Held: That K. was not thereafter bound to perform or tender performance of the contract, and was entitled to recover such damage from W., for the breach of such contract, as were the natural, direct and necessary result of W.'s breach; that K.'s acts were not inconsistent with his claim of the right to hold W. for such damages, and did not establish K.'s assent to the recission or abandonment of the contract on his part, he never having informed W. that he elected to put an end to the same, and that, in such case, it was the duty of K. to do the best he could with the property, so as to save both parties as far as possible from loss, as he was only entitled to recover such damages as resulted after deducting what he made, or ought reasonably to have made out of the property, by using or renting it.

YAPLE, J.

This is a petition in error prosecuted here to reverse a judgment of this court rendered in special term in favor of Wolf and against Kirland. On September 15, 1875, Kirland brought an action against Wolf to recover the sum of $2,000. Kirland in his petition alleged, that on the 21st day of May, 1874, he entered into a written contract under seal with

Wolf *"for a lease"* to Wolf, for the term of one year, commencing on the 1st day of June, 1874, and to end on the 1st day of June, 1875, of certain premises in the city of Indianapolis, in the state of Indiana, being and known as the south half of lot No. 135, South Meridian street; that the defendant agreed to pay him therefor the sum of $2,000 per year as rental thereof, payable in monthly installments; and that the defendant neglected and refused to perform his contract, or any part thereof, by reason of which the plaintiff had suffered loss and damage in the sum of $2,000.

The defendant answered, stating that on May 21, 1874, he entered into a written contract with the plaintiff *"for a lease,"* for one year from June 1, 1874, of the premises (a store-room) mentioned in the petition; that the store-room was described in the contract as being twenty-five feet front and to be two hundred feet deep, with basement under the one hundred feet next to the street, and twenty-five feet wide; that the defendant agreed to pay as rent therefor the amount stated in the petition, and in the manner therein stated; that the plaintiff by said contract agreed to get the store-room in readiness by the 1st day of June, 1874, namely, to whitewash the same, put in all necessary gas fixtures, to paint and grain the front of the store-room and within one month after June 1, 1874, or as soon thereafter as possible, to add to the store-room one hundred feet by an additional building of bricks, the building to be well ventilated and lighted. The defendant then denies that the plaintiff performed the terms of the contract on his part to be performed; and he admits that he did not enter upon or take possession of the premises at any time, or pay any rent therefor. And he then avers, that prior to June 1, 1874, the contract was mutually abandoned.

The reply admits the terms and stipulations of the contract as stated in the answer, avers performance of all the conditions thereof on plaintiff's part, except the building of the one hundred feet deep brick building as an addition to the store, which he avers he could and would have done had the defendant taken the premises he agreed to do; but that the defendant on May 28, 1874, positively refused to take the premises, or to comply with this contract, or any part thereof.

The only evidence offered at the trial was that adduced on the part of the plaintiff; the jury found for the defendant and the court rendered judgment upon the verdict. Among the grounds relied on upon the plaintiff's motion for a new trial, is one that the verdict was contrary to evidence; and one of the grounds of error assigned is that the court erred in overruling the motion for a new trial. The plaintiff proved that, except as to the addition of one hundred feet to the store, prior to May 29, 1874, he had done all that he was to do to get the store in readiness by the first of June, except putting on the gas chandeliers and burners, which he had provided, and which could have been done in from one to two hours; that he had all else done, except the graining of the front of the store-room, which could and would have been done by June 1st, if the defendant had not refused to perform the contract on his part; and that he had made arrangements for the building, and could and would have built the brick addition to the store according to the contract but for such refusal of the defendant.

The evidence showed that, on May 22, 1874, the defendant wrote a letter to the plaintiff, urging him to go ahead and get the store ready by the 1st of June, as he had already ordered goods from the east, and would

not like to be delayed. On May 28, 1874, he again wrote to plaintiff as follows: "Since my last interview with you, events have transpired which will absolutely prevent me from opening a business in Indianapolis as intended, and which will necessitate my immediate departure for the east. I, therefore, take the earliest opportunity of advising you that I shall be unable to carry out my intention of occupying your premises."

Kirland then made out a lease, embracing the terms of the contract for a lease, and forwarded it to the defendant, care of Meis & Meyer, who were with Wolf when he made the contract and took special interest in the transaction. Perhaps the lease never reached Wolf, at least he never executed it.

Wolf's brother wrote to the plaintiff on June 4, 1874, stating the absence from Cincinnati of the defendant, regretting exceedingly that the defendant was unable to comply with his agreement, excusing it, and offering himself to go to Indianapolis and to accommodate the difficulty, if possible, though having no interest whatever in the contract, as he stated, and doubtless truly, to the plaintiff.

The plaintiff then stopped the work of fitting up the store, and did not build the additional brick building. He put a card on the store labelled "For Rent," and tried to rent the property, which he did not succeed in doing until January 1, 1875, when he rented the lower room and basement for $1,500 per year. After June 1, 1875, he brought this suit for damages. Upon the facts, we think it is clear that after May 28, 1874, when the defendant refused to perform his contract, which was before he had any right to possession, and while the possession and legal right thereto were in the plaintiff, the plaintiff had the right to do any of three things:

First—He might have elected to treat the contract as at an end, and if he had done so, neither party could have thereafter sustained an action against the other.

Second.—He might have tendered the lease, fixed up the store and built the addition according to the contract, let the premises stand subject to the defendant's control and freed of his own, and have sued the defendant monthly for the rent.

Third.—He might do what he did, treat the refusal of the defendant as a breach of the executory contract, keep the premises, rent them to the best advantage to save both parties as far as possible from loss, and sue the defendant and recover the damages, naturally and directly occasioned by such breach.

The rule is well stated in Story on Contract, vol. 2, section 1333, 5th ed.: "If one party to a contract, which is to be performed at a future day, gives the other party notice before that day arrives that he does not hold himself bound by it, the party so notified may treat such renunciation as a breach of the contract, and is not bound to perform it himself, and after the time elapses may sue the party thus breaking the contract, and many authorities hold he may bring such action even before the day of performance arrives, especially when in consequence of the refusal something has occurred to prevent the performance of the contract when the time shall arrive."

In this case, the defendant broke his executory contract before the time for performance arrived. The plaintiff never agreed with him that it should be at an end as to both parties; and no act done by the plaintiff is inconsistent with his right, thirdly stated above, to treat the contract

as broken by the defendant, and to sue him for damages occasioned by breach. Where an employe is wrongfully discharged before the period of his service has expired, it is his duty to seek employment at as good wages as he can obtain, and beyond nominal damages in every such case for the breach, the employer is only liable for the difference between the rate of hire, and what the employe has, or could reasonably have earned. So in such a case as the one at bar, where before the time for taking possession, the contractor for a lease refuses to comply with his agreement, the owner must, if he does not vest the lessee with the right of possession, so as to enable him to collect the stipulated rent, keep the possession and use reasonable endeavors to make the property as productive or profitable to him as possible, and if he does so, in an action brought by him for damages, he can only recover such legitimate damages as he has sustained over and above what he might, or ought to have realized from such property. Every act of the plaintiff in this transaction is consistent with his claim under the rule of law stated, and is in accordance with his duties and obligations. If one contract to sell to another a lot of hogs or cattle, or other personal property, to be delivered at a future day, and the buyer before such day notifies the seller that he will not comply with his contract, the latter may sell the property for the best he can get, and after the time of performance sue the contracting purchaser for damages for his breach of contract. The seller is released from performance or tender of performance. Such sale, after breach, would be evidence that the seller had consented to rescind and abandon the contract. The same principle applies to this case. We are satisfied that Kirland, on Wolf's breach of the contract, elected to look to him for damages therefor; and that he has sustained damages, we have no doubt, though we are not called upon here, and now, to lay down rules for the measurement thereof.

We think the verdict and judgment are manifestly against the evidence, and reverse the judgment with costs.

Tilden, J., concurred. Force, J., dissented.

Victor Abraham and W. F. Straub, for plaintiff in error.

Sage & Hinkle, for defendant in error.

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118 **PRINCIPAL AND AGENT.**

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

Tilden, Yaple and Force, JJ.

POST & CO. v. THOMAS KINNEY.

Where a principal is known to a party dealing with the agent, and such party accepts a written contract of the agent, which in no way purports to bind or to be on behalf of the principal, but on behalf of the agent alone, such party is bound to look to the agent, and cannot maintain an action against the principal upon such contract; and parol evidence is not admissible to change the legal effect of such contract, so as to make it the contract of the principal.

YAPLE, J.

This is a petition in error prosecuted by Post & Co., a corporation under the laws of Ohio, to reverse a judgment of this court in special term, rendered in favor of the defendant in error, the plaintiff below, against the plaintiff in error, who was the defendant below, for $900.58 and costs. Kinney sued Post & Co., and Lewis Michaels, to recover

damages for the breach of a certain contract hereinafter set out. At the trial the plaintiff dismissed the action against Michaels, without prejudice, and recovered the above-mentioned judgment against Post & Co.

Among the grounds of error assigned are, that the verdict and judgment are against the evidence and the law. Post & Co. were finishers of railroad cars, and had a brass works shop, where Kinney, a skilled workman, had been employed for five or more years previous to the date of the alleged contract, upon which he sued Post & Co. and recovered this judgment.

Michaels was a director in the corporation of Post & Co., and was employed as superintendent, but for no definite period of time, of the brass shop, with power to employ and discharge hands. He entered into the following written contract with Kinney:

"Cincinnati, April 4th, 1872.

"Thomas Kinney, Sir:—I will give you the polishing and finishing that's now at Post & Co. for three years from date—the said Thomas Kinney agrees to make all the wheels he uses and all other tools—also, without charge, and to polish and finish the following articles at the price herein specified. * * *

"I agree to give those and all improvements and changes on said work to Thomas Kinney, said Kinney to have a boy to assist him in work, and is to have steady work if it be in the shop. In case a slack of work, I agree to give said Kinney all polishing in the shop for the term above specified. At the expiration of three years, if either party wishes to withdraw from this agreement, they can do so by giving three months' notice

"I agree to pay Thomas Kinney the above prices. At the expiration of one year, if labor will be less than at present, the above prices will be less in proportion.

"All work to be first-class.

"April 5, '72.

(Signed). "LEWIS MICHAELS."

Michaels ceased to be superintendent of the brass works, and Kinney was discharged from employment by Post & Co. two years after the above contract was entered into.

Michaels always certified the amount due Kinney for work, and Post & Co. paid the same; but the proof is clear and uncontradicted that Post & Co. knew nothing of the existence of such contract until the discharge by them of Kinney, when they allowed him only to finish the work he then had actually on hand.

At the time of making the contract, Kinney knew that Post & Co. was the principal, and Michaels its agent.

The plaintiff in error contends, that the principal was known to the defendant in error when he entered into the contract, and that he elected to and did take the personal obligation of Michaels, the agent, instead of that of the principal, and, that having made such election and taken such personal obligation of the agent, he has estopped himself from resorting to the principal, but must look to the agent alone for redress.

From the record it appears clear that this point was not called to the attention of, or urged upon the court trying the cause, but the record presents, and we are, therefore, bound to consider the question. Corry v. Folz & O'Brien, 29 O. S., 320.

The contract was one not to be performed within a year, and therefore, was required to be in writing and signed by the party to be charged or by some one in defendant's behalf, by it duly *authorized*.

It is at least doubtful if Michaels, who was employed for no definite time, had authority to make such contracts for the defendant, binding upon it for three years, or whether such agent attempted to do so. The

contract itself negatives such an intention; for it purports to be the personal obligation of the agent above.

Kent, in vol. 2, 12 ed. of his Commentaries, states the rule thus: "Where the party dealing with an agent, and *with knowledge of the agency,* elects to make the agent his debtor, he can not afterwards have recourse against the principal," p. 633, marg.

In the note to Rathbon v. Budlong and Pentz v. Stanton, 1 Amer. Ld. Cas., 5th ed., 764 top, 633 marg., it is said: "But if the name of the principal does not appear in the instrument, and the instrument is without ambiguity, and asserts a positive liability on the part of the person contracting, parol evidence to bind the principal, or to discharge the agent, is not admissible."

And even in the case of an undisclosed principal, Wharton in his Commentary to Agency, section 463, says: "A third party dealing with an agent may unquestionably bind himself to have recourse to the agent, and the agent alone; and in such case, he is estopped by his own act from going behind the contract, and attaching an undisclosed principal. And this exclusive acceptance of the agent may be inferred from the fact, that the contract is based on certain personal adaptions of the agent, he being the only person known to the transaction." The general rule is, that a party dealing with the agent of an undisclosed principal, and supposing such agent to be the principal, may, on discovering the fact, elect to look to such principal instead of the agent, and can hold such principal, unless the latter and his agent have so adjusted their accounts, that, to hold him liable, would work a loss or injury to the principal. Where credit is given solely to the agent of a known principal, which agent contracts to be personally liable, there is an election to look to the agent alone, and the principal can never he held liable. The term "credit," does not mean necessarily, giving time to pay; but it embraces every case, where the personal obligation of the agent, the principal being known, is taken and alone relied on.

The report cases on this subject are numerous and uniformly the one way: Patterson v. Gaudasequi, 15 East, 62; Addison v. Gaudasequi, 4 Taunt., 574; Chandler v. Coe, 64 N. H., 561; Stackpole v. Arnold, 11 Mass., 27; Merchants' Bank v. Hayes, 7 Hun., 530; Bickett v. White, 27 O. S., 405; Fullam v. Inhabitants, 9 Allen, (Mass.) 1; Fenly v. Stewart, 5 Sandf. (N. Y.) 101; Gillig et al. v. Lake Big. Road Co., 2 Nevad., 214; United States v. Parmele, 1 Paine, C. C. U. S., 252.

By the plain, unambiguous terms of the contract in this case, it is the contract of Michaels, personally and alone, and in no way purports to or could bind Post & Co., both upon principle and authority.

Kinney is debarred from looking for redress to Post & Co., but must seek his remedy against Michaels.

The judgment must, therefore, be reversed with costs.

Tilden and Force, JJ., concur.

Emory M. Garrison and Healy & Brannan, for plaintiffs in error.

Logan & Randall, for defendant in error.

[Superior Court of Cincinnati, General Term, January, 1878.] 144

GEORGE H. BUSSING v. UNION MUTUAL LIFE INS. CO.

For the opinion, see 6 Dec. R., 607 (s. c. 7 Am. Law Rec., 52). It was affirmed by supreme court. See opinion, 34 O. S., 222.

[Superior Court of Cincinnati, General Term, 1878.] 147

GEORGE M. HORD & CO. v. WESTERN UNION TELEGRAPH CO.

For this opinion, see 5 Dec. R., 555 (s. c. 6 Am. Law Rec., 529).

[Superior Court of Cincinnati, General Term, January, 1878.] 161

WM. H. FRY v. FRANKLIN INSURANCE CO.

For this opinion, see 5 Dec. R., 558 (s. c. 6 Am. Law Rec., 533). It was reversed by the supreme court, 40 O. S., 108.

INSANITY AS A DEFENSE. 187

[Ross Common Pleas, March Term, 1878.]

STATE OF OHIO v. PERRY BOWSHER.

1. If, prior to the commission of the crime, the accused had, while under indictment for another crime, been tried on an inquest of lunacy, in accordance with the act of March 23, 1875, and adjudged insane, such adjudication is so far conclusive that the burden is on the state to show beyond a reasonable doubt that, prior to the commission of the second crime, he was so far restored to reason as to be responsible.
2. Though the accused committed the crime from some irresistible impulse of insanity, but knowing that it was morally wrong, and was able by the exercise of will to accept the right and reject the wrong, and was conscious of the legal consequences of the act, and committed the crime from the motive of destroying the evidence of another crime, the defense of insanity will not avail, though in a medical sense he may not have been sane.

The charge in this case is murder in the first degree. Insanity was plead in defense.

MINSHALL, J. (Charge to Jury.)

It is claimed as a defense to the accused, that when he committed the homicide, he was at the time insane—an escaped lunatic—and that whatever circumstances may have characterized the act of killing, he is not amenable to punishment. Insanity is a defense to a prosecution for crime. It then becomes necessary that I should define to you what is the nature of this malady of the mind that excuses from punishment those who, under the influence of the disease, commit crime. And here you will have perceived, from the testimony of the medical gentlemen who have been called as witnesses, and the argument of counsel, the question is embarrassed by a difference of opinion between courts and the medical pro-

fession, as to what should be the test of insanity in a criminal prosecution; the test generally adopted and applied in the courts being the ability of the accused, at the time of the offense, to distinguish right from wrong, whilst physicians, including those who have had the greatest experience with the disease, claim that that is unreliable as a test, if not inhuman in practice.

And counsel for the defense in this case, have urged that we should disregard a rule so long received and acted on in the courts, particularly those of our own state, and adopt the views, to a modified extent at least, of the medical profession as more in accordance with justice and the enlightened humanity of the age. Whatever might be our private opinion on this subject, we are not at liberty as a court to disregard the settled law of the state. It is our duty to ascertain the law and give it to you; it is your duty to receive it and apply it to the facts of the case. If there be any need of improvement in the law in this regard, the legislature is the proper branch of the government to furnish the remedy. And notwithstanding the able argument of counsel, and the reasons of the physicians, we are convinced that a change should be made. Much of the confusion that exists on the subject arises, as we think, from the failure to note the essential difference there is between the functions of a court when investigating the subject of insanity, and the aim of a physician when turned in the same direction.

The object of the physicians is, in such case, to determine whether a certain person has any mental disease, and if so, what, with a view to its treatment and cure. The physician seeks absolute knowledge on the subject, as nearly as is attainable, and the highest considerations of duty to his profession and the patient require that he may intelligently exercise the skill of his art. In a court of justice, however, the inquiry is made for the purpose of determining whether a certain person is legally responsible for what he does. It is merely concerned with the moral and intellectual qualities of a man's acts; and the subject of insanity is only relative to the question as it affects his acts and conduct in a legal sense. A court of justice is not alone concerned for the interest of the particular individual—unless it should be in appointing a guardian or a trustee. In the administration of criminal justice, there is upon the one hand, the public, composed of all the members of society, seeking protection from crime, on the other is the accused charged with some crime against the public. And it is one of the dictates of reason, that the highest humanity consists in so administering the law, as to afford the fullest protection to the life and property of the whole public, consistent with a just regard to the rights and conditions of the individual. For this reason the punishment of offenders is adopted, not as a matter of humanity to them, but from the necessities of public safety, because experience hath shown that the example of punishment deter others from the commission of crime; the humanity of the law towards offenders is always measured by this consideration; and the reason and humanity of punishment is defensible on the ground of public policy, in all cases where the example will have the effect of deterring others from the commission of crime, irrespective of the absolute mental condition of the party who is punished. There is no more humanity in taking the life of a sane man than in taking that of an insane man, where the execution of the latter has the same salutary effects as the execution of the former. Here, then, is the origin of the divergence

there is in the views of courts and medical men on this subject of insanity.

From experience and observation courts have learned, that persons who can distinguish between right and wrong, though partially insane, may be influenced from the commission of crime by the fear of punishment; and actuated by motives of public safety, in which consists the highest humanity, inflicts the punishment. To the physicians, who are not professionally concerned with the safety of society from the commission of crime, and have but an inadequate idea of the policy of punishment, being more concerned with the treatment and cure of the disease of insanity, this may seem cruel, but to the jurist it is a question of public policy. With him the great purpose of inquiry distinguishes the moral qualities of their acts and may be influenced by the fear of punishment. With the jurist it is a matter of mental philosophy and public policy as well as of mental pathology.

Then, gentlemen, I instruct you relative to the defense of insanity, that if you find the accused, Perry Bowsher, committed the homicide not from some irresistible and uncontrollable impulse of insanity—but knowing at the time that it was an offense against the laws of God and man; that it was morally and criminally wrong, and that he was then capable, by the exercise of his will, as a free moral agent, to accept the right and reject the wrong, and was then conscious of the legal consequences attaching to this act if detected and brought to justice—and committed the homicide from the motive of destroying the evidence of his guilt in having committed a burglary, or of having killed Edmond S. McVey; if you find such to have been his mental condition at the time he killed Ann McVey, then his defense of insanity can not avail him in this case, though speaking in a medical sense, he may not then have been a perfectly sane man.

But if you find the contrary of this—that he was under the influence of some insane delusion, darkening his mental perceptions and depriving him of the use of his reason—of his knowledge of right and wrong and the consequences which the law attaches to the taking of human life, then you will acquit him as charged in the indictment by reason of insanity.

In determining this question you will consider all the evidence that has been adduced on this subject; the history of his life from his earliest infancy, through youth to manhood, and the time when he was first convicted and sent to the penitentiary; his history, and conduct while there; his history and conduct from the time of his discharge from prison until again arrested for the Leistville offense; the inquest of lunacy on which he was then sent to the asylum; his history and conduct while there, and his escape from that institution; what you may have learned of his history from that time to the commission of the crime; all the circumstances preceding, but connected with and attending the commission of the homicide as they may be developed by the testimony; also the testimony of the medical experts, and the opinions of those intimately acquainted with him, his keepers at the prison and the asylum, and in this way form your judgment upon the question submitted.

You are not bound by the opinion of any witness in the case as to the prisoner's mental condition. These opinions were admitted to aid you, not to be adopted unless in conformity to your honest opinions as you may form them upon a consideration of the evidence of the whole case.

Your inquiry is to be directed primarily to the mental condition of the defendant at the time this offense was committed; this is the question you are to determine, and not whether he was absolutely of sound mind at that time; the question whether he had any disease of the mind is merely relative to the question whether he was morally and criminally responsible for his acts.

In doing this you will adopt and apply the ordinary rules of evidence. You will, to use a figurative expression, interrogate the acts, the words and the conduct of the man; if these taken and considered together are characterized by intelligence, forethought and motive, and consciousness of the consequences of his acts, you will be safe in inferring with certainty that he was not so far deranged as to be criminally irresponsible for his acts. And in reference to this, examine all the circumstances under which the homicide was committed, as developed in the testimony; whether secrecy was adopted in its preparation, or any means to prevent detection; whether he fled, and whether he made contradictory or false statements as to his possession of the bonds.

The burthen of proof. The general rule is that a person charged with crime is sane, and the burthen of showing the contrary is on the accused, when it is relied on as a defense. But when it is made to appear that prior to the commission of the offense the accused was insane, the rule then changes, and the burthen is on the state to show beyond a reasonable doubt that the accused was sane at the time he committed the offense; using the term "sane" in the sense I have just described it to you, capable of determining right from wrong. The record of the inquest of lunacy held in Pickaway common pleas shows this fact, so as to impose the burthen on the state in this case to prove the legal sanity of the defendant at the time the homicide was committed. It is not conclusive of the defendant's insanity; it is only a circumstance that you have a right to consider along with the other facts and circumstances bearing on the prisoner's mental condition. You have a right to inquire from the evidence, and the prisoner's own statement to others, whether he then practiced a fraud on the law by feigning insanity; and if you believe this to have been so, you may reject it altogether as evidence in the case.

A reasonable doubt is an honest uncertainty existing in the minds of a candid, impartial, diligent jury, after a full and careful consideration of all the testimony, with an eye singly to the ascertainment of truth, irrespective of the consequences of their finding. It is not a mere speculative doubt, voluntarily excited in the mind in order to avoid the rendition of a disagreeable verdict. Such a doubt is considered by the law as merely captious, and as an unreasonable one.

The following special charges were asked by the defense, and given by the court, to be taken in connection with the general charge:

1. If the jury find that the defendant prior to the commission of the alleged offense, had been tried by a court of competent jurisdiction, wherein an indictment was pending against him for violation of the criminal laws of this state, and a jury duly empaneled, in accordance with the statute of March 23, 1875, and sworn to well and truly try the question whether the defendant is sane, and a true verdict to give according to the law and the evidence; and, in such case, the finding of said jury, and the judgment of said court upon said question was that the said defendant was insane, then and in such case the finding of said jury, and the judgment of said court upon said question of the insanity of the defendant,

is conclusive until the state shall have established beyond a reasonable doubt that prior to the commission of said alleged offense the defendant had been sufficiently restored to reason to render him responsible for his acts. And if, from the evidence, the jury shall not be satisfied beyond a reasonable doubt that the defendant has been so restored to reason, then, and in that case, it is the duty of the jury to give to the prisoner the benefit of that doubt, and render a verdict accordingly.

2. If you find that the defendant was insane at any time before the commission of the crime charged, the law presumes that he so continued, and the state has the burden of showing that the defendant was restored to reason. Hence, while a reasonable doubt exists whether he had at the time of said offense been restored to a condition of legal responsibility, there must remain a reasonable doubt whether he is guilty or not. The prisoner is entitled to the benefit of that doubt, whether it exists in the minds of all or any one of the jurors. The state is required to establish the defendant's guilt to the satisfaction of the entire jury beyond any reasonable doubt.

3. To be a subject of punishment, an individual must have reason and understanding enough to enable him to judge of the nature, character and consequences of the act charged against him. He must not be overcome by an irresistible impulse arising from disease. If a person charged with crime be shown to have been insane a short time before the commission of the act, the evidence should show that he was sane at the time of the offense, or the jury should acquit. It is for the state to establish in this case that the defendant had the requisite reason and understanding at that time, and that he was not overcome by an irresistible impulse arising from a diseased and unsound mind. If you are not satisfied by the evidence, that the defendant was responsible under the rule I have just given, *at the time* of and in relation to the *particular offense* charged in this indictment, you should acquit, notwithstanding you may be satisfied that at times and under some circumstances and in relation to other events he would be able to discern the right and reject the wrong.

[Cuyahoga Common Pleas, January Term, 1878.] 192

FRANCIS A. NOLZE v. JOHN M. WILCOX, SHERIFF.

For this opinion, see 4 Dec. R., 125 (s. c. 1 Clev. Rep., 51). It was affirmed by supreme court. See opinion, 34 O. S., 520.

CONTRACT—CONSTITUTIONAL LAW 265

[Montgomery Superior Court, Special Term, 1878.]

STATE OF OHIO v. LESSEES OF PUBLIC WORKS.

Where an act is unconstitutional, as in violation of a contract made by the state, it is not simply a nullity, but may be taken by the other contracting party as a violation of the contract, relieving him from its further observation.

This suit was brought for $10,037, the amount that fell due December 1, 1877, as semi-annual payment in advance of rent due the state of the Public Works, as stipulated in the lease. Judge Hayne's decision overrules the demurrer.

The attorneys in the case were Attorney-General Pillars and M. A. Daugherty for the state, and Hon. Rufus P. Ranney for the lessees.

The answer of the defendant sets up as a defense that the lessees, the defendants, were evicted by plaintiff or by its authority from a part of the leased premises, to-wit: From a "side-out" of the Miami and Erie Canal, known as the Hamilton Basin, and from the navigation of the Mad River feeder of said canal at Dayton, by the construction of bridges across the same; by reason of which eviction the defendants claim that they had the right to, and did, surrender to the state the Public Works, and abandoned the same, and are released from payment of said rent claimed in the petition.

To this answer plaintiff demurs, and claims that the facts set up in said answer do not constitute such an eviction, or present such a state of facts as to give the legal right to the lessees to surrender and abandon the leased premises.

The acts of the general assembly, under which it is claimed defendants—the lessees—were evicted from the use of Hamilton Basin, are as follows:

Act of April 27, 1872 (69 O. L., 271).

Act of April 6, 1876 (74 O. L., 467).

The act touching the Mad River feeder at Dayton is as follows:

Act passed April 26, 1877 (74 O. L., 473, 474).

The illegality of the act in regard to the Hamilton Basin matter was substantially admitted by the attorney-general and the counsel for the state; but they claimed that, it being an act unconstitutional and invalid, the law was simply void and beyond the power of the legislature, and hence not the act of the state itself; and that the city of Hamilton was therefore the only trespasser against whom the lessees should seek their relief and redress.

The demurrer overruled: The court, after reviewing the facts admitted and the claims of counsel, held that the act in relation to Hamilton did not specify any public use; was not an exercise of the power of eminent domain, and was a breach of the contract between the state and the lessees; that while the legislation was unconstitutional and invalid, the lessees only could set up or take advantage of that fact. The state itself and no outside party could make any such claim unless the lessees had insisted upon it, and that as they had not so claimed, they had a right to throw up their lease, the contract having been violated by the state.

The lessees, in their answer, set up that this Hamilton Basin was a material part of the public works leased by them. This may be denied by the state in this case; and if so, that question of fact will be raised, which must be tried by a jury.

The effect of the decision of the court, if unreversed, is that the state can collect no more rent under the lease, but must take the canal off the lessees' hands, as though the lease had terminated, unless, as has been said, the question of the fact above referred to will be insisted upon and on trial decided in favor of the state.

In regard to the city of Dayton, the court said that the legislation differed widely from the acts in regard to Hamilton, and while there might be some doubt, yet the court would not assert that these acts were illegal or not valid. Provision had been made for ascertaining compensation, and the award therefore had been found by the jury, and paid into court. The use to which the appropriation had been made, also was a

public one, without doubt, and was in the act definitely specified. The law is settled that property devoted to one public use may be applied to another and a different one, if the legislature so declares in a proper way, the compensation is previously made.

It must be admitted that the change proposed by cutting off navigation infringed upon the rights of the lessees, and was a violation of the contract to them. The demurrer to the answer will be overruled.

[Hamilton District Court, April Term, 1878.] 267

SYLVESTER RUFFNER v. CINCINNATI, HAMILTON & DAYTON R. R. CO.

For this opinion, see 5 Dec. R., 569 (s. c. 6 Am. Law Rec., 685). It was affirmed by supreme court. See opinion, 34 O. S., 96.

[Hamilton District Court, April Term, 1878.] 269

NEWHALL, GALE & CO. v. SOLOMON LANGDON & SON.

For this opinion, see Dec. R., 566 (s. c. Am. Law Rec., 681). This case was reversed by the supreme court. See opinion, 39 O. S. 87.

[Hamilton District Court, April Term, 1878.] 272

THOMAS CLIFTON ET AL. v. CITY OF CINCINNATI.

For this opinion, see 5 Dec. R., 570 (s. c. 6 Am. Law Rec., 687). See note also

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[Hamilton District Court, April Term, 1878.] 274

CHARLES JACOB, JR., v. FIRST NATIONAL BANK.

For this opinion, see 5 Dec. R., 572 (s. c. 6 Am. Law Rec., 689).

[Hamilton District Court, April Term, 1878.] 275

J. H. DEVEREAUX, RECEIVER, v. W. P. BUCKLEY ET AL.

For this opinion, see 5 Dec. R., 573 (s. c. 6 Am. Law Rec., 690). It was affirmed by supreme court, 34 O. S., 16.

[Hamilton District Court, April Term, 1878.] 293

INDIANAPOLIS ROLLING MILL CO. v. MATTHEW ADDY & CO.

For this opinion, see 5 Dec. R., 588 (s. c. 6 Am. Law Rec., 764).

295 MUTUAL BENEFIT SOCIETY.

[Hamilton District Court, April Term, 1878.]

Johnston, Avery, Longworth, Burnet and Cox, JJ.

STATE OF OHIO, EX REL. DINDORF, V. ALGEMEINER VEREIN.

Where a beneficial society, having the right to expel a member for wrongfully reporting himself sick, but not for abuse of family or of other members, or disorderly conduct, and the charges preferred against him showing that he was drunk instead of sick, seem to charge disorderly conduct; yet, where the statement of the witnesses in the investigation show that the cause of expulsion was for the authorized cause, and the member had opportunity to defend and cross-examine, mandamus will be refused, especially after the lapse of two years; nor is it a sufficient irregularity that the witnesses were not sworn.

AVERY, J.

The defendant was an incorporated society of German bakers, and the relator, one of its members, was expelled on charges of disorderly conduct, abuse of family, and calling the chairman of the committee on sickness a liar. The power of expulsion, under the rules of the society, existed only in case of a member wrongfully reporting himself sick, and there was nothing in the constitution of the society to extend this power to abuse of family, or abuse of another member, or to disorderly conduct, in the proper sense of that term. But the committee to whom the charges were referred, examined witnesses to show that the relator was drunk instead of sick while he was drawing benefits, and their report treated this conduct as coming within the charge. In one sense of the term it was disorderly conduct, as being in violation of the first principles of the order and government of the society, and perhaps the German words, of which the court had only the translation, might more naturally bear, this meaning. The statements of the witnesses were annexed to the charges, giving point to, and explaining them, and the relator had notice and opportunity to defend, and the minutes of the meeting recite that he was accused of having wrongfully drawn benefits. The witnesses were not sworn when examined by the committee, but this was simply in the discharge of the committee's duty of investigation. Upon the trial, witnesses were heard in the presence of the accused, and he had opportunity to cross-examine. Irregularity not sufficient to deprive the relator of the full advantage of his opportunity to defend, would scarcely warrant a court, in the exercise of its discretion, to interfere by a peremptory writ, since if the objection be simply to the irregularity of the expulsion, a restoration to membership would leave the relator liable to be expelled by a subsequent proceeding. Another consideration in the case was that the expulsion complained of occurred in 1876, and the minutes showed that when he was expelled the relator left the society, saying it was "all right;" and it would seem, from the fact of his delaying so long to make application for this writ, that he continued, for a considerable space of time, to think it was all right. The writ would be dismissed.

E. Spangenberg, for relator.

HOMESTEAD. 296

[Hamilton District Court, April Term, 1878.]

Johnston, Avery, Longworth, Burnet and Cox, JJ.

H. H. LIPPELMAN v. C. H. BONING.

A debtor cannot hold property exempt from execution in lieu of a homestead where his wife owns a homestead, though mortgaged for more than its value.

LONGWORTH, J.

This was a proceeding to reverse a judgment of the court of common pleas. The action was originally brought by Boning against the sheriff to replevy certain personal property which had been taken upon execution to satisfy a judgment. The cause was tried upon an agreed statement, which showed that the plaintiff was a married man and the head of a family; that his wife owned about three acres of land in this county, of more than the value of $500, upon which there was a house which was used as a family homestead; that plaintiff himself was not the owner of any homestead, and that this property of the wife was mortgaged for more than its full value.

Plaintiff claimed the right, in lieu of a homestead, to exempt this property, upon which the sheriff had levied, from execution.

Court—The question in this case is simply: Is the wife the owner of a homestead in this land? She holds the fee simple, but the property is mortgaged for more than its full value, and the question is: What is the meaning of the word "owner" as used in the statute? The decision in Phelps, lessee, v. Butler, 2 O., 224, covers the case at bar in every point. (Decision quoted.) The owner in fee is prevented from denying that she is the owner because there is an outstanding mortgage. The mortgagor can not be permitted to disown his legal rights to the prejudice of his creditor. Peradvanture these mortgages will never be enforced. Until they are enforced, the holder of the legal title is the owner of the land, even as against the mortgagee. At all times she is the legal owner of the land as against all other persons, and can not divest herself of her ownership, for the purpose of preventing her creditors from collecting their judgment.

It was decided by the common pleas that the plaintiff recover: that the wife is not, within the sense of the law, the owner of a homestead.

This judgment will be reversed.

Young & Crawford, for Lippelman.

Forrest, Cramer & Mayer, for Boning.

297 **DOWER—ESTOPPEL.**

[Hamilton District Court, April Term, 1878.]

Johnston, Avery, Longworth, Burnet and Cox, JJ.

HARRIET O. HOLMES v. WM. SPINNING.

Where, in an action to recover dower, there is no estoppel to set up a defense that the deceased husband, having but a remainder, was divested of it before the termination of the intervening life estate, arising out of proof that such remainder, being sold on execution, was acquired by defendant without evidence that the deceased husband ever had possession, or that his grantors had title or possession, for such proof fails to show that defendant holds title under such deceased husband.

BURNET, J.

The action was to recover dower, brought by the plaintiff as the widow of James C. Hall, who died in 1868. She averred that in 1859 her deceased husband was seized of an estate of inheritance in the premises described in the petition, which premises are owned by defendants; that during his lifetime the premises were conveyed without her having united in the conveyance. The defendant claimed that the only estate which Hall had in the premises was a remainder in fee-simple, after the termination of the estate of Mrs. Ann Harrison, which had been set-off to her as the widow of Gen. Wm. Henry Harrison; that prior to the termination of this dower estate Hall was divested of all the estate which he had in his premises, and therefore no dower right attached on the part of the plaintiff.

The reply set out that an execution was issued upon a judgment against Hall, and levied upon his property, being an undivided interest in 481 acres, as the property of Hall, and that the property was sold under that execution to Milbury Green, under whom defendant holds title, and that he was estopped to deny the seizin and title of plaintiff's husband.

The court held that the defendant was not estopped to deny the seizin. The proof simply showed that a conveyance was made to Hall of an undivided interest in this property. There was no evidence that he ever entered into possession; no evidence that the parties who conveyed to him had any title in the land whatever, not even possession, one of the elements of a legal title. The proof resting here, there was a failure to make out any title in the defendant. If a party be in possession of real estate, and make conveyance under which his grantee enters into possession, there is a *prima facie* evidence of title by virtue of that conveyance and possession; but the mere execution and delivery of a deed, without showing title or possession in the grantor, is no evidence to the title to land in Ohio. A stream can not rise higher than its source, and the subsequent conveyance furnished no evidence of title in defendant. There was a failure of proof on the part of the plaintiff.

Judgment for defendant.

J. C. Hart and Mr. Disney, for plaintiff.

A. Brower and J. J. Glidden, for defendant.

DEVISE—BILLS AND NOTES. 298

[Hamilton District Court, April Term, 1878.]

Johnston, Avery, Longworth, Burnet and Cox, JJ.

ELIZABETH DIEHL v. JACOB DIEHL AND CHARLES ZIMMER, EXRS.

A devise to a wife of "the interest accruing on said loan" for life, being a loan represented by notes in the testator's hands, gives her interest thereafter accruing but interest accrued and in arrears belongs to the estate. The makers having since suit paid the notes to the executors, who are parties, they will be ordered to invest and pay the interest annually to the wife for life.

JOHNSTON, J.

The case came up by appeal from the common pleas, where the plaintiff brought suit, claiming that under the will of her husband, Peter Diehl, probated in June, 1875, she was left the interest for her life on two notes of $500 each, drawing eight per cent., the notes being given for a loan made by the testator to his nephew, Jacob Diehl. The defense admits that the plaintiff is entitled to the interest that accrued since the death of the testator, but not interest accruing previously. The plaintiff claims she is entitled to interest on the notes arising both before and since the death of her husband, in all $615, and also asks payment of the amount of the notes. The defendant admitted that at the time of the death of his uncle he was in arrears $400, but alleges he has since paid this amount to the estate, and tendered the plaintiff the interest becoming due subsequently, which she refused; also that he has paid the principal to the executors. The decision of the court was:

The clause of the will touching this legacy of interest reads, "The interest accruing on said loan." Now, the provisions of the will throughout are in perfect harmony. There is nothing in our opinion ambiguous in this part of the will. The intent evidently of the testator was to provide for his wife, the first object naturally of his bounty, after his decease, after it would be impossible for him to care for and protect her. The devise looked to the future. A will speaks from and after the death of the testator, and its probate. Hence, the interest due at his decease became assets in the hands of the executors. The plaintiff became entitled only to the "accruing" interest, that is, the interest falling due after the death of the testator. Diehl, the maker of the notes, having tendered to plaintiff the interest, and it having been refused, she will not be entitled to cost of interest on the installment. The makers of the notes having, since suit, paid the notes to the executors, an order will be made that they must invest the same, and pay the interest thereof to plaintiff annually during the remainder of her natural life.

325 JUDGMENT BY DEFAULT.

[Pickaway District Court, April Term, 1878.]

Bingham, Steel and Minshall, JJ.

E. E. HASWELL v. HENLEY & CO.

Rendering a judgment by default in a case not triable until placed on the trial docket is a clerical error, under code, section 528 (R. S., section 6728), and should be corrected by motion, under section 535 (R. S., section 5357), and not by petition in error.

This was a petition in error to reverse a judgment of the court of common pleas. The action was begun a few days before the commencement of this term, and the answer-day expired during the term. The case was not placed on the trial docket by order of the court, and judgment was taken by default.

It was alleged for error, that as this was an action in which the issue should have been made up during the term, the action was not triable until it was placed on the trial docket by order of court, under section of the code, 308.

The court held that his was a clerical error under section of the code, 528; and it should be corrected by motion under section 535. The petition in error was dismissed.

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325 ERROR.

[Ross District Court, April Term, 1878.]

Bingham, Courtright and Cowan, JJ.

EDWARD O. STEVENSON v. RERRICK B. SEYMOUR ET AL.

1. Failing to file the original papers with a petition in error, in the district court, is sufficient cause for dismissal, but is amendable.
2. Where the original papers are lost, the remedy is not by motion to file copies, but suggestion of diminution of the record, and to supply the loss by proceedings in the common pleas.

This was a petition in error to reverse a judgment of the court of common pleas. A transcript of the pleadings in the common pleas was annexed to the petition, but the original papers were not filed with the petition in error.

A motion was made by the defendant in error, to dismiss the petition in error on this ground.

The court held that the objection was sufficient to require that the petition should be dismissed. But that it was not a jurisdictional fact, and the defect was amendable, and the plaintiff in error would have leave to file the original papers. That the action was pending under section 20 and 515, when a petition was filed and summons served, and the want of the original papers might be supplied.

It being shown that the original papers were lost, a motion was made by the plaintiffs to file a copy of them, which the court overruled, and held that the remedy was to suggest a diminution of the record, and to supply the loss of the papers by proceedings in the common pleas.

[Hamilton District Court, April Term, 1878.] 326

RUTHERFORD & CO. v. CINCINNATI AND PORTSMOUTH R. R. CO.

For this opinion, see 5 Dec. R., 584 (s. c. 6 Am. Law Rec., 758). It was affirmed by supreme court. See opinion, 35 O. S., 559. The case was distinguished in 41 O. S., 37, 51, 61.

JUDGMENT—MORTGAGE. 328

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

†JOSEPH MARKS v. PHILIP GOLDMEYER.

An action on a note and mortgage, asking a personal judgment and foreclosure. Decree for sale without personal judgment. On appeal therefrom to the district court, a personal judgment should, though by consent, not be rendered in the district court; there is nothing before the court but the mortgage.

AVERY, J.

This was an action on a promissory note secured by mortgage, the plaintiff also claiming personal judgment. There was a decree for sale without personal judgment, on which the case came into this court by appeal, and an entry was handed up by consent, taking a personal judgment in this court.

The court said, while the case in the common pleas may have been a case in which issues were presented for trial by jury, the plaintiff, by taking judgment by default for sale of the property, without reference to the note, was to be taken as having waived his claim for a personal judgment upon the note; and when an appeal is taken, there is nothing before this court but the mortgage securing the note, on which the parties are entitled to an order for sale, and not for a personal judgment.

Decree accordingly.

[Hamilton District Court, April Term, 1878.] 341

CITY OF CINCINNATI v. EDWARD KEATING.

For this opinion, see 6 Dec. R., 605 (s. c. 7 Am. Law Rec., 15). It was reversed by the supreme court. See opinion, 38 O. S., 141.

WILLS—TRUSTS. 344

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

HARRY C. BATES v. *A.* H. SMITH, EXR., ET AL.

Where a will leaves a fund in the hands of trustees who are under bond, the interest to be paid to the beneficiary, and such beneficiary begins an action to contest the will, a motion by the executor to compel the trustees to pay the fund into court, and for the plaintiff to pay the interest he has received into court, will not be granted where he is an heir whose share, if the will were set aside, would be greater than such amount, for such payment is not necessary to the executor's security.

†See also 6 Dec. R., 758, another report of this case, somewhat different, and Moore v. Feldswich, *post*—(s. c. 3 B., 557).

AVERY, J.

The will of John Bates bequeathes $50,000 to a trustee for his grandson, Harry C. Bates, and $50,000 to a trustee for his granddaughter, Julia Woods, the money to be held in trust for each, and the interest paid them until each should arrive at the age of thirty years. Harry Bates and Julia Woods, now Julia Harbeson, are contesting the will, and a motion is made by the defendant, that the trustees shall pay into court the principal, and that Harry Bates and Julia Harbeson shall pay into court the interest, or that in default the action shall be dismissed.

The motion cannot rest upon the ground that it is a case of election, as where a provision made by the will is inconsistent with some claim of a party under the will, because a will can put a party to his election only where it is a valid will, and that is the very question involved in this case. Nor can the motion rest on the ground that a party taking under a will is estopped to contest the validity of the will, because that would go to the right of action, and the cases cited are at the utmost, not that a party is estopped to maintain the action, but that the money or legacy shall be brought into court, or intended to the executor. 3 Curteis, 802; 1 Addams, 360; 54 N. H., 398.

In these cases it is remarked there is a great reason, where a party who has taken a legacy desires afterwards to contest the will, that he should pay the money into court, or tender it to the executors. But the reason is that the security of the executor may require this, and where the reason ceases the rule ceases.

In this case the legacies are in the hands of the trustees, and the trustees are under bonds, and therefore the executor is perfectly secure with respect to the substance of the fund. But even if he were not, the amount of the legacies is much less than the shares of these contestants as heirs, and therefore in the event of the will being set aside, and this action of theirs successful, the amount they would receive being more than the amount already taken, the security of the executor would not be impaired by leaving the money in their hands. And for the same reason that the amount of their shares must exceed the amount of the legacies, the executor is amply protected, as to the interest they have received, and is not in a position to demand any security.

So that with respect to the principal, the trustee being in court, and with respect to the interest, it being very much less than the share of these contestants would be if their suit is successful, the reason that the security of the executors may, in some cases, require money to be paid into court not existing in this case, the motion is overruled.

I. & J. A. Jordan, for the motion.

T. D. Lincoln and Judges Hoadly and Coffin, contra.

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345 [Hamilton District Court, April Term, 1878.]

GT. WESTERN DESPATCH CO. v. NOVA CAESAREA HARMONY LODGE.

For this opinion, see 6 Dec. R., 603 (s. c. 7 Am. Law Rec., 12). It was affirmed by the supreme court, without report, June 25, 1878.

[Hamilton District Court, April Term, 1878.] 347

MICHAEL WELTE ET AL. v. JOSEPH FALLER ET AL.

For this opinion, see 6 Dec. R., 604 (s. c. 7 Am. Law Rec., 13). It was

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[Hamilton District Court, April Term, 1878.]

JAMES HECK, EXR., v. MARY HECK.

For this opinion, see 6 Dec. R., 604 (s. c. 7 Am. Law Rec., 31). It was affirmed by supreme court, 34 O. S., 369.

[Hamilton District Court, April Term, 1878.] 365

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

For this opinion, see 6 Dec. R., 602 (s. c. 7 Am. Law Rec., 9).

[Hamilton District Court, April Term, 1878.]

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

For this opinion, see 6 Dec. R., 601 (s. c. 7 Am. Law Rec., 8).

[Hamilton District Court, April Term, 1878.] 368

JOHN F. MCFARLAND v. ELISHA L. NORTON.

For this opinion, see 5 Dec. R., 585 (s. c. 6 Am. Law Rec., 760). It was affirmed by supreme court, without report, June 18, 1878.

ATTORNEY'S LIEN—ATTACHMENT—PLEADING. 369

[Lucas District Court, 1878.]

WILLIAM A. GOSLIN ET AL. v. LEWIS A. CAMPBELL ET AL.

1. An action for money, in which an attachment is issued and the property attached put in the hands of a receiver, and an action by judgment creditors of the same defendant in the nature of a creditor's bill seeking to subject the property and money in the hands of the receiver, should not be consolidated.
2. Attorneys retained by the defense for the general purposes of the case in which property of the defendant is held by attachment, and is in a receiver's hands, have no lien for their fees on the property, or its proceeds in the receiver's hands, the attachment having been defeated.

Appeal from the Court of Common Pleas of Lucas county.

BARBOUR, J.

On the 24th of April, 1875, one George Woodworth commenced suit against Campbell in the court of common pleas of Lucas county, to

recover money due and to become due him on two notes of said Campbell, amounting to $3,000, and interest, and caused orders of attachment to issue to the sheriffs of Lucas and Ottawa counties, and personal property, belonging to Campbell, was seized by said sheriffs, consisting of lumber, shingles, etc., to secure the amount claimed by Woodworth. Such proceedings were afterward had in that action, that Henry Sellers was appointed receiver, and all the attached property was placed in his hands, with authority to prepare the same for market and convert it into money.

And afterward the petition of the plaintiff Woodworth was dismissed, and judgment rendered for the defendant, Campbell; and the receiver, Sellers, was ordered to render an itemized account to the court of his doings, and pay over to Campbell or his assigns according to law all remaining funds in his hands, and deliver to them such property not yet converted into money.

Messrs. Lee, Brown & Hueston, attorneys at law, were employed by Campbell to defend him in that action, and in that action rendered professional services, for which they are endeavoring in this action to recover money in payment after that order was made, and before the receiver had filed an account or paid over to Campbell or his assignees any of the funds in his hands.

Messrs. Lee, Brown & Hueston having previously obtained a judgment against Campbell for the sum of $379.00, the amount due them for their professional services in that action, on the 14th day of October, 1876, filed their motion in that cause, setting forth, in substance, that they had obtained judgment for their professional services in that action; that the services were rendered for the purpose of and that they were successful in preserving the property in the hands of the receiver from being appropriated to the payment of said Woodworth's claim, and in saving it to said Campbell; that at the time of their retainer said Campbell was insolvent, and agreed they should have a lien on said property; that they had notified said receiver that they had a specific lien on the property in his hands, and demanded payment to them out of the funds in his hands, of enough to satisfy their said claim; that he refused, and they therefore asked for an order of the court directing him to pay the same over to them. Pending their proceeding, another action had been commenced against said Campbell, which interfered at this point with further proceedings in the case of Woodworth against Campbell.

On November 19, 1875, Wm. Goslin et al., partner as Goslin & Barbour, commenced an action in the Lucas common pleas, in the nature of a creditor's bill, against Lewis A. Campbell, and made the receiver in the action of Woodworth v. Campbell a party, in claiming that they had a judgment against Campbell for the sum of $954.14, recovered on the 15th day of November, 1875; seeking to subject the property and money in the hands of said receiver Sellers to pay that judgment. Messrs. Lee, Brown & Hueston appeared as attorneys for plaintiff in this action. Due service was had on Campbell and the receiver, November 22, 1875. On December 20, 1875, Frank Holt and Gould Bros., by their attorneys, Pike & Hall, moved the court, and obtained leave to be made parties defendants. On January 3, 1876, Holt filed his separate answer and cross-petition, setting up that on July 29, 1875, the defendant Campbell gave him a chattel mortgage in due form, upon the property there in the hands of the receiver, to secure a debt due him of $500. This mortgage

was filed in the office of the recorder of Lucas county, the place of residence of said Campbell, claiming the first lien of the property or the funds in the hands of the receiver, and praying for equitable relief. And on the same day, January 3, 1876, Gould Bros. filed their answer and cross-petition, setting up that on October 14, 1875, the defendant Campbell, for the consideration of a debt which was in judgment of $377.96, sold, and by a written assignment conveyed to them so much of the goods, chattels and effects, or the proceeds thereof belonging to him and not otherwise disposed of than in the hands of said receiver, claiming a second lien on the property, and asking to have their rights to be protected. The sale to Gould Bros., and mortgage to Holt, were made before the receiver had converted any of the property into money. On the 2d day of December, 1876, Lee, Brown & Hueston asked and obtained leave of court and filed their answer and cross-petition in this action of Goslin et al. v. Campbell et al., setting up substantially the same matters contained in their motion in the case of Woodworth v. Campbell, claiming that they had the first and best lien on the funds and property in the hands of the receiver, Sellers, by reason of their retainer and services as attorneys for Campbell, asking for an order and decree of the court establishing their lien on said funds and property, and an order to the receiver to pay them their said lien.

The next step in the proceedings is found by a journal entry in the case of Goslin et al. v. Campbell, on January 15, 1877, ordering the case of Woodworth v. Campbell, No. 13,073, and Goslin et al. v. Campbell et al., No. 13,752, to be consolidated, and that the motion of Lee, Brown & Hueston in the former case already stated, to be heard with the case of Goslin et al. v. Campbell et al. Before the case proceeded to hearing, Goslin & Barbour, the plaintiffs, dismissed the action as to their claim, and the said motion and the case of the several cross-petitioners were then heard together, Campbell and Sellers, the receiver, being still in default for demurrer or answer, and a decree was entered consolidating said causes and finding Lee, Brown & Hueston's claim the first lien, Holt's the second, and Gould Bros. the third, and ordering the receiver to make payment in that order. From that decree Holt and Gould Bros. appealed to this court, and their appeal brings this action to this court for hearing. There is substantially nothing to be determined in this court but the validity and priority of the liens claimed by the several parties, and the controversy is entirely between Lee, Brown & Hueston on the one side and Holt and Gould Bros. on the other. There is also a motion made to strike off the Woodworth v. Campbell case as stray papers, because the causes were improperly consolidated. As to the question of consolidation, there can be no doubt that neither the questions presented by the motion, nor the nature of the action of this cause, or the relation of the several parties in the several cases to each other, made a case for consolidation.

Lee, Brown & Hueston claim their lien on two grounds:

First—That at the time of their retainer in the case of Woodworth v. Campbell, C. was insolvent, and that it was understood and agreed between them that they should be paid out of and have a lien on the attached property.

Second—That if the court should find against them on that proposition, still in law, they are entitled to their lien; for the reason that their

services were rendered in saving it to Campbell, in one sense creating it, and that they gave notice to the receiver in whose custody it was.

Testimony has been heard, and the court finds the weight of evidence against Lee, Brown & Hueston. Campbell was undoubtedly insolvent, but we are compelled to find from the evidence that there was no agreement as to how their fees should be paid, until after Holt and Gould Bros. had obtained their assignment of the property.

Now have they a lien at common law? And have they the right to have the money now in the hands of the receiver applied to the payment of this claim as against Holt and Gould Bros.?

A review of all the authorities and a digest of the law presented to the court on the hearing in the able argument of counsel on both sides, would in our opinion be a fruitless task; and we content ourselves with reference to those only in which we deem the law applicable to the facts before us to be most clearly stated.

The case of Longworth v. Handy, 2 Disney, 75, goes only to the extent that an attorney has a lien on his client's papers and documents in his possession for expenditures, and upon a judgment obtained by him for advances and disbursements, and such fees as are included in the bill of costs, upon the theory of an equitable assignment, and pretty strongly intimates that there is no reason in Ohio why an attorney should not have a lien upon the judgment recovered by him, for his professional services.

It further holds that a court of equity distributing a fund in its possession, will protect the claims of solicitors upon it; and when an attorney has collected and received the money on a judgment, he is entitled as against his client and his assignees, to retain out of it a reasonable compensation for his services.

We have carefully examined the various authorities cited from the reports of the various states. In many of the states we find by reference to the statutes themselves, that the doctrines enunciated by the courts in their reports, are controlled by the statutory provisions of the state on the subject. We are satisfied, however, that the farthest extent to which the courts have gone in any of the states sustaining a lien in favor of attorneys, except in states where they are controlled by statute, is as succinctly stated in the elaborate opinion in the case of Stuart v. Flowers, 43 Miss., 513, as follows:

The lien of attorneys and solicitors attaches:

1. Upon papers and writings, including deeds, leases, etc., placed in the hands of the attorney for the purposes of the case.

2. Upon money which may come into his hands as the fruits of his services, or of the litigation he is carrying on, and which, under the terms under which he receives it, is not specifically appropriated for other purposes.

3. Upon notes, mortgages, or other evidences of indebtedness placed in his hands for collection.

4. Upon a fund or estate in the hands of a court of equity, for distribution, in and about which the solicitor has rendered services.

5. Upon judgments in courts of record, which he may have obtained for his client, together with their fruits and incidents.

Whether the lien of an attorney indicated by these propositions will be supported in Ohio, it is not necessary in this case to decide. No case in Ohio, that we know of, has gone farther than the case of Longworth v. Handy, supra.

Admitting, however, for the purposes of this case, that an attorney may have a lien to the full extent of these propositions, we think the claim of Lee, Brown & Hueston cannot be sustained in any view we may take of the case.

The fund which now appears to be in money, was derived from the sale of personal property which came into the hands of the receiver as property attached in the suit of Woodworth v. Campbell. It remained personal property until all the rights of all the parties to this action attached. It was personal property at the time of the retainer of L., B. & H. by Campbell, when, if at all, their lien would attach. Can it be said that an attorney, simply by virtue of a retainer in an action in which property is held by attachment, has a lien upon the attached property whether his services are required for the purpose of obtaining the discharge of the attachment, or for the general purposes of the case? No authority that we have consulted has ever intimated such a doctrine. The property was in no sense created by their services. They added nothing to it; it was not placed in their hands, either actually or constructively. The moment the petition of Woodworth was dismissed, all the authority of the court in that case over the property ceased, except to restore it to the rightful owner, and any attempt to do more, on the motion of the attorneys, or otherwise, would be void. As to their claim for services as attorneys in that case, L., B. & H., stand on the same footing as other creditors of Campbell. If they wanted security before rendering services, they might have required him to give it, or they might have refused to be retained; or after their services were rendered they might proceed by attachment.

By reason of their cross-petition in this case, they acquired no rights which they would not have acquired had their claim arisen in any other manner than for professional services. They acquired no lien on this property except by the assignment to them, which was long after that to Holt and Gould Brothers. By reason of that assignment they would be entitled to a standing in court, but their lien would be postponed to that of Holt, which is first, and Gould Bros., which is second; but as they did not in their cross-petition claim any rights or lien by reason of an assignment from Campbell, they have no standing in court, and can have no relief, and their cross-petition must be dismissed.

Let a decree be entered accordingly.

MOTION FOR NEW TRIAL. 383

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

Tilden, Yaple and Force, JJ.

WHEAT & SONS v. COOPER, STEVENS & CO.

When it is claimed that a verdict and judgment are against the weight of evidence, a motion for a new trial should assign that as the ground of the motion; and if this is not done, a court of error will not look at the testimony below, though the bill of exceptions contains all, and the petition in error alleges that the verdict and judgment are manifestly against the evidence. If true, it will be presumed that the court trying the case would have granted the motion, had it been called to its attention. By not being alleged as a ground for a new trial, the ground was waived.

YAPLE, J.

This is a proceeding in error. The plaintiffs in error, who were plaintiffs below, sued the defendants upon an account to recover $194.83. Issue was joined and the case tried to the court, a jury being waived by the parties. The court found and rendered judgment for the defendants, who thereupon moved to set aside the finding and judgment and for a new trial, stating no ground therefor. The motion was overruled; the plaintiffs excepted, and took a bill of exceptions, setting forth all the evidence adduced at the trial. The petition in error claims that the finding and judgment were against the evidence.

We hold that the motion for a new trial should have stated, as a ground therefor, that the judgment was manifestly against the weight of the evidence; otherwise the court was not bound to consider the evidence in disposing of the motion; and that it is too late to raise such question upon the record, for the first time, by petition in error; for if such be a valid reason for granting a new trial, it is to be presumed that the court trying the cause would have granted the motion had its attention been called to the subject by the motion. A court of error will not grant a party redress for what he might have obtained from the court below by asking.

Judgment affirmed.

Tilden and Force, JJ., concur.

Hagans and Broadwell, for plaintiffs in error.

Paxton and Warrington, for defendants in error.

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384 [Hamilton District Court, April Term, 1878.]

MAVIN PORTER v. JAMES H. LAWS.

For this opinion, see 5 Dec. R., 582 (s. c. 6 Am. Law Rec., 756). It was dismissed by the supreme court for want of preparation, April 25, 1882.

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385 ADAMS EARLE ET AL. v. MARY MATHENEY.

This decision was rendered by the court of some other state, and is erroneously printed as rendered by the Hamilton district court.

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386 [Hamilton District Court, April Term, 1878.]

NORTHWESTERN CENTRAL BUILDING ASSN. v. W. D. HENDERSON.

For opinion in this case, see 5 Dec. R., 581 (s. c. 6 Am. Law Rec., 755).

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387 **APPEAL—NEW TRIAL.**

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

MARTIN MEIER v. MARTIN WEBER.

A petition to obtain a new trial because the party was prevented by misfortune from being present at the trial, is not a civil action, but a proceeding in an action after judgment, and not appealable.

JOHNSTON, J.

This was a motion to dismiss an appeal. Judge Johnston disposed of the case.

This being a proceeding in an action to obtain a new trial, where by casualty or misfortune, the party was not present at the trial of the case, it has been determined in such case that it is simply a proceeding in an action after judgment, and not a civil action under the code of such a character as that it may be appealed to this court. The proceeding to obtain a new trial was conducted under section 536 of the code, and the question whether the party has a right to appeal in such cases is no longer an open question in this state. The identical question was determined in Taylor v. Fitch, 12 O. S., 169.

Motion granted.

LANDLORD AND TENANT. 405

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

Tilden, Yaple and Force, JJ.

ELI FRUETT AND ELIZA MCGOWAN v. DAVID GALLUP ET AL.

1. If a perpetual lease contain an express condition that for non-payment of the stipulated rent, within a given number of days after due, the lessor may enter, and that the lease shall then be at an end, the lessor and lessee, after breach and right to re-enter therefore, may mutually agree, verbally, that the lease shall be at an end, and that the lessee may remain in the occupancy of the premises during life by paying taxes; and if he so remain and pay taxes, not claiming under the lease, such lease will be deemed to have ended at the time of such mutual agreement; and the heirs of the lessee cannot, after his death, maintain ejectment against the lessor.
2. In such a case the lessee and his heirs are estopped from setting up the perpetual lease.

YAPLE, J.

This case comes here for decision upon reservation of a motion to confirm the report of a referee and special master commissioner.

The action was brought to recover the possession of a lot of real estate situated in this city and for mesne profits, by consent of parties: the cause was referred to a special master commissioner, with the powers of a referee, who tried the cause and made special findings of the facts and the law. He found for the plaintiffs, and also allowed them a specified sum over and above ground rents, for mesne profits and waste. The defendants moved for a new trial, which, being overruled, they excepted and took a bill of exceptions embodying all the evidence, the principal ground of exception being that the findings of fact and law were against the testimony, and the law against the motion to confirm and for judgment, these exceptions are interposed. The controlling facts are these:

On March 1, 1837, Lemuel Woodward leased to Melzer Flagg certain real estate, of which the lot in dispute is a part, at a certain annual rent, payable quarterly. The lease was for ninety-nine years, renewable forever. The lease among others contained the following provision:

"Provided, and it is expressly agreed between the parties to this lease, that if the yearly rents hereby reserved to be paid, shall be in arrears and unpaid in part or in whole for the space of thirty days after any one of the days of payment named as above * * * it shall be lawful for the said

Woodward, his heirs, executors, administrators or assigns to enter into and take possession of said premises with all the improvements thereon, as if this lease had never been made; and that no assignment of this lease shall hinder the recourse of said Woodward, unless by consent."

The lease also provided that the lessee, or his assigns, etc., should pay taxes, assessments and charges levied on the premises, and in case of failure to do so, the above mentioned right of re-entry was given the lessor.

On August 17, 1839, Melzer Flagg, by lease for ninety-nine years, renewable forever, demised the premises in dispute to Jacob Fruett, the ancestor of the plaintiffs. The stipulated rent was $60 per year, payable quarterly on the same days that Flagg had bound himself to pay rent to Woodward. The terms of the lease from Flagg to Fruett in relation to the right of re-entry for non-payment of rent, etc., and in all other respects, were the same as those contained in the lease from Woodward to Flagg.

On December 29, 1839, Melzer Flagg and wife re-conveyed, by deed, the lot in dispute to Woodward, the leasehold term of Fruett being left outstanding.

Lemuel Woodward, who resided in the state of Connecticut, died in the year 1851, leaving a will. His real estate in Hamilton county, Ohio, he devised to the defendants and others as tenants in common. Partition was had in the courts of this county, and the lot in question was set off to the defendants. In the partition proceedings it is described as a leasehold estate.

Previous to Woodward's death, David Gallup, one of the defendants, was his agent in respect to his property in this city and county; and Gen. Samuel F. Carey was the collector of the rents for this and other portions of the Woodward estate here.

Jacob Fruett, who was a colored man, died in the occupancy of the lot, leaving a widow, who resided there for some years after his death, as late as 1853, or perhaps later. The plaintiffs, children of Fruett, were slaves in Kentucky and not freed until the emancipation made by the late war; and one of them, Eli Fruett, died without issue since suit brought, leaving Eliza McGown the sole heir of Jacob Fruett.

Jacob Fruett failed in health, and failed to pay the rent, when, in 1844, David Gallup, as the agent of Woodward, came to Cincinnati, and it was agreed between him and Fruett that Fruett should give up or surrender his lease on account of his failure and inability to pay the rent; and in consideration thereof, Gallup, for Woodward, agreed, according to the testimony of Gen. Carey, that Fruett might remain upon the property for life by paying the taxes upon it, and, according to Gallup's evidence, until he could rent the property; and he did remain there, rent free, while he lived ,and his widow also for some time after his death. No written surrender, or deed of release was given by Fruett to Woodward, the transaction being wholly verbal. Gen. Carey testifies that Fruett often afterwards spoke with him and expressed his gratitude for being permitted to live upon the property, rent free, and for the mere payment of taxes, and making no claim of owning a perpetual lease.

David Gallup came again to Cincinnati in 1853 (he resides in Connecticut), after Fruett's death, and rented the lot to one Swartz, whose residence is unknown, but who, it is fair to infer, dispossessed Fruett's widow. After some time he surrendered the property to the defendants,

who by their tenants have ever since been in possession of it, enjoying the rents and profits.

On February 26, 1870, the plaintiffs brought this suit.

The question then arises, whether upon such facts, which are the substantial and controlling facts of the case, the plaintiffs are entitled to recover.

It will be observed that Fruett took a perpetual leasehold estate, subject to a condition subsequent, viz.: that if he should fail to pay any installment of rent within thirty days after it became due, his landlord might re-enter and possess himself of the premises as though no lease had ever been made, and Woodward was his immediate landlord after December 29, 1839; for, on that day, he obtained a conveyance from his first lessee, Melzer Flagg.

"Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated. Of this kind are most estates upon condition in law, and which are liable to be defeated on breach of the condition, as on failure of payment of rent, etc. * * * It is a general principle of law, that he who enters for a condition broken, becomes seized of his first estate, and he avoids, of course, all intermediate estates and incumbrances. * * * A condition does not defeat the estate, although it be broken, until entry, by the grantor, etc., and when the grantor enters, he is in as of his former estate. * * * Though an estate be conveyed, it passes to the grantee subject to the conditions, and laches is chargeable upon the grantee, even though such grantee, or his assignee, be an infant, or feme covert, for non-performance of a condition annexed the estate." 4 Kent's Coms., pages 144, 145, 146, top.

It is usual in the grant, to reserve in express terms, to the grantor and his heirs, a right of entry for the breach of the conditions; but the grantor or his heirs may enter and take advantage of the breach by ejectment, though there be no clause of entry." Id., page 143, top.

In the case at bar, a right of entry, in case of the non-payment of rent, was expressly given the lessor by the terms of the lease, so that his right was stronger than if the condition had merely been created by law, and did not require him to bring ejectment, after breach of the condition, if he could re-enter and re-possess himself without a breach of the peace.

"And, first, of that redress of private injuries which is obtained by the mere act of the parties. This is of two sorts: first, that which arises from the act of the injured party only; secondly, that which arises from the joint act of all the parties together. * * * If, therefore, he can so contrive it as to gain possession of his property again without force or terror, the law favors and will justify his proceeding. * * * As recaption is a remedy given to the party himself for an injury to his personal property, so, thirdly, a remedy of the same kind for injuries to real property is by entry on the lands, etc." 3 Bl. Com., pages 3, 4, 5.

It is then clear by the terms of the lease to Fruett, that his lessor, on breach of the condition, had a right peaceably to re-enter and re-possess himself of the lot and improvements, and thus determine Fruett's estate, and re-invest himself with his original title. This he might do, without a breach of the peace, by his own act, not being obliged to resort to law for the purpose, or to obtain a re-conveyance from Fruett. For a much stronger reason could he put an end to the estate to Fruett, after the latter's breach of the condition to pay rent, with Fruett's consent, and by mutual agreement between them. It is proven as clearly as any fact can

be established by evidence, by the testimony of General Carey and David Gallup, whom no one contradicts, that this was what was done. And, again, no rent having been paid from 1844 to 1853, Gallup leased the lot to one Swartz, whose testimony could not be had, as his whereabout is unknown, and he took possession of the entire premises, as the tenant of the defendants, dispossessing, presumably, the widow of Fruett, without a breach of the peace so far as the evidence shows. Ever since, it has been held by the defendants, by their tenants. It, therefore, seems clear that when this suit was brought, the plaintiffs had no estate or right of possession in the premises whatever.

Further, we may say, that Woodward and Gallup, from 1844 to 1853, relied on the agreement made by Fruett, and, therefore, did not dispossess him in fact for non-payment of rent, as the lessor might have done, and this would estop Fruett from setting up the perpetual lease, had he brought this action in 1870. Whatever would so have estopped him, estops these plaintiffs, his heirs.

The exceptions to the report are well taken; the motion to confirm the same is denied, and it is set aside, and a new trial granted.

Tilden and Force, JJ., concur.

L. M. Strappe and Moulton, Johnson and Levy, for plaintiffs.

Scarborrough & Williams, for defendants.

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409 **PRINCIPAL AND AGENT.**

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

J. G. MURDOCK & CO. v. NATIONAL TUBE WORKS CO.

An agent having property of his principal for sale, cannot transfer it in payment of his own debt, and the creditor so receiving it will be liable to the principal.

Cox, J.

This was a petition in error to reverse a judgment of the common pleas, where the suit was brought by the Tube Works Company, to recover a balance of an account for tubes alleged to have been sold to J. G. Murdock & Co. The defense was that Murdock & Co. never had any dealings with the company, but purchased of the Redfield, Bowen & Walworth Company, in Chicago, who had been fully paid; that Murdock & Co. ordered the tubes from Redfield & Co. to secure an account they had against the company, and there being a surplus, they sent their check to that company to pay the difference. It appeared that on the receipt of the check Redfield, Bowen & Co. had made an assignment. It was alleged that the latter company were agents of the National Tube Company.

The court, in announcing the opinion, said it was well settled that a party who holds property as agent for another, and simply acts as agent, cannot hypothecate it or apply it to the payment of his own debt. The testimony shows that Redfield, Bowen & Co. were in debt to Murdock & Co., and were agents of the National Tube Company; that the pipe they sold to Murdock belonged to the National Tube Company, and they had no right to turn it over to the payment of their own debt. Murdock &

Co. claim that they were not aware that the property belonged to the National Tube Company, but the bill-heads on which certain accounts were furnished set out that fact. Murdock & Company say that though it was a custom of parties to represent themselves as agents, the transaction in question was their individual transaction, and that when the bill was sent to them they did not observe that these parties were acting as agents, and otherwise that they would not have dealt with them. But whether or not Murdock & Company had notice that the property belonged to the National Tube Company, the parties from whom they obtained it could not transfer it in payment of their own debt.

Judgment affirmed.

RAILROAD SUBSCRIPTIONS. 410

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

HARDING JOHNSON v. COLLEGE HILL NARROW GAUGE R'D CO.

A subscription to a railway being payable, half if it is graded to a certain point in a year, and half if completed to that point in two years, where the road was not graded in the year, but was completed in the two years, the latter half is collectible, not the earlier half.

Cox, J.

The railroad company brought suit in the court below to recover a subscription made by the plaintiff to its road. The subscription recited that the plaintiff agreed to pay $500 as a gratuity, one-half when the road-bed was ready for the superstructure to some central point, in College Hill, and the other half on the completion of the road to the same central point, provided that the road be graded within one year, and that it be completed in two years. The petition alleged that the road was completed within two years. The plaintiff answered that the road was not graded within one year, as required by the terms of the subscription; that at the time he subscribed he owned no property at College Hill, but contemplated if the railroad facilities were sufficient, to remain there; that in July, 1875, two months after the time for the completion of the grading, he removed to North Carolina. He claimed that he was not liable for the subscription because the condition upon which it was made was not carried out.

The court held that, if the road had been graded at the expiration of the first year, there was no doubt but that the plaintiff would have been liable for one-half of the subscription, and then if the road were completed within the two years, he could have been held for the remainder of the subscription. These provisions of the subscription were conditions precedent to the payment of the money, and, unless each of the conditions were complied with, the company could not recover the amount dependent on both of them. The road having been completed within two years, the company were entitled to recover the amount which was subscribed upon the completion of the road in that time; but the road not having been graded within one year, the plaintiff was not liable for that portion of the subscription. Judgment would be reversed unless the defendant

would remit the amount dependent on the grading of the road within the year; if it did so, the judgment would be affirmed.

Judge Jordan, for the plaintiff.

H. M. Cist, contra.

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427 **ASSIGNMENT FOR CREDITORS.**

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

†MOORE, ASSIGNEE, v. J. H. FELDWISCH ET AL.

An assignee for the benefit of creditors filing his petition in the common pleas court to determine priorities of incumbrances and for sale, not having any estate therein, except what remains after satisfaction of the liens, cannot have compensation for services and attorney fees out of the proceeds where there is no surplus; the lienholders are only to be charged with the proper costs in the case.

The plaintiff, as assignee of J. H. Feldwisch & Co., filed petition under section 9 of the Insolvent Debtor's Act, which provides that the probate court shall order all incumbrances and liens on the property to be paid out of the proceeds according to their priority; but that the assignee may, where an estate is encumbered with liens, file his petition in the common pleas, and upon hearing, the court shall order a sale, and determine the question in regard to priorities. The property was sold and at a former day of the term a decree for distribution was entered in this court. The case now comes up on motion of the assignee to be allowed out of the proceeds of sale, which are insufficient to pay the holders of the liens, an amount for his own compensation as assignee, and for the services of his counsel.

The application does not extend to general services of the assignee and counsel, but to services claimed by them in this case. These services do not consist in anything done by the assignee, for the property was not sold by him, but by an officer of court. Nor do they consist in anything that could be properly charged as costs. Coe v. R. R. Co., 372, 10 O. S., 409, 410. If paid, it must be out of the fund necessary for payment of the liens. Whether this should be done is not a matter of discretion, but depends upon the estate taken by the assignee under the assignment, as compared with that held by the holders of liens prior to the assignment.

The estate taken by the assignee was subject to the liens. All there was to assign was what should remain after satisfaction of the liens.

This action under the statute is simply for the ascertainment of priority, and that the residue of the fund should be returned to the probate court to be distributed under the Assignment Act. Under the Assignment Act, before any dividend is declared, the costs and expenses of administering the trust are to be paid. But this is a payment to be made out of the general fund; and if the liens and incumbrances are satisfied, there would be no general fund. The services for which this claim is made not being such services as can be properly denominated costs, and the application being in effect that counsel fees and compensation to the

†See Moore v. Feldwisch, *post* 501.

assignee shall be allowed as costs, and there being no provision in the statute, except that which has reference to the payment out of the general fund, and there being no general fund until the incumbrances have been paid, the court is of the opinion that the application should be refused, and that nothing but the proper costs in the case should be charged against those who have liens on the estate.

Durbin Ward, for plaintiff.

John Kebler, for defendant.

APPEALS—MANDAMUS—JUSTICE OF THE PEACE. 428

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

STATE OF OHIO, EX REL. ARGO, v. A. R. LINN.

1. Where, in an action for $15 before a justice, tried by a jury, where the law gave no appeal if neither party demanded more than $20, and there was a jury trial (section 90), if a counter claim demanding more than $20 had no connection with the action, and was disregarded by the justice and not involved in the judgment, the justice will not be compelled to allow an appeal.
2. Mandamus to compel a justice to sign a bill of exceptions, where he answers that he is ready to sign a true bill, but that the bill offered is not true, refused.

AVERY, J.

These are two writs of mandamus. One to compel the defendant, Linn, as justice of the peace, to sign a bill of exceptions, to which he answers he is ready to sign a true bill, but the bill presented is not true. Where, upon mandamus to compel the signing of a bill of exceptions, the answer expresses a readiness to sign a true bill, but denies that the particular bill is true, the writ should be refused, as the right to determine the truth of the bill is vested in the judicial officer to whom it is presented for signature. Creager v. Meeker, 22 O. S., 207.

The other writ is to compel the defendant to take an appeal bond in an action tried by a jury, in which relator was defendant and one Balzer was plaintiff, upon a claim of $15. The relator alleges that he filed a counter-claim in the action for $22. The answer is that the action was for injury to chattel property, and that the counter-claim was for $20 legal services, whereas relator was not an attorney, and for $2 horse hire, all of which was said at the time to be filed for the purpose merely of taking an appeal, and was a sham, and was so regarded by the justice.

By section 90 of the Justice's Act, if either party in his bill of particulars claims more than $20, the case may be appealed; but if neither party demand more than $20, and the case is tried by a jury, there shall be no appeal. The counter-claim in this case was more than $20, but it had no connection with the subject of the action, and was disregarded by the justice. The demurrer to the answer admits this. Section 90 refers to claims which are tried; the section is one of a series upon the subject of trials. The counter-claim was not tried; it was properly disregarded by the justice. Not being involved in the judgment, the judgment itself was not appealable. It would be a vain thing to compel the justice to allow

an appeal when, upon the case being appealed, it would appear that there was nothing with respect to which the party had a right to appeal. Writ dismissed at the relator's cost.

J. H. Morton and H. L. Cooper, for plaintiff.

E. P. Dustin, for defendant.

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429 NUNC PRO TUNC ENTRIES.

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

†AURORA FIRE AND MARINE INS. CO. v. TEXAS BUILDING ASSN. No. 2.

The right of a court, at a subsequent term, to enter a nunc pro tunc judgment, in a proper case, is subject to proper limitations, and should never be exercised, except in furtherance of justice, and where some substantial right would be defeated if it were not entered.

The action below was upon a policy of insurance.

At the November term, 1876, a judgment was prepared and put into the hands of counsel for defendant below, who desired to prepare a bill of exceptions. The judgment entry did not get into the hands of the clerk, but was afterward, during the next term of the court, found among the papers with the indorsement in the handwriting of the judge, who heard the case: "This judgment ought to have been entered at the November term, and I supposed it had been." At the June term, 1877, an order was entered nunc pro tunc as of the November term, 1876, entering another judgment of similar character with this one. A motion was made by counsel to strike this judgment from the record on the last day of the June term, which motion was overruled. One of the errors alleged in this petition was the entering of this judgment nunc pro tunc.

The right of a court at a subsequent term to that at which a case has been tried, to enter a judgment nunc pro tunc in a proper case, has always been recognized. Our supreme court has recognized it in more cases than one. But it is a right subject to proper limitations, and is one that should never be exercised except in the furtherance of justice. It is exercised where the rights of a plaintiff as secured to him by a judgment announced at a previous term would fail but for its exercise. Where a judgment has been given, execution has issued, property sold, sale confirmed and deed made to the purchaser, and the judgment not entered at the term at which it was given, the court in furtherance of justice, and to prevent failure of the title of the purchaser, would order a judgment to be entered nunc pro tunc. But it was only in such cases as these where some substantial right would be defeated, and in furtherance of justice, that it was proper for a nunc pro tunc judgment to be entered by the court. In this case it was not apparent to the court that any of the reasons exist to justify the entry of a nunc pro tunc judgment.

Judgment of the common pleas reversed.

A. G. Collins, for plaintiff in error.

M. L. Buchwalter, for defendant in error.

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430 CONDEMNATION OF LAND—ASSESSMENTS.

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

JAMES GAMBLE ET AL. v. JAMES S. WISE, TREASURER.

1. An ordinance for condemnation of land to widen a street, providing that the expense shall be assessed on abutting property and property benefited sufficiently, designates the property without specifying the lots, and the council may require the board of improvements or three freeholders to determine the lots to be charged.
2. The recommendation of the board of improvements is not necessary to enable the city council to pass an ordinance for condemning property.

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†This case was affirmed by the supreme court. See opinion, 34 O. S., 291.

BURNET, J.

The action was to enjoin the collection, by Wise, treasurer of Hamilton county, of a special assessment levied by the city of Cincinnati on lots belonging to the plaintiffs, to pay the cost of an appropriation for a strip of land condemned by the city to widen John street between Charlotte and York streets. There were several objections made to the validity of the assessment—one that there was no recommendation made to the city council by the board of improvements; that the ordinance did not specify the lots of land on which the improvement should be made; that the property of the plaintiff was not, in fact, benefited by the improvement, and that if benefited there were others also benefited, and should be included in the assessment, so as to lighten the burden of the improvement upon the plaintiffs.

In reference to the first objection the court was of opinion that a recommendation by the board of improvements to the city council to condemn the property was not necessary to give authority to the council to pass the ordinance. The court was also of opinion in reference to the objection that the particular lots were not specified; that the provision of the ordinance being that the expense of widening the street should be levied on abutting property, and property benefited by the improvement, this general designation in the ordinance was sufficient, and that the council may require the board of improvement, or three disinterested freeholders of the corporation, appointed by council for that purpose, to determine the lots to be charged, and to estimate the amount to be charged upon each; also, that the plaintiffs were not permitted to show that their lots were not benefited to the amount of the assessment; or that other lots were benefited in order to relieve their property.

Petition dismissed.

T. McDougall, for plaintiffs.

Matthews, Ramsey & Matthews, for defendant.

BREACH OF PROMISE—ABATEMENT. 431

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

H. L. COOPER, EXR., v. ELIZABETH WEST.

1. A charge in a breach of promise case that "the plaintiff is entitled at least to such damages as would place her in as good pecuniary condition as if the contract had been fulfilled," without stating whether they are to be measured as of the time of the breach or as of the trial, is not ground of reversal where party failed to call the court's attention to the subject.
2. Where a defendant having died, and the plaintiff being thereby rendered incompetent to testify, unless the defendant's deposition is read, a verdict and judgment will not be reversed for misconduct, where the plaintiff's attorney stated, in the presence of the jury, that if the deposition was not introduced, he would comment on the fact, but no reference to its contents was made.

LONGWORTH, J.

This is a proceeding in error to the court of common pleas. Miss West, the plaintiff, brought her suit against Enoch Hayes during his life-

time to recover damages for breach of promise of marriage. Between the answer and the reply Hayes died. The suit was revived against the executor, and proceeded to trial and judgment. The executor is the present plaintiff in error. The jury rendered a verdict for the plaintiff. A motion for a new trial was overruled and judgment entered upon the verdict, and this judgment it is now sought to set aside.

Three reasons are given why the judgment should be set aside. In the first place, it was claimed that there was misconduct on the part of the counsel for the plaintiff in stating, in the presence of the jury, that he claimed the right to comment upon the fact that defendant's deposition had been taken in the case, and that if defendant's counsel did not introduce this evidence to the jury, he claimed the right to comment upon it. The original defendant being dead, the plaintiff was rendered incompetent to testify unless the deposition was introduced. In this case the deposition itself was not commented upon. What it contained does not appear. No reference to its contents was made. Counsel simply called the attention of the court, in the presence of the jury, to the fact that such a deposition existed, and in this we see no misconduct.

The next error complained of the admission of certain testimony which the defendant's counsel moved the court to rule out. Although the testimony related to an admission on the part of the defendant that he proposed to marry the plaintiff at a time prior to the entering into of the alleged contract, still the court was of opinion that the testimony was competent to show the condition of mind of the party. Wherever the existence of a contract of this kind is in issue, the fact that the parties proposed marriage, that they were thinking of marriage, that they were anxious to make such a contract, that "Barkis is willin'," is competent.

The last alleged error was one of more difficulty than the others. The court, in its charge to the jury, said:

"The plaintiff is entitled at least to such damages as would place her in as good a pecuniary condition as she would have been if the contract had been fulfilled. This portion of the charge is excepted to. Standing alone as a proposition of law, it is correct. The court, although giving the general rule correctly, does not tell the jury in any part of its charge as to the time when they are to measure these damages. Whether the jury estimate them as of the time of breach, or as of the time of trial, there is nothing to show. Defendant's counsel did not ask the court to charge the jury anything on that subject. The charge could not have misled the jury from any other cause than that the court did not go on and tell them something else, and the court was not asked to tell them something else. Every presumption is that if this had been called to the attention of the court, the court would have instructed the jury on that subject. The theory of the law always has been, that in a matter of this kind, if a party wishes to avail himself of an omission on the part of the court, he must call it to the court's attention by asking the court to charge upon that subject. This request was not made, and we cannot see that any error was committed.

Judgment will be affirmed.

Hoadly, Johnson & Colston, for plaintiffs.

Jordan, Jordan & Williams, for defendant.

LANDLORD AND TENANT—TAXES. 432

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

LAMBERT ROTHERT v. CASPER WESTMEIER ET AL.

Where a lease, by which lessee is to pay taxes, reserves no lien for taxes, nor has a clause of forfeiture, and such lease being assigned, the lessor makes a new lease to the assignee for a different term, different rent, and reserving a lien for taxes, this lease having been sold to pay liens, the lessor is not entitled to part of the proceeds for taxes under the former lease which he had to pay, nor would he have been entitled had the former lease reserved such a lien; that lease was surrendered.

Cox, J.

In March, 1875, a lease was made by W. Goodman, trustee for Grandin's heirs, to Hengehold & Holte, for two years, of property on the corner of Court and Race streets, with privilege of three further years on the same terms—$500 per year—payable quarterly, and a lien reserved for rent for the original term, and the renewal of three years under the privilege, lessee to pay taxes, but no express lien reserved for the taxes, and no condition of forfeiture. Subsequently the lease was assignd to B. Westmeier, November 4, 1875. January 14, 1876, Goodman leased the same premises to Bernardina Westmeier and Casper Westmeier, her husband, for twenty years from February 1, 1876, at an annual rent of $600 for the first ten years; and $700 for the next ten years, the lessees to pay all the taxes and assessments accruing during the term, to erect a dwelling thereon of the value of from $8,000 to $12,000 with five years, the lessor to take dwelling at the appraised value at the end of the lease. No reference is made in the second lease to any former one. A valuable house was erected after the second lease; the premises have since been sold to pay liens, and the fund is now in court.

Goodman now claims there is a prior lien for taxes paid by him in December, 1875, and the taxes of June, 1876, under the first lease. He claims that these taxes were a lien upon the premises; that having paid them, he is entitled to be first paid out of the proceeds. The first lease gives no lien upon the premises for the taxes, nor is there any provision for the forfeiture of the lease for non-payment of taxes; but even if there were, the subsequent lease having been given by the lessor and taken by one of the original lessees and another party, for an entirely different term, upon different ground rent, and being altogether different in its terms, making no provision in regard to former rent unpaid and the taxes unpaid, giving no preferable lien upon the premises, we think there is no lien in favor of the lessor. If he had a lien at all under the first lease, it was a lien simply on the leasehold, and the leasehold being surrendered and the surrender accepted by the lessor, all his right is gone upon that lease. The leasehold premises being surrendered and the lien abandoned, there is nothing upon which the lien can rest. A new contract was made between the parties, and no lien being reserved upon that, we hold that the lessor is not entitled to any claim upon the premises, particularly as prior to the lien-holders, who erected the building.

Decree accordingly.

P. S. Goodwin, for plaintiff.

Smith & Crawford, and A. J. Jessup, for defendant.

433 APPEALS.

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

CORDELIA CAMPBELL v. MARY A. E. SHOTWELL ET AL.

Contempt proceedings against a receiver for not paying as ordered by decree, in which, on his answer being found insufficient, an order of attachment was issued against him, from which he took an appeal, is not appealable.

This case came up by an appeal from the common pleas.

Cox, J.

The petition was for the sale of mortgaged property to pay debts. Two receivers were appointed, J. W. Johnston and A. J. Pruden, the latter acting by consent. Subsequently, the parties agreed to dismiss the case, directing the receiver to pay over to the heirs the amount of rent collected, deducting certain charges in the case. The receiver, A. J. Pruden, paid over to a number of the heirs the amounts decreed to them, but did not pay to the plaintiffs nor to another of the heirs, and proceedings were commenced against him for contempt in not paying over the amount found due by the decree. The answer set up was that the receiver had a claim against these parties in the shape of a judgment before a magistrate, which exceeded by over $200 the amount of their claims. The answer was found insufficient in the common pleas, and an order of attachment was issued against A. J. Pruden, directing an attachment against him, from which he took an appeal to this court. A motion is now made to dismiss the appeal.

The court held that the case was not properly appealable; that the receiver was not attached, and that there was no final judgment from which an appeal could be taken.

Appeal dismissed.

Moulton, Johnson & Levy, for plaintiff.

A. J. Pruden, for receiver.

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434 CORPORATIONS—BILLS AND NOTES.

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

†S. J. HUBBARD v. THOS. Z. RILEY, ASSIGNEE.

A note given by a corporation for the purchase of its own stock in the hands of one having notice is void.

Cox, J.

Appeal from the common pleas. The proceeding in that court was to compel the assignee of Albin, Son & Co., a corporation, to allow a

†This case was dismissed by the supreme court for want of preparation, April 25, 1882.

claim of the plaintiff founded on certain notes of Albin, Son & Co., made to C. M. Hubbard. The defense of the assignee was that C. M. Hubbard was a stockholder in the corporation; that these notes were given to him by the corporation for the purchase of his stock, and were transferred by him to the plaintiff, his father, with a full knowledge of all the facts; that the corporation did not authorize the notes to be given; that they had no power to purchase the stock from C. M. Hubbard, and therefore the notes were invalid. It was claimed on behalf of the plaintiff that C. M. Hubbard never was a stockholder in the company.

The court after reviewing the testimony, said it was of the opinion that C. M. Hubbard was a stockholder, and was subject to the liabilities of a stockholder. There was an absolute agreement on his part to purchase the shares of stock at $1,000 a share each, and an agreement on the part of the company to repurchase the stock from him if he was not satisfied. He gave to Albin, Son & Co., in payment of his stock $5,000, and his notes for $5,000, indorsed, and on the organization of the company was elected secretary. At the end of the year the company bought back the stock and gave him their notes for $5,00, and these were transferred, after the company became insolvent, to his father, for the purpose of repaying a loan of $5,000 he obtained from him. The law is well settled that an incorporated company, unless the power is given in its charter, cannot purchase or deal in the stock of its corporation; and this company having purchased the stock of C. M. Hubbard, the notes given therefor and assigned to the plaintiff are void in his hands as against the company, and an order will be entered that the assignee disallow them.

E. S. Throop, for plaintiff.

Hoadly, Johnson & Colston, for defendant.

[Hamilton District Court, April Term, 1878.] 451

CITY OF CINCINNATI FOR THE USE OF MCERLAND V. MONFORTH ET AL.

For this opinion, see 5 Dec. R., 587 (s. c. 6 Am. Law Rec., 762).

PRINCIPAL AND AGENT—EVIDENCE. 453

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

Tilden, Yaple and Force, JJ.

†KANAWHA VALLEY BANK V. JOHN A. ROBINSON.

An acceptance of a bill of exchange drawn on one as agent, thus: "Accepted, J. A. Robinson, Agent K. & O. C. Co.," giving only the initials of the principal's name, it cannot be said that these are descriptio personae merely, and that he is personally liable, but parol evidence of their meaning is admissible.

YAPLE, J.

This is an action by the bank against Robinson as the acceptor of a draft. The draft and the acceptance are as follows:

†This judgment was affirmed by the supreme court. See opinion, 44 O. S., 441.

$265.87-100. Kanawha & Ohio Coal Co.,
West Virginia, May 14, 1874.

Seventy-five days after date pay to the order of J. S. Moore two hundred and sixty-five and eighty-seven one-hundredths of dollars.

KANAWHA & OHIO COAL CO.,
By W. H. EDWARDS, President.

To JOHN A. ROBINSON, Agent,
Cincinnati, Ohio.

The draft is indorsed by Moore, and was accepted as follows:

"Accepted payable at the Bank, Cincinnati, Ohio.
JOHN A. ROBINSON,
Agent K. & O. C. Co."

June 16, 1874.

The answer sets up that it was intended by the drawer to draw this bill upon its agent, Robinson, and that he was to accept it as its agent and have it paid here in Cincinnati. It also sets up that the payee knew that that was the intention and that the parties intended that it should be accepted by Robinson as agent and not personally.

It is claimed that all that follows the acceptance of John A. Robinson, the initials "Agent K. & O. C. Co.," is but descriptio personae, and that the defendant is personally responsible.

The answer is demurred to. The rules of law in regard to negotiable paper are similar to the rules governing deeds and specialties, the law being more strict in regard to deeds and commercial paper than in regard to ordinary simple contracts, for the obvious reason that commercial paper is taken in the market among merchants, and as few defenses as possible should be allowed against it. It is well settled from the earliest times, and we have two cases in Ohio, settling the rule of this state, that where an acceptance is made by a party who describes himself generally as agent, the name of the principal for whom he is agent in no shape or form appearing, or in no way being indicated on the paper, he is personally liable, and parol evidence is not allowed to prove that he was the agent of some well-understood principal. The principal must be made liable in some way upon the paper, or he is not liable at all.

There is another class of cases where a party signs a deed or commercial paper, as, A. B., agent of C. D., not saying "for him as agent," or any equivalent words. There are a number of cases in the books that decide that that shall be but descriptio personae, and that the party is still liable, personally, and must be so held notwithstanding the name of the principal appears in that way. There are other cases that, upon that very state of facts, say if the parties intended that he should sign it as agent and it appears signed in that form, the principal is liable, and that the person so signing as agent is not. They hold, as laid down in Wharton's new work on Agency, that the courts must determine the question of liability by an examination of the terms used, taking them in their ordinary commercial sense, and it is held in Angel & Ames on Corporation that parol evidence is receivable, and they also criticise the strict doctrine found in third Wendell, and which is the same as some cases in Massachusetts, which says: "Where, however, the president of an insurance company, in transacting the business of the company, gave a note in which he described himself as president of the company, the note was considered the note of the president and not of the company, the addition to his name being regarded as descriptio personae. The author says, "it will be extremely difficult to reconcile this decision either with principle or authority," quoting the authorities and the cases; and Wharton says: "The cases fade into each other so as to be very difficult to distinguish." In cases of that kind, there is an absolute conflict of decisions.

But there is a third class of cases, where a party indorses the acceptance, adding abbreviations to his acceptance. The question presents itself, how can you tell what is meant as matter of law? They may mean nothing or they may mean a great deal, and there is no way, except by parol evidence, of ascertaining what is the commercial sense and the understanding of the parties with reference to them. That happens to be this case. The defendant places after his name the initials "Agt. K. & O. C. Co." That may have been understood by the parties to mean "as agent" for that company, or it may mean nothing at all, and it is parol evidence that it is to be resorted to to determine it, and although the case of Lacey v. The Dubuque Lumber Co., 43 Iowa, 510, is not perhaps the strongest case, it is one of the number that recognizes the principle. The president of that company signed in

this manner: "M. H. Moore, P. D. L. Co.," not saying "as" and the court say that "when these initials are understood, or explained by parol evidence, indicating that the signor of the note is the president of the defendant, we conclude that the instrument then sufficiently shows on its face that it is the obligation of the defendant" and held the lumber company liable.

We therefore feel constrained to overrule the demurrer to this answer and let the plaintiff reply, and the question can be determined by parol evidence as to what this abbreviation means. We do not think we can determine it as matter of law.

Demurrer overruled and cause remanded.

Force and Harmon, JJ., concur.

APPEARANCE—ERROR. 458

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

A. MAWIECKE v. J. H. WOLF.

1. Appearing before a justice and moving for the discharge of an attachment issued, on the ground of concealment, so that service cannot be made, is not entering an appearance.
2. That a petition in error to a judgment of the common pleas reversing a justice's judgment and retaining the case for further proceedings, is premature.

LONGWORTH, J.

This is the third time this case has been in this court, and is now here on a petition in error. The action originally was brought by Wolf against Mawiecke before a justice to recover rent, and an attachment was sued out on the ground that the defendant had concealed himself so that service could not be made upon them. The defendant was returned "not found," and service by publication commenced. Subsequently a motion by the defendant to discharge the attachment was overruled. and the case was continued over for the completion of service. On the day on which service by publication was completed, judgment was rendered against the defendant by default. Proceedings in error were instituted in the common pleas, where the judgment of the justice was reversed, and the case retained for further proceedings. Thereupon a petition in error was filed in this court, and passed on, the court deciding that the petition in error was premature, and should be dismissed, the judgment not being a final order. Since then a final order had been obtained, and a motion was made in the common pleas to discharge the attachment. The motion was overruled, and a petition in error filed in this court, and at the last term the judgment was affirmed.

The plaintiff in error moved in the court below that the proceeds of the property attached and sold should be brought into court, and that out of the proceeds he should be allowed the amount that was exempt by law from execution. This motion the court overruled. The chief error now complained of is that the justice erred in continuing the case over to await the result of service by publication. It was also contended the justice had no jurisdiction to try the case, because the defendant in his court was not a resident of Cincinnati township. The testimony was conflicting before the justice. It was claimed the defendant had removed his property and was going away to escape liability. This he denied, and brought testimony to show that he intended to remain at his store,

as usual, without changing his residence, though he had taken his family to the country. It was not to be presumed against his own oath and testimony that that state of facts did not exist. Whether true or not, the affidavit before the justice was in proper form, and it became the duty of the justice to issue the attachment. The defendant came into the court and moved that the attachment be discharged, and failed in his motion. In no other way did he enter an appearance. No doubt a party may appear to question whether the court has obtained jurisdiction over his property or person, and for that purpose alone, and the record recites that was the fact.

It was the opinion of this court that the common pleas erred in reversing the judgment of the justice and in retaining the case. But inasmuch as the judgment of the common pleas court is the same as that rendered by the justice which was erroneously reversed, it will be affirmed.

J. R. Von Seggern, for plaintiff.

Chris. Von Seggern, for defendant.

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

MEADER FURNITURE CO. v. ROWLAND ET AL.

For this opinion, see 6 Dec. R., 595 (s. c. 7 Am. Law Rec., 1). It was reversed by the supreme court. See opinion, 38 O. S., 269.

The dissenting opinion of Yaple, J., in this case, found in 3 Bull. 497, is also found in 6 Dec. R., 597 (s. c. 7 Am. Law Rec., 497).

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501 **ELECTION OF ASSIGNEE—APPEAL.**

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

†ALEX STARBUCK AND JACOB PFAU, JR., v. LEO A. BRIGEL.

1. Where an assignee of an estate has qualified and entered upon his duties, and an election by the creditors is subsequently held to choose an assignee, if such election does not result in a removal of the assignee originally appointed, a second election upon another petition cannot be held.
2. An appeal may be taken by a creditor from the order of the probate court, approving an election of an assignee by creditors.

BURNET, J.

There are three causes between these parties presented to the court for decision, arising out of the same matters. Starbuck and Pfau were the assignees of George Weber, being selected by him in his deed of assignment to act as assignees of his estate, and having qualified by giving the requisite bond in the probate court. After the appointment of these gen-

†The supreme court in this case held that no appeal could be taken from such an order of the probate court, and thus reversed that part of this decision. See opinion, 34 O. S., 280. See also subsequent decision of district court, 4 B., 83. That case was dismissed by the supreme court for want of preparation, March 4, 1884. The decision of the supreme court is cited in 39 O. S., 377, 388; 653, 656; 661, 664; 38 O. S., 370, 372.

tleman as assignees, an arrangement was made among some of the creditors by which they were authorized for the period of one year to continue the business of George Weber by running his brewery. There was a written agreement to this effect, signed by a large number of creditors, being more, as is alleged, than a majority in both number and amount. At the end of the first year a similar agreement was made, extending the time for another year, and at the end of that year a similar agreement extending the time for a third year. This last agreement was signed in December, 1877.

In February, 1878, a petition was filed in the probate court by creditors having claims in amount more than $1,000, for the election of an assignee to take the place of Starbuck & Pfau in the conduct of the estate. Upon the filing of this petition, the requisite notices were issued by the probate judge to the creditors called a meeting for the purpose of holding an election. The meeting was had, and creditors holding more than fifty per cent. of the amount of the claims against the estate were present. The probate judge found, as the result of the election held, that more than a majority in number of the creditors had voted for Leo A. Brigel, but that more than a majority in amount had voted for Starbuck & Pfau, and that, therefore, there was no election. Subsequent to this announcement being made, on May 13 another petition was filed by other creditors holding claims amounting to more than $1,000 against the estate, and notices were again sent by the probate court to the creditors to appear on May 18 and hold an election on that day.

The requisite number of creditors did assemble and an election was held, the result of which was declared by the probate court that a majority both in number and amount, had voted for Leo. A. Brigel, and that therefore he was, upon giving the proper security, to be the assignee of the estate. The bond was given, as required by the probate court, and an order issued to the sheriff to put Brigel into possession of the property. Starbuck & Pfau filed a petition in the court of common pleas seeking to enjoin Leo. A. Brigel from taking possession of the property.

They alleged in the petition the agreements that had been made with the creditors by the assignees for the conduct of the business for the term of one year, which had not yet elapsed, and that many of the creditors who had signed this agreement had voted at the last election in favor of Leo. A. Brigel, that other of the creditors who had expressly assented to the agreement had also voted for Brigel, and that others who had acquiesced in the various agreements by which they were permitted to run the business, and upon the faith of which they had incurred large obligations, which were still outstanding, and for which they were individually liable, had voted for Leo A. Brigel, and that they were estopped by their acts, in thus assenting to the conduct of the business, to institute any proceeding to remove them from the business during the time for which it had been agreed that they should conduct it. They alleged also that other persons were held to have voted for Leo A. Brigel, who were not, in fact, creditors of the estate of Weber, and were not therefore entitled to a vote. They alleged that the second election was void, and that under this election Brigel was not lawfully the assignee of the estate, and should be enjoined from taking possession of the property. In reference to the second election, they claimed that there was no authority in the probate court to call another meeting of the creditors, for the purpose of electing an assignee after one meeting had been called and one election held, and

that therefore the order of the probate court based upon the second election was void, and the process issued and about to be served to put Brigel into possession was void, and should be restrained. Upon this petition a temporary restraining order was allowed, and a time fixed to hear the motion for a provisional injunction. When the day arrived on which the motion was to be heard, application was made for leave to file a supplemental petition, which was granted, and a supplemental petition was filed, setting out that, since the filing of the original petition Starbuck & Pfau and two of the creditors, Frank Linck and Peter Andrew, had given bond for an appeal from the second election, and the cause had been appealed into the court of common pleas and transcript filed, and was then pending in that court, whereby the execution, based upon the order of the probate court, was vacated, and the order itself being vacated; that, nevertheless, since the appeal Brigel had assumed to act as assignee, and was still threatening to take possession of the property.

A judgment was rendered upon the petition and supplemental petition, in the court of common pleas, dismissing both. A motion was made to dismiss the appeal from the order, of the probate court affirming the second election, finding that Brigel was elected, and directing that he should be put into possession of the property. That appeal was dismissed, and a petition in error taken to this court and an appeal taken to this court from the judgment of the common pleas, dismissing the petition and supplemental petition for an injunction. Afterward, the probate judge declined to fix the amount of the bond for an appeal from the first election, at which he declared that no assignee was chosen, two of the creditors did execute and file a bond for appeal in the probate court to remove that cause to the common pleas, and a transcript was taken and filed in the court of common pleas for an appeal. A motion made to dismiss this appeal was also granted, and from this order of the common pleas there is a petition in error to this court.

The first question—not taking these causes as they arose in order of time—will be whether, after the election of February 19, and its result was announced, there was a right to have a second election upon the filing of another petition in behalf of the creditors. The opinion of the whole court is that there was no such right; and that after an assignee has been appointed by the assignor of an estate, and he has qualified and entered upon his duties, there is one opportunity given to the creditors if they desire it, without cause, actuated even it might be by caprice, to hold an election for his removal, and if the election does not eventuate in the removal of the assignee, the assignee originally appointed can only be removed for cause after that upon application made to the probate court.

This being our opinion in regard to the right to hold a second election, as a matter of course we must hold that all the proceedings upon that petition was void, and that L. A. Brigel was not lawfully elected to be assignee of that estate, and that any order issued by the probate court to put him in possession would be without authority of law and void. We hold, nevertheless, that the law gives to the party against whom that final order of the probate court was rendered the right to appeal, and, having given a bond approved by the judge of the probate court and filed his transcript, that cause has been removed to the court of common pleas, to be disposed of, as a matter of course, in accordance with the opinion of this court in regard to the validity of the proceeding.

The next question that presented itself is whether there is a right to appeal from the order of the probate court in reference to the first election, in which it was held by the probate court—there being no person chosen by a majority both in number and amount of the creditors—that there was no election. The majority of the court are of the opinion, that there was a right to appeal by a creditor, on the ground that the creditor is a person who is affected by that final order. It is meant as a matter, of course, a creditor who is adversely affected, a creditor who voted for Starbuck & Pfau. The language of the statute giving the appeal is that it may be made by "any person against whom such order, decision or decree shall be made, or who may be affected thereby, to the court of common pleas of the proper county." The majority of the court base their decision upon this point upon construction of this statute giving the right of appeal, and upon the fact that although after this order is made, Starbuck & Pfau are not removed from their office, but continue to exercise all the rights and privileges that they held before, without any change, yet that they do not hold by the same title they would if they had been elected by the creditor.

Two of the members of the court do not agree with the majority in this holding. Judge Avery and myself dissent from it. We think it is a matter of entire indifference whether they derive their title from the original deed of assignment, under which they have qualified, or from a vote of the creditors. The right which they have is precisely the same, and the order has not affected them, nor affected, in the sense of the statute, any creditor who desires that they should remain in their position. The language of the statute is that an appeal may be had "by any person against whom such order, decree or decision shall be made, or who may be affected thereby," and according to our understanding adversely affected. But the majority of the court are of opinion that the right of appeal from this first order did exist, and, on the authority of the case of Hubbell v. Rennick, 1 O. S., that the probate judge, having refused to recognize this right, they might prepare a bond and file it in the probate court, and thus appeal their cause to the court of common pleas, the right remaining in the court of common pleas, upon any allegation of the insufficiency of this bond, to require a new one to be given.

The opinion, therefore, of a majority of the court is that the first order of the probate judge, declaring that there was no election, has been vacated by an appeal to the court of common pleas, and that the whole of that cause was transferred from the probate court to the court of common pleas, the proceedings subsequent to the filing of the petition for an election having been vacated and the petition pending in the court of common pleas for future action.

The decision of the court, therefore, will be that both of these orders, the one dismissing the appeal from the second election and the one dismissing the appeal from the first election, shall be reversed, and the causes reinstated in the court of common pleas.

The question then arises: Shall an injunction be allowed restraining Leo A. Brigel from taking possession of the property of George Weber? The opinion of the court, as already announced, is that Leo A. Brigel has no title as assignee, and has no right to take possession of the property of the estate nor to interfere in the management of it; but it does not necessarily follow that an injunction shall be allowed preventing him from

asserting a title or attempting to take possession. A court of chancery will not proceed to grant an injunction to restrain a wrong, unless the necessity for it shall be apparent.

At the time when the original petition was filed the only allegation upon which an injunction might be allowed, and upon which, in fact, the temporary restraining order was allowed, was the fact that Brigel was about to take possession of the property under a void order, issued upon a void judgment of the probate court, by force. Upon this the temporary restraining order was allowed. There were subsequent allegations made in the supplemental petition. The temporary restraining order ought not to have been allowed on this allegation. Although a person may be threatening to proceed under a void judgment to take possession of property, it does not follow that an injunction shall be allowed to restrain him. An injunction will not be allowed if there is an adequate remedy provided by the law to prevent the evil. In this case the right to appeal from the judgment and vacate it existed, and that right the parties did afterward avail themselves of. If there had been no right to appeal, the right existed to proceed in another court to vacate this order upon petition in error, and either of these remedies remained to the party, and there was no occasion, therefore, upon this allegation, to apply to a court of chancery to restrain by injunction, and the judge—I am happy to say that I must take the blame to myself—who allowed the restraining order upon this petition erred. The supplemental petition alleges that subsequent to the perfecting of the appeal from this void order of the court of common pleas, threats were made to proceed non obstante under the order to put Leo Brigel into possession, and that he had in one instance interfered with a debtor of the estate to collect a claim due to the estate. Upon the hearing we do not find that these allegations were sustained by the proof. Upon the contrary, the preponderance of the testimony is that, subsequent to the appeal, and, indeed, subsequent to the service under the temporary restraining order granted upon the original petition, no threat was made by Leo Brigel to disregard the restraining order, or to proceed in disregard of the fact that the judgment on which the order issued to him was based had been vacated by an appeal to the court of common pleas, and that on this ground there was no necessity for an injunction. This is the opinion of a majority of the court. Judge Longworth and Judge Cox dissent from this opinion. These being the opinions of the majority of the court—the petition and supplemental petition for an injunction will be dismissed at the costs of the plaintiff.

The judgments dismissing the appeals will be reversed and the causes remanded to the court of common pleas for further proceedings.

Judge Hoadly—The order in the equity cause, if I understand it right, is put on the ground, which we should desire incorporated in the entry, that the parties had an adequate remedy at law.

Court—That is all. We find that there is not a case for an injunction, because the evidence does not show the necessity for an injunction; does not show the existence of threats to proceed in violation of law.

Judge Hoadly—All I desire to guard against is having an estoppel in the case with regard to a matter and on a ground upon which the court have expressed no opinion.

Court—Your entry can be drawn in that way.

Mr. Kramer—If I correctly understand the decision in reference to the first election the cause appealed by creditors from the probate court to the court of common pleas will there stand for hearing, de novo, as though the court there had original jurisdiction.

Court—That is the decision.

William M. Ramsey, Judge Hoadly and D. M Hyman, for plaintiffs.

Long & Kramer, for defendant.

FIXTURES. 515

[Mahoning District Court, March Term, 1878.]

C. D. HINE, ASSIGNEE, v. EVAN MORRIS ET AL.

The terms of sale of machinery to be put up in a factory, by which the purchase-money was secured by mortgage on the machinery, preserves the chattel character thereof as against a prior mortgage on the real estate, as to parts bolted to the foundation, and other parts not attached, by, in, and on which other structures so rest as to fall if such part is removed.

George Turner & Son were manufacturers of railroad spikes. In the prosecution of their business they owned and used about five acres of land, upon which was situated their factory, containing boilers, engines, and machinery necessary for the work to be done. In the spring of 1875, being in embarrassed circumstances, they called their creditors together and procured a compromise at a certain per cent. on the dollar, giving their notes for the compromise amounts. To secure the payment of these notes, they executed to Evan Morris, William J. Hitchcock and William Rice as trustees of their creditors, a mortgage upon the five acres of land and spike factory. This mortgage was dated May 28, 1875, and recorded June 30, 1875. After giving this mortgage, finding it impossible to profitably carry on the business if obliged to buy the bar iron used in manufacturing the spikes, they determined to procure facilities for rolling their own iron, and to this end called upon defendants Homer, Hamilton & Co., and requested them to make a pair of bar mill shears, a set of heating furnace castings, a set of boiler fire fronts, and a ten inch train of rolls. Hamilton & Co., who were creditors of Turner & Son, refused to make the articles unless they were secured in some way. Turner & Son replied that they would give them the property furnished as security; that unless Hamilton & Co. were secure, they Turner & Son, did not want the order filled. With this understanding, Turner & Son wrote an order for the property, closing with these words: "Terms of payment, one-third cash on completion of work, with interest to make it equivalent to cash, note to be secured by mortgage on machinery furnished by you and on a large pair of shears."

Hamilton & Co., began delivering the property in August, 1875, and continued until about the 1st of December, 1875, when it had nearly all been set up in a new building, erected expressly for it, being an extension of the spike factory building. Upon the 3rd of December, Geo. Turner & Son, in payment of the property, executed a note for $1,503.56 and a chattel mortgage to secure its payment upon all the property delivered, and one pair of T. Rail shears, purchased by Turner & Son, in New York, and placed in the mill after the first mortgage was executed.

The shears were placed upon a crib foundation of timber, sunk four feet in the earth, through which four bolts were run, projecting through holes bored in the bases of the shears, and upon the ends nuts were screwed to hold the shears in place. The fire-fronts rested upon a stone foundation, and supported the ends of the boilers; if they were removed the boilers would fall unless propped up; they were not secured to the foundation. The heating furnace castings were four iron plates bolted together so as to make a square, placed upon solid stone foundations, but were not fastened to the other work, and the furnace was built of brick inside this frame or shell. If the plates were removed the furnace would be useless, falling to pieces as soon as fire was built. The rolls were placed upon a crib foundation, built of timbers, 32 feet long, and 12 inches square, sunk four feet into the ground, through which twenty-four bolts were run, projecting through the iron frame upon which the rolls rested and worked, and topped with nuts screwed on to hold the rolls in their places. All was then attached to the shafting by belts. It required an application of seven horse power to work the shears and of seventy horse power to work the rolls.

The note of Hamilton & Co. was not paid, and upon the 4th of May, 1876, Geo. Turner & Son made an assignment to plaintiff for the benefit of creditors.

This action was brought for the purpose of adjusting the liens upon the property. The issue was between Evan Morris et al., and trustees who claimed the property in dispute to be fixtures subject to their real estate mortgage, and Homer Hamilton & Co., who claimed them still to be chattels subject to their chattel mortgage.

Upon trial in the court of common pleas a judgment and decree was rendered for Hamilton & Co., from which the defendant, Evan Morris et al., appeal to this court. Upon hearing, this court affirmed the judgment of the court below, holding that the agreement between Homer Hamilton & Co., and Geo. Turner & Son, was sufficient to and did have the effect of preserving the chattel character of the property. That although the question presented has never arisen in this state in just this form, yet the language of the court in the case of Brennan v. Whittaker, 15 O. S., 446, taken with the case of Tifft et al. v. Horton et al., 53 N. Y., 377; Eaves v. Estes, 10 Kans., 314 (s. c. 15 Am., 345,) clearly indicates that the judgment in the case should be for the defendants, Homer Hamilton & Co., who, by virtue of their chattel mortgage, though given subsequent to the real estate mortgage, have the first lien upon the property, and are entitled to be paid their claim in full first from the fund in the hands of plaintiff, which arose from the sale of the mortgaged premises.

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517 **JUDGMENT—LANDLORD AND TENANT.**

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

LAWRENCE BURNS, ADMR., v. MARY LUCKETT.

1. A finding for plaintiff and sending the issue to a jury to assess damages on failure to answer is a mere interlocutory order and not a judgment, and does not bar the court from taking the case from the jury, if the petition states no case or the testimony makes out none.
2. There is no obligation on a lessor to keep a privy common to two houses belonging to him, occupied by different tenants, in repair, and he is not liable for death by falling in, the condition being decayed.

Cox, J.

The case came up by petition in error. The original petition was filed by the administrator of Lawrence Burns, a child five years old, whose death was caused by falling into a privy vault. The plaintiff alleges that Kate Burns, the mother of the child, was a sub-tenant of a tenant of Mary Luckett. The property consisted of two tenement houses, both of which had been leased out to tenants, and in the center of the lot was a privy common to the tenants of all the property. The suit was to recover damages against the owner on the ground of the decayed condition of the privy. No answer was filed, and when the case was called in one of the submitted rooms, on application of counsel, there was a finding for plaintiff, the court directing the issue to be sent to a jury to assess damages. As a subsequent term on trial before a jury, no answer having yet been filed, the court after testimony had been heard, on application of defendant, took the case from the jury and dismissed the case. It was claimed there was error in this.

This finding of the court at the previous term, was not a judgment. It was a mere interlocutory order, over which the court had control within its direction when the case came to be tried before a jury, and if at that time court was satisfied there was not a case properly stated in the petition, or a case made out by the testimony, could take action accordingly, without reference to the previous finding. As to the objection that the court erred taking the case from the jury, and directing a verdict for the defendant, the court had a right if there was no testmony offered by the plaintiff tending to show that he was entitled to recover, to direct such a verdict; but if testimony was offered tending to show that the plaintiff was entitled to recover, the question was then for a jury. Whether there was testimony tending to show that the plaintiff was entitled to recover, was for the court to decide. The premises occupied by the mother of the deceased, it appeared, had been held under a lease by Mary Sweeney, obtained some twelve years ago from General Wade, and subsequently she occupied as the tenant of John Wade, and since then as the tenant of Mary Luckett, who succeeded to the property as one of the heirs of General Wade. The plaintiff claims that the mother of the child, Kate Burns, was a tenant of Mrs. Sweeney, the tenant of defendant, the owner of the premises, and that the defendant being the owner, is liable for the damages which resulted from the defect in the privy. There is no allegation in the petition which charges, nor anything in the testimony which shows that she contracted to keep in repair.

The supreme court has decided in Burdick v. Cheadle, 26 O. S., 393, 397, "that there is no implied engagement or promise on the part of the lessor that the leased premises are in a safe condition, or that they are fit for the use to which the lessee intends to put them. If they be unsafe or unfit, it is the duty of the tenant to make them safe, or to fit them for the intended use, and the landlord may reasonably expect that the tenant will do so." The supreme court commission has also decided the point directly in the case of Schindelbach v. Moon, 32 O. S., 264, using the following language:

"A landlord who has demised property, parting with possession and control thereof to a tenant in occupation, is not responsible for injuries arising from a defective condition of such premises, when that defect

arises during the continuance of the lease. If the defective condition of leased premises occasions damages, in order to make the lessor or landlord responsible, it is not sufficient merely to allege ownership in him, but the special circumstances creating his liability must be averred."

The judgment would be affirmed.

Wilby & Wald, for plaintiff in error.

Jordan, Jordan & Williams, contra.

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519 **EXECUTORS.**

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

ROBERT COLLINS v. A. J. NUGENT ET AL.

Although a debtor of decedent is appointed his executor, his liability on the debt continues, and is a sufficient consideration after his resignation, for a mortgage by him to the one entitled to the debt by the will, and such mortgage is good against subsequent levies on the property.

AVERY, J.

Andrew J. Nugent was the executor of Andrew Nugent, his father. In a few months he resigned the executorship, and George Taph was appointed administrator *de bonis non*. The will provided that six per cent. on whatever money was due to the testator from his son should be paid to a daughter annually during her life; and after her death, and payment of legacies, the principal to go to Andrew J., and his brother. At the time of the death of the testator two notes for $3,100 were due from Andrew J., and after he resigned the executorship and Taph was appointed, he made a mortgage to his sister and Taph as administrator, the condition being the payment of interest to his sister during life, and the principal to the administrator. The controversy that now arises is with certain creditors of his who have levied on the mortgaged property, and who claim that by his appointment as executor, the debt due from him upon the notes was extinguished, and that, therefore, the mortgage was without consideration.

Where a debtor is appointed executor of the estate of his creditor, in one sense the debt may be said to be extinguished, because the right of action on it is gone; but notwithstanding this, the liability remains. No right of action can exist, because the hand that is to pay the debt is the hand that is to receive it, and a man cannot bring action against himself; but yet, as executor, he remains liable for the debt, and must account for it as assets, Bigelow v. Bigelow, 4 O., 138; Hall v. Pratt, 5 O., 72. This principle has found its way into our statutes, where it is provided that the naming of any person as executor shall not operate to discharge a just claim, but the executor shall remain liable as for so much money in his hands. S. & C., 578.

The mortgage was given by one who had been executor, and had resigned to the administrator appointed in his place. By section 26 of the Executor's act, an administrator de bonis non is entitled to the assets unadministered, and may bring suit for the same against the former

executor. In Frazer v. Fulcher, 17 O., 260, it was held that a mortgage to secure a debt would be kept alive in equity, notwithstanding that upon appointment of the debtor as executor, the debt would be a fiction of law be extinguished.

In this case, the executor having been a debtor of the testator, the nature of his liability was changed by his appointment as executor; nevertheless it continued as a liability, and it is not perceived why such liability would not furnish a sufficient consideration for the mortgage, nor why a fiction of the law can be invoked against the will of the parties to destroy a security upon which they have agreed.

It is true the administrator might have had his action upon the bond of the executor; nevertheless he was not deprived of obtaining better security. A security might have been given by Andrew J. Nugent to the sureties upon his bond to answer for this very liability of his out of the assets. Now, it is but doing the thing directly to give the security to those who are entitled to the assets of the estate. As between these parties it is not a case of two securities to which a person having the benefit of two may be compelled to resort by him who has only the benefit of one, since if the administrator should resort to sureties upon Andrew J. Nugent's bond, these sureties would be entitled to stand in the administrator's place, and so be subrogated to his rights.

Therefore, when a security for the assets in the hands of the executor has been given to the administrators, and the parties have consented for that purpose to keep the liability alive, it seems to us to be no answer at all to say that by the appointment of a debtor as executor, the debt at law is extinguished; because while in the one case, notwithstanding it may be extinguished at law, in equity it may be kept alive, in the other case there is sufficient consideration for the mortgage in the liability for the assets which the executor had in his hands.

Decree may be taken accordingly.

McCrary & Karr, for plaintiff.

Hollister & Dustin, for defendants.

[Superior Court of Cincinnati, General Term, January, 1878.] 521

GEORGE W. DYE v. CATHERINE G. GIOU.

For this opinion, see 6 Dec. R., 623 (s. c. 7 Am. Law Rec., 144).

[Superior Court of Cincinnati, General Term, January, 1878.] 523

J. P. KILBREATH v. SAMUEL FOSDICK.

For this opinion, see 6 Dec. R., 629 (s. c. 7 Am. Law Rec., 153). It was affirmed by supreme court, without report, March 17, 1885.

525 LIMITATIONS—BILLS AND NOTES.

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

Yaple, Force and Harmon, JJ.

†KILBREATH ET AL. V. GAYLORD, ADMR., ET AL.

The statute of limitations does not run against notes payable upon demand which subscribers to the stock of an insurance company organized before the adoption of the present constitution, gave to the company for the stock subscribed by them.

YAPLE, J.

This is a petition in error prosecuted here to reverse a judgment of this court in special term, which judgment affirmed the report and finding of a Master Commissioner.

It appears that in the year 1851, prior to the taking effect of our present constitution, and consequently before what we call individual liability attached to stockholders of corporations created by the laws of this state, certain parties, who are defendants here, organized, and others of them became stockholders after organization, of the Washington Insurance Company. The defendant, after its organization, insured the life of a party who died the next day, showing thereby that he was none too early in taking out the risk. The company refused to pay the loss, and suit begun. Several trials were had, and new trials granted, and the case was litigated back and forth until February, 1872, when the plaintiff succeeded in recovering upon the policy. The beneficiary had died, and the policy had been assigned to various parties, and finally to this administrator's intestate. After that judgment was obtained, execution was issued and "no goods or chattels, lands or tenements found" whereon to levy; and it also appeared that the corporation had for many years ceased to elect directors or to keep up its organization, or do any business in the way of insurance. It had, in fact, wound up its affairs, and from all that appears, this is the only outstanding claim against it.

Thereupon, Gaylord, as administrator, filed a creditor's bill to subject the unpaid stock subscription to the satisfaction of the judgment which he had so obtained in 1872.

The defendants answered, setting up the statute of limitations, that more than fifteen years had transpired, and they further showed that for the stock subscriptions which were unpaid, stock subscribers, these defendants, gave their promissory notes to the insurance company, payable on demand, and that as a further guaranty, certain stock subscribers would go security on the note of certain other stock subscribers, and thus they had these notes. They say that these notes took the place of the stock subscriptions, and were due immediately, and that under the decisions, which settle the law in Ohio, the statute of limitations began to run from that period, and that when this plaintiff filed his bill, he could only reach such equities as existed then in the insurance company, and that the insurance company had no equity because of this statute of limitations that was interposed by answer; that the debt was dead, and therefore that the plaintiff could recover nothing. I might say the petition, as amended, counts upon the unpaid stock subscriptions and the notes, and the decree finds upon the basis of the stock subscriptions.

Upon the notes, except as against the directors, I suppose the statute would run. There are certain ones that it is averred and proved were the notes of the directors, and as to these it would seem to be clear that the statute would not run, for the reason that the directors held this trust, and it was their duty to pay their own subscriptions, and to collect those of other stockholders; and it does not seem that they could, by neglecting to do that, create the statutory bar in their own favor, and

†The question of the right of the district court to review the decisions of the superior court in general term was made in Kilbreath v. Gaylord, *post* 547. That decision was affirmed by the supreme court in Gibbons v. Institute, 34 O. S., 289. The decision of the superior court above was affirmed by the supreme court. See opinion, 34 O. S., 305.

thus escape liability by their own neglect of official trust and duty, and the serious question presents itself whether or not the statute of limitations is available as to the stock subscriptions generally.

As we say, that will depend upon whether they may set it up as the notes accord and satisfaction of the stock subscription liability; whether the stock subscriptions were paid by the notes; whether the notes became that which could be sued on. The authorities in many cases are that where you take the note of another person, whilst strong evidence that it is payment in accord and satisfaction, it may not be under the circumstances; and while it may suspend the debt, if time is given on the note, yet when it becomes due you may sue on the original consideration if you so desire.

But, taking this decree and the evidence on which it is based, it does not appear that these notes were taken as in accord and satisfaction, or as anything more than a mere guaranty and security for the payment of the subscription debt; and upon that evidence we do not think we would be justified in overruling the findings of the Master in the court below, and hold it to be in accord and satisfaction.

But, it is said, there was a provision of law which required this company, before it could do business, to have a certain portion of its capital stock paid in, and that unless these notes were that payment, the law would be violated, and that an intention to violate, or violation of law should not be presumed, and they bring that in to strengthen the legal presumption that the notes were the only thing that could be resorted to, and that they were payment and satisfaction of the subscriptions. We have this to say with reference to that:

The reason of a law preventing a company from doing business until a certain amount of its stock is paid in, is that the company may be strong in funds, and we cannot see that taking notes in this way would at all satisfy the law as to what portion should be paid in before they could do business. We think if they did not collect the money, it would be an evasion of the statute, and they could have been restrained until the money was paid in, and it would be just as much an evasion of the law as to let the stock subscriptions stand; and we cannot therefore say that the notes were taken in satisfaction, and must say it stands on the subscription.

While in many states the statute would begin to run against subscriptions from the time the corporation ceased to do business, or failed to keep up its organization. it is not so in Ohio; because, before this company was organized, standing yet upon the statute book, we find at page 368, 1 S. & C., an act passed March 21, 1850, that provides: "That the dissolution of corporations, or their failure to do business, does not operate as against creditors; but they still subsist as corporations for the purposes of suing and being sued." And this was the law from 1850, and is so up to this time.

Then comes the question: What is the nature of a stock subscription? We think it is clear from the method of organizing corporations and of conducting them, that the universal course is not to pay in all the subscriptions at once, but to pay in by installments as called for, and until called for the subscription is continued. It is a continuing liability, and will stand until the call is made, and there never having been a call for these subscriptions, and the plaintiff, after he obtained his judgment in 1872, though trying to establish the claim, never having been in a position to subject this stock, it would seem that the rule prescribed by the statute of limitations does not apply.

We have examined carefully the authorities that have been referred to. Some call it a trust. We found one additional authority in 53 Ala., page 371, the case of Curry v. Woodward. That was upon a statute of limitations passed since the war, and the court there say:

"These sums of money in the hands of the corporators were a part of the capital of the company—of the fund with which it was to transact business and pay its debts. They were its money, held in trust for it, to be paid when and as it should need and call for it, as much so as if the stockholders had received it from the vaults of the institution upon an express agreement so to hold it. Moreover, they themselves constituted the corporation, elected its officers, and through these controlled and managed its affairs. It was not a thing apart from, but was composed of them."

But in our case, as we have seen, the statute keeps this corporation alive. Now that we think prevents the statute of limitations from running generally, and that will apply to all who subsequently became stockholders, even after the creation of their debt; because they subscribed *cum onere*. They would have their share of previous profits, and would be liable for their share of previous losses, and would have to stand assessments to pay the same.

There is a branch of the case peculiar to Gen. Cary. He files a cross-petition, and says that he is entitled to an offset because he advanced money to pay a loss, and that he is entitled to credit for that.

The Master found against him. Plaintiffs replied to his cross-petition, and all the others take no notice of it. In the first place, Gen. Cary's petition cannot interfere with the rights of these plaintiffs, as the suit is not to set aside a fraudulent conveyance under the 17th section of the insolvent act, but to reach equities under a section of the Code for that purpose. The creditor first filing a bill, obtains a lien in preference to the others, and so Gen. Cary's claim would be an independent one, and not at all dependent upon the plaintiffs. The plaintiff could recover the full amount of him. He holds the first claim. But as Cary asserts an independent claim, and has caused no summons to be issued upon it, none of the co-stockholders of the company were bound to pay any attention to his demand until he issued a summons and had them brought into court to answer, and that he may do yet. The finding was properly against him. We have held here several times, that on a cross-petition setting up a distinct and independent claim, the parties doing it must have a summons issued as though they had brought an original action.

There were some other allowances made by the Master, to certain parties who had paid debts, or loaned money, or held claims that under the decisions in Ohio would be postponed to these plaintiff's rights, because he got a lien by filing his bill. But nobody objected to that finding. It is not excepted to. There it is, there it stands, and the court, as everybody is satisfied with it, has no power to touch it, whatever the principle governing it may be.

The plaintiff was not bound to surrender the notes given by the defendants for their stock subscriptions, nor to indemnify against them, for he is not in possession of them, and they are barred by the statute of limitations if in the hands of third parties as assignees.

Judgment affirmed.

Collins & Herron, for plaintiff.

Hoadly, Johnson & Colston and Stallo & Kittredge, for defendants.

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529 **MASTER AND SERVANT—ERROR.**

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

†DAVID SINTON v. THOMAS BUTLER.

In an action against the owner of a building for damages for an injury from a falling elevator, it is not error to charge the jury that if it appears that the owner, and not the tenants, had the control, direction and management of the machinery, and did not merely lease the elevator, but undertook to supply transportation or carriage, he is liable for mismanagement of the employee in charge of the apparatus, that ought to have been known to such employee, if the damage happened while plaintiff was properly on the elevator in discharge of his business, in the reasonable use of the same for the purposes for which it was kept.

YAPLE, J.

The action was brought by Butler against Sinton for injuries sustained by Butler in a fall of an elavator in what is known as the Sinton Block on the east side of Vine street below Fourth. Butler was an employee of Tolle, Holton & Co., and while ascending upon the elevator, when he had reached near the third floor the elevator gave way, precipitating him to the bottom of the cellar, where it rested, and he was severely injured. It is conceded that his injuries were very severe, and will be permanent in some respects. He was injured in August, about the 14th, and he attended business on the 25th of January following. His doctor bills, nurse bills and loss of salary in that time amounted to nearly $2,000. The verdict was for $7,000. His side was found to be subjected to paralysis, and the arch of his feet broken, and in many respects he was permanently injured, so that if there is any right at all to recover under all the circumstances the verdict would not be so high that the court would interfere with it.

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†The decision of the superior court in this case was reversed by the supreme court. See opinion, 40 O. S., 158.

The arrangement was somewhat peculiar. There are three stores in the building rented by Sinton, and in each one there is an elevator. The elevators are all operated by a steam engine under the control of an engineer outside of the store building and in a certain part of the premises. He fires up and furnishes steam, and he also goes in and oils the elevators and sees that they run, and as persons desire to use the elevator all they have to do is to pull the rope and they go up and down.

It appears to be necessary to have somebody upon the elevator to go up and down with the goods, to see that they are properly gathered and are taken care of. Now, while this elevator was in operation one afternoon, as Butler and two or three other persons with about 260 pounds of goods were ascending the elevator, it being calculated to carry a much heavier weight, the ropes gave way, and all were precipitated to the ground, some sixty-five or seventy feet, and the plaintiff was injured, and for such injury, the action is brought.

There was a lease by which Sinton was to pay the engineer, pay first for the coal, and at the time the accident happened he was to keep the elevator in this building in repair, and then he charged over the amount to the various tenants, one-third to each, and they reimbursed him. There is silence in the writings as to who really had control of the engine and the right to direct the engineer. There is a conflict of testimony as to the fact on that point, and the matter had to be submitted to the jury on testimony.

On the whole case it is clear that if Sinton had the engineer in his employment, and he was carrying these goods up, furnishing them the power and transmitting them the power whenever they might see fit to hook on, that the engineer would be his employee, and for the engineer's carelessness or for any other carelessness in running the machine he would be liable if there was no contributory negligence on the part of the party injured, and it does not seem that you cannot ascribe any contributory negligence to Butler. He did once call attention to the condition of the rope, and the engineer says he told him that the rope was all safe enough.

Now, the court gave a charge on that subject, which is expected to. The court charged the jury clearly in the first place that if the engineer was in the control of the tenants Tolle, Holton & Co., and the engineer was in their employ, and they had the right to discharge him and control him and the machinery, there was no liability on Sinton's part; but, "If on the other hand it appears that Mr. Sinton had the control, direction, and management of the machinery, so that in connection with his agreement to keep the elevator in repair, he did not merely lease an elevator, but undertook to supply transportation or carriage, then he is liable for damage happening to the plaintiff by reason of mismanagement on the part of the Mr. Sinton's employee in charge of the steam hoisting apparatus or by reason of any defect in said apparatus, known or that ought to have been known to such employee. If such damage happened to the plaintiff while he was, as one of the employees of Tolle, Holton & Co., properly on the elevator in the discharge of his business, and in the reasonable use of the elevator for purposes for which it was let.

They excepted to that charge because it was said the evidence did not warrant the giving of it. On a full examination of the bill of exceptions we think the evidence did warrant the charge and that that was one of the very questions to be determined upon the evidence. The jury found that Mr. Sinton had the active control and management and we see no reason to disturb the verdict on that account, for the charge is admitted to be absolutely correct.

The foundation of this action is not contract; it is lost, and therefore any party operating machinery like this, of which he has the control, owes a duty to everybody who is lawfully there, entirely independent of contract, to use ordinary care under all the circumstances, and if by his want of using ordinary care injuries should occur to any person without contributory negligence on the part of that person who is lawfully there, he is liable. We think this a turning point in the case, and that the evidence warranted the jury in finding as they did upon that point, and that there was no error.

A number of objections were made as to what the engineer said about the rope, which evidence was competent if the engineer was Sinton's representative, and there were other objections made as to parties who were not experts offering to testify to opinion, and that was ruled out. Certainly there was no error in that. Then there were objections made because the parties testified as to the manner in which this elevator was used, how it was employed and what was the habit of employees as to riding upon it. There were several questions of that kind, and the court held that that testimony was proper, and we think it was highly proper, because the engineer went in there every day to oil the machinery and see that the elevator was running right. There could be no objection then upon that point

There were charges asked by the defendant, all of which were refused by the court, and the court gave a general charge in lieu of them. The first charge asked was clearly correct, but the court covered it fully, and we think the charge of the court was correct in every particular, and as full and as clear as could be required, and that the charges asked for the court was not bound to give in the very words requested.

We have not gone into the structure of this rope, or how the accident occurred, or what was the character of the elevator, because if it broke by running on the shaft of the drum, it is very probable that after it started to fall, the drum kept revolving, and that would throw the rope on the shaft. The rope had given out once, it appears, and they turned it end for end. Then as to the schieve wheels, they had two of eighteen inches in diameter. Although the rope goes only one-fourth around where there are two wheels, yet that will always bring it on the schieves at the same places. The eighteen-inch schieve wheel is too small.

Upon the whole case we feel obliged to affirm the decision.

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538 PARTNERS AND PARTNERSHIP.

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

Tilden, Yaple and Force, JJ.

MITCHELL & RAMMELSBURG FURNITURE CO. v. CHAS. RUNK.

Where one partner becomes deeply indebted to the other, and the defendant is selected to wind up the business by assuming control, taking an inventory, putting the stock in condition, making collections, etc., applying the proceeds to the amount due to the creditor partner, and providing that "He shall arrange for room in the factory, such factory belonging to the debtor partner, to whose credit the rent has always been placed, such defendant has power to pay the debtor partner in cash for the use of his factory, instead of crediting the rent to his account.

YAPLE, J.

This was an action brought in special term by the Mitchell & Rammelsburg Furniture Co. against Charles Runk, to recover something less than $500, for failing to account for the proceeds of certain furniture left in his hands as agent to dispose of. The jury found a verdict for the defendant, and a petition in error is filed here to reverse the judgment rendered upon that verdict, because it is contrary to the evidence, and because the court erred in its charge to the jury, which charge was excepted to at the time. It seems that Mitchell & Rammelsberg, an Ohio corporation, and Joshua Jones, formed a co-partnership to manufacture furniture of various kinds in this city; that they occupied the factory building of Joshua Jones, and the firm paid rent to Joshua Jones by quarterly passing the amount of rent to his credit upon their books, and it appears also that in the final winding up of business, Joshua Jones was indebted to the Mitchell & Rammelsburg Furniture Company in something like $20,000, and that Joshua Jones is insolvent. In the progress of their business, there were differences, and they submitted the same to arbitration, and the arbitrators made this award:

"Cincinnati, September 4, 1873.

"In the matter of business differences at issue between the members of the firm of Joshua Jones & Co., the undersigned arbitrators, selected by the parties, present, as an equitable basis of settlement, the following:

"1. That Charles Runk, at the request of both members of the firm, is chosen to close up the business, and vested with full powers, subject to the conditions herein stated, a copy of which will be furnished to each party interested.

"2. On Mr. Runk's assuming control of the business, Walter Jones, the former bookkeeper, will be relieved from further duty, and his salary cease.

"3. It will be the duty of Mr. Runk to enter into charge of the concern at as early a date as possible (September 9, 1873), take a complete inventory of the stock, noting the condition of the furniture as regards its completeness and finish, also kind of work. If a reasonable amount of labor in varnishing or oil finishing will put the work in better condition to transfer or sell, then this shall be done under his direction.

"He shall arrange for room in the factory, when an equal division of the furniture shall be made to as full an extent as practicable and list taken, noting kind of wood, style of finish and state of completion. When so separated, one lot will be delivered to the Mitchell & Rammelsberg Furniture Co., and the other to Joshua Jones & Co., charging each at the same rate of valuation on the books of the concern. In case a selection can not be made satisfactory to both parties, preference shall be decided by lot. After all furniture that can be is disposed of, the remainder of the assets belonging to the firm, excluding cash book accounts or other evidences of debts due the firm, will be properly arranged, unless previously disposed of at private sale, or sold at public auction, the sale to be at the discretion of Mr. Runk. The proceeds of the sales and collections are to be applied first, to the payment of all debts due to the firm, and second, to the liquidation of such amount as may be due to the Mitchell & Rammelsberg Co. in excess of the account of Joshua Jones.

"In the event that the full assets of the firm, remaining after the division of the furniture, may not re-imburse the Mitchell & Rammelsberg Furniture Co., to the amount due them, in excess of the amount to the credit of Joshua Jones above stated, the amount due them (the authority to empower Runk to pay the sum in dispute for Jones.
giving them (the Mitchell & Rammelsberg Furniture Co.) an approved note, bearing interest and payable six months from date of settlement. The dissolution of the firm shall be published in one or more of the daily papers, to take effect from the date of such publication.

"Mr. Runk will use due diligence in collecting such accounts as may be owing to the firm, and keep all books and accounts correctly, and when assets are disposed of as before provided, such accounts and claims due the firm as may be uncollected will be divided between the parties, or placed in the hands of such collection agent as they may agree upon, and his trust surrendered by Mr. Runk.

"Mr. Runk is to receive, etc.

"In case more time is required by Mr. Runk than thirty days to close the business, compensation for extra time will be allowed by the arbitrators."

Now on the evidence the court charged the jury, that it was for them to determine what authority had been given to Brittingham, and that if Mitchell gave Brittingham authority to settle all accounts that might arise between the parties under the trust, then Brittingham would have authority to empower Runk to pay te sum in dispute for Jones.

The objection to the charge of the court is that it said that anything that Brittingham, the agent for Mitchell & Rammelsberg Furniture Co. should agree to, might under the trust, be allowed. The division of the furniture was made as far as could be done, to one party one lot, and to the other party the other. There was a portion of the furniture that the parties were unable to divide, and dispose of between themselves, and that was put up for sale. The Mitchell & Rammelsberg Furniture Co. bought a part of this for which they paid cash, and Jones bought a part, for which he paid part cash. He bought about $1,000 worth, and brought in a bill for rent for between four and five hundred dollars, and Runk allowed him that rent to compensate for that much of his furniture bill bought. And that is what it is objected Runk had no power under the trust to allow, and what the Mitchell & Rammelsberg Furniture Co. seek to make him account for in this action.

Robert Mitchell was the chief manager of the Mitchell & Rammelsberg Furniture Co., and just at this time, being called away to Europe, he appointed to act for him in his absence, a Mr. Brittingham, and the evidence is that Mr. Mitchell stated to Mr. Jones and Mr. Runk, in the hearing of witnesses, that, while he was away, whatever Brittingham did would be the same as though he was there and did it himself, and this allowance of rent to offset so much furniture was made between Brittingham, Runk and Jones.

The evidence is that it was stated to Brittingham, and Brittingham said he would consider it. He considered it until next morning, and then he came in and said that it was perfectly fair, and Runk so closed the business.

Now the question arises whether under the trust, if that power was given to Brittingham to act for Mitchell, he had power to agree to pay Jones for the rent of the building, instead of crediting Jones with the amount of it on the books? It seems to us that in the argument one provision of the award is overlooked. This would be a liability after getting into the hands of Runk, an arrangement for rent, and it is this: "He shall arrange for room in the factory." What is the meaning of "arrange?" The factory was Jones'. Now, if it could arrange by any proper bargain to pay rent anywhere, it would become a debt or charge of the administration of the trust, and would have to be among those items first paid before it came to the application of credits as between the parties. Of course half of the furniture bought by Jones was Jones', and half the charge of the rent would be Jones', but the other half of the rent, and the other half of the furniture would balance, and it would come to the same whether you had it divided or had their interests unseparated.

Upon that evidence and upon that proof of what Brittingham did, and as this agent did not derive any profit, except his wages, having paid the money over, and Jones having become insolvent, it seems to us that the court and jury were warranted in finding a verdict for the defendant, and in view of the whole case we are constrained to affirm the judgment, which will be done.

King, Thompson & Maxwell, for plaintiff.

Howard Douglass, for defendant.

[Superior Court of Cincinnati, General Term, June, 1878.] 541

CITY OF CINCINNATI v. E. H. DODSON.

For this, which is the dissenting opinion of Judge Yaple, see *post* 504.

[Superior Court of Cincinnati, General Term, June, 1878.] 543

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

For this opinion, see 6 Dec. R., 621 (s. c. 7 Am. Law Rec., 118).

COMPROMISE BETWEEN CREDITORS. 545

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

JOSEPH M. RAY v. LEOPOLD F. BROWN.

Where one creditor only refuses to sign a composition, and thereupon a relative of the debtor, without the latter's knowledge or consent, executes his own note to such creditor for the balance, whereupon such creditor signs the composition, the maker of the notes is not liable to one obtaining them from the creditor after maturity. Signing a composition is in spirit an agreement between the creditors themselves, and sustaining an advantage not provided for in it is a fraud on the other creditors.

ERROR to the Common Pleas.

The defendant was the son of Ferdinand Brown, who had effected an arrangement with all of his creditors, except one, by which they agreed to a settlement of their claims upon receiving a certain percentage thereof. Th creditors agreed to this composition, and either signed or agreed to sign it before its presentation to Nathan Ranselhoff, who declined to sign unless he could obtain the full amount of his indebtedness, to-wit: fifteen per cent. more than all the other creditors had agreed to take. It appeared from the testimony that the defendant, without the knowledge of his father, voluntarily waited upon Ranselhoff, and agreed that if he would sign the composition paper, he would execute his note to him for the entire balance of the indebtedness, amounting to $1,397.50. Ranselhoff agreed to that, whereupon these notes were given. After they matured they were endorsed without recourse to the plaintiff. Upon these facts the court found as a matter of law that Leopold F. Brown was not liable. JOHNSTON, J.

It is a well-settled principle of law that where a composition is agreed upon between a debtor and his creditors, if any one of the creditors undertakes to obtain for himself a greater sum from the debtor than the other creditors signing the paper, a note given for this additional sum is void in the hands of the payee; that is, the creditor would not be able to recover thereon, for the reason that it is a fraud upon the other creditors. A composition is not only an agreement between the creditors themselves as well as between them and the debtor, in which the utmost good faith must be observed, and therefore if one creditor take the advantage of the others—if he endeavors to take to himself security for a

greater amount than the other creditors are receiving, the obligation given for this excess is held by the courts to be in fraud of the other creditors and void.

In the case at bar, however, the party promising the additional sum was not the debtor, nor were these notes given for the balance of the indebtedness with his knowledge or consent. In this case, while the debtor was not a party to this transaction, his creditor, Ranselhoff was. He agreed with his son, upon the voluntary request of the latter; and, in fact, on the dictation of Ranselhoff, the son agreed to pay the excess of fifteen per cent., as an act of kindness and charity toward his father. This agreement, by which Ranselhoff undertook to get dollar for dollar for his claim, while the other creditors, whose names were upon the same paper with his own, were to get but eighty-five cents on the dollar, was an act of fraud on his part towards the rest of the creditors. In the case of Breck v. Cole, in 4 Sanf., a case very much like the one at bar, and in harmony with the English cases, it was decided that every composition deed is, in its spirit, if not in its terms, an agreement between the creditors themselves as well as between them and the debtor, and any security given, or agreement for such security, not provided for in the deed, was illegal and void as against the other creditors. Where a debtor, in the course of compromising his debts, by notes made by his brother, was required to and did give to one of his creditors his own note for the balance of the debt as a condition of such creditor signing the deed of composition, the other creditors being ignorant of the transaction, it was held that the note was illegal and void. Such being the current of the decisions, a majority of the court are of opinion that, both upon principle and authority, the decision of the court below was correct, and its judgment would therefore be affirmed.

F. D. Macneale, for plaintiff.

Forrest, Cramer & Mayer, for defendant.

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547 **SURETY—ERROR.**

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

WILLIAM SCULLY v. LOUISA KRUCKER.

The refusal of the court to grant a motion of a defendant, asking that it be certified that one of the defendants was principal and the other surety is not subject to review on error.

LONGWORTH, J.

This was a proceeding in error to reverse a judgment of the common pleas. The defendant in error, Louisa Krucker, brought suit against Wm. Scully and Patrick O'Hearn on two promissory notes, executed jointly by them and assigned to her. O'Hearn filed no answer. Scully answers, setting up that he signed the notes simply as surety for O'Hearn, the principal debtor; that the intention was that the notes should show this fact, but by oversight they were not so drawn; that notwithstanding that was the true relation of the parties, and the plaintiff was aware of it, and by certain transactions with the principal, had caused the surety to be released. This was denied. In November, 1877, upon a trial of the

case, the jury returned a verdict for the plaintiff, and on the day following Scully filed a motion that the clerk be directed to certify that O'Hearn was the principal debtor, and that he (Scully) was surety. The court overrule this motion, and entered judgment for the plaintiff. On the 5th of January, 1878, a motion was filed to set aside this order, and also for a new trial, but the motion was filed as of the last day of the November Term, 1877. So far as that motion is concerned, the court could not look behind the verdict; for whether they treated the last motion, which asked for a new trial, as of the 5th of January, 1878, or of November, 1877, in either case it would be long after the time limited by law.

As to whether the court erred in refusing to certify one of the defendants as principal and the other as surety, where the parties are jointly and severally liable, they may, as between themselves, have equities with which the plaintiff below had nothing to do. The plaintiff could recover from either or both, while as between themselves one would be liable and the other not liable at all. Various methods exist of enforcing the equities of defendants inter se by action by one to compel the other to pay the debt. To avoid circuity of action the Code has provided in section 49, that in all cases where a judgment is entered against two or more, and it shall be made to appear that one or more of the persons signed the note as surety or bail, it shall be the duty of the clerk in recording the judgment to certify which of the defendants is principal debtor, and which are the sureties or bail, and the clerk shall cause execution to issue against the principal debtor; but in case of insufficiency of the property of the principal debtor, execution shall be issue against the bail, after the property of the principal is exhausted. This refers simply to the manner of the execution. As far as the plaintiff is concerned it is a judgment against both. This petition in error was filed by Scully against the plaintiff below. It is clear the order of the court is not one which is subject to review or error. It was not given as against the plaintiff, but was an order to the sheriff in what manner to proceed. The verdict was against both. The judgment properly followed the verdict, and the mere refusal of the court to certify who was principal and who security, was not the subject of review by a proceeding in error.

Judgment affirmed.

L. J. Miller, for plaintiff in error.

Goss & Peck, for defendant.

INJUNCTION—PARTIES—MUNICIPAL CORPORATIONS. 551

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

†RICHARD MATHERS ET AL. v. CITY OF CINCINNATI ET AL.

1. The action of a tax-payer to enjoin the city, on the refusal of city solicitor to enjoin, is a bar to another action, by another tax-payer, for the same cause, the same as if the solicitor had brought both actions; each represents the public.

†See also case in superior court between same parties, *post* 521.

2. The city may grant a right-of-way through a park to a street railroad, and may reserve a rent therefor.
3. It is no misjoinder for two tax-payers to unite in enjoining the city on the refusal of the city solicitor to act.

BURNET, J.

The petition alleged that in November, 1877, the city council passed an ordinance establishing Route No. 16, extending from the Mount Adams Inclined Plane to Walnut Hills, through Eden Park; that Kerper and Henderson each presented bids for the construction of the road, on behalf of himself and his associates; that the bid of Kerper was accompanied by the consent of a majority of the property-holders along the line of route; that the bid of Henderson was not accompanied with such consents, but, instead, with the statement that they were not obtained by him, because they had been previously obtained by another person that the bid of Henderson was the lowest. The petition further alleged that the ordinance required the grant to be made to the individual or the company who should make the lowest bid, and obtain the consent of a majority of the property-holders along the line of the route; that Kerper was not the lowest bidder, and Henderson had not obtained the consent of a majority of the property-holders along the route, and that therefore, a grant to either of them would be contrary to law. The petition further alleged that provision of the ordinance permitting the filing of a statement giving a reason why the consents were not filed, was contrary to the statute, and therefore the ordinance is invalid. The petition also alleged that the ordinance requires to be reserved upon the grant made a rental for the use of the grounds occupied in Eden Park, and that the city had no authority to grant the right to the company to pass through the park at all, the provision of the ordinance being that the route shall pass through the park without passing over any of the avenues of the park, and that the city has no authority to grant a street-railroad route to any company which shall pass over private property, and for these reasons the granting of the route to either Henderson or Kerper should be restrained as contrary to law.

To this petition demurrers were filed on behalf of the city on the ground of misjoinder of parties plaintiff, of misjoinder of causes of action, and that there is no cause of action against the city; and on the part of Kerper and Henderson each a general demurrer. There was also a motion for an injunction.

The court held that as to the demurrers, he said that section 412 of the Code provides that no grant of a street-railroad shall be made except to a corporation, individual or individuals that will agree to carry passengers on the proposed route at the lowest rates of fare and shall have previously obtained the written consent of a majority of property-holders along the proposed route, represented by the feet front. It is essential before such grant can be made that the party to whom it is made shall be the lowest bidder. The allegation is that Kerper is not the lowest bidder, but that Henderson is. The city, therefore, may not make the grant to Kerper, under this section, unless by reason of its being coupled with the language, "Shall have previously obtained the written consent of a majority of the property-holders on the line of the proposed route," etc., it shall be held that it is meant the lowest bidder who shall have obtained

these consents, excluding from consideration or competition any other bidders than those who have obtained the consents.

The purpose of the law is to throw open to the widest competition these street railroad routes, and to secure the best possible terms for the general public, and hence the lowest bidder must be preferred; provided, in other respects, he complied with the law. Under the act regulating street railroads as amended in 1868, the provision in respect to obtaining consents was different from the provisions of the code as they now stand. By the provision of the law it was necessary that the party who obtained a grant should obtain the consent of the property-holders, but it was not made a condition precedent. In the section of the Code there is this change introduced: That the consent of the property-holders must be obtained before the bids will be considered or any grant made, and this is the meaning of the change in this section. As the law stood before, there was the widest competition.

No person was forestalled by the action of any other in competing for the privilege of constructing the road, because the consents were to be obtained afterward. It was not the intention of the legislature in the change made in the section that any person should be forestalled and competition prevented, but that the same competition for the benefit of the public should be invited as was invited before, but simply before any bid should be entertained that it should be ascertained whether the property-holders would consent to the construction of the road, and therefore the consents obtained by any one party will inure to the benefit of all who may file their bids and the provision of the ordinance that where a party does not file with his bid the necessary consents, if he file instead thereof his statement that he does not do so because those consents were obtained by other parties is not contrary to the law, and is valid.

It is, therefore, the opinion of the court that Kerper does not come within the provisions of the law so as to entitle him to this grant, but that Henderson is brought within its provisions by the fact that the consents had been obtained by another party, which will inure to his benefit, and that he is the lowest bidder, within the meaning of the law.

It is claimed that the provision of the ordinance reserving a rent for the use of a portion of a public park is contrary to law, and also that the city has no right to make a grant of the use of a public park for street railroad purposes. The city having the right to lay off roads and avenues for other purposes through a public park, has equally the right to lay off a road for the accommodation of the public in this method through a park. The city might establish first an avenue along the line of this route, and then permit the railroad company to use it. Without that circuity of action the city may at once grant the right to occupy or pass through the park. And the city may also reserve a rent for the use of that portion of the park which is granted to the street railroad company. In neither of these particulars is the ordinance contrary to law.

The demurrer of Kerper must be overruled. As against him the petition is good. The demurrer of Henderson is sustained, not only on this ground, but on another ground. The application for an injunction against Henderson is to prevent the city from making any contract with him for the construction of the road, and to prevent him from constructing it. It does not appear upon the petition that the city proposed at all to make him any grant. On that ground there is no necessity for the

intervention of the court. The only allegation looking in this direction is that he threatens to apply to the supreme court for a mandamus to compel the city to make the grant to him. It would look very much, if on this ground, we restrained the city from making the grant, or Henderson from receiving it, and that we equally restrained the supreme court from granting the relief upon the mandamus.

The demurrer of the city will be overruled, either upon the general ground or upon the special ground named in the demurrer. There is no misjoinder of parties. By the provisions of the code the city solicitor may apply to any competent court to restrain the city authorities from doing any act in contravention of law. If the solicitor fail to do it, any taxpayer may apply in his stead, after having made a written request of him and his refusal. There is no reason why two tax-payers may not unite. On this ground, the misjoinder of parties plaintiff, the demurrer is not good.

Nor is there any misjoinder of causes of action. The object of the petition is to restrain the city from making a grant of this route to either Henderson or Kerper, for the reasons assigned in the petition. This is not a misjoinder of causes of action.

But it is alleged that the city is about to make the grant to a person who is not the lowest bidder. This presents a valid cause of action against the city, and it is proper that the city should be restrained. But on the motion for the injunction, the affidavit of Kerper was presented, in which he alleges that another suit, previously commenced, is now pending in the superior court, brought by Henderson on the same cause of action to restrain Kerper and the city from consummating the grant. From a comparison of the petition in that case with the one in this, the court is of the opinion that the two causes are identical, at least as to Kerper. The Municipal Code provides that the city solicitor may apply to restrain the city from any act contrary to law, and on his refusal any tax-payer may apply in his stead.

The allegation of the petition in the superior court is that Henderson brought the suit as a tax-payer after the refusal of the solicitor to bring it. He presents himself in his representative capacity and not as a private citizen, qualified it is true by the fact that he is a tax-payer, and prompted because the solicitor refused to appear for him. In this case, the Mathers appear as tax-payers in their representative capacity, because the solicitor refused to appear for them. Certainly, if the solicitor had made the application, the plaintiff would be identical, not only in character but in person. In this case, the representatives of the public are in character identical. In their representative character they are the same plaintiff. In appearing, therefore, that there is already pending in a court of competent jurisdiction a petition upon the same cause of action for the same purpose; that they are so between the same parties in such a sense as that the subsequent action must be restrained on account of that proceeding so long as that action is pending, the court, therefore, is constrained to deny the injunction.

The demurrer of Kerper is thèrefore overruled, the demurrer of Henderson sustained and the injunction refused.

Judge Hoadly, on the part of the plaintiffs, obtained leave to amend, setting up that Kerper is about to run his cars on the route, and asking leave to enjoin such running.

Hoadly & Johnson, for plaintiffs.

W. M. Ramsey and the City Solicitors, for defendants.

VERDICT. 555

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

PATRICK KENNEDY v. ELLEN KEATING ET AL.

A general verdict for plaintiff is sufficiently definite and responsive in ejectment where the answer was a general denial.

JOHNSTON, J.

The defendants in error brought suit to recover possession of a strip of ground one foot eight inches in width, in Clark Williams' subdivision, of which they allege Kennedy unlawfully held possession, and they ask a judgment finding the right of property in them, and damages in the sum of $500 for its detention. The defense was a general denial. A general verdict was returned for the plaintiff below, and it was claimed the verdict was indefinite and not responsive to the issue, and should have been for the defendant. The motion for a new trial was overruled in the common pleas, where it was held that plaintiffs below were entitled to the strip of ground.

The court was of opinion that inasmuch as the action was instituted to recover possession of a definite strip of ground and there was a general denial, the verdict was sufficiently definite. As to the claim that the verdict should have found damages, the court held that by the Code of civil procedure it was optional with the party seeking to recover possession of real estate to claim damages or not, and it was not required of the jury in any event to assess damages. In respect to personal property, damages must be assessed, although but nominal. There were two causes of action virtually in the petition, one to recover specific property, and the second damages in money, and the jury having found a general verdict for the plaintiff, it was presumable they found against the claim of plaintiff in reference to mesne profits, which constitute a separate cause of action.

Judgment affirmed.

F. Lampe, for plaintiff in error.

W. E. Jones, for defendant in error.

ASSESSMENTS. 556

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

CITY OF CINCINNATI FOR THE USE OF CROTTY v. AARON SHAW;

SAME v. HENRY BUSCHE ET AL.

Where the original resolution for an improvement was broad enough to cover a retaining wall, and after the improvement was contracted for and partly finished such wall was found necessary, it may be constructed by a separate contract, and a separate assessment levied for it on the property abutting without the passage of another resolution.

BURNET, J.

These cases were before the court on appeal. The actions were brought on assessments for the improvement of East Sixth street. The defense was, that subsequent to the contract with Crotty to do the paving and grading, another contract was entered into with Peter O'Hare to build a retaining wall along the line of the improvement, the work of Crotty being interrupted to permit the building of the wall; that the assessment for the retaining wall had been paid, and that the two assessments amounted to more than twenty-five per cent. of the value of the lots abutting after the completion of the improvement.

The court held that the original resolution which referred to the improvement by retaining wall, was broad enough to cover both contracts, and that it was not necessary that there should be a second resolution declaring it necessary to construct a retaining wall, which should be published as required for the first resolution by the Code. As soon as it was found necessary to construct a retaining wall, the original resolution providing that it might be by drains or retaining walls, Crotty was notified to desist until the necessary proceedings could be taken for the erection of the wall, and after the wall was completed he then proceeded. Although there were two contracts and two assessments, it was one improvement, made by the authority of one resolution, and both assessments must be considered in determining the liability of the property holders. The first assessment was valid. It was only for a part of the work. The second assessment is valid, and can be resisted only so far as the amount already paid upon the first assessment reduces the liability upon the second. Both assessments will be considered, and it being agreed that the value of the property as found by the court below shall be taken to be true, the parties can readily determine the amount of the judgment to be rendered in this court.

The decrees will be prepared accordingly.

Paxton & Warrington, and the City Solicitors, for plaintiff.

Cole & Cox, R. Tyler and E. S. Throop, for defendants.

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557 **APPEAL—MORTGAGE—USURY.**

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

†MOORE, ASSIGNEE v. JOHN H. FELDSWICH ET AL.

1. An action for personal judgment on a note and foreclosure of a mortgage securing it, if no personal judgment is taken, but simply a foreclosure, an appeal may be taken to the order of the distribution.
2. Usury in a mortgage on a partnership property having been assumed by a succeeding firm, which agreed to pay the liabilities of its predecessor, cannot be set up by the firm assuming to pay, and hence, not by its assignee for creditors.

JOHNSTON, J.

The plaintiffs' assignors, John H. Feldswich & Co., were furniture dealers, and made an assignment to plaintiff for the benefit of their creditors. Their property was very heavily incumbered. The plaintiff

†See Moore v. Feldswich, *ante* 467. See also Marks v. Goldmeyer, *ante* 454.

instituted this suit for the purpose of having the property sold, making the mortgagees parties. The principal mortgagees were P. G. Stewart and H. W. Schleutker. They filed cross-petitions, asking for personal judgments, and also for foreclosure. The plaintiff and certain of the creditors set up usury in the mortgages of Stewart and Schleutker, and asked that it be credited on the principal. An order was taken below to sell the property without finding the amounts due. Thereafter a finding was made as to the amount due to Stewart and Schleutker upon their mortgages, but no personal judgment was taken against the makers of the note. On the distribution being made, no abatement for usury was allowed. To the order finding that no abatement would be allowed, an appeal was taken. On the trial of the case in this court two questions were raised; first, a motion to dismiss the appeal, and second, the question of usurious interest.

While it was true a personal judgment was asked by Stewart and Schleutker against the makers of the notes, yet, upon the trial of the case in the first instance, no judgment of any kind was taken upon the notes, but simply an order of sale. Thereafter there was a finding of the amount due upon the notes, but no personal judgment against the makers. No notice of appeal was given with reference to either of these proceedings, but simply to the order distributing proceeds. If a personal judgment had been taken in the first instance, no right of appeal would have existed. The right to a personal judgment may be waived, notwithstanding the shape of the pleadings, and in this particular case the parties saw proper to waive it, and there was simply a finding of the amount due, and an order of sale, so that the motion to dismiss must be overruled.

As to the claim of usury, it appeared that the firm of John H. Feldswich & Co., were the successors of a series of firms, each of which agreed to pay the liabilities of the preceding firm, and that the mortgagees of Stewart and Schleutker were upon the firm property, which constituted a part of the assets of the late firm. Where the purchaser of real estate that has incumbrances on it, assumes the incumbrances as part of the consideration, although the mortgages may be tainted with usury, he is estopped to set up that usury as against the mortgagee. And inasmuch as Feldswich & Co. would not have that right, their assignee would not have that right, neither would the creditors.

Decree accordingly.

Ward & McMakin, for plaintiff.

John Kebler and C. W. Cowan, for defendant.

RAILROADS. 558

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

Yaple, Force and Harmon, JJ.

†ELIZA HUGHES ET AL. v. CINCINNATI & SPRINGFIELD RY. CO.

A railroad company is not liable for the voluntary act of a contractor, who, in the construction of the road, dumped earth and rubbish on the lands of plaintiff, though a clause provided that the work should be under the construction and supervision of the engineer, the engineer having designated to the contractor a proper place to deposit.

†This case was affirmed by the supreme court. See opinion, 39 O. S., 461.

558 Hughes et al. v. Railway Co.

YAPLE, J.

This is an action brought by the plaintiff against the railroad company in which it is alleged that the company, in constructing its road, had removed earth, stone and rubbish, and deposited it on the land of the plaintiff, thereby injuring it and rendering it valueless for agricultural purposes. The company deny that it did so, and the fact is that the contractor, who had a contract with the railroad company, did it. There is no evidence connecting the company with the act, except that the engineer of the company was once seen there; but there is no evidence that he ordered or did anything authorizing the injury.

The plaintiff says, however, notwithstanding the contractor did it, that there was a clause in the contract that it was to be under the supervision and to the satisfaction of the engineer, and that therefore the company was bound to see that the earth was deposited without injury, and, if it were not, it was liable.

There is no evidence in the case that shows that the engineer failed to do his duty, or failed to point out on the land of the company itself, where this dirt should be put, and it leaves it, on the evidence, as the willful and voluntary act of the contractor, for which the company in no way that we can see in the testimony, can be made responsible. We think, therefore, that the court was justified in instructing the jury to return a verdict for the defendant.

Looking at the contract, we cannot find that there is anything to show that it was not the simple voluntary act of the contractor. It does not show that the Railroad Company failed to designate the place where the earth should be deposited, and therefore the judgment will be affirmed.

Force and Harmon, JJ., concur.

John F. Follett, for plaintiff.

E. W. Kittredge & M. C. Shoemaker, for defendant.

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559 **LIFE INSURANCE.**

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

Yaple, Force and Harmon, JJ.

GUARDIAN MUTUAL LIFE INS. CO. v. ANNA M. SANDAL.

A petition by a life insurance company to cancel a policy which shows that a suit for the collection of the policy has been begun by the defendant, puts the party out of court, for under our code he has a complete remedy at law by setting up as a defense in the first case the matters set up in this case.

YAPLE, J.

This case is reserved here upon the testimony and the findings of the jury.

The Guardian Mutual Life Insurance Co. brought suit against Anna M. Sandal, who had effected a policy of insurance upon the life of her husband, now dead, and the bill claimed that it was obtained by fraud, and asked that it be surrendered and cancelled.

The authorities seem to be that, in a proper case, although there may be a defense at law, the policy may be compelled to be delivered up and cancelled, unless it shows on its face that it is void.

The defendant in this case, filed an answer and cross- petition, setting up the policy and asking to recover on it. The plaintiff replied, setting up the same matter that was in the bill, and the court referred the issue to a jury on the petition, and expressly reserved for trial by jury the issue raised on the cross-petition and the reply.

Now, if the bill in this case was demurrable, if it showed no cause of action, then the findings of the jury upon the issue framed on that petition amount to nothing, and, after looking over the bill and finding that

it states a case, it further states a fact, which in our judgment, puts the party out of court, so far as equitable relief is concerned. It says that this defendant, Anna M. Sandal, has instituted suits in the court of common pleas and the superior court upon this policy of insurance. That shows that there was a plain, adequate and complete remedy at law, to-wit: to go into the court of common pleas, where the first case was brought, and set up the very matters that the bill sets up, and asks to enjoin all the other suits. Under our Code there would be no difficulty in making the defense, and, as the findings are simply on the petition, and as the issues raised by the cross-petition and the reply are expressly reserved for trial by jury, we think that the petition should be dismissed; that this finding amounts to nothing, and that the case will be for trial upon those issues fully.

The entry will be that the petition be dismissed, and the case stand for trial upon the cross-petition and reply.

Force and Harmon, JJ., concurred.

C. D. Robertson, for plaintiff.

Durbin Ward and M. S. Sayler, for defendant.

STREET IMPROVEMENT BY FILLING. 560

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

Yaple, Force and Harmon, JJ.

*CITY OF CINCINNATI v. E. H. DODSON.

1. Where a city, in building a street, is compelled to place a slope necessary to support it upon adjacent private property, the city does not become liable for the land in fee simple, as it takes only an easement, leaving the title in the owner for all purposes consistent with this right.
2. The compensation of the owner is the difference in the value of the land without the easement, and its value so burdened.

HARMON, J.

Dodson owned a lot of land fronting on the Walker Mill Road. When, by annexation, that road became a city street, the city proceeded to improve it, having first changed the grade so as to necessitate a fill in front of Dodson's lot. Dodson sued the city, alleging that without his consent or knowledge, and without having appropriated it according to law, the city had entered upon and taken possession of a portion of his lot, *i. e*, a strip along the entire front, twenty-five feet deep and constructed said street thereon, ten feet thereof being occupied by the street proper, and fifteen feet by the slope of the fill, whereby he has been deprived of said property and the beneficial use thereof, for which he claimed compensation.

The exact line of the street was in issue; but the jury, in answer to a specific question, found that none of the lot was taken except for the slope. The value of this in fee-simple they were instructed to and did assess and allow Dodson.

This instruction was excepted to by the city and is now assigned as error.

The question presented is one of great importance in a city where fills are so common in the construction of streets, and it seems never to have been expressly settled or provided for. We are aware that in the case of the City v. Kemper, *ante* 245, 251, it was held by this court upon the authority of Hatch v. C. & I. R. R. Co., 18 O. S., 92, and Goodin v. Same, 10 O. S., 557, that where without condemnation proceeding, the city constructs a street over private property, without objection, it amounts to an appropriation of the land, and the owner is entitled to compensation for its value in fee.

*This decision was affirmed by the supreme court. See opinion, 34 O. S., 276.

The question now presented was neither raised nor considered. That question is this: When the street proper, as intended for public travel, is built entirely upon the property to which the city has regularly obtained the title for street purposes, but the slope necessary to support it is placed upon private property, does the city thereby appropriate the land itself and become liable for its value in fee-simple?

By section 507 of the Municipal Code, the city is authorized to appropriate, enter upon and hold real estate for street purposes, etc., but is forbidden to take more than is reasonably necessary for the purpose to which it is to be applied. The term real estate is expressly defined by section 509, as "including rights and easements of an incorporeal nature." Even without this express definition it seems clear to the majority of the court that the right to condemn real estate includes the right to condemn any estate or interest therein. This was decided in Hayman v. Blake, 19 Cal., 579. We see no reason, therefore, why the city, by regular proceedings, might not have acquired an easement upon Dodson's land, for the support of the street, by extending the slope thereon. In such case the estate sought to be taken, and the purpose to which it was to be put, would have been expressly stated. In this case the act of the city alone is relied upon as showing an appropriation. Such, indeed, it might be, if done with the consent or even with the passive knowledge of the owner; otherwise it might be a mere trespass, or such an encroachment as would be restrained by injunction.

The bringing of a suit for compensation, however, was regarded by the court, in the case of Hatch v. C. & I. R. R. Co., 18 O. S., 92, as an assent by the owner to the taking of his land, and it was held that the rights of the parties in such cases are governed by the same principles which would have been applicable in a condemnation proceeding.

There being no declaration in such cases, the actual taking must be looked to, to ascertain what is appropriated, and for what purpose.

Now, in this case, the city does not certainly take the strip covered by the slope for the purpose of a public street. It was not intended for travel. It was not improved and never intended to be improved as a street. The city evidently did not intend to take and did not take from the owner and vest in the public the exclusive use and occupancy of the land covered by the slope. To hold otherwise leads to conclusions to which we cannot bring our minds. It would follow that no street over uneven ground could be uniform in width. The base of slopes being one and a half feet to every foot of height, the streets in Mill creek bottom, which are filled to a height of forty feet, are sixty feet wider on each side than they were intended to be. In case of lots one hundred feet deep, sixty feet being taken from the slope, only forty feet is left to the owner, too little to be of any value. The building of streets at such a grade would annihilate all abutting private property, and the expense of either slopes or retaining walls would annihilate the city treasury.

In short, we do not think that in such cases the city takes anything but an easement for support, leaving the title in the owner for all purposes consistent with that right. He certainly is at liberty to build on the line of the street proper, or use the slope of the street as part of his fill. Will it be claimed that he must build his house fronting on the toe of the slope? That is equivalent to saying that he cannot build at all, that the lot is ruined for building purposes; for, if the slope of the fill is street, the same as the top, he could not obstruct it, or fill it up so as to obtain access to his house.

We think both the fee of the land covered by the slope and its beneficial use, so far as consistent with the easement of support, remains in the owner. Consider the vast amount of property which would be rendered neither useful nor taxable if these slopes are considered absolutely the property of the city.

The owner is entitled to compensation, it is true, but its measure is not the full value of the fee. It is the difference in the land without the easement, and its value as burthened with the easement. For some purposes, such as building, this difference is nothing. The land is benefited rather than injured; for others, it may be considerable. True, the owner's absolute freedom in the use of his land is taken away, but proper compensation can be given by the jury.

We think there was error in the charge complained of, and the judgment will be reversed and the cause remanded.

Force, J., concurred; Yaple, J., dissented.

The City Solicitors, for plaintiff.

Pugh & Throop, for defendant.

YAPLE, J., dissenting opinion.

I am unable to concur with the majority of the court in the conclusion to

which they have arrived in this case. The question is what is the rule of damages in such cases?

The city, in constructing Walker Mill Road, found it necessary to go outside of the sixty feet width of the street, and upon Dodson's land construct an earthern slope to support the street; and the court charged the jury in substance, that for such part of the plaintiff's ground as the slope covered and could not be removed without substantial injury to the street, the plaintiff could recover to the extent of the value of the fee of the land so appropriated for such supporting slope. As the evidence and the entire charge are not before us for review, it will be presumed that Dodson so far consented to the appropriation that he cannot recover the possession of the ground so taken, and only compensation for what he has lost, thus bringing the case under the rule decided by the Supreme Court in Goodwin v. Cincinnati & White Water Canal Co., 18 O. S., 169, and Hatch v. Cin. & Ind. R. Co., *Id.*, 92.

In this State, too, a municipal corporation appropriating lands for streets, takes the fee simple the uses and purposes of such streets, 2 S. & C., 1484, section 8. And if such streets are ever abandoned by the municipality, the abutting lot owners take to the center of the abandoned streets. This is settled by the great weight of authority.

Now, I think that the slope in this case is part and parcel of the very structure of the street itself, and may be maintained by the City forever against all rights of interference by Dodson. I cannot see how the City is in a position to deny that it took the property covered by the slope for street purposes. In fact, though it does not appear in this case, Dodson's property with that of others, was assessed for the cost of this slope as part of the street, and Dodson was compelled to pay the assessment, the Supreme Court refusing to grant him leave to file a petition in error.

I think the case is governed by the same principle as was decided by this court, in general term, in the case of the City v. Kemper, *ante* 245, 251. I held there, that the measure of damage is the value of the fee of the land taken for the slope, or so much of it as was necessary for the construction of the street, as the city saw fit to make the street, and that any other rule would permit the city to appropriate the land for a street forever, without making full compensation for its value. Suppose in this or any like case, the value of the remaining ground, after the improvement, deducting the assessment to be greater than the whole before the improvement, then, if no more than nominal damages at furtherest, are recoverable, it being the proper deprivation that is compensated for, the result will be that so much property has been appropriated for the public use without compensation, except in benefits conferred upon the property not so taken; and this will violate or work an overthrow or evasion, of article 1, section 19, of the constitution, which requires that "compensation shall be assessed, etc., without deduction for benefits, to any property of the owner."

PLEADINGS. 563

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

*ALBERT STEIN v. POWELL CROSSLEY, ADM'R.

1. A plaintiff can recover only on the causes of action stated in his petition.
2. It is necessary to have the cause of action stated in his petition, and therefore, a case cannot be made by reply, for that is a clear departure.

YAPLE, J.

This is a petition in error brought here to reverse a judgment of this court rendered in special term. The plaintiff, Good, filed a petition against Albert Stein and Benson to have an account taken of certain partnership transactions in the construction and navigation of steamboats upon our rivers. Stein filed an answer stating that as to two of the grounds alleged for an account there was an arbitration, and that there was an award found and so much found to be due to Benson upon the transaction and that award was binding.

Crossley, the administrator of Benson, then filed a reply, admitting this arbitration and award, and admitting that it was in full force, and he came into special term and demanded a judgment upon the amount admitted by the answer of Stein to be due, and judgment for that amount was awarded to the administrator against Stein. Stein objected, demanding a trial, and excepted. Among other of his excep-

*This is a decision following the the mandate of supreme court in Benson v. Stein, 34 O. S., 294. See also 5 Dec. R., 505 (s. c. 6 Am. Law Rec., 340).

tions, as shown in the petition in error, is one assigning that the judgment should have been for him (Stein) and against Crossley, the administrator. The application was made under an amended section of the Code, amended March 13, 1872. It reads as follows:

"If the taking of an account of proof of a fact or the assessment of damages be necessary to enable the court to pronounce judgment upon a failure to answer, or having answered to a part of the cause or causes of action alleged, the court may in its discretion render judgment upon such part or parts as are now put in issue by such answer."

It was under that provision the judgment was rendered. A petition in error was filed in the general term, and when it came to the general term, it appeared that there was one Hogdson who had a claim by garnishment, and it was insisted that that took away from the court the power to render this judgment for the part stated in the answer. The general term affirmed the judgment, and Stein took the case to the supreme court, and the supreme court, because of Hodgson's adverse claim, reversed the general term, and upon representations made in that court that Hodgson had filed since the petition in error a disclaimer. The supreme court refused to reverse the special term, and remanded the case to the general term, to be proceeded in according to law, and I may say that the mandate is to us an incomprehensible document. It is very much confused. Granting, as the supreme court seem to have held, that those proceedings subsequent to the filing of the petition in error and the disclaimer of Hodgson would take away all difficulty, we were confronted with another objection made at this general term for the first time that we are aware of in the whole progress of the litigation. Nothing was said about it when the judgment was taken in special term. Nothing was said about it on the argument in general term.

Nothing seems to have been said about it in the supreme court, but when it is brought here the general assignment of error is insisted upon, and in the case of Corry v. City of Cincinnati, the supreme court has held distinctly that a general assignment of error requires the court to scrutinize the whole record. Then how does the case stand on the petition in error from the general term? The petition is for the taking of an account of partnership transactions, and for a judgment based upon that. The answer, by way of defense, alleges that they cannot have an account of the partnership transactions because there was an arbitration, and that the claim was merged in the award by that arbitration, and that by that arbitration there was only so much due.

The plaintiff thereupon files a reply admitting in effect that he had no cause of action, stated in his petition to that extent, that the award was the ground of his action, and he then asks a judgment upon the answer. That matter has been before the supreme court. He does not ask for a judgment on this cause, or causes of action alleged by him, nor did he get judgment on the part or parts not put in issue by the answer.

The answer stated in defense the arbitration, and stated it in full. Now, the supreme court of the state in the case of Durbin v. Fiske, 16 O. S., 534, says: "A plaintiff can recover only on the causes of action stated in his petition. It is not the province of a reply to introduce new causes of action. This can be done only by an amendment of a petition." It is a clear departure, and no judgment can be predicated upon such a state of pleadings as that. It is as necessary to have the cause of action stated in the petition as it was under the old practice that it should be stated in the declaration, and a case cannot be made by reply, for that is a clear departure, and for that reason, there having been set-offs and other defenses pleaded here to other parts of the case, the judgment in special term was erroneous, and it is proper to take this occasion to say that if this objection had been called to the attention of the court in special term, the judgment never would have been rendered, or had it been insisted on in the general term, on the petition in error, the same ruling that is now made would have been then made. It was not made in the supreme court, but is now made here, and it is a valid objection. There is one trouble under which we labor; very often cases are argued here, and upon all the points made there may be a clear case one way or the other, but the case will be taken to the supreme court, and some entirely new point that never was called to the attention of the court below, is raised there for the first time, and the case is decided on that, just as it would have been decided in the court below if attention had been called to it there, and thus the necessity of going to the supreme court would have been obviated. This often puts the court in a very unfair position.

The judgment will be reversed and the cause remanded.

It was pleaded as a defense to the action for an account of the partnership transactions.

HOMESTEAD. 569

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Longworth, Johnston and Cox, JJ.

JACOB LEVI v. GROVES.

The valuation of appraisers setting off from property levied on an exemption claimed in lieu of homestead, is conclusive in the absence of fraud or collusion.

JOHNSON, J.

In May, 1876, B. Pfirman was the owner of a judgment against Jacob Levi, and caused execution to issue to Groves, a constable, for the purposes of levy. Groves levied on a cigar store of Levi on Central avenue. and immediately afterwards Levi made an affidavit, setting forth that he was not the owner of a homestead, and demanding that property should be set off to him under the exemption law of the state. The constable thereupon summoned two house-holders, who appraised the entire effects of the establishment at $1,400, and a selection of property to the amount of $480 was made by Levi, leaving the balance to be sold on execution. The next morning Levi sued out a writ of replevin, under which he took the entire contents of the establishment. That case was certified to the common pleas for hearing, and upon trial to a jury a verdict was rendered for defendant, Groves, for $350, and he remitting $150, a motion for a new trial was overruled, and judgment entered on the verdict less the *remittitur*. This proceeding in error was instituted by Levi to reverse the judgment.

The court in announcing the opinion, said the motion for a new trial was defective, and did not bring before this court for review, all the exceptions taken by the plaintiff below, the only ground alleged being that the verdict was contrary to law and the evidence. The court below instructed the jury, that if there were no fraud or collusion between the appraisers and constable or creditor, the appraisement was conclusive. In this the court did not err. If the action of the appraisers was to be the subject of review, by petition in error or other proceedings, the operation of the law providing for the exemption would be defeated, and the means taken away from the indigent debtor by which he might support himself and family. The statute makes no provision for appeal or review, and unless fraud or collusion is charged in reference to the appraisement, it is conclusive between the parties, and the debtor must abide by it. The debtor did select $480, and the court charged the jury that the valuation fixed by the appraisers was conclusive, and that they must consider the testimony as to the value of the other property over and above that amount, and for whatever that value was the officer would be entitled to their verdict. The verdict was as above stated, the amount being reduced by $150. The court could not say that the verdict was contrary to law. If there had been no selection at all, the constable would have had the right to sell, and where the debtor selects to the amount of $500, that selection has to be respected, and the value fixed on by the householders is conclusive.

Judgment affirmed.

Long & Kramer, for plaintiff.

M. Kary, for defendant.

570 JUSTICE OF THE PEACE.

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Longworth, Johnston and Cox, JJ.

STATE OF OHIO EX REL. BRAUN v. HENRY HARMEYER, J. P.

There is no provision authorizing a review of the findings of a justice in forcible entry and detainer, as being against the weight of evidence; if, therefore, there were no exceptions to rulings of law, or on the competency of evidence, or because there was no evidence whatever to support the findings, which would make the judgment against law, the justice is not obliged to sign a bill of exceptions.

LONGWORTH, J.

This was an application for mandamus to compel defendant, a justice of the peace, to sign a bill of exceptions. The action was brought in forcible detainer, and the justice, on submission of the case, found the defendant guilty. No exceptions were taken to any of the rulings during the trial, but a general exception was taken to the finding and judgment, and a full bill of exceptions presented to the justice, which he refused to sign.

Held, that where there is evidence in an action of forcible entry and detainer tending to sustain the finding, and the only exception is the finding itself, on the ground that it is not sustained by the evidence, the justice is not bound to sign the bill of exceptions setting forth the evidence. A party has the right to except to the rulings of the justice upon the law, or upon any questions touching the competency or relevancy of the evidence. But no such exception was taken. If the bill of exceptions showed clearly that there was nothing whatever tending to support the finding of the justice, an exception ought to be allowed, for the judgment would be against law; but where there is evidence tending to make out the claim, and the finding is erroneous upon the facts, there is no provision authorizing a review for that reason; and inasmuch as the justice is only obliged to allow exceptions where the statute authorizes an exception, and the only office of a bill of exceptions is to recite those exceptions which are properly and legally taken, a mandamus can not be allowed in this case, for it is clear from the bill of exceptions, that the evidence was, to say the least, conflicting. In the opinion of a majority of the court, the writ should be refused.

E. W. Kittredge and S. A. Miller, for plaintiff.

C. W. Baker, for defendant.

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

SWING AND MELLEN, EXECUTORS OF TOWNSEND v. GATCH.

For this opinion, see 6 Dec. R., 599 (s. c. 7 Am. Law Rec., 5).

PAYMENT. 574

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

Yaple, Force and Harmon, JJ.

MILLVILLE INSURANCE CO. v. ANDREW J. FLESHER.

A settlement of loss by agents of a foreign insurance company and receipt "in consideration of this payment, the policy is hereby surrendered to the company," and it was surrendered, but for part of the payment the agents gave the assured their draft, which never was paid, does not prevent the assured showing that he did not take the draft as pay unless it was paid, in which case it was merely collateral, and he may collect from the company its amount.

YAPLE, J.

This is a petition in error, brought here to reverse a judgment of this court at special term in favor of Andrew J. Flesher, against the Millville Insurance Co., for something less than $200. The action was brought by Flesher as assignee of parties who originally took out a policy of insurance in the sum of $600 on the steamboat Prairie City, which was lost by the perils insured against. There was a settlement of that loss made, and the agents of this insurance company, Murdock & Hobbs, undertook to pay off Mr. Flesher, the assignee of the policy, and entitled to recover the loss. They deducted, as was right, the unpaid premium notes, and he signed a receipt to them, drawn by them, for the amount. The receipt is in these words:

"Received Cincinnati, O., August 17, 1875, of Murdock & Hobbs, agents of the Millville Ins. Co., of Millville, N. J., $575.31, in full settlement of loss under this policy, and in consideration of this payment, the policy is hereby surrendered to the company."

And it was surrendered. As to the cash part that they paid, there is no objection; but they gave him their draff, payable on time for a part which is the amount recovered for in this action. The draft never was paid by them, and the evidence shows clearly that they were insolvent at the time they gave the draft. This was pleaded as payment. The defense of the company was that they had paid, and on the trial they introduced this receipt, and claimed that it was taken in satisfaction of the policy, and that the company had credited Murdock & Hobbs on its books with the amount of that draft, as though it had been paid by them, but they did not prove that Mr. Flesher ever knew of their crediting, or ever requested them to do so. He testified that he came here to settle the loss; that they told him they had not the money for him, but that the company had never failed to pay its losses, and if he would take this draft on time it would be promptly met. He told them he could wait, provided the money was paid. He says that was the distinct understanding, that if the draft was paid it would be all right, and if not his claim should subsist.

That matter was submitted to the jury, and the claim here is that because this receipt was drawn by Murdock & Hobbs in this form, and signed by Flesher, there is no possible way of his showing by parol that he did not receive satisfaction and take that draft as pay, whether they ever paid it or not. We think not. We think the jury were clearly right in finding on the testimony that he merely took this draft as collateral; that if it was promptly met, he would consider himself paid; and if it was not,

he would look to his policy for his claim. The jury, we think, rightly allowed him that amount, and this judgment will therefore be affirmed.

Moulton, Johnson & Levi, for plaintiff in error.

Lincoln, Smith & Stephens, for defendant in error.

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575 PRINCIPAL AND AGENT—BROKERS—CUSTOM.

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

Yaple, Force and Harmon, JJ.

SOUTHER & CO. v. STOECKLE.

1. A jury having found in favor of a broker sued for the value of bonds sold by him to plaintiff through a broker, which afterwards turned out to be forgeries, if evidence was given on trial that it was the custom for brokers, though knowing they were dealing for principals, to look to each other personally, where the principals are not brought in, and such evidence is not contradicted, but is ignored by the jury, a new trial will be granted.
2. One who *bona fide* sells bonds for another, which afterwards turn out to be forgeries, cannot be held personally liable if at the time of the sale he stated that he was selling as agent, his principal not being disclosed, because not inquired about.
3. The mere facts that one selling bonds is known by the other party to be a broker, and states he has got the bonds from a person not named, is not sufficient to relieve the broker of responsibility for the genuineness of the bonds. An agent to relieve himself, must not only disclose that he is an agent, but must name the principal, and in such a way that the other party must understand that he is dealing with the agent only as such, and that the credit is to be given to such principal, and that the agent is not dealing in his own name.
4. On the issue, whether a broker who had sold bonds to plaintiff, which had turned out to be forgeries, was selling for himself or a principal, the payment of the money by the broker to one alleged to be the principal being testified to, and the absence of a receipt being relied on by plaintiff, evidence that the receipt of the broker to such person for the bonds was taken back on turning over the proceeds, instead of taking a receipt for the proceeds, such receipt and the indorsement of its return are admissible, not in proof of the contents, which were otherwise proved, but to show the manner of acting, and why a receipt was not taken.

HARMON, J.

This case was reserved on motion by the plaintiff for a new trial.

It has been tried four times and four verdicts rendered.

The first three were for the plaintiff, and were set aside either at the special or general term, for various reasons, the last being for the defendant.

This action was brought by the plaintiffs to recover from the defendant an amount advanced by the plaintiffs through Keys & Co., of this city, upon thirteen Union Pacific Bonds of $1,000 each, which turned out afterwards to be forgeries.

The question in the case was, whether the defendant, Stoeckle, in the sale of those bonds to the plaintiffs through Keys & Co., acted either as principal, or in such way as to make himself liable as principal, or acted as agent for a third person, in such a way as to make the third person and not himself liable.

The testimony was somewhat in conflict upon that question, and the charge of the court was excepted to by the plaintiff, and relied upon as erroneous in the motion for a new trial.

The court charged the jury, that "the defendant says he was in fact an agent in the transaction of some men calling himself Henry Pardee, and that in the transaction with Keys, through whom plaintiffs purchased the bonds, he had disclosed the fact of his agency, and that he did not act for himself in the transaction, but acted for and on behalf of his principal; and for that reason he is not liable, and that is the main issue in the case. It is the controlling fact, as you may happen to find it one way or the other."

The court then went on to charge the law upon the subject, in substance thus: That if the jury should find that the fact was that Stoeckle was the agent of Pardee; that if he made known to Keys & Co. the fact of his agency, and that he was not acting in the transaction for himself, but for his principal, he would not be liable.

The plaintiff claimed that the court ought to have charged the jury that although the defendant was in fact the agent for Pardee, and although he may have disclosed the fact of his agency, and although the other party may have known that he was acting for his principal, that yet if he did not disclose the name of his principal, he would be liable.

We do not think that there is any error in this charge of the court.

There are authorities which seem to go to the extent claimed by plaintiff's counsel, but the later authorities, both in England and the United States, as they are to be found in Wharton's Treatise on the Law of Agency, sections 449, 501 and 730 and the cases cited, establish the law as laid down by the court.

The liability of an agent, who fails to disclose the name of his principal, is not in the nature of a fine or penalty imposed on him for failing to disclose his principal; but it proceeds upon the theory that as the other party must have contracted with some one, and if he did not know that the other party was an agent, and acting as such for somebody else he must be presumed to have contracted with him personally; but when the alleged agent is an agent in fact, and makes known to the other party at the very time of the transaction, that in the contract he is then making he is acting on behalf of a principal, if the other party does not see fit to make inquiries as to who the principal is, that is his own fault.

He knows he is making a contract with this agent, because the agent says so. He knows, or is supposed to know, that in law he can pursue the undisclosed principal if he ever has occasion to do so and finds him out. He is put upon inquiry, and it is his business to prosecute his inquiry if he is not satisfied with the representations made.

The next error relied upon was in the admission of certain testimony. It is an issue in the case, whether in fact the defendant was anybody's agent or was making this transaction on his own account; and among other witnesses called was the defendant's clerk, who produced the receipt which he, on behalf of the defendant, had given to the man calling himself Pardee, who had brought these bonds to the defendant in order to have the defendant sell them for him as his agent or broker. He testified that when the money was received upon them, the defendant paid over the money to this man Pardee, and instead of taking a receipt from him for the money, simply took back the receipt which he had given for the bonds, and he then and there endorsed upon it in red ink: "Returned

from Henry Pardee, August 29, 1872, and proceeds paid over." Signed, "A. R."

Now a point was made against the defendant in the case, that he kept no books; that there was no record preserved of this transaction—that there was no receipt given by Pardee for the money, and it is claimed by defendant's counsel that the transaction between Pardee (if there were such a man) and the defendant, being vital to the case in order to establish the question whether there was an agency in fact or not, all that took place between the defendant and Pardee at the time of the transaction is admissible as a part of the *res gestate*. It is not claimed that Pardee had given a receipt for the money at the time he got it. In fact the absence of a receipt is a point relied upon by the plaintiff.

The defendant's testimony shows that instead of taking a receipt, the business was done in this way, and we think that upon that account the testimony was admissible, although not for the purpose of proving the facts stated in this writing, which were testified to by the witness himself. This receipt with its endorsement forms part of the transaction, showing the manner in which the parties acted.

So that so far as the errors alleged are concerned, we think the motion for a new trial should be overruled.

But upon looking into the bill of exceptions, we find that the fact was brought out in the evidence of Mr. Keys very clearly, that a custom exists among brokers, both in New York and Cincinnati, which the convenience of business has led them to adopt, that where they deal with each other, although they know they are acting for principals, yet if the principals themselves are not brought in to take part in the transaction, the custom is for the brokers to look to each other personally. There was no testimony to contradict this.

There may be upon another trial, but as the record stands, there was none.

The court instructed the jury fully upon this question and the effect of it, but the jury seem to have utterly ignored it, and for this reason the case having been so fully tried, we think that upon another trial the parties may get in all their evidence and the case be finally and fairly disposed of. We, therefore, grant the motion for a new trial.

We will say to counsel, that the case has been tried so often, that unless there is some palpable blunder in the court in its rulings or charge on any other trial which we can not anticipate, the next verdict has got to stand.

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578 MUNICIPAL CORPORATION—CONTRACT—CUSTOM.

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

Yaple, Force and Harmon, JJ.

WM. H. MALONE v. CITY OF CINCINNATI.

A contract by a city with plaintiff for paving blocks at so much per square yard, to be furnished to the satisfaction of the street commissioner, cannot be shown to mean a square yard of blocks as laid in the street, with a space or strip between each course, by parol evidence, either that the street commissioner told the contractor in answer to an inquiry before bidding that they would be measured in that way, or by proof of a previous course of dealing between him and the commissioner, whereby such measurements had always been agreed to be used.

HARMON, J.

The plaintiff sued to recover a balance of nearly $14,000, alleged to be due for paving blocks and strips furnished to the city. The city pleaded payment in full. The plaintiff recovered a verdict for the full amount, which verdict the city moved to set aside as contrary to law and the weight of evidence. That motion comes here on reservation.

The blocks in question were furnished under a written contract between the plaintiff and the city auditor, duly authorized by a resolution of the counsel. The contract provided that the plaintiff should furnish the city as required, during the term of one year, from the 25th of September, 1873, paving blocks, and the city should pay therefor certain prices per square yard, depending upon the thickness. The blocks were furnished from time to time, and weekly statements made out by the plaintiff, which statements also included certain charges for strips, which, in making Nicholson pavement, are placed between the rows of blocks, which strips were not provided for in the contract, but were purchased from time to time at the market prices. Upon these statements payments were made on account from time to time.

In June, 1874, it was ascertained by the board of improvements through the new street commissioner, Mr. Corbett, who a month before had been installed in the place of Mr. Bristol, that these bills were being made out by a mode of measurement which consisted in estimating as a square yard of paving blocks, the amount of paving blocks which would be in a square yard of ordinary Nicholson pavement when laid in the street; that is the blocks were piled in the plaintiff's yard, the number of square yards ascertained by ordinary lumber measurement, and then one-fourth of the whole amount deducted for the space which the strips would occupy when the blocks should be laid in the street. Thereupon the city refused to receive any more blocks under the contract unless the mode of measurement was changed. The plaintiff insisting on his mode, an agreement was finally made whereby the plaintiff continued to furnish blocks during the remainder of the year, and the city to make payments on account of the solid mode of measurement, as it is called, without prejudice to the right of the plaintiff, if entitled under his contract, to recover the amount due, estimating by his mode of measurement.

It is admitted that, if the city's mode of measurement be the correct one, nothing is due, while, if the plaintiff's mode be correct, the whole amount claimed is due.

The natural and ordinary meaning of the language used is beyond question that claimed by the defendant. A square yard of lumber, in the shape of blocks, fit for paving, contains nine square feet, by board or lumber measure. It does not mean blocks enough to make a yard of pavement, when used with other materials. It does not mean a quantity of blocks measured in the street when laid down. It means a square yard of *blocks*.

The plaintiff on the trial attempted to sustain and justify his construction upon four grounds: First—That, before bidding, he inquired of the street commissioners, and was informed that the blocks to be measured would be measured in this mode; second, that a custom to measure paving blocks in this way prevailed among persons dealing in them; third, that in previous purchases of blocks from him by the city, they had been measured and paid for by this mode of measurement, thereby establishing a course of dealing; and fourth, that the city, for nine out of the twelve

months covered by the contract, had received weekly bills made out by this mode without objection, and made payments thereon.

As to the first ground, it is sufficient to say that the street commissioner was not the officer authorized to receive bids or enter into this contract. Nor was he authorized to make any part of this contract, nor to agree upon any particular construction of this contract. True, the blocks, after the contract was made, were to be furnished to the satisfaction of the street commissioner, but that could refer only to the size and quality of the blocks. If the plaintiff desired assurances or information as to the mode of measurement, he should have inquired of the officer entrusted with the making of the contract, and had the mode stipulated in this bid inserted in his contract.

The custom on which the plaintiff relies, he signally failed to prove. He did not prove that street contractors for paving streets by the Nicholson process made their bids to the city and contract for the material, that is the boards, blocks, and strips with the lumber men by the square yard measured in the street when laid. But the city seems to be about the only purchaser of blocks alone, and if the evidence of other dealers of the city, and of her officials, proves any custom at all in such cases, it proves that the custom is to measure as contended for by the city. Whether, if the custom plaintiff sought to prove were proven, the law which recognizes only fair and reasonable customs, would enforce it in this case, and thus enable plaintiff after being paid for the strips to measure and be paid for the space they occupy as blocks, need not be here determined. There is nothing in this contract to show that these blocks were to be used exclusively for Nicholson pavement; in the testimony the evidence shows that the city uses them laid without strips or spaces in front of engine houses.

As to the third ground. It is true that the previous course of dealing between parties to a contract may be considered when their meaning, as expressed in the writing, is doubtful. But before their previous dealings can throw light upon their present meaning, it must appear that they invariably attached a peculiar meaning to the terms whose meaning is now sought. In other words, their previous dealings must establish as between them, a custom which would have the same effect upon their contracts that a general custom would have upon the contracts of all persons. Now the only purchases of blocks made before this time were made by the street commissioner, who was authorized, up to a limited amount, to make purchases. But it does not appear that in any such transaction the term "a square yard of paving blocks" was ever construed, or acted upon as meaning enough of blocks to make a square yard of Nicholson pavement. On the contrary, the plaintiff's own testimony shows that, upon every occasion, the mode of measurement was determined by express agreement between the commissioner and himself at the time of purchase.

We cannot see, therefore, how the fact, that heretofore, by express contract, a peculiar and unusual meaning has been given to this language, can avail to give it that meaning here. On the contrary, the failure to make any such express contract in this case would seem to imply that the ordinary meaning of the language was intended.

Moreover, it would seem impossible that the city, acting in its corporate capacity, through its council, could be bound to a peculiar course of dealing by an inferior officer like a street commissioner. A sound public

policy would seem to require, that in such cases the previous course of dealing, to have that effect, must have been participated in or known to the city council, or, at least, to the officer entrusted with the making of the contract.

As to the fourth ground. The city cannot be held to have adopted these statements as correct, nor can it be held that the payments she made upon them were voluntary, unless it appears that this was done with a full knowledge of the facts.

Now, the testimony shows that, in this case, the city engineer was not called upon, as was customary, to measure the blocks, but the bills as made out by the plaintiff, were certified by the street commissioner without such measurement, and as soon as their incorrectness was ascertained the proper steps were taken by the city to have them corrected.

The motion, therefore, for a new trial will be granted, and the cause remanded to special term for further proceedings.

Jordan, Jordan & Williams, for plaintiff.

The City Solicitors, for defendant.

ACKNOWLEDGMENT—DEED—LANDLORD AND TENANT. 581

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

Yaple, Force and Harmon, JJ.

†The Catholic Institute v. Joseph G. Gibbons et al.

1. Where a grantee takes a conveyance mortgage having a proper notarial certificate of a married woman's acknowledgment, and without knowledge or means of knowledge of any defect, the grantors cannot impeach it as against him; and that the notary was a clerk in the grantee's lawyer's office does not charge him with notice. Such clerk is no agent of the grantee.
2. It is a sufficient delivery of a mortgage that it was taken from the grantor's house for the purpose of being delivered to the grantee, and has been on record ever since, and that at one time one grantor, the husband of the other, the wife being the owner, had received some money to indemnify the wife against it.
3. Where a five-year lease contains an agreement to give a mortgage "as security for the rent due at the end of any one year, that is to say, as security for the full term of five years for any sum due," etc., and the mortgage itself provides that it is "to secure the rent as specified in the lease, for the term of five years," it cannot be claimed that the mortgage does not secure the rent for a fraction of a year beyond a complete year of default, and that it only covers rent due at the end of a year.
4. A religious literary and scientific corporation, incorporated under the act of 1852, has power to lease part of a building owned by it for theatrical and operatic purposes.

Harmon, J.

Miles & Carpenter desiring to lease a part of the Mozart Hall Building, known as the Grand Opera House, Joseph G. Gibbons agreed to become their surety for the payment of the rent, and further security being desired, it was agreed by Miles & Carpenter and Jos. G. Gibbons that they would furnish security by way of mortgage.

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†The question of the right of the district court to rescind decisions of the superior court in general term was made in this case on error, *post* 548. The decision in that case was affirmed in supreme court. See opinion, 34 O. S., 289.

Accordingly the premises were leased to Miles & Carpenter, a mortgage being given by Jos. G. Gibbons and wife upon the property of the latter situated upon Fifth street. The lessees went into possession, and remained in possession nearly three years, when on the 14th of June, 1877, the lease was declared forfeited, and the premises restored to the plaintiff, and this action is brought to forclose the mortgage given to secure the rent.

The first defense set up is, that the Catholic Institute by the terms of the law under which it became incorporated, was not authorized to rent these premises for the purposes stated in the lease, the incorporation being under general act of 1852, with relation to religious, literary and scientific associations, and the lease being for theatrical and operatic purposes.

We think that the purposes for which the place was leased come fairly within the designation of the law, for some of the highest productions of literature were first made known to the people through the medium of the stage; and in some countries it is even employed in religious ceremonies.

But if this were not so, it seems to us that the principle of estoppel would apply, and that the mortgage having been given to obtain this lease, and the property having been enjoyed under the lease upon the faith of the mortgage, so that the parties can not be put in *statu quo,* the right of the plaintiff to make this lease cannot be questioned by the mortgagor.

It is further set up by Mrs. Gibbons, the owner, that she never executed the mortgage; that it was not properly acknowledged, and that it was never delivered. The claim that the mortgage was never executed, is based upon an alleged change, which was made in the instrument between the time when Mrs. Gibbons signed it, and the time when she acknowledged it before the Notary Public, and there is considerable conflict of testimony upon this point. The only two persons, however, whose duty it would seem to have been to examine critically the terms of the mortgage, were Jos. G. Gibbons and Christopher Von Seggern, the latter being the counsel of the plaintiff, and Mr. Gibbons acting on his own behalf and that of the lessees; none of the other witnesses claim to have done so, or even have read it all. The testimony of these two witnesses is directly in conflict, Mr. Gibbons claiming that the mortgage having been drawn up and signed by himself and his wife and also by one witness about a week before it was acknowledged, the trustees of the plaintiffs were dissatisfied with its terms, and demanded that a change should be made; that he informed them that if a change was made it would vitiate the instrument, that they, notwithstanding, insisted upon the change, and he therefore made it in the defeasance clause of the mortgage. Mr. Von Seggern, on the contrary, says that Mr. Gibbons had been to see him at least a dozen times with reference to the lease and mortgage, that he had examined the latter before it was either signed or acknowledged, a number of times, and that the lease was then as it now is in all respects.

It is useless to comment further upon the testimony, than to say that the court is not satisfied therefrom that there was any change whatever in the mortgage between the time when it was signed and the time when it was acknowledged. This finding will dispose of the question raised by the counsel for the defendant, that if it were changed before it was

acknowledged, while the acknowledgment might operate to incorporate the change into the mortgage, yet there was only one witness to the acknowledgment after the change, and it consequently would be an imperfect instrument. However that question may be, it is not necessary to pass upon it.

It is claimed further, that when the notary went to the residence of Mr. Gibbons to take the acknowledgment of himself and wife, that he failed to examine the wife separate and apart; that he failed to read or otherwise make known to her the contents of the instrument, and the proof shows that he simply held up the paper, exhibited her signature, and asked if that were her signature, and she says that when he asked her if she was aware of the contents of the instrument, she gave him an evasive answer. She further says, that she is in the habit of signing any paper which is presented to her by her husband. While if a notary neglects the duties imposed upon him by law, to the damage of another, he may be liable personally or upon his bond, the supreme court of Ohio, in the case of Baldwin v. Snowden, 11 O. S., 203, has clearly settled the law in this state, that where a mortgage with a proper certificate of acknowledgment, signed by an officer authorized to take acknowledgments, is delivered to and acted upon by the grantee, who neither knew or had means of knowledge, and was not put upon inquiry, of any defect in the acknowledgment, the grantors can not, as against him, avail themselves of any defect in the acknowledgment, and can not be permitted by parol testimony to impeach it.

Now it is claimed in this case, that as the notary who took the acknowledgment was a clerk in the office of Mr. Von Seggern, counsel for the plaintiff, that the plaintiffs are chargeable with notice that the acknowledgment was not taken in the proper manner. We think that it would be carrying the doctrine of agency to an extent not warranted by the law, to say that the clerk of an attorney in any way represents the client. He went there as an officer of the law, to represent the law; he was paid by the defendant, Mr. Gibbons, and therefore when these plaintiffs received the mortgage, they received it just as the grantee did in the case, Baldwin, *supra,* without any knowledge of the defects in the certificate, and on the faith of the mortgage they delivered the lease and put the lessee in possession.

As to the point that the mortgage was not delivered. It is clear that the lease was taken from the residence of the defendants with their knowledge that it was to be delivered to the trustees of the plaintiff, who were waiting to receive it and deliver the lease. It was known for nearly three years that it was upon record, and that the lease was in force upon the strength of it, and the defendant Joseph G. Gibbons, at one time received money, in order to indemnify Mrs. Gibbons against possible loss upon the mortgage.

We think, therefore, the delivery was sufficient. If it were not sufficient, if actual handing by grantor to grantee be necessary, there are very few deeds or mortgages that are ever delivered, for a formal delivery seldom takes place.

We therefore find, that the plaintiff is entitled to recover upon the mortgage, and the question then arises as to how much he is entitled to recover. The lease contains an agreement by the lessees to give to the first party "a mortgage upon real estate in the city of Cincinnati, worth at least $18,000, additional security for the rent due at the end of any

one year of this lease. This is to say, said mortgage is to be as additional security for the full term of said five years for any sum due, not to exceed in all $18,000, for which amount said mortgage is given." Now whatever the agreement to give security may have been, so far as this action is concerned, we can only look at the terms of the security that was given. It is claimed by the defendant, that under the terms of this provision in the lease, only the amount of rent due at the end of any one year can be recovered, and that as the end of the third year was not reached by reason of the forfeiture of the lease, therefore the rent which accrued in the third year, is not covered by the mortgage; and as the amount remaining due at the end of the first and second years is only about three or four thousand dollars, that is all they are entitled to recover. But upon looking at the defeasance clause of the mortgage, it will be found that it is conditioned "to secure the rent as specified in the lease of the Catholic Institute to said Miles and Carpenter, for the term of five years from the date thereof, as provided in said lease," and the other terms are so general that they would cover any rent falling due at any time during that term, under the terms of the lease, which is referred to. There is no prayer in the petition to amend or reform the mortgage, so as to make it correspond to the promise of security in the lease, and as the mortgage stands, it certainly covers any rent falling due during the life of the lease. That amount, including part of the third year between its beginning and the date of the forfeiture, with the amounts due in other years, amounts to more than the amount named in the mortgage, the rent being something over $20,000, and the mortgage being for $18,000, and we are therefore of opinion that the plaintiff is entitled to a decree of foreclosure upon the usual terms, for the full amount of the mortgage.

A decree will be entered accordingly.

Force and Yaple, JJ., concurred.

J. F. Follett, for plaintiff.

Coffin & Mitchell, for defendant.

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

MANNING & LONGLEY v. A. LUDINGTON ET AL.

For this opinion, see 6 Dec. R., 620 [s. c. 7 Am. Law Rec. 117.]

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

MICHAEL ROWLAND, ADM'R, v. RICHARD GRIFFITHS, ADM'R.

For this opinion, see 6 Dec. R., 619 [s. c. 7 Am. Law Rec., 115.]

CONTRIBUTORY NEGLIGENCE—CHARGE OF COURT. 592

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

Tilden, Yaple and Force, JJ.

†PITTSBURGH, CINCINNATI & ST. LOUIS RY. CO. v. WERNSING, ADM'X.

A passage in a charge as to contributory negligence of plaintiff's decedent, that if a man of ordinary prudence, knowing what the deceased did, and seeing what he saw, situated as he was, would have done as he did, he was not guilty of negligence is not erroneous.

FORCE, J.

This is a petition in error to reverse a judgment at special term. The action was brought by the administratrix of the deceased, against the railroad company, for damages occasioned by his death, by reason of the negligence of the railroad company's employes. The bill of exceptions sets forth the testimony, and the new trial is asked, first, because the verdict is against the testimony, and second, for misdirection of the jury.

Upon the testimony it appeared, that the railroad company was breaking up a train, separating the cars of the train, at a place on the road where a street crossed the track, and at this street crossing, being near the water-works, there were at least two hundred wagons crossing every day. It appeared that the employes of the railroad company set the train in motion, and then detached the passenger cars from the locomotive, and, while there was a brakeman on the cars, he was at that part of the cars remote from the crossing, so that he could not see the crossing.

Upon this state of facts alone it is clear, and it is hardly controverted by the parties, that the railroad employes were guilty of extreme negligence, of reckless negligence.

The question is left whether or not, notwithstanding the reckless negligence on the part of the railroad employes, the deceased was charged with contributory negligence. Now, without going into the details of the testimony, this much, at least, may be said, that the testimony is conflicting, anad hence the jury had the right to find that he was not chargeable with contributory negligence. So that there is no ground for setting aside the verdict on the ground of its being against the weight of the testimony.

As to the error claimed in the charges given. All the charges asked for by the defendant below, the plaintiff in error, were given. Only one passage in the general charge is objected to, and in that passage objected to, the court said to the jury, that if a man of ordinary prudence, knowing what the deceased did, and seeing what he saw, situated as he was, would have done as he did, he was not guilty of negligence. The charge seems to have been carefully guarded as to the rights of all the parties, certainly as to any rights the plaintiff in error had.

We find no error in the charge or the finding of the jury, and the judgment is affirmed.

Yaple and Harmon, JJ., concurred.

Matthews, Ramsey and Matthews, for plaintiff.

Healey & Brannan, for defendant.

†This case was affirmed by supreme court refusing to allow a petition in error. No report, July 2, 1878.

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

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

For this opinion, see 6 Dec. R., 625 [s. c. 7 Am. Law Rec., 147.]

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673 [Cuyahoga Common Pleas, May Term, 1878.]

JOHN KELLEY ET AL. v. JOHN INGERSOLL ET AL.

For this opinion, see 4 Dec. R., 284; [s. c. 1 Clev. Rep., 210.]

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689 [Cuyahoga Common Pleas, May Term, 1878.]

WALBURGA SCHEURER v. FRANZ SCHEURER AND THERESA SCHEURER.

For this opinion, see 4 Dec. R., 297; [s. c. 1. Clev. Law Rep. 233.]

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709 INJUNCTION—STREET RAILWAY.

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

Tilden, Yaple and Force, JJ.

†RICHARD MATHERS ET AL. v. THE CITY OF CINCINNATI ET AL.

1. A person cannot seek as taxpayer to enjoin a city on the refusal of the solicitor from awarding a contract to a certain person when he is himself a competitor for the award, and hence is interested adversely to the city; he cannot appear in the double character.
2. The action of a taxpayer to enjoin the city, on the refusal of the city solicitor to enjoin, is a bar to another action, by another taxpayer, for the same cause, the same as if the solicitor had brought both actions; each represents the public.
3. Under section 412 of the Municipal Code as it stood in 1878, consents of property holders given to one bidder for a street railroad route would inure to the benefit of another bidder, who states that he does not file consents because consents are obtained by others.
4. Where a part of a street railroad route is over unimproved streets, the title in which is not yet obtained by the city, the city may allow a temporary track on streets not in the route around such unimproved squares, and without consents of abutting proprietors, this not being a grant, but a revocable license.
5. No one can object that a street railroad is putting a double track where only a single track was authorized by the grant, except owners of lots abutting on the double track.

YAPLE, J.

This is an application for a temporary injunction by Richard Mathers, John Mathers, and J. H. Kinney, against the City of Cincinnati, George B. Kerper and associates, and the Mount Adams, Eden Park and Wal-

†For decision in this case, on demurrer as to misjoinder of parties, see *ante*, 496.

nut Hills Street Railway Co. It is sought to enjoin the further construction by the defendants of what is known as Street-Railroad Route No. 16, running through Eden Park. The petition is presented in a two-fold aspect; first, by these petitioners as private property-owners, who claim that injuries would result to them that are special, and not such as the public at large will sustain, and they invoke the aid of the extraordinary powers of the court, by injunction, to protect their especial individual rights from injury. They have also applied to the city solicitor to bring suit on behalf of the public, on the ground that what was doing and what the defendants contemplated to do would be a public injury, and that, if the city or its authorities would sanction it, it would be an abuse of the corporate powers of the city. They, therefore, avail themselves of that provision of the statute which authorizes suits in behalf of the public by private citizens. One of the plaintiffs, Mr. Kinney, is interested as a stockholder in Route No. 10, and also with Mr. Henderson, in the bid which he made, and which, it is claimed, entitles them to this route, instead of the present Route 16 Company. In an application on behalf of the Henderson party for an injunction to restrain the defendants from constructing the road, the court held that they could not avail themselves of this provision giving to any person, on the refusal of the city, the right to restrain corporate abuse, on the ground that they were adversely interested to the city and to the public, and were seeking the contract themselves, and that they could not appear in that double character. But Mr. Richard and John Mathers are not interested in Route 16, and they have the right to invoke the aid of the court, to restrain the abuse of the corporate powers of the city, and the case is consequently presented in both phases. The first part of the partition in this case sets out what has heretofore been stated in another case to court, that there was a wrongful failure on the part of the city to award the construction of this entire route to the proper party; that consents had been obtained which would inure to the benefit of the other bidders; and that Henderson and his associates bid less and on more favorable terms to the city, and for that reason the construction of the road should have been awarded to them, and should now be arrested. Both parties, so far as this petition is concerned, conceded that the road, as originally contemplated, was authorized; that all the consents were obtained in a proper way; and that the road would, if built and operated, be of public utility. They both concede that. It is claimed that the work ought to be enjoined, because the parties that are doing it are not doing it on as favorable terms as the rightful bidder.

The Henderson party have gone to the supreme court, where the case is now pending, on a claim that the contract should be awarded to them by mandamus. The question then presents itself whether the construction of this road, under such circumstances, is such an injury to the public as that the court ought to interfere by injunction to stop its further construction. If what they say be correct, it will be presumed that the supreme court will award the contract, upon proper terms to the parties who ought to have it and thus the public interest be advanced; and I cannot see that there is a binding legal obligation on the court to interpose the extraordinary remedy of injunction to prevent the work being done at all, when what is set up by them will fully protect the public, and the proper parties can get the road and the benefit of the construction. I think that this is not a ground, under such circumstances, that

ought to call upon the court to stop the work, the work itself being presumably upon this theory of the case, beneficial to the public. The public rights are abundantly secured, and the plaintiffs will be in whatever right they may have, in the suit in the supreme court, which is speedily to be decided.

In the next place, it is claimed that after the letting of the work and after the bonds had been given and the obligation devolved upon these parties, there was an attempt to give them an option not to construct, if they did not see fit to do so, some 3,000 feet of this road—that part between a certain street and Chestnut street. It is contended if that privilege were allowed it would change the terminus, and make the enterprise substantially a different one, and that could not be done without reletting. That is a part of the case which, whether the city had a right to do what is claimed it has or not, I do not feel called upon to determine now. It is by no means clear to my mind that they have any such authority; but that will be left to be determined when a judicial necessity for it arises. If it were shown that these parties intended to and had exercised the option to abandon this part of their route, it might call for more thorough consideration. But the object of this suit is not to complain that the defendants are refusing to do what it is claimed they should do, but it is to prevent them doing anything at all.

I, therefore, think that I am not called upon to pass upon that question; but lest it might be hereafter claimed that the action of the court would be considered a sanction of the validity of the ordinance granting them the option to abandon, if they saw fit, I merely wish to say that the question is not determined at all.

The other main question in the case is the allegation that, by a resolution passed in August last, there was a change of the route, and that there has been no consent of the property-holders, or legal steps taken which would enable the parties to build the road on the streets to which the route has been changed. It is claimed that that is a grievance at once to the public. That ordinance provides for a temporary track on Nassau street and Gilbert avenue. This change seems to have grown out of the fact that Grand street is not open, and that private property will have to be condemned, the owner not consenting, and the fact that the probate court of this county, a court of learning and ability, has decided that, under the present law, a street-railroad company has no right to condemn private property for the use of its road, and it seems that the city is attempting a condemnation for the opening of the street, but the time has not gone by for it, and that there is a necessity for the making of the street railroad. This presents the question whether or not the getting of consents, and the taking of the other steps required, is requisite for a mere temporary change rendered necessary for any cause satisfactory to those who have the control of the streets.

Now, as a street-railway company has vested property rights, and a franchise is created in the company, and as they become a monopoly and may interfere with the private rights of persons to a great extent, the law wisely requires that certain steps should be taken in the construction of the road in order that the rights of the public may be fully guaranteed, and private rights secured. I am compelled to take this resolution at just what it says—that it is for a temporary purpose; that it cannot last longer than a year in any event, and that it is merely a revocable license; that the city can require the track to be taken up at any time, and it is not to be per-

manent; that the resolution was passed in good faith, for the very purpose and object stated in it.

The subject-matter of the resolution is confided by the legislature in the first instance, to council, and its power and its responsibilities under the grant are not different from, but arise in the same way, as those of the court. They are by legislative grant. I must presume, therefore, that the resolution means just what it says, and that it is in good faith. If that is so, the question presents itself at once: For any temporary change in a street-railroad route for any cause, have the general provisions for acquiring a permanent property-right any application? If they have, very serious practical consequences would result, obvious to every one.

From various causes the streets are liable to be torn up or obstructed, or a bridge broken down, and if council has no power except to pursue the general law, in overcoming the obstacles temporarily, the whole travel would often be arrested.

Considering the consequences that would follow from such a holding, I cannot find that the general statutes, where simply a temporary use of the streets, such as we are bound to assume this to be, from what the city council itself has said, have any application. When the council does grant the use of the streets for any purpose, there is more or less inconvenience. There is always more or less inconvenience in having railroad tracks in the streets. But as I understand the Cumminsville cases, the appropriation, to make out a case, must be such as to cut the lot-owner off from the enjoyment of his property, or something that goes to that extent, not a mere hindrance or inconvenience. The portion of the city where this work is going on, not being thickly populated, and while this one track on Gilbert avenue may interfere somewhat with the convenience of these parties, I can not see that it cuts them off from access to their property, or the use of it.

Upon these grounds—some other minor points were presented, but I do not remember any that I think substantially affect the case—considering the improvement as a valuable one, and that these parties will have all their property rights reserved, and that if the road has gone to the wrong parties the right ones are seeking to get it and will get it, I do not think I ought to interfere by the extraordinary aid of a court of equity and stop the work. I am constrained, therefore, to deny the application. The bill can stand, and whatever rights the plaintiffs may have can be presented when the case comes to the final trial, and they can be compensated.

Mr. Warrington: They are abandoning the road, as originally granted, on streets, along five squares, and substituting a double track on streets along five other squares where only a single track was authorized. Does the court hold that the consents for a single track on these streets are consents for a double track?

Court: No; but none of the plaintiffs own property where the double instead of the single track is to be laid, and it is only such owners of lots who can object to the double track. Others who seek to object for them are mere volunteers, and are not entitled to be heard. With the *termini* unchanged, this route will be substantially the same, after this change is made, as it was originally intended to be.

Geo. Hoadly and J. W. Warrington, for plaintiffs.

Stanley Matthews and W. M. Ramsey, for defendants.

737 [Hamilton Common Pleas, June Term, 1877.]

W. H. DOWELL, GUARDIAN, v. CATHARINE GUION, EXR., ET AL.

For this opinion, see 6 Dec. R., 634; [s. c. 7 Am. Law Rec., 273.]

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737 **JUDGMENT.**

[Hamilton Common Pleas, June Term, 1877.]

†JAMES MACK v. GEORGE SCHLOTMAN ET AL.

A judgment against one in the name of George Schlotman, being the name he gave when contracting the debt, though his name was Gerhart Schlotman, is a lien on lands held by him in his real name, and being such lien is good against a subsequent *bona fide* purchaser of the lands without a notice of the fact that he was ever called George, or that there was a judgment.

BURNET, J.

The plaintiff obtained a judgment against the defendant (Schlotman), and filed a transcript in this court. Execution was issued and levied upon the property. The plaintiff alleged that the property was subject to a prior mortgage made by Schlotman, and now belonging to the St. Aloysius Orphan Asylum, about which there was no dispute. He also averred that B. H. Shoemacker claimed to be the owner of the premises by virtue of a deed executed to him subsequent to the attaching lien of plaintiff, provided he has a lien upon the property, the transcript having been filed anterior to the conveyance to Shoemacker.

The court in disposing of the case said the difficulty occurred from a misnomer. Schlotman derived title and made his conveyance by the name of Gerhart Schlotman. The judgment was against him as George Schlotman, and the subsequent proceeding upon the transcript gave the name as George. There was some testimony tending to show that George was a translation of Gerhart, but the weight of testimony was against it. It appeared that he was known more by the name of George than Gerhart. The judgment was rendered against him by the name of George. He was served in that action. The judgment was properly taken unless the misnomer rendered it inoperative. As between plaintiff and Schlotman the judgment was a good judgment, binding him personally and any property that he might own. The fact being proven that he was more commonly known by the name of George than Gerhart, the judgment would operate as a lien, and being a lien, persons buying the property would buy it subject to the lien. It is true that a person buying the property, if he were ignorant of the fact that Schlotman was as well known by the name of George as Gerhart, would not examine the record for judgment against George; but the court would not make any allowance for such ignorance of his name. That was the name by which he was more generally known in the community. The judgment was a lien upon the property.

Decree accordingly.

Snow & Kumler, for plaintiff.

A. E. Cramer, for defendant.

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738 **ALIMONY—INJUNCTION.**

[Belmont Common Pleas, May Term, 1878.]

ELIZABETH PARKER v. JOSEPH PARKER AND JOHN PARKER.

A wife whose husband has been adjudged imbecile, and put under guardianship, she living with him, cannot, on the neglect of the guardian to give her means of support from the estate, or allow her to manage the household affairs, bring a suit for alimony against her husband and the guardian, as for gross neglect of duty; her remedy is in the probate court.

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†For opinion of district court sustaining this opinion, see 6 Dec. R., 749; [s. c 7 Am. Law Rec., 665.]

Action for alimony and injunction.

The plaintiff and the defendant Joseph Parker were married on the 21st day of May, 1871, and have been living together ever since. In the month of March the defendant, Joseph Parker, the husband of the plaintiff, was adjudged an imbecile by the probate court of Belmont county, and his son, the defendant, John Parker, was appointed guardian of the person and estate. The object of this suit is to recover alimony for the plaintiff—restrain the defendant, John Parker, from acting as guardian.

The petition avers the marriage of the plaintiff and the defendant, Joseph Parker; that she is a resident of the state and county aforesaid: and that her husband, Joseph Parker, has been guilty of gross neglect of duty in this, to-wit: being aged and infirm he has permitted the defendant, John Parker, a son by a former wife, to assume entire control of the property and farm of the said Joseph Parker, under a pretended appointment as guardian, and now refuses, and for about the space of one month has refused, the plaintiff the means necessary for her support, and has placed a daughter of the said John Parker in charge of the household affairs of this plaintiff and her said husband, the defendant, Joseph Parker, to the entire exclusion of said plaintiff to manage, control, or in any manner interfere therein.

The petition alleges also the possession of certain described real estate by the guardian, John Parker, and that she and the defendant her husband, are living together in a certain dwelling house.

Plaintiff prays alimony out of the estate of the ward, her husband, Joseph Parker, and a temporary alimony pending the suit; also an injunction against the defendant, John Parker, from "depriving said plaintiff and her husband of their property and from in any way interfering with the household affairs of the plaintiff."

A demurrer was interposed to the petition of the plaintiff and presented this novel question: Can an imbecile ward, adjudged so by the probate court, and under the surveillance of a guardian of the person and estate, be guilty of gross neglect of duty to support a case of alimony? Can a wife living with her husband recover alimony?

Can a court of this state restrain an officer acting under the authority of another court?

It was contended by the defendant that the allegation of gross neglect on the part of the husband was not made out in the petition, the neglect, if any, existing in the guardian, and that the appointment of the guardian was conclusive as to any neglect on the part of the husband, he being adjudged an imbecile.

As to the alimony, defendant contended that alimony was given upon a separation of husband anad wife, 3 Weekly Law Gazette; 3 John Ch. R. 519; 2 Paige R. 62; 1 McCords Ch. R. 205; Wrights R. 104; 70 O. L., 50; 67 O. L., 13; but in this case the petition alleged that the parties were living together.

It was useless to urge that an imbecile could not be guilty of gross neglect, as there could be no intent.

If the plaintiff was in need of maintenance, the disregard of the guardian in this respect would be a breach of his official duty and the probate court was the proper jurisdiction where he could be removed. Act April 12, 1858, section 17, Guardians, S. & C. 674.

738 Parker v. Parker and Parker.

Whether, being guardian of the person, it was not the duty of the guardian to attend to a proper regulation of the household affairs of the ward and his wife, was not argued.

Upon a hearing of the demurrer the plaintiff dismissed her case.

B. D. Sinclair, for defendant.

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739 [Cuyahoga Common Pleas, September Term, 1878.]

EX PARTE LEOPOLD NUSHULER.

For this opinion, see 4 Dec. R., 299; [s. c. 1 Clev. Law Rep., 249]. A *contra* holding, by Knox common pleas, will be found in *ex parte* Langford, 15 B., 267.

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761 ROADS—EASEMENTS—SEWERS.

[Hamilton Common Pleas, September Term, 1878.]

*R. L. CILLEY ET AL. v. CITY OF CINCINNATI.

Where abutting owners own the fee of the land under a turnpike road, the additional easement of a sewer under the road, not for the purposes of the road but for a public institution, cannot be imposed by consent of the turnpike company without the consent of the owners of the fee.

JOHNSTON, J.

This case was submitted on a motion for a restraining order to prevent the city from laying a drain-pipe within the limits of the Cincinnati and Springfield Turnpike from the infirmary buildings of the city, for the purpose of draining that institution, over and through this turnpike into Mill creek. It was claimed by the plaintiffs that they are the owners of the real estate bounding on this turnpike for a distance of one thousand feet, through which, of necessity, this drain must be constructed; that they are owners of the fee simple to the center of the turnpike, and that the owners of the turnpike bought simply the easement or right of way for the purpose of operating and maintaining a turnpike road, the plaintiffs never having given their consent to having this sewer constructed along the turnpike, and that the use to which the strip of ground was proposed to be applied did not fall within the uses, rights or easements obtained by the turnpike company, and they therefore ask to have the construction of the sewer enjoined.

They allege further that they are the owners of the real estate bounding on Mill creek, their rights extending to the center of that stream, and that the point which terminates the sewer is above their land, and on account thereof there would be washed against their soil some 700 barrels of filth daily from the infirmary. They allege that if this sewer is constructed it will pollute the waters of Mill creek to their damage.

The Court said: No order has been allowed in the case, and this is an application for a temporary restraining order on filing the petition. The city, without filing any answer, substantially demurs, claiming that the turnpike company having an easement to operate a turnpike, that the turnpike thereby becomes a public highway, and that the license given by the turnpike company to the city is not inconsistent with the uses and easement given to operate a turnpike. In another pro-

*See decision of district court, in what seems to be this case, *ante* 344.

ceeding between the parties, the question was before the district and common pleas courts, and an injunction was granted perpetually restraining the city from draining the offal and filth of the infirmary on to the property of the plaintiffs, which lies south of the infirmary. The city now seeks to get rid of the sewage of the institution by conducting it eastwardly through its own property, and thence by the license of the Turnpike Company under its roadway to Mill creek.

This institution accommodates over six hundred inmates, and it would not be desirable to prevent the infirmary from emptying the sewage in any direction. But the court had to apply to this institution, and to the city the same rules of law that apply to a private individual, and the city would have no more right to inflict a nuisance on a neighbor's property than would a private individual. The city purchased this farm for the purpose of an infirmary, and it would have the right to condemn property where it could not be obtained by agreement, for the purpose of drainage and protecting the health of the inmates. The question arises, having obtained the consent of the directory of the Turnpike Company, was it incumbent on the city to obtain the consent of the abutting owners before it started to put down the sewer on the west line of the turnpike, these plaintiffs claiming to own up to the center of the highway. The law is well settled that where a turnpike or road exists not within a municipal corporation and the land has been condemned simply for the purposes of a turnpike or road whose tolls are to be charged that the easement simply carries the right to construct and maintain such road and such rights as are incidental thereto, all other rights of property remaining in the abutting proprietor. That was settled indirectly in the case of the Cincinnati St. Ry. v. The Village of Cumminsville. The supreme court held in that case that there was a right remaining in the abutting property owners; that before the Street Railway could acquire the right to put down their track in front of his property, he should be compensated. And a case more clearly defining the rights of the parties is that of Hatch v. C. & Ind. Rd. Co., 18 O. S., 92. In that case the supreme court distinctly announced the principle that the property being condemned for the purposes of a canal, while the canal might part with its easement to the railroad company, yet when the railroad company laid down its track, that for the additional burden that would be imposed on the strip of land, different from the uses for which it was condemned, canal purposes, the abutting proprietor was entitled to compensation. It is claimed in this case that the right to lay down the sewer did not pass to the Turnpike Company. I am of that opinion. This sewer in nowise benefits the turnpike and is wholly unnecessary to its maintenance, and therefore, as was decided in the Cumminsville case, the injunction should be granted enjoining the city from entering upon the turnpike in front of the property of the plaintiffs until the city first obtains consent from them, or appropriates the right to lay down the sewer by proceedings in condemnation.

The temporary restraining order will be allowed.

Cole & Cox and I. J. Miller, for plaintiff.

Clement Bates, for the city.

763 [Hamilton Common Pleas, September Term, 1878.]

EX PARTE CHARLES W. VAN VLECK.

For opinion in this case, see 6 Dec. R., 636; [s. c. 7 Am. Law Rec., 275.]

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766 **ENLISTMENT OF A MINOR.**

[Hamilton Common Pleas, September Term, 1878.]
IN RE CAMILLO WIESENBERGER.

The enlistment of a minor in the United States army, without the consent of his parents is, as to the parent, unlawful, and, although the oath of the recruit as to his age concludes him under the United States law of 1862, it cannot bind the parent.

This was an application made by Lorenz Wiesenberger for the discharge of his son Camillo from the army of the United States, on the ground that at the time of his enlistment he was a minor.

The sheriff made a return to the writ, stating that he produced the said Camillo Wiesenberger in court, and also stating that he had served the officer who had the young man in his custody with a true copy of the writ.

The officer did not appear in court.

Lorenz Wiesenberger testified that he is the father of the said Camillo, who was born February 11, 1858, in Bohemia, and produced a certificate of his baptism. His son enlisted in New York on the 12th of the present month, without consent of witness.

Court—Did your son state at the time of the enlistment that he was twenty-one years of age?

Witness—I do not know; he was living away from me a little over two months.

Question—Why did he leave?

Answer—He wanted to look for work in New York. I have been about four years in this country and two years in Cincinnati.

Q. Did he obtain any bounty or advance pay at the time of the enlistment?

A. I believe he did not.

Camillo Wiesenberger was then called to the witness stand. He was dressed in soldier's uniform. He testified that he came to this country four years ago with his parents, and lived with them until two months ago. He left to look for a situation in New York as a draughtsman, and could not find any, after looking around about one week. He enlisted on the 12th of this month in the Sixth Regiment of Calvary. He was sworn in.

Q. What did you swear your age was? A. That I was twenty-one years; that was on the paper.

Q. Did you have the consent of your father to enlist? A. I did not. Yesterday morning I sent him a dispatch that I wanted to see him at the depot, as I might not have an opportunity again for five

years. I will be twenty-one years of age on the 14th day of February, 1879.

Q. Did you obtain any advance pay at the time of the enlistment? A. I did not; I got nothing but my clothes. The man who accompanied me from New York is an Orderly Sergeant. He was going to St. Louis with a detachment.

JOHNSTON, J.

The writ of habeas corpus is a writ of right, and in this case no answer having been made thereto by the officer having the son of the petitioner in charge, is an admission in law of the facts alleged in the application. At one time it was the law that a minor over the age of 18 years and under 21 could enlist in the army without the consent of his parent or guardian. That was under the law of 1862, passed shortly after the commencement of the late rebellion.

It is in that act that occurs the provision that the oath of the recruit as to his age is conclusive, and Attorney-General Williams, in his opinion to the Secretary of War, 14 Attorney-General Opinions, 210, (1873) concluded that that provision was still in force and shut out all inquiry on that subject, and that the act of 1872, did not by implication repeal it. Admitting that it did not, it can scarcely be claimed that where the parent petitions for the release of his minor son, who has enlisted without his written consent, he is to be precluded by the false oath of the son. He was not a party to the enlistment, nor privy to it, and the doctrine of estoppel as between him and the government cannot be pleaded. The parent is entitled to the custody and services of his minor children, and cannot be deprived of either without his consent.

As the act of 1802 still in force provides that an officer shall be liable to fine for enlisting a minor without his guardian's or parent's consent, it is but a reasonable interpretation of the act of 1862, that the provision referred to was for the protection of the recruiting officer, and would excuse him when he had been imposed upon. This view has been taken of it by Judge McCandlass, U. S. district court, Northern District of Pa., 5 Pha. Reps. 296, 299, also to same effect 5th *Id.* 523, and 24 How. Pr. 247, and 25 Id. 148.

If the recruit had made the application he must have been here refused a release, for having sworn that he was over twenty-one he would not now be heard to gainsay it against the party he had misled.

The evidence is conclusive that he was, when enlisted, and now is under twenty-one years of age, and that his father, the petitioner, did not consent thereto. An order will, therefore, be entered releasing him from further detention by reason of said enlistment.

Herman Markworth, for petitioner.

[Cuyahoga Common Pleas, September Term, 1878.] 785

FOWLER v. ZIMMERMAN.

For this opinion, see 4 Dec. R., 271; [s. c. 1 Clev. Law Rep. 195.]

787 [Guernsey District Court, September Term, 1878.]

CATHARINE J. ARNEEL v. ANNA C. KNOX ET AL.

For this opinion, see 4 Dec. R., 313; [s. c. 1 Clev. Law Rep., 285.]

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788 [Guernsey District Court, September Term, 1878.]

GEORGE NEFF v. NANCY TURKLE ET AL.

For this opinion, see 4 Dec. R., 314; [s. c. 1 Clev. Law Rep., 285.]

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788 INSOLVENT PARTNERS—HOMESTEAD.

[Guernsey District Court, September Term, 1878.]

McIlvaine, Frazier, Marsh, Okey and Patrick, JJ.

MORTLEY & PINKERTON v. TAYLOR, ASSIGNEE.

Where, of two partners hopelessly insolvent as individuals and as a firm, and knowing themselves to be so, one sells out to the other, who assumes the debts, and thereupon the purchasing partner makes an assignment for benefit of creditors, and claims a homestead, there being no bad faith in the sale, a majority of the court held him entitled to a homestead exemption.

ERROR to Common Pleas.

PATRICK, J.

The question arose on a demurrer to a reply in which the following facts are admitted: A member of an insolvent firm sold his interest in the partnership property to his partner. The latter assumed the partnership debts and executed his note in payment. The firm was hopelessly insolvent, and so were the partners as individuals, and both partners knew that at the time. The sale was made with the intention of continuing the business and paying the debts, and without intent to defraud the creditors, except what can be inferred from the transaction. A few days after the sale, the purchasing partner made an assignment for the benefit of his individual creditors and claimed a homestead.

The Court held that he was entitled to a homestead.

Okey, J., concurred; March J., dissented, holding that the sale was a constructive fraud on the partnership creditors.

McIlvaine and Frazier, JJ., did not sit.

Crew, for plaintiff in error.

Matthews & Heade, for defendant in error.

MORTGAGE—HOMESTEAD. 789

[Guernsey District Court, September Term, 1878.]

McIlvaine, Frazier, Marsh, Okey and Patrick, JJ.

NOBLE COUNTY NATIONAL BANK v. JOHN DONDNA ET AL.

1. An existing indebtedness is good consideration for a mortgage.
2. A mistake in recording the name of the officer before whom a mortgage is recorded does not affect its priority.
3. A mortgage to a man after his death is void for want of a grantee in *esse*.

PATRICK, J.

John Dondna borrowed $2,500 of Barnes in his lifetime, and thereafter, and before the note became due, executed a first mortgage on his home farm to secure the same, in which his wife did not join; the mortgage was not placed on record until after the death of Barnes, when it was placed on the record by the administratrix of his estate. The Recorder made a mistake in recording the name of the officer before whom it was acknowledged. After the death of Barnes, Dondna and his wife joined in the execution of a second mortgage, on the same land, to secure the same debt, and named Barnes as the grantee. Other valid mortgages were executed by Dondna and wife on the same land, precluding the setting off of a homestead. The administratrix of Barnes set up the first mortgage, which was attached by subsequent judgment creditors. The home farm sold for $5,600. Widow demanded an allowance in lieu of the homestead out of the amount found due the Barnes estate.

The court held first, that an existing indebtedness is a good consideration for a mortgage as between the parties. Second. That the second pretended mortgage was void, the grantee not being in *esse*. Third. That is was competent for the administratrix to place the mortgage on record, that being no part of its execution. Fourth. That the lien was perfected when the mortgage was left for record and was not affected by the clerical mistake in recording it. Fifth. That the farm having been sold for enough to pay both the debt and the allowance in lieu of a homestead, that the Barnes estate be paid in full as the first and best lien.

Frazier and Marsh, JJ., concurred.

Okey and McIlvaine, JJ., did not sit.

White & Campbell, for the Barnes estate.

Collins, and Skinner & Steel, *contra*.

JUSTICE OF THE PEACE—MANDAMUS. 792

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

STATE OF OHIO EX REL. CRIGLER v. LEOPOLD BLOCK, J. P.

Where a justice improperly refused to allow a party to execute an appeal bond, the court cannot, after the time in which it can be done has passed, compel the justice, by mandamus, to allow it.

AVERY, J.

This was an application for a peremptory writ of mandamus. The relator was the defendant in a suit before the justice, and judgment having been rendered by default in his absence, it was set aside under the statute. Subsequently another judgment was rendered on the 31st of August, and within ten days the relator appeared before the justice with a surety and proposed to execute a bond. The justice declined to receive the bond not, however, because he refused to approve the surety, but because the time, he claimed, had expired, he counting it from the first judgment, and the relator, as it properly should be, from the last. The relator at the same time applied for a transcript, which at the time the justice refused to furnish, but he did furnish it in two days after. The relator now applies for a mandamus to compel the justice to allow him to execute the bond, and to date the certificate of the transcript as of the time when it was applied for. The court saw no reason for the last application, because no matter what may have been the date of the certificate, the relator would have all the rights under the statute, if he obtained the certificate within thirty days after the judgment, and filed the transcript. With respect to compelling the relator to execute an appeal bond there is an insurmountable objection, inasmuch as the time for taking the appeal had passed The transcript must be filed within thirty days from the date of the judgment. The application is now made to the court after the expiration of such thirty days, and no transcript has been filed. It does not appear the bond was executed and yet it was not the duty of the relator to execute it. The duty of the magistrate was to approve the surety, and so far as appears from the affidavit he made no objection to the surety. If the relator had executed the bond, and there being no objection to the surety, he had left the bond with the justice, or offered to leave it, and then filed his transcript, the case would have fallen within the case of The Public v. Renning, which decides that the party shall not be deprived of his right of appeal by neglect of duty on the part of the court, where he had done all that was required of him. As it is, the application having been made after the time within which the duty required of the relator was to have been performed, there can be no remedy.

Application for mandamus accordingly refused.

C. L. Raison, Jr., for relator.

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841 **REFUNDER OF TAXES.**

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

COMMISSIONERS OF HAMILTON COUNTY v. GEORGE WOOD.

1. The five years for which back taxes erroneously paid can be recovered runs from the time for payment; hence, recovery for the second half-year's taxes, payable in June, may be had at any time in five years from payment, and not from the time it was charged.
2. There will be no refunder of back taxes granted where one is assessed for fifty-five feet front, and owns only 54½ feet, where there is no proof that the assessor valued the property by the front foot; the presumption is in favor of the correctness of the officer's act.

JOHNSTON, J.

This case came up on a petition in error to reverse the judgment of the common pleas, having reached that court by appeal from the decision of the county commissioners. George Wood, the defendant in error, by his petition to the county commissioners, alleged that he, for a great many years prior to 1870, was the owner, and at the time of the filing of his petition was still the owner of fifty-four and one-half feet of ground situated at the northeast corner of Fifth and Race streets. He alleged that in 1872, through the stupidity of an assessor, four new buildings at a valuation of $21,000, appraised by the assessor, were reported to the auditor, to be put upon the property in question, adding to the then valuation of his property $21,000, making the entire valuation on which he was to pay taxes $77,000. He continued, as he alleged, to pay taxes on this highly inflated valuation of his property for several years after 1870, but in March, 1878, he discovered that he was paying the taxes of a neighbor on $21,000, and he petitioned the county commissioners for a refunder of the taxes paid by him during the five years next preceding the discovery of the error, basing his right to the refunder upon the provision of section 20 of the act of 1859, as amended January 6, 1873. A refunder was made, extended back to, and including the taxes of 1873, but not including the last half that had been levied for 1872, and which was payable in June, 1873, amounting to $211.05. This the county refused to refund, claiming that it having been charged more than five years next preceding March, 1878, it did not fall within the provisions and meaning of the statute. That was claimed as a first cause of action for refunder, and a second cause was this: That while in fact he was the owner of but 54½ feet of ground fronting on Fifth street, at the decennial appraisement there was valued 55 feet of ground as belonging to him at that corner, and that ever since he was charged and taxed and compelled to pay tax upon one foot more ground there than he owned, and that these erroneous charges amounted to $79.90. This claim he also presented to the county commissioners, and they also refused payment.

The case having been taken to the common pleas, was tried and a judgment rendered in favor of Wood for the whole amount of both claims. Exception was taken to that judgment, and the county prosecutes a petition in error here to reverse it.

The court said: As to the first claim of $211.05, being the last half of the tax assessed for the year 1872, but not paid until July, 1873, it was the opinion of the court, upon the construction of this statute, that it was passed for the purpose of affording the tax-payer a remedy to recover taxes erroneously charged and collected against him; that such construction should be placed upon it as to advance the remedy, and to give the tax-payer, who had been improperly required to pay taxes, the benefit of its provisions. To place the construction on it asked by the county, the party could only recover four years and a half of overpaid taxes instead of five years, whereas the statute provided that he should be entitled to a refunder of all taxes charged and collected within the next five years preceding the time of the discovery of the error. It is the collection for payment of the tax that is the grievance. Taxes may be charged but never collected, the error being corrected before payment. The legislature, in the opinion of the court, intended that the tax-payer should be entitled to recover back all taxes erroneously collected within

a period of five years next preceding the discovery of the error. The judgment of the court below, therefore, in giving to the tax-payer this installment of $211.05, the last half of the tax of 1872, that was paid in July, 1873, was correct and should be sustained.

As to the second claim of $79.90, the court would not undertake to order a refunder. They were of the opinion that the claim as presented by Wood as to this one foot of ground could not be sustained, and that the court below erred by giving him judgment for taxes paid prior to the preceding five years. There is no evidence that the assessor valued the lot by the front foot. The statute does not require it to be valued in that way and oftener it is valued by the lot or parcel, at a sum in gross. The presumption in law, is in favor of the correctness of the proceedings of a public officer. The statute required him to value the lot upon actual view, and having done so it is presumed he valued only such a frontage as was there in fact, as claimed by Wood, to-wit 54¼ feet. As to this claim the judgment will be reversed.

C. W. Baker, for commissioners.

Swornstead, for Wood.

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843 **ASSESSMENTS.**

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

CITY OF CINCINNATI v. HENRY MCERLANE.

Where a city contracts for the improvement of a street, to be paid for by certifying an assessment on the abutting property to the contractor, and there is no power to make the assessment (the improvement being rendered necessary by a change of grade, Municipal Code, section 560), the Worthington law, 71 L. 80, does not apply, and the city is liable to the contractor, though there was no money in the treasury at the time of the contract. The expenditure is not because the contract was made, but because it was broken.

AVERY, J.

This is a petition in error to reverse a judgment of the common pleas. The city of Concinnati, under an ordinance in due form, contracted for the grading and paving of Chestnut street, on Walnut Hills, the work to be paid for by assessments. The contract was assigned by the contractor to Henry McErlane, who completed the work, and receiving the assessments from the city, proceeded to collect the same by suit against owners of the property. In the suit it was found that the assessment was occasioned by the change of grade previously made, the cost of which had been assessed upon the abutting property, and that a majority of the abutting owners had not petitioned for the change. McErlane then brought his action in the court of common pleas against the city for the breach of its contract to furnish him a valid assessment. The court of common pleas rendered judgment in his favor, and this is a petition in error.

The only defense of the city was that neither at the time of the contract, nor at any time thereafter, was there any money in the city treasury especially set apart to meet the expenditure, except the two per cent. upon the entire cost of the work, and the cost of intersection. The act of April 16, 1874 (71 O. L., 80), commonly known as the "Worth-

ington Act," provides that no ordinance or order for the expenditure of money shall take effect until the auditor shall have certified to the council that there is money in the city treasury especially set apart to meet the expenditure. The plain object of this provision was that expenditures should not be made in advance of its revenue; but this would not apply where the expenditure was to be met by assessment upon abutting property, and not by payment out of the revenues. The contention, however, is that the contract for payment by assessment was necessarily a contract for expenditure of money, becaust there was no power in the particular case to impose an assessment. Nevertheless there was power to make the contract, and although, as against the owners of property, the power to make the assessment was wanting, the city, by its contract, had assumed to exercise the power. Cincinnati v. Dickmeier, 31 O. S., 242, 244. For the exercise of that power, the city, and not the contractor, was responsible; and if an expenditure is to result because there was no power to make the assessment, such expenditure was not because the contract was made, but because it was broken.

To the suggestion that this would leave the law to be evaded by indirection, we answer that such case must wait until it comes. In the present case the assessment failed because of section 560 of the Municipal Code, which provides that where a street has been graded, and the cost assessed upon abutting property, no assessment occasioned by a subsequent change of grade shall be imposed upon abutting owners, unless a majority of them have petitioned for a change. The grade of Chestnut street had been made and assessed upon abutting property before Chestnut street had been brought within the limits of Cincinnati. The power to assess for street improvements existed in the city of Cincinnati, but by reason that there had been a previous grade, was limited in this particular case. The actual existence of the facts upon which this limitation of power depended was not known, so far as it appears, at the time, and was only ascertained after the matter had been submitted to judicial investigation in a suit upon the assessment. The actual existence of the facts was, therefore, not inconsistent with an honest ignorance of them, and if, where a contract is made under an ordinance providing, not for the payment by the city, but for a payment by assessment, the law is to be extended to cover the case, because, by reason of facts which were unknown at the time, the power of assessment could not have been exercised, we think that this would be extending the statute by indirection, and that in this particular case we are not required so to extend the statute in order to anticipate possible evils that may arise from any future indirect attempt to evade it.

The judgment of the common pleas will be affirmed.

The City Solicitors for plaintiff.

Paxton & Warrington, for defendant.

845 ATTORNEY AND CLIENT.

[Noble Common Pleas, October Term, 1878.]

STATE OF OHIO v. FRANCIS JOSEPH BURKHARDT.

The privilege of communications does not extend to any but a regular attorney, and does not protect those made to one once a justice of the peace who is in the habit of trying justices' cases, but not admitted to the bar, with the view of defending the action and accompanied by a retainer.

FRAZIER, J.

During the progress of the trial the state called as witness one David Martin who was asked to state conversations or statements made by the accused to him. Witness stated that all the statements made by the accused, as to matters inquired of, were during the time he was employed to manage the defense of a civil cause pending before a justice of the peace, and for which he had received, at the time, a retainer of five dollars, and that said communications were made with a view to defend said action; and was necessary for the proper management and correct counsel as to his rights to the matter then in controversy.

Witness also stated that he had at one time been a justice of the peace, and that since 1860 he had been in the habit of appearing before justices in the trial of causes and in giving counsel in the matters within their jurisdiction to all persons who saw proper to employ him, but had never regularly read law nor been admitted as an attorney.

Defendant objected to said witness testifying as to any communication or statement made under such circumstances.

The court overruled the objection, holding that the communications were not privileged, the defendant not being an attorney within the meaning of the law.

J. M. McGinnis, prosecuting attorney, and E. H. Archer, for state.

Belford & Okey, for defense.

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853 MANDAMUS—ERROR.

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

STATE OF OHIO EX REL. CUNNINGHAM v. CAPPELLER, AUDITOR.

The refusal to allow an alternative writ of mandamus is not reviewable on error. The remedy of the relator is by application to this court, after its refusal by the district court.

AVERY, J.

The relator was elected assessor of the eighth ward of Cincinnati at the last spring election, on the 1st of April, and on the 5th of April took the oath of office and gave bond. Having discharged the duties, he claimed to be paid $2.50 per day for the time actually employed, but the auditor refused and paid him $2 a day. This is an application for a writ of mandamus against the auditor to compel him to draw his warrant for

the additional fifty cents per day, and is submitted upon the agreement of counsel that the decision now, although this is but a preliminary application, shall be final.

At the date of the election, and when the relator took his oath and gave bond, the act of March 13, 1865, S. & C. 19, providing that assessors should be paid $2.50 per day for the time actually employed, was in force. Upon the 6th of April, the day after he was qualified, the present act fixing the compensation at $2 a day for the time actually employed, was passed and the former act was repealed.

By section 20, article 2, of the constitution of the state, the general assembly, in cases not provided for in the constitution, "shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished." It has been held by the supreme court that the word "salary" is not used in its general sense of compensation, but as applying to annual or periodical payments, depending on the time employed and not on the amount of service. Assuming that the per diem of an assessor is salary, the question is whether the law was changed during the existing term of office of this relator. The provision that no change shall affect the salary of the officer during his existing term implies that the change shall be made during that term. Otherwise there would be no necessity for the provision. The act for the election of assessors does not fix the term of office nor the time of commencement. Nevertheless, by article 10, section 4, of the state constitution, "township officers shall be elected on the first Monday of April, annually, by the qualified electors of their respective townships, and shall hold their office for one year from the Monday next succeeding the election, and until their successors are elected and qualified."

The act for the election of assessors in entitled "an act to provide for the election of township assessors," and to prescribe their duties, and although assessors of towns and wards and parts of townships are referred to in the statute, the term "township assessor" is used indifferently as to all. As for instance, "each township assessor shall give bond and take the prescribed oath of office on or before the first Monday of April after his election." Section 1 prescribes "that in each township, town or ward in this state, forming an election district, there shall be elected on the first Monday of April annually, by the qualified electors of the township, town or ward, or part of a township not included in an election district." Although assessors for wards are elected within the precincts of a city it by no means follows that they are city officers. The requirement of the constitution that all property, real and personal, shall be taxed according to its true value in money "implies," says Judge Cooley, in his work upon constitutional limitations, "that there shall be an assessment of valuation by public officers."

Cities are voluntary associations under general laws for the private or local interest and advantage of the inhabitants. The power of imposing taxes might be left to the officers of a city, but not the power of returning the valuation upon which the levies for the county and state are to be laid. On the other hand assessors, because public officers, are not officers of the state, as is contended in argument, distinguished from officers of a township. For purposes of political organization and civil administration the state is divided into counties, and these again into local sub-

divisions called townships. The townships are agencies of the state in the administration of its government, but the officers derive their power from within the limits of the township, and are to exercise it only within those limits. Just as the power of the state to preserve order is vested in the township, and by the township in a constable so the power of assessment for taxation is apportioned among the townships and vested in assessors. It matters not that the election is by ward or town or part of township, and that the voters within that subdivision cast their votes for an officer who, deriving his office only from them, exercises its duties only within the territory over which they are conveyed. The duties are appropriate to the township as forming part of the state organization and the officer is in that sense an officer of the township, although elected only for a portion of the township.

The statute itself follows this idea, not simply in the provision that these elections shall take place upon the first Monday in April, annually, but also in the provision that the assessors shall give their bond on or before the Monday following. Now, if the bond may be given under the statute by the second Monday in April, the inference is conclusive that the duties of the office were not intended by the Legislature to commence until then.

Moreover, property is listed for taxation as of the day preceding the second Monday in April, which again will imply that the duty of the assessor was not to commence before that time.

The fact that a bond was given and an oath of office taken would not fix the commencement of the term. Otherwise it would be left to the option of every officer to regulate his own term. The term of office may be said to commence only from the time that the right to enter upon its duties begins, and it is impossible, whether we look at the act providing for the election of these officers or the laws in respect to taxes, to fail to see that their duties are so far limited that they could not by any possibility have commenced on the 5th day of April, at the time when this relator took his oath of office; nor on the 6th day of April, at the time when the present statute changing the compensation was passed.

We are of opinion, therefore, that there was no constitutional inhibition against this law affecting the salary of this officer, and that his application for a mandamus ought to be refused.

W. M. Ampt, for the relator.

C. W. Baker, *contra.*

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855 **APPEAL BOND.**

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

S. J. Broadwell, Admr., v. D. E. Cody.

An appeal bond with one surety being offered, and the clerk stating that he would accept it unless objections were made, and neither the opposite party nor the clerk having objected during the time limited for the giving of such bonds, the bond will be held to have been approved by the clerk.

LONGWORTH, J.

Motion to dismiss an appeal from the court of common pleas. At the last January term of the court below the plaintiff recovered a decree for sale against the defendant Cody and others. At the same term Cody gave notice of appeal on the journal, and within the time limited by law entered into an undertaking with one Brady, his surety, to perfect his appeal. It was claimed that this undertaking was not approved by the clerk as required by law, the law being that an appeal shall be perfected upon the giving of such an undertaking, within the time limited by law, with one or more sureties, to the satisfaction of the clerk. On the other hand it was claimed, as a matter of fact, that the clerk did approve of the bond, and that the appeal, therefore, was properly perfected.

In overruling the motion to dismiss, the court said that the dispute as to whether there was a promise to furnish more than one surety upon the bond was immaterial, for no objection to the sufficiency of the bond was ever made by Mr. Broadwell. The clerk had stated that he would approve the bond, unless objections were made. The time elapsed within which a bond could be given without any objection being made, and the court thought that that was an approval of the bond on the part of the clerk.

Hagans & Broadwell, for plaintiff.

Mallon & Coffee and A. P. Ward, for defendant.

ASSESSMENTS—JUDGMENTS. 856

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

EVANS ET AL. V. CITY OF CINCINNATI.

Where on affirmation of a judgment enforcing the collection of a street assessment, without awarding the penalty allowed by municipal code, section —, no exception was taken to the omission of the penalty, the appeal not having been prosecuted for vexation or time merely, a subsequent motion to award the penalty will be refused.

Cox, J.

At the last term of this court a judgment was entered in this case in favor of plaintiffs. The suit was brought for the collection of an assessment for grading and paving a street. In that judgment no penalty of five per cent., as provided by the municipal code, was allowed to the plaintiffs. No exception was taken. Subsequently a motion was made to amend the judgment by awarding a penalty of five per cent. to the plaintiffs. In the meantime an application was made by the defendant for leave to file a petition in error in the supreme court. Pending that application, the court withheld its decision on this motion. Leave was not given to the defendant to file his petition in error, and thereby the judgment of this court was affirmed.

The case now comes up to be heard upon the motion of the plaintiffs to assess a penalty of five per cent. against the defendant upon the judgment rendered during the last term. The municipal code provides, in

cases of assessment of this kind, that, "if payment be not made by the time stipulated, the amount assessed may, together with interest and the penalty of five per cent. be recovered." When the judgment was entered omitting a penalty, no exception was taken by plaintiffs to such omission. Heretofore this court has not been inclined to give any penalty on judgments in assessment cases, for the reason that in most of them there has been an honest litigation on important and difficult questions, upon which the bar and court were often divided, and the solution of them was fairly and properly sought by a hearing in the higher courts. I know of but one case in which it has been imposed since I have been on the bench. The penalty contemplated in the statute is in the nature of a punishment on the party for prosecuting his defense on unreasonable grounds, for mere vexation or time. Such we do not regard this to be.

The judgment having been entered without exception at the time, we will leave the party to such other remedy, if any he may have, to reverse it.

In this case we do not think the party is entitled to the penalty. We do not wish to be understood as saying that, in a proper case, we will not enforce penalties hereafter, but in this case the motion will be overruled.

Jordan & Bettman, for Evans et al.

Wulsin & Worthington, for defendant.

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863 **BOARD OF EQUALIZATION.**

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

JAMES S. WISE, TREASURER, v. THEODORE KROMBERG.

An addition, by the board of equalization, to the valuation of personal property returned by a taxpayer, without evidence, is unauthorized.

AVERY, J.

This is a case on the error docket of the court that was submitted as upon a petition in error to reverse a judgment of the common pleas. He said the petition in error is not among the papers, but the case will be disposed of upon the assumption that such petition shall be found. Kromberg brought his action against the treasurer to recover $145 taxes for the year 1877, upon personal property paid by him under protest. The action was brought within one year from the time of payment. His petition alleged that he made return of his personal property under oath at $11,000, and that the return was correct; that being summoned to appear before the city board of equalization, he came and asserted the correctness of his return, and offered to produce his books; that there was no other evidence before the board, and, without anything further, and without any statement of facts upon the journal, the board proceeded to add $5,000 to the valuation returned by him; that this being charged against him on the tax duplicate, he, at the annual period for the payment of taxes, paid upon the entire amount the taxes assessed, under protest, and that his payment included the $145 which he sought to recover.

There was an agreed statement of facts, in which all the allegations of the petition were admitted, and further the entry appearing upon the journal of the board was set out. It was as follows:

"Upon motion the amounts set opposite the names of the following persons are added to their respective returns. Kromberg, Theodore. Item 40, $5,000."

The act of May 1, 1857, S. & C. 1157, authorizes suits to recover taxes illegally assessed, if the suit be brought within one year from the time of payment. Voluntary payments can not of course be recovered, but the payment of an illegal tax under protest, and accompanied by a notice that the party will resort to a suit to assert his rights, and also by an offer to pay what may legally be due will not be considered a voluntary payment. W. U. Tel. Co. v. Mayer, 28 O. S., 521; Stephan v. Daniels, 27 O. S., 527.

We understand from the agreed statement that the plaintiff below had done all that was necessary to entitle him to recover back the tax if it were illegally assessed, and that this is left as the only question in the case. City boards of equalization are governed by the provisions and limitations prescribed for county boards, and by section 46, where an addition to a valuation under oath is made by a county board, a statement of the facts upon which such addition is made shall be entered upon the journal of the board. The tax law of 1847 contained no such provision as this, and under that law it was held that it would be presumed the board of equalization had acted on satisfactory evidence until the contrary was shown by the party aggrieved, Hambleton v. Dempsey, 20 O., 168. The present law does away with this presumption, and shifts the burden, by requiring the journal entry to set out the facts upon which the addition is made. Without saying that if the journal entry should set out facts, it could be attacked in a collateral way, and without saying that if the entry failed to set out the facts, such facts might not be shown, we are clear that in a case where there are no facts to make the addition, and no entry of any facts upon the journal, the addition was unauthorized, the assessment illegal, and the plaintiff below entitled to recover.

There being no error in the judgment for the plaintiff, such judgment will be affirmed, or if the petition in error, upon which some sort of courtesy between counsel this case was supposed to be submitted, be not forthcoming, the case will be stricken from the docket. There is an appeal transcript, but the case is not one for appeal, inasmuch as the action was for money only.

C. W. Baker, for plaintiff in error.

S. F. Hunt, for defendant in error.

JUDGMENT. 865

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

JOHN J. COZAD v. W. C. SHANNON.

That a defendant has demurred to the petition before the affidavit and other proceedings in interpleader (Code, section 42; section 5016, Revised Statutes, requiring the affidavit to be before answer), does not authorize a judgment against him personally.

LONGWORTH, J.

This was a proceeding to review on error a judgment of the court of common pleas. Shannon in the court below filed his petition against Cozad, asking judgment for $634.34, balance alleged to be due upon a certain building contract. To this petition Cozad demurred generally, and his demurrer was overruled. Thereupon before answer Cozad filed an affidavit setting forth that certain other persons, not parties to the suit, claimed an interest in the fund in controversy, and prayed that they might be made parties, and ordering that a summons should issue against them. No process was issued, but these parties all came in voluntarily, and filed their answer setting up their several claims in the fund in dispute. Cozad paid into court the full amount as ordered, being the amount claimed in the petition, and it did not appear from the record that he ever took any further action in the premises. The cause came on for final hearing, and the court, after adjudicating the rights of these third persons to the fund in court, and distributing it among them, proceeded to render judgment against Cozad in favor of those persons who have not been satisfied out of the fund. It was this judgment which it was now sought to reverse for error.

The court suggested that inasmuch as this affidavit must have been filed before answer, that Cozad was too late in filing it after a demurrer had been interposed. We cannot see that there is anything in this suggestion. Although a demurrer is a pleading, and although in some senses it is a defense to the action, it is not, within the terms of the statute, a defense. The order, as well as the affidavit, is strictly in compliance with the terms of the statute. The order of the court was that these parties be brought in, and when brought in should be made defendants in the place of Cozad. Cozad remained in the action, it is true, until they come in perhaps, but certain it is that when they did come in and were made parties defendant, Cozad was discharged.

It is true, also that these parties filed their answers and cross-petitions against this fund on the same day that they were made parties. Nevertheless, in contemplation of law, these answers were filed after they were made parties, because until made parties no answer could be filed, and the very act which made them parties discharged Cozad. No summons was issued upon their answers and cross-petitions against Cozad by which perhaps he might have been brought into the case again, nor did these answers and cross-petitions pray any relief against Cozad individually, but simply against the fund in court.

Inasmuch as Cozad did not further appear in the case, it was error in the court to grant to him any relief personally, or to enter upon any judgment against him in favor of any other parties to the suit or to the fund. It was error to regard him as being in the case.

So much of this judgment as distributes the funds seems to have been correct. The fund was properly distributed. But so much of the judgment as proceeds further to render judgment against Cozad and to provide that he shall pay one-third of the costs in the proceedings, is erroneous.

Judge Guthrie and J. McGarry, for plaintiff.

Lotz & Beddinger, for defendant.

MASTER AND SERVANT. 866

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

M. WERK & CO. v. ADAM ARMBURST.

The rule that an employee, knowing of the defect in machinery he is operating, takes the risk of accidents caused thereby, does not apply where he only apprehended danger of loss to his employers, and had no such knowledge as to determine whether there was danger to himself or not.

ERROR to the Common Pleas Court of Hamilton county.

JOHNSTON, J.

Armburst was the employe of M. Werk & Co. in 1876, in their soap and chandlery business. His duties were the drawing of hot melted fat from the large vats and running it off into vessels for the purpose of cooling. While engaged in this employment, he was injured by the sudden escape of a column of hot fat, and he alleged that his injury was occasioned by the negligence of the plaintiffs in error, the defendants below, in failing to provide the tanks with proper faucets. In the court below a verdict was returned in favor of the plaintiff in the sum of six hundred dollars. The defense was that plaintiff assumed the risk of such an injury as befell him; also, that he contributed to his own injury.

The plaintiffs in error claimed that the court erred in not granting a new trial, for the reason that the verdict was contrary to the law, as well as to the evidence. For that reason this proceeding was prosecuted. It was claimed by the plaintiffs in error that the business was attended with such risks as that Armburst, when he was employed, necessarily expected to incur such a risk or accident as befell him; and that, therefore, the defendants were not responsible. Plaintiffs in error also argue that Armburst knowing the fact that the faucet was loose, in continuing to work in drawing off the hot fat, without having the faucet made secure, thereby contributed to his own injury, and for that reason was not entitled to recover.

The court cannot accept this application of the law in this case. It is true that a servant does, to some extent, assume the risk of the employment in which he engages. He takes the risk upon himself that he will not be injured by any negligence of his own; but in so doing he does not thereby excuse the want of proper care on the part of his employer to protect him, while thus engaged in his duties, against injury.

The testimony in this case discloses that six or seven times before this injury occurred to Armburst he called the attention of Mr. Werk, one of the junior members of the firm, to the fact that this faucet was loose. The testimony discloses further, that Werk, having thus been notified, said: "Go ahead and draw off the fat." Armburst testified that on one of these occasions in thus drawing off the hot fat, as he had done before, from a tank erected upon a scaffolding some twelve feet above the level of the floor, he climbed a ladder, reached out his left hand, and easily, as he said, sought to turn the faucet. In so doing the faucet dropped out, and the column of hot, melted fat struck him upon his left breast and side, scalding him severely.

Now he used, in our opinion, ordinary care in the discharge of his duty. His employers had received notice, as the testimony shows, that this faucet was in an insecure condition, or at least was loose. There is no testimony to show that he ever knew of any person being injured by this faucet coming out.

As to the other ground claimed for error, that this party contributed to his own injury, the question whether a servant contributes to his own injury, depends to some extent, as has been recently decided by our supreme court, as to the knowledge the servant has of the cause out of which the injury arises. In this case there was no evidence tending to show that, in the falling out of this faucet, plaintiff had reason to expect there would any other injury ensue than the loss of the melted fat to his employers. The evidence did not show that Armburst had such knowledge of the business and the construction of the tanks and the fastening of the faucets within as to have determined whether there was danger to himself or not. With these facts the employers were cognizant, or presumed to have been cognizant. It was the duty of the employers, when they were thus notified, to have taken steps to remedy the defect and not to have increased the risk of accident by neglecting to repair the faucet.

It does not appear that Armburst ever considered this question of accident any further than that if the faucet should drop out, there might be a loss of fat to his employers, not considering that he might be injured himself. Therefore the question of negligence was properly in that case, as we understand it, according to the decision of the supreme court in Railroad v. Fitzpatrick, 31 O. S., 479, left to the jury to decide and the jury must have found that Armburst having used ordinary care in seeking to turn off this fat, and being unaware that injury might ensue to him, and the defendants, or plaintiffs in error, having had notice of the defective condition of this faucet five or six times, and failing to remedy and tighten it, they were thereby guilty of such negligence as would entitle the plaintiff below to recover. There is no complaint that the damages were excessive, and upon the whole case we find that there was no error to the prejudice of the plaintiffs in error.

The judgment below will be affirmed.

Coffin & Mitchell, for Werk & Co.

T. Q. Hildebrant, for defendant.

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868 **PAYMENT OF USURIOUS INTEREST.**

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

W. P. HULBERT v. H. M. CIST, ASSIGNEE OF ROSS.

Where a debtor, owning an amount in which is usurious interest, the amount being secured by a note and mortgage, induces plaintiff to take up the note and mortgage, not only by executing new ones, but by allowing the original ones to represent the security between them, and to pay the full amount to the creditor, this is a payment, and it is too late to plead usury afterwards; and moreover the debtor is estopped to plead usury against plaintiff by having induced him to pay the full sum, and by not having notified him so as to put him on his guard.

JOHNSTON, J.

This was a proceeding in error to reverse the judgment of the common pleas. After reciting the facts of the case at some length, the court said: Two views may be taken of this case that are each about equally satisfactory to the court. Prior to the act of 1848, where a party paid usurious interest voluntarily, he was without remedy. He could not recover it back under any circumstances, but it was especially provided under the act of 1848, that where a party contracted to and does pay usurious interest, he may when he comes to pay the principal, or when the security is being merged into a judgment, ask that the excess over the legal rate may be credited upon the principal, and that the payee or owner of the obligation may be entitled to recover the principal, with six per cent. interest.

While this is the law, it is evident from a reading of the statute that this right to have the excess credited as principal must be exercised during the lifetime of the security, before it be paid by the maker finally to the person entitled to receive the money, or at the time judgment is being entered upon the security.

Taking the facts of this case, it seems to the court that in reality, as between Ross and Avery, when Ross requested Hulbert to pay the principal sum of $2,000 over to Avery; that, as between Ross and Avery, there was a satisfaction of payment of the principal sum, without the deduction of the excess over six per cent., and the case naturally assumed this phase —that Ross had paid the money ($2,000) direct to Avery, and having done so when in law he might have claimed a credit of $360, he chose with full knowledge of the facts, to make the payment, and having paid to a greater amount voluntarily than the party was entitled to claim, the excess cannot be secured back.

But the other view that may be taken of the case is equally, if not more satisfactory to the court. As disclosed by the pleadings Ross was well aware of the fact that he had paid usurious interest, and in law was entitled to a reduction as against Avery of $360. Hulbert, it is true, was aware of the same fact, and advanced the money upon the statement of Ross that he was unable to pay it, with full knowledge of all the facts.

It appears, as disclosed by the pleadings, that Ross virtually assured Hulbert that if he would pay the principal sum of $2,000, this plea for usurious interest would not be made against him, and Hulbert, as before stated and as is stated in the answer, acted upon this representation. In such a state of facts we are of the opinion that the well-known law of estoppel has its application. It is a law founded in justice, and it has its application whenever a party induces another by his acts or by his declaration to alter his position, or do something to his prejudice, and would thereafter gainsay what he had said or done.

Now, at the time Ross had induced Hulbert to pay the $2,000, if he had intended to avail himself of this plea of usury, he should have notified him so as to put him on his guard, and it has become a well-established rule that where a party should speak and does not, justice will compel him to observe silence when he would speak.

Now, in this case, Hulbert alleges that he was misled; that he was induced by statements of Ross to advance the full sum of $2,000 to Mr. Avery, and this court is of the opinion that after having thus induced him to pay the full sum of $2,000, he should now be estopped from gain-

saying what he did and what he said to Hulbert to induce him to make this investment. It was virtually a loan of $2,000 as between Ross and Hulbert, by which they agreed, rather than to go through the form of executing a new note and mortgage, to allow the old note and the old mortgage to represent the security between them, which in equity it did.

Judgment will be entered here on this basis: $2,000 the amount loaned, less $240, with interest thereon from the time it may have been paid; add interest on the balance at 6 per cent up to the first day of the term.

Jordan & Bettman, for plaintiff.

H. M. Cist, for defendant.

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870 **REFORMATION OF CONTRACT.**

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

Yaple, Force and Harmon, JJ.

†W. F. AND V. WHITNEY v. GEO. L. DENTON AND THOMAS CHATTLE.

A claim made in 1878 to reform a contract made in 1861, in a suit already pending three years before such claim is made, will not be granted unless the proof amounts almost to demonstration.

YAPLE, J.

The issues presented in this case arose on the averment of the plaintiffs that there was a mutual mistake in a certain contract in writing under seal, entered into, and executed by the parties on the 15th of June, 1861. The contract, as written and executed, binds Chattle and Denton to fulfill and perform the existing contract between them and one Sherman for the manufacture of lumber by Sherman, in all things yet remaining to be done on the part of said Whitneys. It is sought to insert in the contract a clause to the effect that the payments that had been made theretofore by Chattel and Denton to Sherman and Marsh should be borne by Chattle and Denton, and no part of it charged to the Whitneys, and these items of payment amounted to about $14,000, one-half of which, if this provision cannot be inserted in the contract, would have to be borne by each party under the decision of the case in the Supreme Court. The facts were substantially these: The Whitneys and Denton and Chattle were in partnership, or jointly concerned in the ownership of timber lands in Pennsylvania, the manufacture of lumber, and in the rafting of logs down the Ohio river to Cincinnati and elsewhere along the river; and in the progress of that business prior to entering into this contract, they had an agreement with Mr. Sherman to manufacture lumber at a specified price. It was a continuing contract, and continuing after the dissolution of the Whitneys, Denton and Chattle partnership, and by that contract, what was to be done thereafter Denton and Chattle assumed. But prior to the contract Sherman had manufactured large quantities of lumber under his contract, and the Whitneys had paid him about $2,400, and Denton and Chattle had paid him about $8,000. They also had special contracts with Marsh to raft this lumber down the river to Cincinnati at $3 per 1,000 feet, and before this contract he had rafted large quantities of lumber, and the Whitneys had paid him $600 and Denton and Chattle about $6,000. When the lumber came here the parties divided, the Whitneys taking half and Denton and Chattle half, and disposing of it. It was contended originally, and found by the master, and affirmed by this court in special and general term, that Denton and Chattle were bound under this contract to bear, as between them and the Whitneys, these advances to Sherman and Marsh, and the case went to the Supreme Court, which decided that could not be done, but that each woud have to bear the half, and receive credit for what they had paid, and that parol evidence was not admissible to establish the fact under that contract that the parties had agreed that Denton and Chattle should allow, and stand the whole charge of Sherman and Marsh. Then this bill was filed to incorporate that provision in the contract, alleging that it was left out by mutual mistake of the parties.

†This judgment was reversed by the Supreme Court. See opinion, 31 O. S., 89.

The rule in regard to correcting written contracts under seal is very properly a rigid one, and it requires clear and convincing proof to enable the court to order it to be done. This contract was made on the 15th of June, 1861, and the amended petition claims to correct it, after the case had been in litigation from 1875 to about the beginning of 1878, without any intimation of a mistake in the contract; and after the decision of the Supreme Court that it was not in it, this claim is made that there was a mistake and asking the court to correct it. Now the lapse of time, and the frail memory of witnesses, ought to require the court to be very cautious, and not to interfere, except in a very clear and obvious case, amounting almost to demonstration, if any subject like this could be demonstrated. The court had looked through the evidence before the master, and could not find that Denton and Chattle understood and agreed that they were to stand the whole of these advances. It is very probable that the matter was not distinctly understood between the parties. The Whitneys may have supposed such was the understanding. But it is not enough that one of the parties to a written agreement supposes a thing to be so and so. They must both agree to it, and then if by mistake the scrivener leave it out and that fact is clearly shown, the court can have it inserted. It is said the value of the lands shows that that must have been the agreement. But looking back to the time when this transaction took place, in 1861, and considering that the rebellion had begun, when there was no power in any man to foresee the future, and with the general stagnation in business, because it was not till 1862 that the legal-tender notes began to be issued, it might well be supposed that property of this kind would be regarded as very hazardous. So that this matter of consideration did not weigh so strong with the court. All that he could say was that it was probable the plaintiffs are right in their claim. But they must make it out satisfactory, and the Supreme Court having decided this was not in the contract, the responsibility, if anything wrong should take place, is not resting on this court in obeying the decision of the highest tribunal in the state. Judge Welch dissented, and he (Judge Yaple) would have differed on one point with the Supreme Court; that is in relation to the item of $2,400 paid to Sherman and the $600 paid to Marsh, and yet the contract may be susceptible of the construction put on it by Judge Boynton. He, therefore, could not find there was any mutual mistake in the contract entered into in 1861, and must deny the relief prayed for. The contract on the evidence before the court could not be reformed and that provision inserted in it. It may be a hard case, but the court was not responsible for it.

W. J. Coppock and W. M. Ramsey, for plaintiff.

Coffin & Mitchell, for defendant.

JUDGMENTS—JURISDICTION—COURTS. 887

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

†Joseph G. Gibbons et al. v. Catholic Institute of Cincinnati. James P. Kilbreath et al. v. W. S. Gaylord, Admr., et al.

Jurisdiction of the district court to reverse, vacate or modify judgments of the superior court of Cincinnati.

Petitions in error to revise judgments rendered by the Superior Court of Cincinnati, in General Term, July, 1878.

Avery, J.

Motions are made by the defendants in error to dismiss. The judgment of the court in general term, in one case, was upon reservation from special term; in the other, upon petition in error; but as judgments upon reservation are subject to the same right of review as judgments of the special term taken to general term upon error, and there affirmed, the question in both cases is the same.

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†The case of Kilbreath v. Gaylord, sought to be reversed in this action, will be found *ante* 487; that of Catholic Institute v. Gibbons, *ante* 516. This decision was affirmed by the Supreme Court in Gibbons v. Institute. See opinion, 34 O. S., 289.

The act to revise and consolidate the laws relating to civil procedure and procedure in error provides (75 O. L., 804, section 3) that "a judgment rendered or final order made by the court of common pleas or any superior court, may be reversed, vacated or modified by the district court." Prior to this the code of civil procedure, in force from June 1, 1853, had provided that judgments and final orders of the court of common pleas, superior court of Cleveland, and superior or commercial courts of Cincinnati, might be vacated, reversed or modified by the district court. When the Code of Civil Procedure took effect, the superior courts of Cleveland, and the superior and commercial courts of Cincinnati had ceased to exist, under the constitution which limited their existence to the second Monday in February, 1853. Afterward the superior court of Cincinnati, as now existing, was established by act of April 7, 1854, which provides that the court shall consist of three judges; any two of them may hold a general term of said court, and any one a special term; that the special terms shall be held for the trial of causes, and the hearing of motions; and that all petitions in error shall be heard and decided in general term; that judgments of the court in special term may be reversed, vacated and modified by the court at general term upon petition in error (without leave; and that judgments of the court in general term may be reversed, vacated or modified by the Supreme Court upon petition in error) with leave, in the same manner as provided by law for reversing, vacating or modifying judgments and final orders of district courts of the state.

The Code of Civil Procedure, in force since 1853, has been repealed by the present act, which provides that judgments and final orders of any superior court may be reversed, vacated or modified by the district court. By the plain words, "any superior court," the superior court of Cincinnati is included. The doubtful question is whether the words were intended to apply to judgments and final orders already made by that court in general term.

Statutory repeals by implication are not to be favored. "It is an established rule in the construction of statutes that a subsequent statute treating a subject in general terms, and not expressly contradicting the provisions of the prior act, shall not be considered as intended to affect more particular and positive provisions of the prior act, unless it be absolutely necessary to do so in order to give its words any meaning," Fosdick v. Village, 472; 14 O. S., 473. The words, "Judgments and final orders of any superior court," will have a meaning if restricted to judgments of the superior court in special term, and from a concurrent act of the same legislature, the inference is reasonable that the words were intended to be used in this restricted sense. The act referred to was passed four days before the act to revise and consolidate the laws relating to civil procedure, and is entitled, "An act to change the common pleas districts of the state, and to give greater efficiency to the common pleas and district courts, and to repeal certain parts of an act therein named." The principal portion of this act has lately been declared by the Supreme Court unconstitutional, but the repealing act is separable from the main body of the act, and, although one part may be unconstitutional, the repealing part will stand upon the principle that where a law is capable of being severed, the unconstitutionality of one part will not affect the rest.

The act therein named, parts of which are repealed, is "an act entitled an act to establish the superior court of Cincinnati," and the parts repealed are section 17, and all portions of said act conferring upon the court at general term jurisdiction to reverse, vacate or modify judgments of said court at special term. "All proceedings in error pending in said court on the first Monday of October, 1878, shall be by such court at once certified to the district court of the first judicial district, which shall thereupon have full jurisdiction of such cases, and from and after said time final orders and judgments of said superior court may be reversed, vacated or modified by said district court, in the same manner and by like proceedings as judgments of the court of common pleas."

Proceedings in error pending in the superior court on the first Monday of October were proceedings in error in the general term to reverse final judgments and orders of the special term. The power of the general term to sit as a court to reverse, vacate or modify the judgments of the special term was extinguished, and the business of the court in general term transferred to the district court by requiring that pending cases should be certified. Final judgments and orders, which after that time might be reversed, vacated or modified by the district court, were in like manner final judgments and orders of the superior court in special term to which no petitions in error had yet been filed, and over which, by reason of the extinguishment of the power of the court in general term as a court of review, no reviewing court was left.

In judgments already rendered by the court at general term, the errors of the superior court had been once passed upon, and there was reason for distinguishing these from judgments of the court which had not already been subjected to review.

The act establishing the superior court of Cincinnati, by section 21, provided that judgments of the court in general term should be reviewed in the Supreme Court, and the intention of the legislature to leave that section unaffected is obvious from the fact that when the same legislature which passed the act revising and consolidating the laws relating to civil procedure had passed the act to give greater sufficiency to the common pleas and district courts, it while repealing section 17 of the act establishing the superior court, which gave the general term of that court jurisdiction to review the judgments of the special term, left unrepealed that section which subjected judgments of the general term to review only by the Supreme Court.

The question before us has no reference to judgments of the court in general term, if such judgments may be rendered since the change in the organization of that court made by existing laws. The question decided is, simply, that prior to the 1st of September, when the act revising and consolidating the laws relating to civil procedure took effect, and the first Monday in October, when the laws in relation to the district court took effect, no petition in error would lie in this court to reverse, vacate or modify judgments or final orders of the superior court; anl that since then no petition in error will lie in this court to reverse, vacate or modify judgments and final orders of the superior court in general term, made prior to that time. This motion raises simply that question, and upon it this court concur the motion should be granted, and the petitions in error dismissed.

J. F. Follet, for the motion.

Judges Hoadly and Coffin, contra.

INJUNCTION—PRACTICE. 890

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

WILLIAM J. AFSPRUNG ET AL. v. SAMUEL ALTHOFF.

Where a case stands on a petition, and a full, square denial by answer, and there is no testimony, a motion by defendant to dissolve an injunction will be granted.

Cox, J.

This case was heard on a motion to dissolve an injunction. A petition was filed in the common pleas against the defendant, to enjoin him from prosecuting certain cases before magistrates, for rent of premises on Main street, in this city. The petition alleged that the plaintiffs held a lease of the premises, with the usual covenants for quiet enjoyment; but that in the spring of 1878 the defendant tore down the north part of the store, and that by the dirt and rubbish occasioned in the tearing down, his goods were injured and soiled, his employes were kept out of work for a long while, and he was damaged to the extent of $2,000.

Plaintiff claimed that defendant had brought suit before a magistrate to recover the rent for the month of July, and brought other suits for subsequent rent; that in these suits he (the plaintiff) attempted to set up his damages, and the magistrate refused to hear the defense, on the ground that he had no jurisdiction. He claimed also that the defendant was insolvent, and that in any suit which the plaintiff might institute against him, although he could recover judgment, he would be unable to make the amount on execution. He, therefore, asked the court to enjoin these suits upon this ground, as well as to prevent a multiplicity of vexatious suits from time to time, involving him in costs and litigation.

The defendant has filed an affidavit denying all the averments of the petition, except as to the lease. He denies that he or any one under him, or by his authority, did the injury complained of, or in any manner interfered with the possession of the plaintiff, and denies also that the defendant is insolvent, but avers that he has abundant property to satisfy any judgment plaintiff may recover. He also denies that the magistrates before whom the cases were tried, refused to entertain their claim for damages, on the ground of want of jurisdiction, and says that the case went to the court and jury on the entire facts. No testimony was offered on either side. The case thus stands on petition of plaintiffs, and a full, square denial by defendant of all the allegations upon which it is claimed the injunction ought to be sustained.

The motion to dissolve the injunction will therefore be granted.

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891 CHANCERY JURISDICTION OF PROBATE COURTS.

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

CATHARINE BORNTRAEGER, ADMX., v. CATHARINE BORNTRAEGER.

The probate court has chancery powers to determine controversies between parties to a sale of a decedent's property to pay debts. Where, in a proceeding by an administratrix to pay debts, a party sets up a decree for sale on a purchase-money mortgage as a first lien, and the administratrix, in reply, says she was not made a party to such case until after decree; that there is a motion to set such decree aside, and that she has certain claims alleged to be prior to the purchase-money mortgage, in such case the probate court has complete jurisdiction to pass upon all the questions.

LONGWORTH, J.

This case comes up by petition in error to reverse judgment of the common pleas.

The plaintiff filed her petition in the probate court, as administratrix of her deceased husband, Franz Borntraeger, to obtain a sale of his real estate to pay debts. The real estate consisted of lots 252 and 253, in Greenwood's subdivision, Cincinnati.

Frederick Pfannkuchen, one of the parties defendant, filed his answer, uniting with the plaintiff in a prayer for a sale. He alleges that he had obtained a decree in the common pleas against the intestate for the payment of $1,619, and an order for sale of lot 252, upon a purchase-money mortgage held by him thereon; that the same is the first lien, and he asks that out of the proceeds of sale his claim may be paid.

Such proceedings were had in the probate court that the lots were sold under order of the court, Michael Nevins being the purchaser of lot 253, and the defendant Pfannkuchen, the purchaser of lot 252.

The court confirmed the sale, and adjudged the lien of Pfannkuchen to be the first and best lien upon lot 252, and ordered that he be paid out of the proceeds of the sale.

Thereupon Catharine Borntraeger filed her individual reply, by leave of court, setting forth that Pfannkuchen had obtained a decree, as alleged by him, but that she was not a party to the proceedings originally, but has been made a party since the decree, and has filed her answer, and that there is a motion pending to set aside said decree.

Her reply further set forth that the buildings upon lot 252 were paid for out of her separate moneys, and were not covered by the purchase-money mortgaged. She also claimed homestead exemption.

Thereupon Pfannkuchen moved the court to set aside said sale and all the proceedings, for the reason that the jurisdiction of the court was ousted by reason of the equities which arose in the case.

This motion was granted and the case was dismissed for want of jurisdiction.

From this order an appeal was perfected by Catharine Borntraeger in the court of common pleas, and upon hearing upon the pleadings and proofs the court of common pleas dismissed the action. From the judgment a petition in error is prosecuted in this court.

Although the probate court is a court of limited and statutory jurisdiction, it is a mistake to say, as it is often said, that it has no chancery powers, unless the same be given expressly by statute; neither does it possess common law jurisdiction unless it be given by statute, or, for that matter, any jurisdiction of any kind whatever outside of statute law. The legislature has seen fit, in certain cases, to clothe probate courts with full equity powers for the purpose of enabling them to settle, finally, certain controversies before them, without resort to a court of chancery.

By section 2 of the act of April 12, 1858, it is provided that in proceeding to sell the property of a deceased person to pay debts, the probate courts shall have "full power to determine the equities between the parties, and the priorities of liens." No broader language could be used to confer full and complete chancery powers in such proceedings.

The probate court, therefore, had complete jurisdiction to pass upon all the equities presented in the case before it, and should not have dismissed the proceedings for want of jurisdictions. Although the issues presented by the reply of Catharine Borntraeger were of a character to require the determination of a court exercising equity jurisdiction, it is plain that there was no equity in her claims upon her own showing. Her right to homestead exemption certainly could not be asserted against one holding a purchase-money mortgage; that the improvements upon the land were paid for out of her own funds, could be answered by any one having the most elementary knowledge of the law of fixtures.

It was claimed in argument that the court of common pleas dismissed the appeal for want of jurisdiction to consider it. An inspection of the record shows this to be a mistake. The entry of judgment in that court shows that the cause came up for hearing upon the pleadings and proofs offered, and was, upon consideration, dismissed.

What the proofs were we cannot ascertain. We are not furnished with any bill of exceptions, and upon this subject the record is silent. We must presume that the evidence was such as required that the cause be dismissed.

The judgment of the court below is presumed to have been correct until the contrary appears, and there is nothing in the record to show us that it was not correct. It will be affirmed.

893 COMMON CARRIER—LIMITATIONS.

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

J. L. WARING & Co. v. BALTIMORE & OHIO R. R. Co.

Though a bill of lading is silent as to the goods being delivered within a reasonable time, yet that obligation is part of the written contract, and an action for failure to deliver in a reasonable time is not barred in six years, but in fifteen years.

ERROR to the Common Pleas.

The plaintiffs brought their action in 1877 against the railroad company upon a bill of lading issued in 1865 for 800 barrels of flour, to be transported to the city of Baltimore. The allegation in the petition is, that the defendant did not, within a reasonable time, deliver the flour to the consignees who were the agents of the plaintiffs for the sale of the flour in Baltimore. To this petition the plaintiff files an answer, in the second count of which it sets out the bill of lading, in *haec verba,* and alleges that the right of action did not accrue within six years. To this count of the answer plaintiff filed a demurrer. The court of common pleas overruled the demurrer, and thereupon, the plaintiff not seeking to reply, a judgment was entered for the defendant. The petition alleges that the defendant, by the written contract, undertook to deliver within a reasonable time the goods committed to it in the city of Baltimore, but that they failed to deliver them at a reasonable time. It is claimed on the part of the defendant that the written contract set out in its answer does not contain any express promise to deliver within a reasonable time, but that the obligation admitted to have rested on the company is an obligation which the law fixes upon the undertaking to transport; that it is not, therefore, a written contract, and that the statute of limitations barring actions upon simple contracts not in writing, unless begun within six years, will apply.

BURNET, J.

We are not able to agree with counsel for defendant in this position. It is the duty of a common carrier, when goods are tendered to him for transportation, to receive them upon being paid a reasonable compensation for his services, and within a reasonable time to deliver them at the place of destination, and for a refusal, except upon good cause, to undertake the service, a right of action exists against the carrier. When goods are delivered to a carrier for transportation, the contract which the law implies, is, whether there be any writing or not, that the carrier, for a reasonable compensation, will within reasonable time deliver the goods at the place of destination to the consignees. If there be a bill of lading given at the time the goods are delivered to the carrier, that bill of lading comprises, not only a receipt for the goods, but a contract to fulfill the obligation which the law imposes on the carrier, and although the words be not put in the bill of lading that the carrier will deliver within a reasonable time, that is the legal interpretation of the contract which he enters into when the bill of lading is given, there being nothing put into the bill of lading to exclude that interpretation; and in the case of a bill of lading

then, that is a part of the contract in writing, and the right of action will subsist for fifteen years without being barred by the statute.

The court here referred to the case of Haines v. Tharp, 15 O. S., 130, and said it was precisely similar in principle to the case at bar. In intendment of law, the contract contained in the bill of lading was to deliver within a reasonable time, and the contract was in writing, and was not barred in six years.

The judgment of the court below will be reversed.

Jordan & Bettman, for plaintiff in error.

Hoadly, Johnson & Colston, for defendant in error.

SURETY—STAY BOND—EXECUTION. 894

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

WILLIAM GOCKEL v. HENRY AVERMENT.

1. A demurrer to an answer having been sustained, and the cause suffered to remain until the following term, there being no application on the part of defendant to amend, or of plaintiff for judgment, and at such next term judgment was rendered by default, this is not error.
2. To entitle a plaintiff to his remedy against the surety on a bond for stay of execution before a justice, it is only necessary that there should be a return of execution on the judgment unsatisfied at the expiration of the stay, and it is no defense for the surety to set up that there was property on which to levy, but that by collusion between the plaintiff, the debtor, and the constable, the execution was returned unsatisfied.

ERROR to the Court of Common Pleas of Hamilton County.

BURNET, J.

Henry Averment obtained a judgment before a justice of the peace against Alice Baker and John F. Baker, her husband, for a sum over $100. Within the ten days from the rendition of the judgment stay of execution was obtained by the giving of bond by Wm. Gockel, plaintiff in error. At the expiration of the stay, execution was issued upon the original judgment, and returned "no goods or chattels found whereupon to levy." Action was then brought upon the stay bond against the surety, Gockel. He answered that there was sufficient goods and chattels in the possession of Alice F. Baker and her husband to meet the amount of the judgment, and that by collusion between the plaintiff, Averment, and the Bakers, the execution was obtained to be returned unsatisfied. To this answer a demurrer was filed and the demurrer sustained, and leave granted to amend. The defendant, Gockel, then filed an amended answer alleging the same facts with the additional statement that there was collusion between the plaintiff and the defendant and the constable for the return of the execution unsatisfied. To this amended answer a demurrer was also filed and sustained, and subsequently, there being no application to amend the answer again, a judgment was rendered against the surety and in favor of Averment. To this judgment a petition in error is filed.

It is claimed that the allegations in both answers constituted a good defense to the action.

The court in disposing of the case said that it had been held by the supreme court commission, in 27 O., that where any execution for any cause had been issued upon the original judgment upon the expiration of the stay of execution, the bond given in stay of execution was not good, and therefore the judgment debtor would be required to enter a new bond, and upon default thereof, execution having been issued before the expiration of the stay, which was returned unsatisfied, the action upon the bond could not be sustained. But the only requirement of the statute was that there should be a return of an execution upon the judgment unsatisfied at the expiration of the stay, to entitle the plainiff to his remedy against the surety.

Although it may have been true that there was collision between the constable who made the return and the defendants, the judgment debtors below in the magistrate's court, to which collusion the plaintiff himself was a party, yet the condition had been performed which entitled the plaintiff to his action upon the bond, the condition of the bond being that the surety obligates himself, the original defendant shall pay the amount of the bond. If the allegations contained in the answer could be established, and it could be shown that the defendants before the magistrate in the original judgment had sufficient property out of which the amount of the judgment could have been made, the surety, upon paying the judgment, was entitled to proceed and collect the original judgment; and if by reason of any change of circumstances of the judgment debtor it should become impossible for him to make the amount of the judgment out of the original judgment debtor, he would have his remedy upon the bond of the constable who made the false return. The demurrer was sustained at the November term, 1877, of the court of common pleas. The cause was suffered to remain until the following term, there being no application on the part of the defendant to amend, nor any application on the part of the plaintiff for a judgment at the November term, and at the January term judgment was rendered by default. It was claimed that this was error. The court was unable to perceive wherein the error lay, and the judgment would accordingly be affirmed.

Dustin, for plaintiff in error.

Pohlman, for defendant in error.

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914 RAILROAD SUBSCRIPTIONS—EVIDENCE.

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

BENJAMIN FREEMAN v. AUGUST MUTH.

Parol evidence is not admissible to show that a written subscription to a railway, payable on completion, was given in consideration of certain culverts and bridges to be put in at defendant's farm, as promised by the soliciting agent. But evidence that such agent falsely stated that he had seen the plans of the road, that such plans contained such culverts and bridges, in reliance on which defendant signed, being representations not promissory but of an existing fact, would have been competent.

BURNET, J.

In this case a petition in error was filed to reverse a judgment of the common pleas in a suit brought against Muth to recover $500 as a subscription made to aid in the construction of the Junction Railroad, the promise being to pay this amount to the company on the arrival of the

first train of cars at Indianapolis. The plaintiff declares on this instrument as a promissory note. The defendant answers, denying the instrument sued on is a promissory note, and alleging that it was a contract for the payment of money and obtained under false and fraudulent representations. The defendant also denies that there was any consideration for the contract, and denies that the railroad company assigned the contract. As a further defense it is alleged that certain representations were made by an agent of the railroad company, which the defendant alleges were false and fraudulent; also that the writing sued upon did not contain all the conditions of the contract, and the defendant sets out the other conditions, which he says ought to have been inserted in the contract and have not been complied with. The answer prays that the writing may be reformed and the petition dismissed.

It appears from the evidence that the instrument was procured to be signed by one Smith, an agent of the company who was authorized to procure subscriptions from parties through whose lands the railroad ran; that the agent applied to Mr. Muth to obtain his subscription, which was at first refused on the ground that the road, as it was proposed to be built, would not benefit him, but would be an injury to his land; that an embankment was to be made through his farm which would cut off access to forty acres of his land, and also for the reason that it would be necessary for him to have a station near his farm in order that he should have any benefit from the road; that the agent said he was familiar with the plans and purposes of the company, and that it appeared from the plans that it was their intention to make a culvert or bridge where the intended embankment was to be, large enough to permit access to the forty acres, and avoid the injury the defendant apprehended; that there would be a passage-way for the water to run off, and the plans also showed that it was the intention of the company to establish a station near the defendant's property. It was claimed by the defendant that the contract was not binding on him because the consideration had failed.

The consideration is that set out in the instrument itself. This instrument is not like a promissory note, in reference to which, the consideration not appearing on its face, it is competent to show there was no consideration for giving, or that it had failed. On the contrary, the consideration for giving this promise appears on the face of it. It was claimed by the defendant that the proof showed that there were false and fraudulent representations made by the agent of the company which were the inducements to enter into the contract. There was a conflict in testimony as to whether the representations were made, but the preponderance of the evidence seems to show that they were made. But there is no evidence that they were false. False and fraudulent representations which would authorize the setting aside of a contract must be in the nature of fact, and not in the nature of a promise of a thing that will be done in the future. There is no evidence that the plans of the railroad company did not provide for all the things the agent said they did, and promised would be done. There was no proof, therefore, of such fraudulent representation of facts as would enable the defendant to resist the enforcement of the contract on that ground. It does appear that the matters promised by the agent were not done, and that the station was not made as promised. But these are not in the nature of misrepresentation, but in the nature of an agreement, promise or undertaking not fulfilled, and in order that defendant could resist the enforcement of the contract on this

ground it must appear that they were parts of the contract sued upon. The written contract does not contain them and there is no evidence to show that they were omitted by mistake or fraud. Nor does it appear that the agent who took the subscription had authority from the railroad company to bind it to the performance of the things alleged to have been promised by him, but on the contrary it affirmatively appears that he had no such authority.

The court below found the plaintiff had no cause of action, and dismissed the petition.

The judgment will be reversed.

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939 **USURIOUS INTEREST—EVIDENCE.**

[Hamilton District Court, October Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

JOHN BLACKBURN v. GAZZAM GANO ET AL.

Where a note bears on its face eight per cent. interest, and the whole amount of the note was advanced to the borrower, and usurious interest is paid by him, only the excess over eight per cent. will be credited on the principal, and parol evidence that the original agreement was for an usurious rate will be excluded.

BURNET, J.

The plaintiff brought his action to foreclose a mortgage given by Gazzam Gano to him for money loaned. On December 27, 1871, Gano executed a note for $5,000 to A. F. Willis, which was transferred to the plaintiff. At the same time he executed a mortgage to secure the note, in the condition of defeasance of which was included also the security of subsequent advances to be made. On the 24th day of January following $1,000 in addition was loaned upon the faith of this mortgage and a note given. Both notes were transferred to Blackburn. Both notes called upon their face for eight per cent. interest. The proof showed that as the semi-annual interest became due, Gano paid ten per cent. interest, the payment being made to Blackburn, plaintiff in this case. Subsequently Gano made an assignment to Thomas Scanlan and Sylvester Hand, for the benefit of creditors, of all his property, including the mortgaged premises. The assignees set up the fact that ten per cent. was paid upon these notes from the day of their date, and claim that the excess over six per cent. should be credited upon their principal. The question now is, simply, what shall be deducted from the principal, if anything, for the excess of interest above the legal rate. It is proper to say that Mr. Gano himself does not seek to avoid payment of any usurious interest which he has agreed to pay, and has suffered judgment against himself for the full amount; but it is contended by the assignees that the contract for interest is an illegal one, and that therefore the lender is remitted to the legal rate of six per cent. During the trial they sought to prove that at the time of the contract there was an agreement between Gano and Blackburn that although the note recited that the interest was to be eight per cent., yet in fact he was to pay ten per cent. semi-annually, in accordance with which he actually did pay ten per cent. This evidence was excluded by the court upon objection of the plaintiff. The majority of

the court being of the opinion that the evidence was incompetent. Volume 66 of the Laws, page 91, provides for interest not exceeding eight per cent. upon a written agreement; and also provides that in case of judgment upon any instrument bearing eight per cent. the judgment shall bear interest at the same rate. By the statute of 1848, it is enacted that in all actions for the recovery of money hereafter prosecuted in the courts of this state all payments of money or property made by way of usurious interest, whether made in advance or not, shall be deemed and taken as to the excess of interest above the rate allowed by law at the time of making the contract to be payments made on account of the principal, and the said court shall render judgment for no more than the balance found due after deducting the excess paid. Under the statute it has been uniformly held that where a borrower has paid more than the rate which the law allows to be reserved as interest, the excess above that rate shall be credited upon the principal as payment of principal at the date at which the payments have been made. If the contract be by parol, and more than six per cent. has been annually paid, the excess above six per cent. is to be credited as principal. If the contract be in writing and more than the amount which the law at the time of the contract authorizes to be contracted for in writing, be paid, the excess above that sum shall be credited as principal, and this whether paid after, or at the time of the loan.

If, for instance, a loan be nominally of $2,000, and a portion of it be retained at the time of the transaction as an excess of interest above the amount which the law allows to be reserved, it shall at that time be credited as of the principal, and upon showing this fact the borrower can recover only the amount actually advanced, with six per cent. thereon thereafter. If, however, the whole is actually advanced by the borrower to the lender, then, if it be a parol contract, the payment of interest over and above six per cent., will be credited upon the principal as payments of principal at the time the payments were made. But the payments that the law actually allows to be contracted for, will, to that extent, be enforced. It seems to have been a common idea that when under the eight per cent. law, there has been an agreement to pay eight per cent., and more than eight per cent. has actually been paid, the excess above six per cent. is to be credited as of the principal; that the agreement to pay the interest at the rate of eight per cent., which the law authorizes to be made by writing, is avoided, and the party is remitted to the amount he might claim independently of the writing. We do not so consider. See Samyn v. Phillips, 15 O. S., 218, 220, and Erie Ry. Co. v. Lockwood, 28 O. S., 358, 365; also Clearwater v. Cloom, 2 Handy, 94, where Judge Gholson decided the same question. It will be observed that our statute in giving the right to charge the excess of interest up against the principal, makes no reference to the terms of the contract of the parties, but the provision is, "all payments of money or property made by way of usurious interest, whether made in advance or not, shall be taken as to the excess of interest to be payments made on account of the principal." It is immaterial for the purpose of this question whether the payments were made in pursuance of an agreement at the time of the loan, and in conformity with its stipulations, or whether they were made voluntarily by the borrower, as interest. It is not the fact of the agreement, but the fact of payment that gives to the borrower his right to demand that the excess shall be credited as of the principal, and it is the

excess over the legal rate. The legal rate, in case of a parol contract, is six per cent., and in case of a written contract, eight per cent.

In the process of the trial it was proposed by defendants to show that at the time of the loan Gano in fact agreed to pay ten per cent. instead of eight per cent., and, upon objection, this evidence was excluded by the court. In those states where contracts are avoided because of usury, or penalties or forfeitures are attached, the courts will permit the parties to go behind the written contract and prove what in fact was the contract, that they may not, by any device, escape from the penalties and forfeitures fixed by statute, and that the real transaction may be developed; but in this state there is no penalty or forfeiture affixed for illegal interest, nor in determining whether there shall be a remittitur of the excess actually paid is it material whether it was in pursuance of a contract of the parties different from their written contract or not. Therefore there is no reason in such cases for making an exception to the general rule that the parties cannot contradict their written contract by parol testimony. That question is a very different one from the other, whether a party can prove that, although a note may be for a special sum, in fact the amount advanced was less than that sum. The decree will be drawn in this case for the amount remaining due upon these notes after calculating interest at eight per cent., according to their terms, and deducting the amount actually paid by defendants. The interest upon that decree will be eight per cent.

Judges Cox and Johnston dissented from the opinion of the majority of the court.

JOHNSON, J., dissenting opinion.

"While I concur in the conclusion reached, I cannot assent to all the reasons given, whereby the majority of that court were enabled to reach such conclusion. Upon the evidence the court permitted to be introduced, no other conclusion could have been reached. I desire, however, to dissent to that part of the opinion wherein the court decide that parol testimony cannot be introduced to vary that which appears upon the face of the note to be the contract as to interest where usury has been pleaded by the maker, or as in this case, by his assignee.

In this case, the plaintiff, having introduced the note and mortgage, rested. Gano was then called by the assignee, and having proved that the $6,000 was received direct by him from Blackburn, and that the first semi-annual installment of interest was paid at the rate of ten per cent. per annum as well as all the other subsequent installments, counsel for the assignee then put this question: "What was the agreement at the time of the loan between you and Blackburn as to the rate of interest you were to pay him thereon?" To this question plaintiff objected and the objection was sustained. I was of the opinion then, that the objection should have been overruled and answer taken, and I am still of that opinion. Under the plea of usury it is my opinion that what appears upon the face of the paper, either as to amount loaned or rate of interest, is not conclusive upon the parties; but that it is the right of the party making the plea to show by parol testimony just what the agreement in fact was. It was his right if he could to show that the rate, "8 per cent.," never was agreed upon or stipulated at all between them; but that ten per cent. only, an unlawful rate, was agreed upon. Unquestionably if defendant could have shown this to have been the only agreement, and that the words

"eight per cent.," were written in as a shift or devise to give the appearance of legality to that transaction, a different conclusion must have been reached than that just announced. For if a usurious rate of interest only be contracted for and paid, that contract is an illegal one and void, and the lender is remitted to 6 per cent., the legal rate fixed by statute.

Judge Cox concurred in the dissenting opinion.

John G. and H. Douglass, for plaintiff.

Madox and Mannix, for defendant.

CONDEMNATION OF PROPERTY—DAMAGES. 965

[Hamilton District Court, April Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

DAVID BANNING v. TRUSTEES OF SOUTHERN RAILROAD.

1. Where the owner of a tract of land subdivides it, and the plat is recorded, and where one buys land previously so subdivided, the lots are subdivided for all purposes as if actually separated by real lines, and a corporation seeking to condemn some of the lots, cannot be compelled to pay damages to the remainder of the lots, no part of any one of which was taken.
2. Condemnation proceedings in the probate court having been reversed on the application of one of several defendants in the common pleas, the case should be remanded to the probate court, and not retained for further proceedings.

LONGWORTH, J.

This action was originally brought in the probate court to appropriate land for the construction of the Southern Railroad bridge. A petition in error was filed in the court below to the judgment of the probate court. The court below reversed the judgment of the probate court and ordered that the case be retained in the court of common pleas for further proceedings. To reverse this judgment this proceeding in error was instituted.

The court found that Banning was the owner of a tract of ground, 300 by 100 feet, on the corner of Seventh and Anderson streets, acquired in proceedings in partition in a tract of fifty acres, in which Banning owned two undivided acres. Banning's undivided two acres were set apart to him in lots, numbered from 137 to 148, inclusive, in a subdivision made in these partition proceedings. The trustees proposed to appropriate all except eight of these lots. Banning, in the probate court, moved to compel the trustees to amend their application in such a manner as to describe in addition to the lots sought to be appropriated the other lots forming a portion of the whole tract of 300 by 100 feet. The theory upon which the application was made was that the trustees were bound by law to pay for the land actually appropriated and the damages suffered to the remaining lots, not appropriated, by reason of the appropriation, and the question was, does that refer to the remainder of the whole tract owned by Banning, or to the remaining portions of those lots only a portion of which has been appropriated?

It is not because the defendant is the owner of the land which is condemned, that he is entitled to recover. The law simply gives him compensation for the land taken and damages done to the remainder not taken. If the defendant owned another piece of property in the neighborhood which was damaged directly or indirectly by the appropriation,

it would not be contended that he was entitled to compensation in that proceeding by-way of damages for such injury.

It was claimed that inasmuch as the land lay all together, being subdivided by lines which were purely imaginary, it was more valuable for manufacturing purposes as a whole tract than as lots, and that therefore, it should have been considered as a whole tract, and not as a subdivision, the court being cited to the case of Springfield R. R. Co. v. Longworth, 30 O. S., 108, as authority. The court there permitted an unrecorded plat to go in evidence to show that the land sought to be appropriated was capable of subdivision, but whether the subdivision should control it was left to the jury. Railway Co. v. Longworth, supra.

Where the owner of the tract of land subdivides it, and the plat is recorded, or where a person purchases land which has been previously subdivided in such a manner, this is a legal subdivision of that land for all purposes. It is the intention of the party, whether he actually separates the land by real lines instead of imaginary ones, or whether he draws simply a legal line there, to forever separate that property in contemplation of law. If the proceeding had been by the municipality, (for the proceedings of the trustees were simply under a power given to the corporation), the city could not have assessed any of the lots in the tract except those abutting upon the street improved. Where, instead of doing so, the city seeks to take a portion of the land and the owner asks damages to the remainder, what is the remaining property as between him and the city is to be determined in the same way. It would not be a good rule if it did not work both ways. If the lots had been used as subdivided lots, there would be no question about it. If Banning had sold the intervening lots, it would not be contended that the other lots which he still owned could be considered in estimating the compensation. The court below, therefore, did not err in reversing the judgment of the probate court, which ordered the trustees to amend their application in the manner stated.

Banning was the only party served with summons in error in the court below. We cannot see how the judgment of the court below could affect rights of the other defendants. The court of common pleas erred in retaining the case for further proceedings in that court. The case should have been remanded to the probate court.

Alex. Long and Alex. Huston, for plaintiffs in error.

W. T. Porter for defendant in error.

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985 **FRAUD AS A GROUND OF DIVORCE.**

[Hamilton Common Pleas, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

†ANNA MARIA MEYER v. HERMAN MEYER.

False representations of a party as to his respectability, connection in society, wealth, and the like, are not fraud in the marriage contract as ground of divorce, nor is giving himself a false name, not representing himself to be another person, but falsely representing that he was related to another; there must be not mere fraudulent representations inducing the entering into the relation, but they must be as to matters that are essential parts of the relation itself.

†This decision was affirmed by the district court. See opinion, 4 Bull., 368.

AVERY, J.

The petition alleges that the defendant represented himself to be Herman Meyer, the son of a wealthy land owner in the province of Westphalia, and to substantiate what he said, he introduced to the plaintiff persons who knew or pretended to know him, and exhibited letters. These representations were made on the 10th of September, 1877, when the plaintiff first formed the acquaintance of defendant, and she states that, confiding in them, on the 16th of the same month she accepted a proposition of marriage from, and on the 3rd of the following month married him. The parties cohabited together until the 23rd of March of this year, when, as she alleges, she discovered that his representations were false, and had been made to deceive her; that he was not Herman Meyer, but Herman Bruns, and that he was not the son of Meyer, the wealthy and respectable citizen of Westphalia, but a man without any means or character, and not the man she intended to marry. On that ground she claims a divorce. The defendant demurred to the petition.

One of the causes for divorce prescribed by the statute is fraudulent contract. What is meant by this is to be ascertained from the subject-matter of the statute. The subject-matter is dissolution of marriage. The fraudulent contract intended, therefore, was fraudulent contract of marriage. To this term, text-writers assign a certain sense, and it is to be presumed that it was intended by the legislature to be used in that sense.

Marriage is a civil contract, but it is also something more. In its origin the relation precedes and is the parent of civil society, but when society is organized and government established, it becomes an institution of the state. Public policy demands that it should be held peculiarly inviolable and sacred. Like every other contract, fraud may vitiate it, but the fraud must be in the essentials, not in the inducements, but in the marriage contract itself. Consent, and the capacity for marital duties are essential, but if the capacity exists, and there be consent, it matters not what may be the inducement to the consent. Character, name, fortune, family, are not of the essence. Representations as to such matters may form ground of the preliminary engagement to marry, but can make no part of the contract by which the parties are joined together. That is a contract for better, for worse, for richer, for poorer, and unless the law is to put a premium on haste in marrying, no avenue of escape should be left open from the consequences to either party of incredulity, no matter how produced, in the representations of the other. The remedy for hasty and ill-judged marriages is not, so far as society is concerned, in affording facilities for divorce. This case is an example. A first acquaintance is followed in six days by an engagement to marry, and this again in sixteen days by the marriage itself.

The plaintiff alleges the defendant was not the person she intended to marry, but the facts averred show he was the same person, though not of the same name and family. There may be cases of mistaken identity, as where one person, by fraud or mistake, is substituted for another at the moment of the marriage ceremony, but it may be safely assumed that this case presents no mistake of that kind, else it would not have taken five months of cohabitation to find it out.

The observation of Lord Ellenborough in the case of The King v. Inhabitants, 3 M. & S., that if a man assumed a false name for the purpose of fraud to conceal himself from the person he intended to marry, it would be a fraud upon the Marriage Act and the rights of marriage, had reference solely to the English act to prevent clandestine marriages. That act required that all marriages should be solemnized by license, or publication of bans; otherwise it was declared they should be null and void. In the construction of that act it was held that the true name was required, but that unless a false name were assumed for the purpose of concealing identity, the statute would not apply to make the marriage void. The deductions of Mr. Bishop, in his work on "Marriage and Divorce," section 204, from this case, are too general. The decision was not that a false name, assumed by a person about to marry, would avoid the marriage contract because of fraud, but simply that the false name assumed for the purpose of fraud, would bring it within the declaration of the act that the marriage should be null and void. Moreover, the learned author, in the very section, concedes that even the very doctrine he takes to be established is shaken by another case, which he cites. Besides, in a former section he remarks that, generally speaking, a mistake as to character, fortune, family, and the like, even when brought about by fraudulent practices, does not render void what is done. If a false assumption of character will not avoid a marriage, there is no reason why a false assumption of name will have that effect. Indeed, character is quite of as much importance in that relation as name.

In Clark v. Clark, 11 Abbot, 228, under a statute of New York, which, as a cause of divorce, prescribed that the consent of one or the other was obtained by fraud, the husband represented that a former wife was dead. The fact was, he was divorced. He having contracted a second marriage, the second wife sought to avoid the marriage on the ground that she had been deceived; that she had not intended to marry a man that had been divorced, and that she had trusted to his representation. The court of that state refused her application, holding it was not a fraud as to a material matter or thing within the legitimate purposes of the marriage.

In Weir v. Still, 31 Ia., 167, a convict, who had been released from the penitentiary, contracted marriage, fraudulently concealing his true character, and making false representations as to his family and connections. The wife sought to annul the marriage for fraud, and the court refused her petition, holding that fraudulent representations as to character, social standing or fortune did not avoid the marriage inducted thereby. The name or character of a man can be of no more importance in the relation of marriage than the chastity of the woman, and yet fraudulent representation of chastity, except in case of existing pregnancy by a stranger at the time of the marriage, will not avoid it. The court here read from the case of Reynolds v. Reynolds, 3 Allen, (Mass.), and from 13 Michigan, Leavitt v. Leavitt, in which states there are statutes allowing divorce on the ground of fraud, the holding in these cases being that representations as to social standing, fortune, health or temper did not constitute the essential element on which the relation stands, and would not invalidate a marriage. The last case, Carris v. Carris, 24 N. J. Eq., holds briefly, after considerable discussion, that neither anti-nuptial incontinence nor false representations in regard to family, fortune or external condition, are sufficient to avoid a marriage contract. In the case at bar, neither on principle or authority, could the court find any reason on which this petition could be maintained.

The demurrer was accordingly sustained and the petition dismissed.

Counsel for plaintiff reserved an exception.

Emil Rothe and Wm. M. Corry, for plaintiff.

W. A. Cotter, for defendant.

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991 CONTRACTS—STATUTE OF FRAUDS.

[Hamilton District Court, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

CHARLES P. SLOCUMB v. JOHN SEYMOUR.

An agreement to abstain from doing a thing (in this case from competing business) for an unspecified time, though it may be forever, is not within the statute of frauds.

LONGWORTH, J.

This suit was brought for an injunction to restrain the defendant from violating a contract made with him not to engage in the hardware business within a certain locality, the plaintiff alleging that the defendant, having sold him the stock of hardware at 19 East Pearl street, transferred to him also the good will of the business, and agreed that he would not go into that business again within ten squares of the old stand, but that shortly afterward he did go into the same business. The defendant denies that he did sell the good will, or make any agreement not to engage in the same business again.

It was insisted by the defendant that this contract, if it existed, was one that fell within the statute of frauds. The current of the authorities was to the effect that an agreement to abstain from doing a thing, although it may be forever, is not an agreement within the statute of frauds. The supreme court held in the Gottschalk case that an agreement not to go into the business for five years was an agreement that

could not be performed within one year, and therefore fell within the provision of the statute. This decision stands alone, and it was to be presumed the supreme court put it on the ground that it was expressly provided in the agreement that five years, and not one year should be the limit.

In the case at bar the court was of the opinion that the contract was without the provisions of the statute of frauds, and that the plaintiff might prove by parol that such agreement was made. The question is whether the proof shows it was made. There were various interviews between the parties, and the result was that a sale took place. Seymour testifies that he did not agree to sell the good will; that he was tired of the business, and did not intend to go into it again, but that he refused to make such a contract. The sale of the property, however, took place, and the consideration, $7,000, was paid.

After reviewing the testimony, the court remarked that in their opinion the plaintiff had not made out his case by a preponderance of witnesses, and the denial of the defendant was substantiated by the written paper made at the time, and by the fact that the articles sold were fully worth the price paid for them.

Judgment for the defendant.

CLAIM OF NEPHEW FOR SERVICES. 994

[Hamilton District Court, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

WALTERN N. NORRIS, ADMR., v. JOHN N. CLARK.

1. Under an agreement by an uncle to compensate a nephew in consideration of services to be performed by providing for him in his will, and the uncle dying intestate, recovery for the services may be had against the estate.
2. Proof of the value of the estate is not incompetent in connection with statements that decedent would give plaintiff a child's share, as tending to show the uncle had made a fair estimate of the value of the services, and that he had agreed to compensate them.
3. The statute of limitations would not begin to run on a contract to compensate services by provisions in a will, until death of the permissor.

The case came up for hearing on petition in error. The plaintiff in error was defendant in the common pleas.

John N. Clark, plaintiff below, alleged in his petition that about 1849 he was employed by plaintiff in error's intestate, John C. Norris, his uncle, to enter into his employment as an apprentice in the trade of blacksmith, in this city, and subsequently as foreman; that the agreement was that if he entered into such employment his uncle, J. C. Norris, would make such provision for him at his death as would fully compensate him; that he would make the same provision for him as he would for his own children, in the meantime giving him nothing but his board and clothing. Clark alleged that he did work for him from 1845 to 1854, and again from 1858 to 1874 he aided his uncle in carrying on his business, in the meantime receiving no compensation, and relying upon his promise that at his death he would make provision for him. J. C. Norris died in 1875, after having been confined for a few months at Longview, and he left no

will and no papers whatever making a provision for the pay plaintiff should receive. Wherefore plaintiff instituted this action to recover $7,000 and interest from March 20, 1875.

The administrator denies any such agreement, and says the plaintiff has been paid for his services, and as a third and last defense pleads the statute of limitations. A verdict was rendered for $4,720. Exceptions were taken during the trial of the case which are embodied in the bill of exceptions.

JOHNSTON, J.

The case upon first consideration of it is liable to give rise to the impression that it is open to this objection, that for the plaintiff to recover it is necessary to establish a parol will, and by action to enforce it. But upon further consideration of the case and the authorities, it is found to stand upon higher and better ground, and that it was considered as a breach of contract, and the law permits him to recover for the services rendered. The books contain several cases of this character; a remarkable similarity in the facts; in almost every case the plaintiff being a nephew—sometimes a niece—who, under the promise of a well-to-do uncle, that if such nephew or niece will continue to reside with such uncle, and labor for him in season and out of season, he will, when he comes to die, make a liberal provision for him or her in his will—will make him or her his heir. In perhaps a majority of such instances, this confiding youth is doomed to disappointment, for upon the opening of that sacred document, either through a treacherous memory, ingratitude, or undue influence, this dutiful nephew or the niece, is not found to have been one of the chosen object of the uncle's bounty, but on the contrary, has been entirely forgotten. Now the courts under such circumstances will not turn such person away penniless, but permit a recovery as for a breach of an express contract, the measure of compensation being the fair value of the services, estimated as of the time they were rendered.

Numerous exceptions were taken by plaintiff in error during the trial, to the admission of testimony on the part of plaintiff below, and to the refusal of the court to admit certain testimony offered by the defendant; and exceptions were taken to the refusal of the court to charge as asked, and to portions of the general charge of the court.

The court proceeded to review the exceptions *seriatim,* remarking that the nearest approach to error was in the court below permitting testimony to be offered by Clark, showing the amount of the estate of Norris at his decease and the number of his children. It was evident from the cautious manner in which the jury were charged on this point, that they were not misled, for while the estate amounted to $30,000 and there were four children to inherit it, the verdict was less than one-sixth of the estate.

Besides we are of the opinion that the evidence was as that court ruled—competent. Considerable evidence was introduced as to declarations made by Norris through a long series of years to the effect "that he had agreed to make provision for Clark at his death—that he would give him a child's share." Now, proof of the value of the estate and the number of children to inherit it, tended to show that the deceased had made some promise to compensate the nephew, and his estimate of the value of his services.

The statute of limitations would not apply for the payment of services not to be made until Norris' death. The money then became due.

It is claimed that the damages are excessive. We have examined the evidence carefully upon this point. The rule of damages, we think, was properly given to the jury. They were charged that the value of the services was to be fixed as of the date when they were performed, and that no interest could be allowed except from and after Norris' decease; that if the services were performed to be paid for only at that time, whether it was worth more to labor and be paid in that way, rather than at the end of each month or year, was a question of fact and not of law. In this case it was in testimony that Clark performed part of his labor over twenty years before he became entitled to demand payment therefor. But there was testimony as to his services at the current prices for such labor at the time of its performance sufficient to justify the verdict, and we will not therefore disturb it.

The judgment will be affirmed.

Halstead & Merrill and J. H. Clemmer & Son, for estate.

Thos. McDougall and Alex. Long, for Clark.

DIVERTING SUBTERRANEAN STREAM. 1007

[Hamilton District Court, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

WM. W. LEWIS v. MOUNT ADAMS AND EDEN PARK INCLINED PLANE RY. CO.

1. Where the construction of piers of an inclined railway is a lawful act, there can be no recovery for injury by vibration caused by running the cars, there being no previous wrongful acts.
2. The rule as to diverting sub-surface percolating water is different from surface water, and if a structure causes such water to be diverted, and it thereby, by softening the ground, injures plaintiff's house, there can be no recovery.

JOHNSTON, J.

This case was a proceeding to reverse a judgment rendered in the common pleas in favor of the railway company. The plaintiff alleges that he is the owner of a lot of land on the west side of Baum street, near the track of the railway company, and that in the construction of their track, they caused an excavation to be made above, below and alongside of his property, into which excavation two piers were placed, and that in doing this the piers interrupted the flow of water, and caused it to be turned in on his property, which was damaged in the sum of $5,000; that his house was made to settle and walls crack. There was a general denial filed by the company, and a verdict was returned in their favor. Exceptions were taken to certain charges of the court, and a refusal to give others, and exceptions to the general charge.

There was no evidence that any damage resulted to the plaintiff other than by the sub-surface water softening the ground beneath his property. It was claimed by the company that such an injury would not afford a cause of action; that where surface-water is thrown on the land there may be a recovery for the injury resulting, but that it was different where the injury resulted from subterranean or percolating water, and such being the question involved, the defendant asked this charge, which was

given, and exception taken: "That even if the erection of the piers caused the subterranean water to be diverted from its usual course, and the plaintiff's premises were thereby injured, such injury would give no right of recovery." That is the law. The testimony tended to show only that any water that may have softened the ground about the plaintiff's property were waters that percolated the soil, and the rule of law as to such water is different from that applying to water flowing in natural courses on the surface. While a party has no right to throw surface water on the land of a proprietor, if a subterranean stream whose course is not known is diverted on to the adjoining proprietor, he can not maintain an action therefor.

The next charge was: "There can be no recovery for injury from vibration caused by the running of the cars, the railway being a lawful structure, unless by previous wrongful acts, making the defendant liable." This charge is proper. The construction of the piers was not an unlawful act, and so long as the defendants used ordinary care in the construction, such an injury as was claimed here would not be a ground of action.

A charge was asked by the Railway Company, and given, that though the defendant may have dug below nine feet, unless actual injury resulted therefrom to the plaintiff it would not give him a right to recover. That was also a correct charge. The general charge was correct, and the law on the whole case properly given.

Judgment affirmed.

Simrall & Hosea, for plaintiff in error.

Matthews & Ramsey, for defendant in error.

1100 STAY OF ACTION BY BANKRUPTCY PROCEEDINGS.

[Hamilton Common Pleas, January Term, 1879.]

MASON v. STACEY & CARROLL.

An action for slander of title—in notifying the public that plaintiff's patent was an infringement, and all parties using it would be held liable—is stayed by the pendency of proceedings in bankruptcy of one defendant, and the defendants being joint owners, and jointly issuing the notice complained of, the proceedings as to one authorize a stay as to both.

MOORE, J.

In June, 1876, the defendants, Stacey & Carroll, obtained a patent for "Improvements in Air Vents and Collapse Valves," and soon after commenced the manufacture of the same in this city, and, in September, 1876, the plaintiff Mason and one Malcom also obtained a patent for "Improvements in Air Vents and Collapse Valves," and began the manufacture of the same under their patent. The defendants, Stacey & Carroll claiming that the patent of the plaintiff, Mason & Malcolm, infringed their patent for "Improvements in Air Vents and Collapse Valves," notified the plaintiff that the patent obtained by him was an infringement of the patent of the defendant, and that they could hold him legally responsible for said infringement. The defendants also sent out printed circulars, notifying the public that the patent of plaintiff was an infringement upon their patent, and that they would hold all parties dealing in the same responsible to these defendants for said infringement. Some of

these circulars and cards were sent to the customers in trade of the plaintiff.

The plaintiff Mason instituted this suit to recover $5,000 damages for these representations, claiming that they were false, and that the plaintiffs were damaged thereby to the extent of $5,000. The defendants demurred to the petition on the ground that the state court had no jurisdiction of the case, claiming that a trial of the case would bring up the question of infringement of patents, which was exclusively within the jurisdiction of the United States courts. Judge Longworth overruled the demurrer. The defendant Stacey then filed his individual answer, suggesting that he was a bankrupt, having filed his voluntary petition in bankruptcy, and been adjudicated a bankrupt.

The plaintiff demurred to the answer of the defendant, Stacey, claiming that the action was for slander of title, and could not be stayed by bankruptcy proceedings.

Upon argument, the court, Judge Moore, held, that this being in action for slander of title to a patent affecting a man's business, was such an action as would be stayed by bankruptcy proceedings. The defendants, Stacey & Carroll, then filed a motion to stay proceedings in the case until the question of the discharge of Stacey by the bankrupt court was determined. The court, upon consideration, held that the action was such as would be stayed by the proceedings in bankruptcy of Stacey; that there was such a privity of interest between the defendants, Stacey & Carroll as would authorize a stay of proceedings as to both defendants.

Order entered staying all proceedings as to both Stacey & Carroll.

Moulton, Johnson & Levy, for plaintiff.

C. L. Raison, Jr., for defendants.

[Hamilton District Court, November Term, 1878.] 1118

STATE OF OHIO EX REL. CULBERTSON v. CAPPELLER, AUDITOR.

For this opinion, see 6 Dec. R., 702; [s. c. 7 Am. Law Rec., 473.]

LACHES IN FORECLOSURE PROCEEDINGS. 1120

[Hamilton District Court, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

EXRS. OF EDEN B. REEDER v. EXRS OF WM. STEPHENSON.

1. A petition filed in 1876, claiming that a personal judgment in decree rendered in 1872, in a chancery suit pending when the code took effect (Code, section 5337), was introduced therein surreptitiously and by fraud, regarded as a bill of review, is barred by lapse of five years.
2. *Semble:* A personal judgment in a decree in a chancery suit, where the original bill did not ask it, is not void but voidable, and if not attacked in time is good.

BURNET, J.

This case was before the court on a demurrer of the plaintiff's testator to an answer of the defendants.

In the year 1840 Eden B. Reeder executed a mortgage to Charles Fox upon real estate in Cincinnati. A bill in chancery for foreclosure was filed by Fox in the old superior court of Cincinnati, and upon decree rendered was appealed by Reeder to the supreme court of Hamilton county. Fox having assigned the mortgage to Wm. Stephenson, during the pendency of the suit, Stephenson was brought into the case by a cross-petition of Reeder, and a decree of foreclosure rendered in his favor at the April term, 1842, of the supreme court. Stephenson, yielding to the importunities of Reeder, and relying upon his repeated promises of payment, omitted to issue an order for the sale of the premises until the year 1869, when an order was issued from this court, as the successor, under the present constitution of the state, of the Hamilton county supreme court. Meanwhile, Reeder had subdivided the property, and had made sales to the various purchasers, who, ignorant of the existence of the decree or the pendency of the suit, had entered into possession and improved. These purchasers caused themselves to be made parties defendant in the chancery suit, and filed their answer and cross-petition, claiming that by his laches Stephenson had lost his right to enforce his decree to their prejudice; and at the April term, 1872, of this court, it was held that the right of Stephenson to subject this property in the hands of the innocent purchasers had been lost by his laches, and a decree was rendered, exonerating the property from the lien of the mortgage. A judgment for the amount due on the mortgage debt was also rendered against Reeder, who testified on the trial that the debt remained unpaid.

The petition filed by the testator of the plaintiffs alleges that the personal judgment rendered by this court at the April term, 1872, was introduced into the decree surreptitiously and by fraud practiced upon him and upon the court; that the original bill in chancery did not ask for a personal judgment, and an action at law upon the mortgage had long since been barred by the statute of limitations; and asked that so much of the decree of 1872 as gave a personal judgment against him might be vacated. The defendants answered, denying fraud, and alleging that Reeder and his counsel were present in court at the trial, and that they were informed and believed that Reeder and his counsel were also present when the decree was rendered, and knew at that time of the personal judgment, and that if Reeder had ever been entitled to vacate the decree, his right was barred by the lapse of time. They also aver that after the death of their testator, in the month of February, 1877, upon their application, a conditional order of revivor was made, under which process was served upon Reeder, and their cause revived in their favor. To this answer Reeder demurred.

The original cause was a bill in chancery before the code of civil procedure took effect. Section 534 of the Code provides that final decrees thereafter rendered in such causes may be revived in the same manner, and within the same time, as if the Code had not taken effect. In Myres v. Myres, 6 O. S., 221, it was held that such decrees might also be vacated or modified after the term at which they were rendered, by the same court by which they were rendered, in the manner provided by the Code.

Now, if this petition is to be regarded as a proceeding to vacate under the Code (sections 534, 541), the defense in the answer that it comes too late, is good. If it is to be regarded as a bill of review to vacate for alleged error, apparent upon the record, the defense in the answer that it is barred by lapse of time is equally good; for the statute governing proceedings in chancery anterior to the Code, provided that a bill of review must be filed within five years from the rendition of the decree sought to be reviewed, and here more than five years had elapsed. If it is to be regarded as an original petition to impeach the judgment as in chancery for fraud, the demurrer must still be overruled, because it reaches back to the petition, and the petition is bad on demurrer. When a bill is filed to impeach a judgment for fraud, the facts and circumstances which are claimed to constitute the fraud, must be particularly set out that they may determine whether, if true, they make a case of fraud. The petition in this case is defective in this respect, and will therefore be dismissed.

REPLEVIN. 1122

[Hamilton District Court, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

VALENTINE KNAPP v. FERDINAND SPRINGMEIER ET AL.

A petition to replevy money, generally, is not demurrable, for if the money was marked or in a parcel, replevin lies. Motion to make more definite is the proper mode of objecting.

Cox, J.

The action was originally in replevin before a magistrate, to recover $200, claiming it to be exempt under the Homestead act, and a judgment being obtained, Helffrich & Sons, who were substituted for the sheriff, appealed the case to the common pleas, where also plaintiff filed a petition in replevin. A demurrer to the petition was sustained, and no amended petition being filed, a judgment was rendered in favor of Helffrich & Sons. The question was whether money was a proper subject of replevin. The reason given was that money had no ear marks, and the difficulty of returning it in kind. As to the second reason, that disappeared under our law of replevin. Recent authorities are to the effect that money, when marked or in a parcel, may become the subject of replevin. The course that should have been taken in this case was by motion to make the petition more specific, and the court was of opinion that a general demurrer was not the proper pleading to defeat the petition. The defendants filed an answer and cross-petition, setting up that they were entitled to the money replevined, but their description was not any more definite than that of the plaintiff.

The judgment in favor of the defendants was held to be erroneous, and the judgment was reversed.

Higley, for plaintiff in error.

Forest, Kramer & Mayer, for defendant in error.

1122 SPECIFIC PERFORMANCE.

[Hamilton District Court, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

BOARD OF EDUCATION OF CINCINNATI v. PETER EVERSMAN.

It is no defense to specific performance of a contract to buy land, that the advertisement called for more ground than was there, where this fact was announced on the day of sale, and the defendant made acquainted with it before signing.

Cox, J.

This was an action to compel the defendant to specifically perform a contract for the purchase of a tract of land in Storrs township. The defendant admitted that he purchased the property, but he said that the purchase was made relying upon the advertisement as a correct description of the property. He averred that the property did not correspond to the description of the advertisement, being only 109 feet on one side instead of 143 as described. He set up fraud on the part of the plaintiff.

The court found that a correct plat of the property was made, and it was ascertained that the lot was only 109 feet on one side, and that fact was announced on the day of sale, and the defendant was made acquainted with the fact before he signed the contract. He obtained from the city, the court thought, just the property he purchased, and should be made to comply with the terms of sale. The entire purchase-money was now due, but the defendant was allowed six months within which to make the payment.

J. H. Perkins, for plaintiff.

Logan & Randall, for defendant.

1123 PRIVATE CORPORATIONS.

[Hamilton District Court, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

†WM. COPPEN v. GREENLESS & RANSOM MFG. CO.

A specific performance of a contract by a corporation to purchase its own stock, cannot be enforced, where the corporation was not authorized by its charter to make such a purchase.

Cox, J.

The action was brought to compel the defendant in error to specifically perform a contract to purchase stock of the company owned by Coppin to the amount of $3.000. The court held that this being a corporation under the laws of Ohio, it had no authority to purchase or deal in its own stock. This question had been before decided in the same way by this court. We think the authorities fully sustain the doctrine that no corporation can purchase or deal in its own stock unless authorized to do so by the terms of its charter. No such authority appearing in the charter of the company, the judgment of the common pleas ordering a specific performance of the contract should be reversed.

Judgment of the common pleas reversed.

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†This decision was affirmed by the Supreme Court. See opinion, 38 O. S., 275. The case is distinguished in Morgan v. Lewis, 46 O. S., 6, 8.

MALICIOUS PROSECUTION. 1139

[Hamilton District Court, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

JEFFERSON JOHNSON ET AL. v. JOHN R. CORRINGTON.

In malicious prosecution, the defendant, to show probable cause, is not confined to the transactions of plaintiff alone, but proof of the acts of associates of the plaintiff tending to give defendant a belief of the plaintiff's guilt, is relevant.

ERROR to the Court of Common Pleas of Hamilton county.

AVERY, J.

John R. Corrington was plaintiff below. His original petition was for false imprisonment. Afterward an amended petition was filed, intended to be for malicious prosecution. To this defendants objected upon the ground that it was a substantial change of the claim. In Spice v. Steinruck, 14 O. S., 213, an amendment was allowed changing an action for false arrest into malicious prosecution. *E converso,* the same rule will apply to the amendment in this case.

One of the grounds of defense was that the prosecution complained of consisted in the arrest of Corrington under a warrant of the Governor of Ohio, upon requisition from the Governor of North Carolina, to answer an indictment for embezzlement in that state. The duty of returning any person charged with crime in one state who shall flee from justice and be found in another, is imposed upon the respective states by the constitution of the United States. It is a duty between the states themselves, and under regulation of act of congress is to be discharged by the state executive. Nevertheless the steps required to be taken are in the nature of process, and where this is put in motion by a private person maliciously, and without probable cause, there is no reason why such person should not be answerable for any consequent loss. "To put in force the process of law maliciously and without probable cause is wrongful, and if thereby another is prejudiced in person or property, there is that conjunction of injury and loss which is the foundation of an action on the case." Churchill v. Siggers, 3 E. & B., 937.

The fact that an indictment has been found and may be pending, does not preclude inquiry into an arrest made, not upon the indictment itself, but upon requisition. If the trial and judgment in an action does not necessarily involve probable cause for issuing an attachment in the action, suit for malicious prosecution of the attachment may be brought during the pendency of the original suit. Fortman v. Rottier, 8 O. S., 548. For a like reason that whether one has fled from justice is not necessarily involved in the question whether he is guilty or innocent under an indictment, there may be a suit for malicious prosecution of him as a fugitive from justice, without waiting for the determination of his guilt or innocence of the charge in the indictment.

Upon the trial, certain evidence offered by the defendants was excluded. It appeared that defendants were general agents for the Wheeler & Wilson Sewing Machine in North Carolina, with headquarters at Wilmington, and that they had employed the plaintiff and two others as sub-agents for the sale of machines at Newberne. It was upon a charge

of embezzling money or property received in this business that the plaintiff was indicted. One of the defendants testified that the course of business was to furnish machines to each of these sub-agents separately, and keep separate accounts, but that they were permitted to borrow machines from each other by giving receipts, upon which transfers would be made in their respective accounts; that they all left Newberne and the state within a week, having between them $1,600 unaccounted for, the plaintiff and one of them going off in company; that the defendant did not know of it until they had gone; that receiving reports from reliable persons at Newberne that he had been robbed by his agents, he visited that place and was informed that they had all been selling machines below cost, that the plaintiff and one who had gone off in his company had carried away a machine with them, and that their letters to him announcing their departure had been left under directions not to be mailed until they had gone. These letters were offered, together with a letter, of the same date, written from his home in Ohio by the other one of the three, who had departed from Newberne a few days earlier. The plaintiff's letter stated he had to go to his home in Ohio immediately, but did not state why. Of the other two, one stated he had to go home immediately, because his father was sick, the other that his father was sick, and his presence at home also was required as a witness.

Upon motion of the plaintiff, all testimony tending to criminate the others, or touching their transactions, individually, or in connection with him, was ruled out by the court. In this there was error. An essential element in actions for malicious prosecution is want of probable cause. Probable cause has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong of themselves to warrant a cautious man in the belief. 3 Wash. C. C. R. 31, Ash v. Marlow, 20 O., 119. The question is not as to the actual state of the case in point of fact, but as to honest and reasonable belief. Upon that question inquiry into the state of mind of the defendant was permissible. White v. Tucker 16 O. S., 468. Hearsay information that went to make up his mind, became competent. 4 Vt., 363; 6 Cush., 217. He was entitled to show an apparent concert between plaintiff and the others in departing from North Carolina, and that all had apparently been guilty of embezzlement. *Noscitur a sociis* was a reasonable maxim to apply. Not that it would prove the plaintiff had, in fact, fled from North Carolina to avoid prosecution for embezzlement, but that it would have a bearing upon defendant's belief of the fact. The circumstance of all leaving about the same time, and of all writing letters, in which, though each assigned a different reason, all concurred in stating that their presence elsewhere was immediately required, may have been a mere coincidence, nevertheless, defendants were entitled to the effect of it.

For error in excluding the evidence, the judgment of the court of common pleas is reversed and the cause remanded.

Moos & Pattison, for plaintiff in error.

Hildebrandt, for defendant in error.

APPEAL BONDS. 1141

[Hamilton District Court, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

JOHN A. POLL v. JOHN MURR.

The undertaking of a surety on an appeal bond from a justice was not that the judgment debtor would pay, but that he, the surety, woud pay. Where a levy on the judgment in the appellate court was made on personal property of the debtor, but not advertised for want of printer's fees, and abandoned, the surety on the appeal bond is not discharged; the creditor was under no obligation to advance printer's fees, nor to issue execution.

BURNET, J.

This is a proceeding to reverse a judgment of the common pleas. Murr obtained a judgment before a justice of the peace against J. I. Gillespie, who appealed to the common pleas, the plaintiff in error being surety on the appeal bond. In the common pleas judgment was rendered in favor of Murr against Gillespie, and execution issued and was levied on personal property, a quantity of ice belonging to Gillespie. The next day after the issue of the execution, the sheriff made a return, "not advertised for want of printer's fees." Gillespie subsequently resumed possession of the ice, which had never been under the control of the sheriff. Subsequently an action was brought by Murr on the appeal bond against the plaintiff in error before a justice of the peace, and a judgment in his favor. This was appealed also to the common pleas, where again a judgment was rendered in favor of Murr, and a bill of exceptions being allowed, the case is now presented to this court.

The court remarked that the question was between the surety on the appeal and the judgment creditor, a levy being made on personal property, which, as it appears, was sufficient to satisfy the execution, which is afterwards abandoned, and the possession of the property resumed by the judgment debtor—the abandonment being placed on the ground that the fees necessary for advertising were not paid to the officers, whether in that case the surety is discharged. The judgment certainly remains in full force against Gillespie. There was no obligation resting on the defendant in error to proceed by execution against him. The undertaking of the surety on the appeal bond was a positive and unconditional one that on the rendition of the judgment he would pay it, not that the judgment debtor would pay it. It can hardly be said, therefore that his obligation is collateral as surety to that of the judgment debtor. Whilst the judgment creditor has issued his execution he was not under any obligation to advance the fees, any more than to issue the execution itself, to enable the officer to proceed and sell the property which has come again into the possession of the judgment debtor.

The surety on the appeal bond is not discharged by the course pursued by the judgment debtor.

Judgment affirmed.

R. D. Jones, for plaintiff in error.

J. Johnston, for defendant in error.

1142 SETTLEMENT OF ESTATES.

[Hamilton District Court, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

A. B. HUSTON, ADMR. OF MARTIN, v. MARY E. KING ET AL.

An administrator is entitled to such expenses as were the result of obtaining the appointment, but not those incurred in prosecuting the interest of his wife, who was one of the heirs.

Cox, J.

This was a petition in error. In the probate court plaintiff filed a petition for the sale of his intestate's real estate to pay debts. The claim upon which it was said it was necessary to sell the real estate was the claim of H. W. King, a former administrator of the estate. The amount of the claim was $291. It was allowed, excepting $50. In the court of common pleas, where the case was taken by appeal, a judgment for $21 was allowed. Error is claimed to this judgment. The court found that Martin had died in Alabama, devising his property to sundry legatees, to whom the property was at once distributed. Subsequently King, whose wife was one of the heirs of Martin, went to New Orleans and had the will set aside, and had himself appointed administrator. He proceeded to hunt up the legatees, but could find none of them. He then came back to Ohio, and Mr. Huston was appointed administrator, to administer upon the real estate here. It was claimed by the heirs that all the money King expended was simply in furtherance of his claim as husband of one of the heirs, for his own personal interests, and not in the administration of the estate, and that, having absented himself from Louisiana, by the laws of that state he lost his right to recover anything as administrator.

The court held that the administrator was entitled only to such expenses as were the result of the obtaining of his appointment and of the advertising, and not such as were incurred by him in prosecuting the interest of his wife, who was the heir of decedent.

The testimony warranted the judgment of the court of common pleas, and the judgment would be affirmed.

Judge Whitman and C. H. Stephens, for Mr. King.

H. J. Harrup, *contra.*

1143 [Hamilton District Court, November Term, 1878.]

O. & M. R. R. Co. v. J. C. SHORT.

For opinion in this case, see 6 Dec. R., 703; [s. c. 7 Am. Law Rec., 474.]

1145 [Hamilton District Court, November Term, 1878.]

JACOB JACOBY V. STATE OF OHIO.

For opinion in this case, see 6 Dec. R., 705; [s. c. 7 Am. Law Rec., 477.]

FRAUDULENT CONVEYANCE. 1159

[Hamilton District Court, November Term, 1878.]

Avery, Burnet, Cox, Johnston and Longworth, JJ.

JOHN A. THACKER v. THOMAS NEWELL ET AL.

A debtor, pending a suit against him to recover the debt, may transfer real estate to another creditor, a near relative, in payment, the transaction being bona fide, and the property transferred not being of greater value than the debt.

Cox, J.

This is a petition in error to reverse a judgment of the superior court. In that court a petition was filed by Newell to set aside two conveyances made by Thacker to his sister, Jane A. Thacker, the ground of the application being that the conveyances were fraudulent. The defendant obtained a judgment before a magistrate for house rent against the plaintiff, and finding nothing upon which to levy, brought this suit. The court below sustained one of the conveyances, the conveyance of a house on Seventh street.

As to the one piece on Seventh street the judgment was correct. It seemed to have been a perpetual leasehold estate, and the lessor had declined to convey to a female, and the plaintiff thereupon became the lessee, and immediately transferred to his sister the property in question, himself assuming in the original lease to perform the covenants.

As to the second piece of property, situated on George street, near John, it was denied that there was any fraudulent intent, it being claimed that the conveyance was made upon a good and sufficient consideration and for a fair and *bona fide* purpose. It appears that Miss Thacker was a teacher in this city for a number of years, and had also inherited from her grandfather some $2,000. Her brother was a student, with no income, his sister from time to time furnishing him the means to prosecute his education, and for establishing him in his profession. The sister was the main support of the family during that time. After his graduation, a scheme was started to purchase the property on George street, and turn it into a medical college. The property was purchased for $12,000, divided into shares of $1,000. Dr. Thacker purchased one of these shares, paying a small portion out of his own funds, but the main portion came from his sister. While he was the owner of this share, Newell brought this suit. Pending the suit, the conveyance was made by Thacker to his sister. Previous to that a mortgage had been given to her on his library, amounting to $650. The testimony showed, without any contradiction, that she had advanced him a much larger amount of money than the consideration of the conveyance and mortgage, and that it had not been repaid.

The supreme court has decided that a party may fairly prefer one creditor over another, even though he be insolvent. But in such case the utmost good faith should be observed toward the rights of other creditors. The creditor taking the preference must act solely for the purpose of saving himself, without interposing any barrier to the rights of others, except as may be necessary to effect that object. And, although courts should carefully scrutinize transactions between near rela-

tives, we see nothing in this transaction to take it out of this principle; and it does seem to us that the plaintiff had a right to prefer his sister, under the circumsances, above any other person. She was getting old, and had a large part of her means invested in this transaction. She had stinted herself for long years to aid her brother. The testimony fails to show any evidence of fraud in the transaction.

Judgment as to the second piece of property is reversed.

L. French, for plaintiff.

J. J. Desmond, for defendant.

1160 [Hamilton District Court, November Term, 1878.]

FERDINAND SPRINGMEIER, SHERIFF, v. HENRY BLACKWELL.

For opinion in this case, see 6 Dec. R., 705; [s. c. 7 Am. Law Rec., 476.]

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11 [Hamilton District Court, November Term, 1878.]

C., C., C. & I. RY. v. ALFRED WALRATH.

For opinion in this case, see 6 Dec. R., 718; [s. c. 7 Am. Law Rec., 555]. The judgment was affirmed by the Supreme Court. See opinion 38 O. S., 461.

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12 [Hamilton Common Pleas, 1878.]

LOUIS H. BAUER v. VILLAGE OF AVONDALE.

For this opinion, see 6 Dec. R., 706; [s. c. 7 Am. Law Rec., 478.]

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21 **FIRE INSURANCE.**

[Hamilton District Court, November Term, 1878.]

Avery, Burnet and Cox, JJ.

AMAZON INSURANCE CO. v. ALEXANDER MCINTYRE.

A clause in a policy, that if any person other than the insured procures the insurance to be taken by the company he shall be deemed the agent of the insured, does not make an agent to solicit and forward applications, who received the premium, the agent of the insured, binding the latter by answers in the application inserted by such person; nor was the insured to suppose that the person procuring him to take the policy also procured the company, nor does receiving the policy from the agent ratify the application made out by him.

AVERY, J.

This is a petition in error to the superior court. The action below was upon a policy of insurance on a building and stock of goods in Cozad, Nebraska. The building was upon a lot of ground which was held by a verbal contract of purchase from one who was supposed to have title under the Kansas Pacific Railroad Co. In the application for the

policy, to the printed question whether the ground was held in fee simple or by lease, the written answer was "by bond for a deed from the Union Pacific Railroad Co." And to the question whether the title was absolute, the answer was in the affirmative.

There was a conflict of testimony as to whether these answers had been written by the agent of the company in Nebraska from information furnished by the son of the insured, who afterwards signed the application; or whether the son at first signed the application in blank, with the understanding that the agent should see his father to obtain the answers, and that afterward the agent filled up the answers, without consulting the son or the father.

The policy contained the clause that if any person other than the insured procured the insurance to be taken by the company, such person should be deemed the agent of the insured, and not of the company, and the application, which is given as a warranty, was made a part of the policy.

The court below charged the jury that if the application had been filled out by the agent upon information obtained from the son of the insured, and the son had then signed the application for his father, there could be no recovery upon the policy; but on the other hand, if the son had signed the application in blank, with the understanding that the agent should see his father for the purpose of obtaining the answers, and the agent then, upon his own authority, had filled up the answers, the company would be bound.

The verdict was against the company, and judgment was entered. Errors are now assigned, as well to the charge, as to the overruling the motion for a new trial.

The decisions are not uniform as to whether the agency will shift to the insured, in case the agent of the insurer exceeds his authority. In a late case, however, before our supreme court commission, it was held "Where an agent of an insurance company, acting within the general scope of the business intrusted to him as such agent, fills up in his own language an application for insurance from the statements of the insured fully and truthfully made, receives the premium and issues a policy, duly executed by the insurer on such application, the insurer will not be permitted when a loss happens to defeat the policy by denying the truth of the application, nor the authority of the agent in the transaction, although he has transcended his authority, unless the insured is chargeable with knowledge of his having exceeded his authority. Union Ins. Co. v. McGookey & Moore, 33 O. S., 555.

The general scope of business intrusted to the agent here, was the procuring of the risks for the company. He had authority besides, to collect and receive premiums. In fact, the policy in question was issued by him, since although dated and signed in Cincinnati, the premium was only paid when he delivered it to the insured in Nebraska, and until then, by a condition of the policy itself, it was not of binding force against the company.

It is testified on the part of the company, that his authority was limited to the soliciting and forwarding applications for insurance, but this was not known to the insured.

To the insured he was only known as the agent and representative of the company. The policy contained a clause that any person other than the insured, who had procured the insurance to be taken by the

company, should be deemed the agent of the insured; but the insured was not bound to do violence to the nature of the thing by interpreting this to mean that the person who had procured him to take the policy, was the person who had procured the insurance to be taken by the company.

Neither did acceptance of the policy, at the hands of the agent, without inquiring as to the application, amount to a ratification and adoption of such application. The acceptance of a benefit, obtained for one by another, who without authority has assumed to act for him, may amount to a ratification, but this is where, from the circumstances of the transaction itself, or otherwise, the party receiving the benefit has notice that the other has assumed to act for him. The principle has no application to a dealing between the parties, where one has assumed to act for a third party, and simply exceeds his authority derived from that party.

Judgment affirmed.

Moulton, Johnson & Levi, for plaintiff in error.

Victor Abraham, for defendants in error.

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23 **SURETIES.**

[Hamilton District Court, November Term, 1878.]

ADAM DREHER AND JNO. TISCHBEIN v. WILLIAM SICK.

Where a surety has purchased the note on which he is surety, and a relative of the maker's wife having funds of her's, takes up the note then in bank for collection, but the maker failing to keep an agreement as to its payment, such relative can not recover from the sureties where he agreed to look to the maker only.

ERROR to Court of Common Pleas of Hamilton County.

Cox, J.

In the court below suit was brought by Sick upon a note made by Adam Tischbein as principal, John Tischbein and Adam Dreher being sureties. The case was tried as to Adam Dreher and John Tischbein, Adam Tischbein being in default. The defense was that the note, which was for $1,000, had been paid. Sick replied, saying the note had not been paid, but that he advanced the money upon the promise that Adam Tischbein would pay him the amount. Adam Tischbein had purchased a saloon of one Ludwick, and gave his note for $1,000 therefor. About that time his wife, the sister of Sick, inherited the sum of $2,500 from her mother in Switzerland, which was in bonds of the Southern Railroad, the interest on which was only to be paid to her, but by agreement with the trustees of the will, the whole amount might be paid over. After the making of the note, Adam Dreher, one of the sureties, went to Alabama, and while there purchased the note from Ludwick. A movement was made to pay over the bonds inherited by Mrs. Adam Tischbein, in order that they might pay the note held by Dreher, and Sick wrote to Dreher to know upon what terms he would sell the note. Dreher replied that the note was in the German-American bank for collection. Sick went to the bank, and asked them who would own the note if he took it, and they said he would, and he paid the money and

took the note, upon an agreement that Adam Tischbein would deposit the bonds in a building association, and borrow money therefrom, in order to pay Sick the money advanced for the payment of the note. But after Sick had paid the money for the note, there arose some difficulty between Adam Tischbein and his wife, and the bonds were not deposited with the building association, and thereupon Sick brought suit to recover the amount from the plaintiffs in error. Judge Cox, in deciding the case, found that from the evidence, Sick did not intend to hold the sureties after his purchase of the note, but by direct agreement was to look to Mr. and Mrs. Adam Tischbein, and the judgment of the court below against Adam Dreher and John Tischbein, sureties, would be reversed.

J. R. Von Seggern, for plaintiff in error.

G. Tafel, for defendant in error.

SLANDER—HUSBAND AND WIFE—PARTIES. 31

[Fulton Common Pleas, 1878.]

NETTIE CORNELL v. MASON A. DURKEE.

A married woman may sue alone for slander *per se* concerning her.

OWEN, J.

The plaintiff, Nettie Cornell, filed her petition in this court against the defendant, Mason A. Durkee, in which she alleges that she is the wife of one James A. Cornell, and in which she alleges the speaking by defendant of defamatory or slanderous words of and concerning her, thereby imputing unchastity to her, and for which she claims damages.

The defendant demurs to this petition for alleged defect of parties plaintiff, and maintains that the husband of the plaintiff, who is not, should be a plaintiff in the case with his wife.

Is this an action in which the husband is a necessary party plaintiff?

Numerous cases are cited by counsel from the courts of other states but as the decisions in them rest to some extent upon the provisions of the statutes of these states respectively, it will, perhaps, be more profitable and more satisfactory to examine the question in the light of our own statute relating to this subject.

Section 4, 75 O. L., 606, provides that: "A married woman can not prosecute or defend by next friend; but her husband must be joined with her, unless the action concerns her separate property; is upon her written obligations; concerns business in which she is a partner; is brought to set aside a deed or will; or is between her and her husband."

If this action is properly brought by the plaintiff without joining her husband, it is so for the reason that the action concerns her separate property. Does it?

The injury complained of is to her reputation. The redress she seeks is the recovery of money in the form of damages, sustained by reason of such injury. Is her claim to damages for such injury her separate property?

Section 11 of "an act concerning the rights and liabilities of married women," passed April 3, 1861. (S. & S. Stat., p. 389), provides *inter alia* that: "Any personal property, including rights in action, belonging to a married woman at her marriage, or which may * * * have grown out of any violation of her personal rights shall * * * be and remain her separate property and under her sole control, etc."

It seems clear to me that if plaintiff's "right in action" in this case is one which has "grown out of any violation of her personal rights," it is her separate property, and as the action concerns it, she is properly sole plaintiff herein.

What are personal rights? Among them are the rights of personal liberty and the rights of personal security.

"The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation." 1 Bl. Com. 124 to 139, Bouv. Law. Dic., Title, Rights—9.

The plaintiff's legal and uninterrupted enjoyment of her reputation was, then, a personal right. It has been violated. Out of this violation has grown her right in action herein. It is her separate property.

It would seem to follow, as a fair and logical inference, that the husband is not a necessary party plaintiff.

Demurrer overruled.

J. M. Ritchie and W. W. Touvelle, for plaintiff.

C. H. Scribner and Amos Hill, for defendant.

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39 [Holmes Common Pleas, January Term, 1879.]

CATHARINE SHREVE v. LOUIS PARROTT.

For this opinion, see 4 Dec. R., 373; [s. c. 2 Clev. Law Rep., 52.]

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

GUSTAVE WAHLE v. CINCINNATI GAZETTE CO.

For this opinion, see 6 Dec. R., 709; [s. c. 7 Am. Law Rec., 541.]

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67 **ADMINISTRATOR DE BONIS NON.**

[Hamilton District Court, November Term, 1878.]

C. B. MONTGOMERY, ADMR., v. HERMAN GOEPPER, ASSIGNEE, ET AL.

1. Without legislative aid, an administrator *de bonis non*, whose predecessor's powers have ceased by death, can neither maintain an action against the administrator of the estate of the deceased administrator, nor can he enforce a settlement by him in the probate court of the deceased administrator's account with the estate he represents.
2. The only remedy afforded by the statute to such administrator *de bonis non*, is an action on the administration bond of the deceased administrator.

Cox, J.

This cause comes into this court on an appeal from the decree of the court of common pleas, dismissing the petition of the plaintiff. In that court a petition was filed, wherein the plaintiff, Montgomery, alleges that he had been duly appointed administrator *de bonis non* with the will annexed to the estate of Philip Ziegler, deceased. That on the

17th day of November, 1868, Philip Ziegler, having died testate, George Klotter was appointed administrator with the will annexed of his estate and qualified as such, the executor having declined to act.

That said George Klotter so continued to act as administrator from the date until the 11th day of April, 1877, when he resigned. That the assets of said estate, which came into his hands, consisted entirely of personal property, and amounted to over twenty-one thousand dollars.

That at various times between the 17th of November, 1868, to April 11, 1877, Klotter collected the assets belonging to said estate, and wrongfully expended and misappropriated the same in the erecting of a brewery building on property then owned by him on Brown street in Cincinnati, contrary to the terms of the will of Ziegler.

That on the 19th of February, 1877, George Klotter, Sr., being then insolvent, made a deed of assignment of the brewery premises with the brewery thereon for the benefit of creditors to F. J. Mayer, who afterwards resigned, and Herman Goepper, one of the defendants, was appointed in his stead, and qualified as such. And the plaintiff says that by reason of such misappropriation of the funds of the estate of Ziegler by Klotter as administrator, he as administrator *de bonis non,* is entitled to have the premises sold, and the funds paid to him as said administrator *de bonis non,* and he asks that Herman Goepper, assignee of Klotter, so be declared trustee of plaintiff, the premises sold and the proceeds applied to the payment of his claim, with interest and costs.

Christian Kissinger, assignee of Klotter's Sons, and also Michael Werk and John A. Ziegler are made defendants as claiming some interest in the premises, and called on to set up their respective claims.

No answer is filed by George Klotter, Sr. Werk answers, setting up a mortgage executed to him on the premises by George Klotter, Sr., and wife, dated September 27, 1875, to secure the payment of $20,000, with 8 per cent. interest, payable in three years, and denies that any part of the trust fund was applied to erecting the brewery, and denies that at the date of the execution of this mortgage he had any knowledge, actual or constructive, of any such misapplication; prays to have plaintiff's petition dismissed, or, if a sale of the property be ordered, that his claim be first paid.

Herman Goepper answers, admitting that he is the assignee of George Klotter, Sr., admits that Klotter, as administrator of Ziegler, came into possession of a large amount of assets belonging to said estate, and has converted a large part to his own use, and is answerable to the estate of Ziegler therefor; but denies that the amount is as large as set forth in the petition, and denies that the trust fund was used in erecting the brewery, and denies the right of plaintiff to the relief sought.

Kissinger, as assignee of Klotter Sons, answers, setting up substantially the same defense as Goepper.

John A. Ziegler answers, claiming a large amount of interest due him, as legatee, under the will of the testator.

The case was tried in this court on the pleadings and testimony.

From the testimony, it appears that Klotter, as administrator with the will annexed of Ziegler, had collected assets of the estate to about the amount set forth in the petition. That as collected from time to time by the sale of bonds, collection of mortgages, notes and otherwise, he had deposited the proceeds in bank to his own individual credit,

with his individual funds, and that they had thus been mingled; that he had at different times drawn out of the mingled fund amounts necessary and used them in the erection of the brewery; that in so doing, he so appropriated $2,952.60 of the funds of the said trust.

It is contended by the defendants that plaintiff as administrator *de bonis non,* can not maintain an action against George Klotter, Sr., the former administrator with the will annexed, nor pursue the trust funds and charge them on the brewery, but that his only remedy, if at all, is a suit on the administrator's bond. The right of an administrator *de bonis non* to bring suit to recover assets received by a former administrator has been a subject of much discussion in the books and decisions of courts in England and most of the states of this union.

"At common law, an administrator or executor, who had resigned or been removed, was liable to no action at the suit of the administrator *de bonis non,* except for the recovery of such assets as remained *in specie* unadministered." And by common law, when merged by the administrator with his own funds, they were considered as administered. 2 Williams on Executors, 915.

In the case of Peter O'Connor v. State, 18 O., 225, this question was raised, and the court then held that the action would lie under the statute of 1831, under which this suit was brought, which provided for a suit by the administrator, who may be appointed in the place of any administrator who may have resigned or been removed, against said administrator for any moneys, assets, rents, or profits that may have been received by such administrator, as well as all damages done by such administrator to the estate. The court proceeds to say, "the present statute (Swan 344) contains a similar provision." But this is evidently a misapprehension of the court. For the section referred to in Swan statutes, is the same now in force as section 26, Swan & C., 571 and that section only authorizes the administrator *de bonis non* to bring a suit on the bond of the former administrator. This question again came up in the case of Blizzard, administrator *de bonis non,* of Clay v. Filler et al., 20 O., 479, and the court then affirmed the proposition that no such suit could be maintained at common law, *held* that the 26th section of the act of 1840, does not in this particular change the common law, and that such suit cannot be maintained on general chancery principles. The question again came up in the case of Tracy v. Card, 2 O. S., 43, but that was a case under the act of 1831.

Again, in Curtis, Adm'r, *de bonus non* v. Lynd, Adm'r, 19 O. S., the supreme court says: "An administrator *de bonis non* cannot, without legislative aid, maintain an action against either the representative of the deceased administrator, or the sureties on his official bond."

The act of April 7, 1854, only confers power to maintain an action on the bond of the former executor, or administrator, whose power has ceased by death or otherwise. The legislature has provided an ample remedy on the bond, leaving the common law rule not otherwise affected.

Recently the same question was again before the supreme court in the case of Douglas v. Day, 28 O. S., 175, and the supreme court affirms this, saying: "The only remedy afforded by the statute to such administrator *de bonis non,* is an action on the administrator's bond of the deceased administrator."

This question will also be found the subject of judicial decision in Pennsylvania, Illinois, Iowa, Texas and other states, but wherever it

has been held that a suit could be maintained by an administrator, *de bonis non,* against a former administrator, it will be found that it was upon the express authority of the special statutes of such states.

We find no statute in this state authorizing such a suit, and must hold, therefore, that it cannot be maintained.

Petition will be dismissed.

Montgomery & Kleinschmidt and Stallo & Kittredge, for plaintiff.

Forrest, Cramer & Mayer, Irwin, Wright, Coffin & Mitchell, and Hildebrant & Bruner, for defendants.

[Hamilton District Court, November Term, 1878.] 75

CITY OF CINCINNATI v. WESLEY M. CAMERON.

For this opinion, see 6 Dec. R., 727; [s. c. 7 Am. Law Rec., 592.]

BILLS AND NOTES—LIMITATIONS. 78

[Superior Court of Cincinnati, 1879.]

MARIA CASEY v. CYRUS KIMBALL AND P. L. WEED.

This action was brought on a promissory note more than fifteen years after the maturity of the note. The defendants are joint makers of the note. One of them has been continuously absent from the state since the making of the note, and was not served. The other defendant, the only one served, has been in the state continuously ever since the making of the note, and pleads the statute of limitations.

FORCE, J.

The rule is well settled in Ohio that, where one of the joint plaintiffs has been under disability, so that the statute has not run as against him, his right to bring suit is not barred; and, as he cannot sue without joining his co-plaintiffs, no one is barred, but all can sue. The same rule should apply where the defendants are joint parties, and where, by reason of the absence from the state of one of joint debtors, the right of action against him is saved; the right should be to bring action against him together with his joint debtors, and hence, the right be saved as against all.

It has been held otherwise by the court of appeals of New Jersey, in Bruce v. Flagg, 25 N. J. Law (1 Dutch), 219. It is there held that the right to sue joint defendants, where the statute has in terms run against one and not against the other, must be a right to sue all or none; and the right to sue being barred as to one, is therefore barred as to all.

The decision is founded partly on reasoning and partly on authority. The New Jersey statute says, "if the person or persons against whom there is a cause of action be absent from the state, the time of absence shall not be counted in computing a bar by the statute of limitations. And the court say, "the phrase 'person or persons' means if the person against whom jointly there is a cause of action, etc." And hence, if there are several joint debtors, the statute runs unless all the debtors are absent from the state. The court also relied on the authority

of Perry v. Jackson, 1 Term R., 516. That was a case of joint plaintiffs, where one of the plaintiffs had been beyond the seas, and the court held that the section in the statute of James I. "If the person or persons having a cause of action be beyond the seas," meant that if all the plaintiffs were beyond the seas the right of action would not be barred, but if one of them was all the while at home, the right of action would be barred as to all.

The ruling in these cases hinges on the phraseology "person or persons." The phraseology of the Ohio statute is different. It is "If when a cause of action accrues against a person."

Moreover, later English cases, while claiming not to, Perry v. Jackson, certainly do overrule Bruce v. Flagg, supra. The statute of limitations of James I provided for the case of absent plaintiffs. The statutes of Anne provided that if any person or persons against whom there shall be causes of suit, be beyond the seas, etc., the plaintiff shall be at liberty to bring action against such person or persons, etc. Under this statute, the courts of Queen's bench and common pleas, without expressly overruling Perry v. Jackson, have both, upon full consideration, held, that in case of a joint debt, one of the joint debtors being absent from the kingdom, the plaintiff's right to sue is preserved against all the debtors until the return of the absentee. Fannin v. Anderson, 7 Q. B. (A. & E., N. S.), 811; Towns v. Mead, 16 C. B. (7. J. Scott), 123.

Hence, both the reasoning and the authority in which Bruce v. Flagg are founded, are alike inapplicable to Ohio; while the later English cases of Fannin v. Anderson, and Towns v. Mead, are in entire accordance with the ruling of our supreme court made in the case of joint plaintiffs, and will be followed as precedents in the case of joint defendants.

Judgment for plaintiff.

Morse, for plaintiff.

Pruden, for defendants.

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79 [Cuyahoga Common Pleas, January Term, 1879.]

ANNIE REHAK v. JOHN W. WILCOX, SHERIFF.

For this opinion, see 4 Dec. R., 379; [s. c. 2 Clev. Law Rep., 65.]

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81 **SCHOOL LAW.**

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

MARTIN QUINN v. MARY D. NOLAN.

A teacher has the right in pursuance of the rules of the school known to the parents, to inflict reasonable corporal punishment upon a pupil deserving it, and if by reason of a hidden defect in the pupil's constitution, of which the teacher was not informed, such reasonable punishment causes injury, this does not entitle the parent to recover.

HARMON, J. (charge to the jury.)

"You will observe that this suit was not brought by the boy, but by his father. The reason why the father can maintain such an action is because he is liable for the support and entitled to the servitude of his

child until he reaches the age of twenty-one years. Therefore the law gives him a right of action against any person who by injuring the child diminishes or destroys the value of his services, or increases the cost of his support. It is for that alone, and not for the sufferings, which the child may have undergone, not for any injury to the boy himself, that this action is prosecuted. The boy has a right of action on his account for injuries done to him. The plaintiff alleges that the defendant, a teacher in the public schools, maltreated and severely injured his boy, who was one of her pupils; that the result was a permanent injury to the boy's health and consequenct damage to the plaintiff, both by loss of the child's services and expenses incurred for medical and other attention. All this is denied by the defendant. The burden of proof rests on the plaintiff to satisfy the jury by a fair preponderance of the evidence that the defendant did unlawfully beat and injure the child; that the alleged injury to his health resulted therefrom, and that the father has suffered the damage, and has been put to the expense alleged.

"From the time of Solomon to the present, parents have had the right, in a proper manner and to a proper degree, of inflicting corporal punishment on their children, and when the parent sends the child to a public school, the teacher has the same right while the child is under his or her charge. It is not disputed that by the express rules of the school in question, to which rules the father assented when he sent his child there, corporal punishment was permitted in proper cases, and in a proper manner. The question therefore in this case is not whether the defendant inflicted corporal punishment on the child, for that is admitted; but whether, considering the offense of the child, if any, his age, condition and all the circumstances, the defendant inflicted unnecessary and extreme punishment; because, while the teacher has a right to punish, it is the right to punish only in a proper manner, and to a proper degree. If the teacher goes beyond that, the act becomes unlawful, and she is responsible for the consequences."

In determining this question the jury should consider the circumstances he had named, that is, the offense, the size and apparent condition of the boy, the character of the instrument of punishment used, and the testimony as to the manner in which, and the extent to which, the punishment was inflicted.

A number of boys of tender age had been called as witnesses. Some had not been allowed to testify, because their examination showed they did not understand or appreciate the character of the oath, without the sanction of which no testimony is permitted by our law. Others appreciating the nature of the oath to a greater or less degree, had been permitted to testify; but it was for the jury to say, what effect, if any, their age should have upon the weight to be given to their evidence.

If the jury should find the defendant did not, in view of all the circumstances, inflict a greater decree of punishment upon the plaintiff's son than she was fairly entitled to do, and was proper, of course they must find for defendant. But, if they should find she did go beyond that, then it would be necessary to go further and inquire into the damages that should be allowed. The law holds a person responsible only for the natural and ordinary consequences of his acts, those consequences which the law presumes he might or should have forseen at the time he committed the act. Therefore it might make a difference in the amount of their finding if it should appear that the child was afflicted with, or

predisposed to certain diseases, and the defendant had no notice thereof from the parents, the boy himself, his appearance or otherwise. If the defendant, from the knowledge she had of the boy and from his appearance would be justified in supposing him to be like other boys of his age, and inflicted only a proper punishment, then she would not be liable at all, even though unfortunately some hidden defect in the boy's constitution should cause injury to his health to follow. Or if they should find for the plaintiff, this fact of ignorance on her part would prevent her from being liable for any consequence arising from such weakness or predisposition in the boy, of which she was ignorant in fact, and of which his appearance furnished no warning. It is the duty of parents who send children to school whose health or disposition would render the punishment permitted by the rules of the school dangerous or improper, to see that the teacher is informed of the fact.

Verdict for defendant.

S. T. Crawford and Mr. Goebel, for plaintiff.

E. P. Bradstreet, for defendant.

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83 ASSIGNMENT FOR CREDITORS.

[Hamilton District Court, November Term, 1878.]

†Leo A. Brigel v. Alexander Starbuck et al.

Where S. & P., assignees for benefit of creditors, under authority from creditors, continue the business, and afterwards, on a vote of creditors, S. & P. received the vote of a majority as to amount, but a majority in number voted for B., and the court decided there was no election, and at a second election a majority, both in number and amount, voted for B., and the court accordingly approved the selection and fixed the bond: Held, a second election was not authorized and was void, but as the court had power, for good cause, to remove an assignee and fill the vacancy, its order to that effect was valid, although purporting to be in pursuance of the selection, for the court is to judge of what it may deem good cause, and may follow the advice of creditors.

Burket, J.

Starbuck & Pfau, the assignees of George Weber, in entering upon the discharge of the duties of the assignment, continued the business of the Jackson brewery (which formed a large portion of the property of the assignor) under an authority given to them by a large majority of the creditors, under their own signatures, and with the assent and acquiescence of the other creditors. The authority was continued from year to year until the month of December, 1877, when it was again renewed. In the month of February, 1878, at the instance of some of the creditors, whose claims amounted to more than $1,000, the probate court appointed a meeting of all the creditors for the purpose of electing an assignee. The meeting was held and the votes of the creditors were cast. The probate court having referred to a Master the question of ascertaining who the creditors were and the amounts of their several claims, in the month of May following decided that a majority in number and amount had not voted for an assignee; that whilst a majority in number voted for Leo A.

†For former decision of district court, which was reversed by the Supreme Court, 34 O. S., 280, see *ante* 477. This case was dismissed by the Supreme Court commission, March 4, 1884, for want of preparation.

Brigel, a majority in amount voted for Starbuck & Pfau; and as the statutes required that in the selection of an assignee, a majority, both in number and amount, shall vote for the persons to be named assignees, the court decided there was no election. Thereupon another petition was filed by creditors for another election, and a notice in due form was issued by the probate court, notifying creditors that on the 18th of May a second election would be held. On that day a meeting took place in the rooms of the probate court, and a large majority of all the creditors, both in number and amount, voted for Leo A. Brigel. Thereupon they reported their proceedings to the probate court, which approved the selection, fixed the amount of bond to be given by Brigel, which was accordingly given, and the court made an order that the former assignees, Starbuck & Pfau, surrender to Leo A. Brigel, the assignee, all the property and assets of the estate, and in default of such surrender, that the sheriff should put Brigel into possession. Starbuck & Pfau, and certain creditors who had not voted for Brigel, appealed the case to the common pleas, which court dismissed the appeal upon the motion of Brigel. It is a part of the history of the case that a petition in error was taken from the judgment of the common pleas dismissing the appeal, to the district court, which court reversed the decision of the common pleas. An appeal was taken to the supreme court, which reversed the district court and affirmed the common pleas.

Upon the affirmance by the supreme court of the judgment of the common pleas in dismissing the appeal, the sheriff, having in his hands a certified copy of the order of the probate court, which directed him to put Brigel into possession of the property, under the proper certificate and seal of the probate court, undertook to put Brigel into possession, and did surrender to him at least a portion of the Jackson brewery. This writ was served on the morning of the announcement of the decree by the supreme court, between the hours of 10 and 11 o'clock. Starbuck & Pfau, and those creditors who associated with them, filed in the common pleas a petition for an injunction against Brigel to restrain him from taking possession of the property and assets of the estate, setting up the alleged authority under which they were conducting the affairs of the brewery, citing the proceedings of the probate court, and asserting that the action of that court in affirming the action of the creditors at their meeting on the 18th of May was null and void, and claiming that all proceedings based upon that election were null and void and without authority in law; that Brigel was a trespasser, and asked the court to issue a restraining order. A temporary restraining order was allowed upon the presentation of the petition, restraining Brigel from taking possession of the property, or interfering with Starbuck & Pfau, the assignees, in the management of the estate. The summons was served between 12 and 1 o'clock of the same day, and the injunction was served soon after that hour. The cause was afterwards heard upon a motion for a temporary injunction, and also upon charges filed against Brigel that he had violated the restraining order of the court. The case was heard at great length, and the bill of exceptions set out all of the testimony.

Upon that hearing the common pleas granted a temporary restraining order, enjoining Brigel from interfering with the assignees in the management of the estate; from taking possession or holding possession of the property of the estate, and imposed upon Brigel a fine of $200 for

contempt of court, and ordered him to make restitution of all things he had taken belonging to the estate, or in default thereof to be imprisoned until such restitution was made.

A petition in error was filed in this court to this action of the common pleas, and upon the suggestion of the court that it required two petitions in error in order to review both judgments of the common pleas, one as to the temporary injunction and another as to the contempt, a second petition was filed.

Upon application of the plaintiff in error supersedeas bonds were given, restraining further action of the court of common pleas in enforcing the sentence of judgment against Brigel for contempt, and to so much of the temporary injunction as forbade him to hold possession of the property of which he might be in possession. These petitions in error now come before the court. It is claimed on the part of the defendant in error that there was no authority conferred upon the probate court to hold a second election for an assignee, although the first election did not result in any choice; and that all orders of the probate court or proceedings based upon the result of such election are without authority of law and void, and that, therefore, Brigel, when he understood to take possession of the property of the estate, or to interfere with Starbuck & Pfau, was a mere trespasser.

The court in announcing the decision, said it was of the opinion that there was no authority in law for the holding of a second election; that the meeting of the creditors on the 18th of May was not a meeting authorized by law; that the election by the creditors, although by an overwhelming majority, both in number and amount, was of no validity, and if that alone were the ground upon which Brigel claimed to be assignee of this estate, the position of the former assignees would be impregnable. But the probate court was clothed with full and exclusive authority to control the management of estates assigned for the benefit of creditors. It has the sole authority to appoint and remove assignees, and under the law had a right, without an election, to remove the assignees, and substitute another. It was claimed on the part of Starbuck & Pfau, that whilst this was admitted, yet the record of the action of the probate court showed that the proceeding of that court was based solely upon the election by the creditors, and that it was nothing more than an approval of that election, recognizing the right of the creditors to make the selection, and simply acquiescing in it. The record shows that a meeting was held on the 18th of May; that the election was had; that it was reported to the probate court, and that thereupon, on the 20th of May, the probate court made this entry: "Now, on the 20th day of May A. D. 1878, the proceedings, in writing, of the creditors of said George Weber in the office of the probate court of Hamilton county, Ohio, was presented to this court, and it appearing to the court that creditors representing more than fifty per cent. of the debts of the said assignor George Weber were present at said meeting, in person or by attorney, and that said creditors elected Leo Brigel assignee of the estate of said George Weber, said election being made by creditors being a majority in number and value of creditors present at said meeting, and said election being now submitted to the court for approval, the selection and choice of Leo A. Brigel, so made by said creditors, is hereby approved by the court." Thereupon, the court fixed the amount of bond to be given, and the bond was given to the acceptance of the court. And, afterwards, on the 21st day of May, the

following entry was made: "On application of Leo A. Brigel, assignee of the estate of George Weber, the former assignees, Alexander Starbuck and Jacob Pfau, Jr., are hereby ordered to deliver possession to said Leo A. Brigel, assignee, of all the property, money, rights and credits belonging to said assignor, covered by said assignment, and in the event of their refusal to surrender the same, that the sheriff of Hamilton county is now hereby ordered to put said Leo A. Brigel into possession of the same."

The law of assignments (section 14) provides that the probate court shall have the right, at any time, to remove any assignee for good cause, and to appoint another in his stead, and to make and enforce all orders required to cause the property and effects to be delivered to the new trustees. It was claimed on the part of Starbuck & Pfau that it was not done "for good cause." Whatever was the process by which the probate court arrived at this conclusion, this was a removal of the former assignees and the appointment of a new one. It was also claimed that the probate court was a court of special and limited jurisdiction, and an inferior court, and in order that its proceedings may be valid, the record must show that it has acted within its jurisdiction, and that the record in this case showed that the entire proceeding was based upon a void act. The probate court, however, is not an inferior court. It has a portion of the same jurisdiction which was formerly, under the old constitution, vested in the court of common pleas. It is a court of limited jurisdiction, but its judgments are entitled to the same credit and verity as any other judgments. The supreme court in Shroyer v. Richmond, 16 O. S., 455, 464, says: "There are certain inferior jurisdictions, in respect to which the rule is, that they must appear to have pursued their authority strictly, and no intendment shall be made in their favor. But this rule is not applicable to the probate courts of this state . . . Whilst the statute requires the record to contain an entry of the appointment, of all guardians (in this case assignees) it nowhere requires that the record shall show the existence of a state of facts such as to warrant the exercise of its authority, or the evidence upon which the court relied in making the appointment. Nor does any rule of law require this of such a court."

See also the case of Sheldon's Lessee v. Newton, 3 O. S., 494, 500. "The distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it to final judgment, without setting forth the facts and evidence on which it is rendered, and whose records, when made, imparts absolute verity; and those of an inferior grade, whose decisions are not of themselves evidence, and whose judgments can be looked through for the fact and evidence which are necessary to sustain them. Orphans' courts and courts of probate, when constituted courts of record, have uniformly been held of the former description."

The second election of an assignee was null and void, and the probate court might have disregarded it, and the mere approval by the court of the action of the creditors would not have added any validity to it; but in this case the court not only approved the action, but fixed the amount of the bond, accepted the bond, and thereupon made an order directing the former assignees to surrender possession of the estate to Brigel, and that in case of refusal the sheriff put him into possession. Whether or not this proceeding commenced in a mistaken view by the probate court of the manner in which to proceed to remove, the result

was to remove and to substitute—to do what the probate court had a perfect right to do. The "good cause" is what the court shall consider to be good cause. The probate court might take the advice of the creditors of the estate and act upon that as a good cause, or might have ascertained a good cause in some way not disclosed by the record. The record need not show what the facts were. It is the opinion of the majority of the court, that the court below, in granting the temporary injunction restraining Brigel from holding possession of the property of which he may have been put in possession, or from taking possession of the property belonging to his assignor, or interfering in the management of the estate, erred, and so far as it enjoins from holding possession, the judgment will be reversed. The court reviews the action of the court below upon the application for injunction only so far as affects its mandatory part.

As to the other branch of the case, the proceedings for contempt, the court of common pleas undoubtedly had jurisdiction of the cause under the application for the injunction. It had made an order restraining Brigel in that case. The evidence shows a violation by Brigel of that order. It was a contempt of the court which, whatever might be the merits of the case itself, did authorize the court to punish the party. There was no error in the method of proceeding in that matter. The court not only had the authority to impose the fine upon Brigel, but, while the suit was still pending, to enforce in all respects the order which it had made, including the restitution of the property taken in violation of the injunction, and require that Brigel should be imprisoned until he should make restitution, that the subject matter of the controversy might remain in *statu quo* until the final disposition of the cause. The judgment in reference to the contempt must be affirmed. It will be remanded to the court of common pleas, to take such action as, in view of the action of this court, would be proper in the premises.

I. M. Jordan and Long, Kramer & Kramer, for plaintiffs in error.

W. M. Ramsey and E. M. Johnson, for defendants in error.

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95 **SUIT TO FORECLOSE A TRUST DEED.**

[Montgomery Common Pleas, February Term, 1879.]

A. & G. W. R. R. Co. v. LEWIS H. PHILLIPS.

Where a suit to foreclose a trust deed made by a railway company is brought in another county, to which one S., the holder of a judgment rendered in this county of later date than the trust deed, was made a party and served with summons, but took no notice of the case, and in 1871, a decree of foreclosure and sale thereunder to plaintiff's grantors was had, but the deed not recorded for over a year. And in the meantime, S. proceeded in this county by execution under his judgment, levied it before the foreclosure decree was rendered, and sold the same property after the foreclosure decree to the defendant, who recorded his deed immediately and a year before the deed under the foreclosure in the other county was recorded: Held, that the service on S. prevented him from being a *bona fide* purchaser without notice, and his grantee was in no better position, and moreover he had constructive notice of the trust deed on record in this county. A trust deed or mortgage is not merged by judgment on it, so as not to be notice of the lien, and the delay in the record of the deed in foreclosure does not avail one having notice.

ELLIOTT, J.

Suit is brought in this case against defendant, Phillips, to quiet title to certain lots in the city of Dayton. Plaintiffs claim title derived from a foreclosure suit against the said A. & G. W. Ry. Co., in which their grantors were purchasers, while defendant claims title derived from a purchase at sheriff's sale on a judgment against said A. & G. W. Ry. Co., in favor of David Sinton. There are several other suits pending in this court brought by plaintiffs against other purchasers under the Sinton judgment. The same questions of fact and law arise in all of them, and it is agreed that the determination in one shall govern as to all the cases. No question is made as to the fact of possession, and for the purposes of the suit we are to regard that question as out of the case. The cases are tried here on an agreed statement of facts, which, so far as they are important to be considered here, are as follows:

We leave out of the statement the history of the original organization, consolidation and reorganization of the corporation which is now known as the A. & G. W. Rd. Co. The real estate in question was conveyed to the corporation in 1853. In 1855 the company executed to Flagg and Steadman a deed of trust over all its property, to secure $4,000,000 bonds issued and to be issued. Mr. Steadman having deceased, F. Schuchard took his place as trustee, and in May, 1863, the company executed a deed of trust to said Flagg and Schuchard, as a further assurance and security for said bonds. In July, 1863, the company executed a deed of trust to W. H. Upson over all its property, and specially mentioning the lots in question, to secure a further issue of bonds in the sum of $4,000,000. In October, 1865, the several original organizations having been consolidated as the A. & G. W. Ry. Co., the latter executed a deed of trust to John R. Penn over all said property, to secure the issue of $30,000,000 in bonds. All these deeds of trust were in due time recorded in Montgomery county in their proper order.

In April, 1867, the court of common pleas of Trumbull county, in proceedings for that purpose, appointed R. B. Potter, receiver of all the property of the company, and in April, 1867, by order of court, the corporation executed to Potter a deed of trust over all its property to secure the aforesaid mortgage creditors, and this deed was also recorded in this county December 14, 1867.

February 16, 1867, David Sinton instituted his suit in the superior court of Montgomery county, to recover against the company on an unsecured claim, and at the May term, 1867, recovered a judgment thereon for $13,915.58.

February 16, 1868, Sinton caused an execution to be issued to the sheriff of this county on his said judgment, which was returned "no property."

December 11, 1869, an alias execution was issued and levied by the sheriff on the lots in controversy and on others as the property of the corporation.

August 5, 1871, by virtue of a *vendi*, the sheriff sold the lots, and the defendant, Phillips and others, became purchasers. The sale was confirmed October 2, 1871, and a sheriff's deed executed October 5, 1871, and placed on record October 19, 1871.

April 7, 1869, Penn instituted suit in the common pleas of Summit county against the company and others to foreclose his trust deed, mak-

ing other lienholders parties. David Sinton was made a party and served with process, but paid no attention to the proceedings. At the February term, 1871, of the Summit common pleas, a decree of foreclosure was entered, finding the amount due Penn as trustee, and also determining the priorities of the several liens, and ordering the railway and its franchises and property to be sold. As special master, Reuben Hitchcock sold the property at public sale July 16, 1871, to George B. McClellan, A. G. Thurman and W. B. Duncan for the sum of $4,435,500, which sale was confirmed August 31, 1871, and a deed was executed to the purchasers October 3, 1871, which was not placed on record in Montgomery county till December 23, 1872. McClellan, Thurman and Duncan conveyed the railroad, with its franchises and all the property, to M. R. Waite and four others, who proceeded to organize and incorporate the railroad company, which, upon consolidation with others, in New York and Pennsylvania, became the A. & G. W. Rd. Co. The latter deed was recorded in this county, December 23, 1872.

It is conceded, for the purposes of this suit, that David Sinton had no personal notice of the several deeds of trust, nor of the purchase and sale by McClellan, Thurman and Duncan, and no further notice or knowledge of the proceedings of the court in Summit county, than his being served with process. It is also agreed that the defendant Phillips, who purchased at sheriff's sale under the Sinton judgment, had no actual or personal notice or knowledge of any of the aforesaid proceedings, or of any of the deeds of trust, or of the proceedings in Summit county, or of the purchase and sale by McClellan and others. Nor was he made a party to any of the proceedings. At the sheriff's sale in this county, August 5, 1874, under the Sinton judgment, David Sinton himself became the purchaser of quite a number of the lots in controversy, some of which he subsequently conveyed to Worthington, the latter taking title without notice of the prior claims and equities of the plaintiffs. Suits were subsequently instituted in the superior court of this county against Sinton and Worthington by the railroad company to quiet title, and upon the same statement of facts, that court entered a decree for the plaintiffs.

These suits were taken on error by Sinton and Worthington to the supreme court, and on consideration by that court, leaves to file petitions in error was refused. By this action the judgment of the court below was affirmed, but no written opinion was delivered or preserved, and hence we are left to conjecture as to the grounds upon which the supreme court acted. Certain it is, however, that Sinton and his grantee were found not to be innocent purchasers without notice. The several deeds of trust were on record in this county, and Sinton might have seen them had he chosen to do so, and, moreover, he was made a party to the foreclosure proceedings in Summit county, and was therefore bound by all that was done therein. The mere fact that the deed to McClellan, Thurman and Duncan was not placed upon record until after six months, and after his purchase under his own judgment sale, could avail him nothing, because he bought with notice; and his grantee, Worthington, stood in no better position. It is claimed on behalf of Phillips that he occupies a position different from that of Sinton, and that difference is to save him, if he can be saved.

That is, defendant claims that the supreme court may not of necessity have passed upon his particular defense, and that therefore we are

to give him the benefit of the doubt, and look into the question. Sinton had constructive notice of the several deeds of trust, for they were a matter of record in this county. Phillips had the same notice. Sinton had no personal knowledge of the deeds of trust, neither did Phillips have such knowledge. Neither Sinton nor Phillips had any personal knowledge of the sale and deed to McClellan, et al., nor of their deed to Waite et al., nor of the reorganization of the company. Sinton had no personal knowledge of the proceedings of foreclosure in Summit county, any more than Phillips had, except that Sinton was made a party and served with process. He bought August 5, 1871, pending the suit and proceedings in Summit county, to which he was a party—he bought *pendente lite,* and therefore with notice. Defendant Phillips bought on the same day, *pendente lite,* without actual notice, and it is claimed he is not bound by any constructive notice, not being a party to the suit in Summit county.

1. The claim of defendant is this, that, upon the rendition of the decree of foreclosure in Summit county, February, 1871, the several deeds of trust, or mortgages, as they might be termed became merged into the judgment, and were no longer liens upon the property, but that the judgment became a lien, instead and that unless such judgment was made a matter of record in this county, it could not operate as a lien upon the property, especially as against innocent purchasers, or, rather, purchasers without actual knowledge. Code, section 79.

2. It is next claimed that upon the sale to McClellan et al., and the confirmation thereof, the judgment of the court became *functus officio,* and was no longer notice, actual or constructive, and that the purchasers must rely solely upon their deed.

3. That the deed to McClellan et al., was not placed upon record until after the expiration of six months, and that in the meantime Phillips had placed his deed upon record, and all without any notice of the existence of the McClellan deed. S. & C., 467, section 8.

Section 8 of the deeds act (S. & C. 467), provides that all deeds, etc., shall be recorded in six months from the date thereof, and if not so recorded within six months, shall be deemed fraudulent as to subsequent *bona fide* purchasers, having at the time of making such purchase no knowledge of the existence of such former deed. It is conceded that Phillips is a *bona fide* purchaser, and at the time of making his purchase had no actual knowledge of the existence of the McClellan, Thurman and Duncan deed, or of the proceedings of the court in Summit county. As between the parties to the suit in that county, the deed made in pursuance of the decree and sale was good, whether recorded or not. To defeat this deed it must appear that Phillips had no notice of its existence. Constructive notice would be sufficient. Irwin v. Smith, 17 O., 226, 234. The trust deeds of Penn and others were on the record in Montgomery county, but the claims which they were given to secure were put into judgment. Did this merger of the debts extinguish the lien of the deed? In merger the less estate is annihilated or merged in the greater, and the judgment is evidence of the debt instead of the deed.

The merger of the note in a judgment does not extinguish the debt, and the mortgage continues a lien till it is satisfied or is barred by the statute of limitations. 1 Jones on Mortgages, section 848; 2 Jones, section 936; Freeman on Judgments, section 215.

In Wayman v. Cochran, 35 Ill. 151, it is decided that "when the debt has been changed to a judgment, the mortgage then is changed in

effect, to security for the payment of the judgment." If these authorities are sound, then the record here was notice to Phillips of the lien or mortgage which existed to secure the payment of the judgment rendered in Summit county. And why not so? Are we to believe that a mortgagee loses his lien by reducing his claim to judgment? And when the judgment of foreclosure is rendered in an adjoining county, may a third person, knowing nothing of its existence, step in and buy the mortgaged property between the entering of the judgment and the sale? It would seem that the bare statement of the proposition shows its fallacy.

As before stated, Phillips purchased at sheriff's sale under the Sinton judgment. Sinton's judgment was entered in May, 1867. The Penn decree was entered in February, 1871. To the proceedings in the Penn foreclosure Sinton was made a party and served with notice. As to him therefore, the proceedings and judgment in the Penn case were *lis pendens*. There can be no doubt if defendant had bought the lots of the company pending the proceedings in Summit county, he would be held a purchaser with notice. Code, section 78. If he bought at sheriff's sale under the Sinton judgment, pending the said proceedings, would he—could he be in any better position? Was not notice to Sinton notice to all who might purchase under his judgment *pendente lite?* See Code, section 78; Freeman on Judgments, see 193. *Lis pendens* affects purchasers at sheriff's sales to the same extent as if the alienation was voluntary. 32 Ala., 451; 4 Minn., 294 and many other authorities. *"Lis pendens* is only constructive notice of the pendency of the suit as against persons who have acquired some title to or interest in the property in litigation, under the parties to the suit, or some of them, *pendente lite"* Freeman, section 201.

But it may be claimed that Phillips purchased after the rendition of the Penn decree. That would not, it seems, alter the case. "It cannot be objected that the case is no longer *lis pendens* after decree, and sale and conveyance executed, because the court of chancery is not *functus officio* until the decree is executed, by delivery of possession." Freeman, section 206. Whether we should go to that extent or not is immaterial here, for it must be conceded that the court is not *functus officio* until, at least, the sale is confirmed and the deed of the master executed. Sales in chancery are in effect made by the court, and the master is but the agent or instrument of the court in carrying out its decree. Phillips purchased at sheriff's sale, August 5, 1871. The master sold under the Penn decree to McClellan, Thurman anad Duncan, July 26, 1871, while sale was not confirmed until August 31st—twenty-four days after Phillips' purchase. He therefore got his title *pendente lite.*

Irvin v. Smith, 17 O., 226, 239. See also Cooly v. Brayton, 16 Ia., 11, a learned opinion by Judge Dillon, now of the United States district court:

"Where a party purchases at a sheriff's sale pending an action of ejectment for the premises, in which the persons whose title he purchases are parties, he is affected with notice of it, and is bound by the decree in the case as much as if he were an actual party in it." Hersey v. Turbett, 27 Pa. St., 418.

As if to clinch the matter, it is held in O'Rourke v. O'Connor, 39 Cal., 442, that the "holder of a lien acquired by judicial process occupies no better position than a purchaser with notice." See also Freeman, section 357. Sinton having been a party to the Penn decree, his (Sinton's)

judgment as a lien upon the lots in question was extinguished by that decree. 1 Jones on Mortgages, section 1,554, citing King v. McCully, 38 P. St., 75, and other authorities; hence the judgment creditor must look to the surplus, if any there be. Freeman, section 349. Morris v. Way, 16 O., 469.

With these authorities and legal principles meeting us at every turn in the case, and with the action of the supreme court in the cases of the Railroad v. Sinton and Worthington as a forcible reminder of the position of that tribunal on these questions, it would, it seems to me, be folly to hold otherwise than as has been plainly indicated.

The finding must be for the plaintiffs and decree accordingly.

Durbin, Ward & Howards, for plaintiff.

Craighead & Craighead and Boltin & Shauck, for defendant.

[Belmont Common Pleas, October Term, 1878.] 101

DANIEL W. CADY v. VILLAGE OF BARNESVILLE.

For this opinion, see 4 Dec. R., 396, [s. c. 2 Clev. Law Rep., 100.]

STREET ASSESSMENTS. 102

[Hamilton District Court, November Term, 1878.]

CITY OF CINCINNATI v. MICHAEL CROWLEY.

Where the resolution declaring it necessary to improve provided that the assessment should be certified to the contractor in payment for the work, and the contract provided that the contractor agrees to receive in payment of the sum due thereunder "the assessment on the property made liable by law to pay the costs," and not to make any claim for any further "compensation that may be due under the laws of the state and the ordinances of the city," the contractor cannot hold the municipal corporation liable for loss from deficiency in the value of the lots.

Cox, J.

This cause came into this court on a petition in error filed by the city to reverse a judgment of the superior court. In that court the plaintiff brought an action to recover from the city the sum of $316, with interest and penalty, due him for grading and paving Corry street. He claimed in his petition that he had contracted with the city to do the grading and paving, the city agreeing to pay him a stipulated price in cash, or in valid assessments on the abutting property; that, in pursuance of his contract, he did the work, and to pay for the same the city levied an assessment of $5.04 per front foot on the abutting property, and ordered the owners to pay the amount to the contractor, and the assessment was delivered to him to be collected and the proceeds applied to the payment for the work. That one of the assessments was on the premises of one B, for $504, and he refusing to pay the amount, suit was brought against him, of which the city had notice. B defended, setting up as a defense that the assessment exceeded twenty-five per cent. of the value of the land after the improvement was made, and on the trial the court adjudged that the sum of $187.50 only was properly chargeable thereon, leaving due to Crowley on account of the failure of the assessment, the sum of $316.

To the petition the city answered by a general denial of indebtedness, and says that the resolution of council declaring it necessary to improve said street, passed March 19, 1875, and being one of the preliminary steps averred in the petition, provided as follows: "The expense of said improvement and the damages due on account thereof to be assessed per front foot upon the property abutting thereon, according to the laws and ordinances on the subject of assessments, and such assessment of the expense of the work to be certified to the contractor in payment for the work." And, further, that the contract contained the following clause:

"7. Said party of the second part further covenants and agrees to receive in payment of the sum due under this contract the assessment upon the property made liable by law to pay the costs and expenses of this improvement, and covenants not to make any claim, nor bring any suit against the party of the first part under this contract for any further or other compensation than may be due under the laws of the state and the ordinances of the city in relation thereto."

Another defense is set up that at the time of the contract no funds were set aside, nor was there any certificate of the auditor that any funds had been set aside for the expenses of the work other than the city's two per cent. and cost of intersections. To this answer the plaintiff demurred, and the court sustained the demurrer, which is assigned as error.

It is claimed by the city that the ordinances directing this work provided that the expense of doing the same should be assessed on the abutting property, and the assessment should be assigned to the contractor in payment for his work, and that in the contract he obligated himself to receive that assessment in full payment, and not to claim anything further from the city. On the part of the plaintiff it was claimed that the city was bound to give him a lawful assessment for the amount of his claim, but that the assessment given was an illegal one, inasmuch as it was for more than 25 per cent. of the value of the lot, and that the city, having no legal right to assess the abutting property more than 25 per cent. of the value, but assuming nevertheless to do so, was responsible to him for that excess.

Section 542 of the Municipal Code provides that in making an assessment according to valuation the council shall be governed by the assessed value of the lots when the land has been subdivided, etc.

Section 543 limits the assessment to 25 per cent. of the lot or land as assessed for taxation; and that any amount exceeding that, is to be paid out of the general fund of the corporation. As was said in Creighton v. Toledo, 18 O. S., 447: "It is not claimed that the parties could not agree that the contractor should look exclusively to the assessment for his compensation. The question is whether he did so agree." The whole case turns on the construction of the contract.

The authority to make the improvement and the manner of paying for it was a matter for the consideration of the city council as a legislative body, and to this action as well as its legal authority to so act, the contractor was bound to look. As was said by the supreme court in Welker v. Toledo, 18 O. S., 453, 455, and reiterated in Goodale v. Fennell, 27 O. S., 426, 431: "He must be presumed to have known the law fixing the power of the city to pay in assessments, and to have contracted with express reference thereto. He was bound to know the facts as to the value of the lots, the cost of the work, the language of the contract, and to

have considered the deficiency, if any, that would exist under the law as it then stood."

Holding the parties to the presumptions, the supreme court in the Fennell case decided that a law limiting assessments to 25 per cent. of the value of the lot, passed after the contract was entered into, was illegal, because when the contract was made the law allowed the whole assessment to be collected from the property, which was sufficient to have paid the amount whereas, by the limitation sought to be enforced by that law, the contractor could not get out of the property that for which he had contracted. His contract was for an assessment as of the law when his contract was made which, as well as the value of the property, he was presumed to know. And the supreme court in that case construe the contract as one not to look to the city for anything in payment of the improvement, beyond the amount which the city could legally assess on abutting property, and in consideration that it give up all claim on the general fund. Applying the principles to the case before us, we have a party entering into a contract with the city, which has already passed an ordinance declaring that the expense of the improvement shall be assessed on the front foot of abutting property, and such assessment certified to the contractor in payment for the work. We have the legal presumption (which is also a natural and reasonable one), that the party, before he bid, knew the premises and the facts as to the value of the lots, and the cost of the work, and the law fixing the power of the city to pay in assessments, and he must be presumed to have contracted with reference to all these things. What contract did he make? He agreed to receive in payment the assessment upon the property made liable by law to pay the expenses of improvement, and not to make any claim, or bring any suit for anything other or further than may be due under the laws of the state and the ordinance of the city. He therefore agreed to look to the assessment alone, which he was bound to know could not exceed 25 per cent. of the assessed value of the land either by the laws of the state or ordinances of the city. It is argued that this stands on the same principle as the case of Cincinnati v. Diekmeier, 31 O. S., 242. In that case the syllabus declares that when a municipal corporation agrees with a contractor to pay a stipulated sum for a street improvement in assessments upon the abutting property, and the assessments levied and assigned to the contractor exceed 25 per cent. of the value of the property after the improvement is completed, the city is liable to the contractor for the deficiency. In that case the allegations of the plaintiff were substantially as in this case, but the answer of the city was not so broad. The answer set up simply that by the terms of the contract "the work was to be paid for by an assessment upon the abutting property," and denied that the assessment exceeded 25 per cent. of the value.

The court says, p. 244: "Here the averment is that the work was to be paid for by assessments. There is a manifest difference between an agreement to accept a particular assessment in payment of a debt, and to accept payment of a debt in assessments. In the first case the assessment received pays the debt; but in the second the debt is paid only by a transfer of a valid assessment sufficient in amount to extinguish it. It is not to be supposed in the absence of more explicit language than was here used, that the parties intended the contractor to assume the risk of the validity or the invalidity of the assessment to be made by the city." And again, on page 245, "the contractor not having agreed to receive the

assessments in full payment, the facts stated in the answer constitute no defense." But in this case, as we conceive, the contractor did agree to receive in full payment the particular assessment which he could and did make on the abutting property, and stipulated that he would make no other claim, and the answer constituting a good defense to the action, the demurrer should have been overruled.

The judgment will be reversed.

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113 [Hamilton District Court, November Term, 1878.]

PATRICK J. HOGAN v. JOSEPH B. CARBERY.

For this opinion, see 6 Dec. R., 729; [s. c. 7 Am. Law Rec., 595]

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117 **PARTNERSHIP.**

[Hamilton District Court, November Term, 1878.]

RICHARD F. CALDWELL v. LAFAYETTE DEVINNEY.

Where P. and G. made a contract with plaintiff in their own names, but in reality for a partnership composed of P. and G. and D., who were to divide profit and loss, and plaintiff, not knowing this, but understanding that P. and G. were only agents, and that D. was their undisclosed principal, sues D. alone, the principle that the right to elect between the agents and the real principal must be exercised does not apply when, by reason of ignorance until the trial, there was no opportunity to elect, and D. may be held, whatever steps were taken against his partners, P. and G., and the partnership liability will sustain the action against him alone, for the omission to join the other parties not appearing on the petition, not having been taken by answer, is waived.

AVERY, J.

This is a proceeding to reverse a judgment by the common pleas, where suit was brought by Caldwell for storage of butter, and judgment was entered for the defendant.

The butter had been received by Caldwell in store at his fruit house in Covington, Ky., from Pearce & Grover, of this city, and he gave them warehouse receipts, which were afterwards indorsed to Devinney, and by him to Smith & McAlpin. Upon Smith & McAlpin producing the warehouse receipts, he let them have the butter without collecting the charges.

The ground of the action against Devinney was that he was the owner of the butter, and that Pearce & Grover, who stored the butter, and Smith & McAlpin, who took it out, were acting for him.

There was evidence that Caldwell was informed, while the butter was being stored, that it was put in for Devinney; also evidence that it remained in store two seasons, and that at the end of the first season the bill for storage was presented by Caldwell to Pearce & Grover. The court charged that if an agent contracts in his own name for an undisclosed principal, the party has the right to elect on discovering the principal whether he will look to the agent or the newly discovered principal, and that to entitle the plaintiff to recover he must show that he gave exclusive credit to Devinney from the time it was discovered that he was the owner.

The charge is subject to the criticism that it seems to require an election to hold a newly discovered principal, whereas, the rule is that if the principal is unknown at the time, the right of election continues, until,

by some act of his own, the creditor has evinced a final determination to look to the agent; Story on Agency, 446. But passing this point, there is another particular of which plaintiff in error complains.

The evidence was that the butter was stored by Pearce & Grover in pursuance of a contract between them and Devinney, they to purchase the butter and Devinney to advance the money and receive the warehouse receipts, the profits and loss to be equally divided. The court was asked to charge that this constituted a partnership between Pearce & Grover and Devinney, and unless Caldwell, with the knowledge of this partnership, looked exclusively to Pearce & Grover, he might still hold Devinney. The court refused the charge.

Whatever may be the rule as to election by a creditor between principal and agent, no occasion can arise for such election, unless principal and agent are both known, and no steps taken by the creditor against the agent will preclude him until the principal is discovered.

This contract constituted a partnership, because it divided profit and loss, Insurance Co. v. Ross, 29 O. S., 429. Caldwell was informed that Devinney was the owner of the butter, and that Pearce & Grover were acting for him. But the transaction being one by a firm composed of Pearce & Grover and Devinney, Pearce & Grover were not acting for Devinney alone, but for themselves and Devinney—in other words for the firm. The existence of the partnership contract was not made known until the day of trial, and there was no evidence that Caldwell was informed of it. The only information that he had was that Devinney was the owner. He had, therefore, no opportunity to elect as between the agent and the real principal, and no matter what steps were taken against Pearce & Grover, he might still hold Devinney. 36 N. H., 167; 6 Conn., 347, 9 M. & W., 79, 11 M. & W., 315.

This action is brought against Devinney alone, but that does not preclude the plaintiff from relying upon the partnership liability as the ground of the action. As a partnership contract, there was a defect of parties, but this not being set up by plea, was waived. Where one of the several joint contractors is sued by himself, the objection must have been made under the old practice by plea in abatement, and on default of such plea the defense was gone—McArthur v. Ladd, 5 O., 514. Under the Code, the objection being defect of parties defendant, aand not appearing on the petition, must be taken advantage of by answer, otherwise it is waived. 75 O. L., 620.

Whether the plaintiff was estopped by letting Smith & McAlpin have the butter without paying the charges was a question to be left to the jury. The estoppel did not arise as matter of law, from the mere fact that Caldwell released his lien on the butter, for he still might continue to look to the owner for the charges unless other circumstances constituting an equitable estoppel had intervened.

The refusal of the court to charge as asked, makes it unnecessary that we should here inquire into the existence of any such circumstances. Even if it should be conceded there was evidence upon which such circumstances might have been found by the jury, it is impossible to say whether the jury did so find. Their verdict may have been based altogether upon the transactions of the plaintiff with Pearce & Grover, and for error of the court in refusing to charge as to the relations of Pearce & Grover, under their contract with Devinney, the judgment must be reversed.

120 LANDLORD AND TENANT—STATUTE OF FRAUDS.

[Hamilton District Court, November Term, 1878.]

†WILLIAM HEPWORTH v. GEORGE H. PENDLETON.

1. Under a written lease providing for a periodical re-valuation by arbitration every fifteen years, a re-valuation may be by parol agreement, and if not evidenced by writing is not within the statute of frauds.
2. The lessee having paid on the re-valuation for ten years, can not then say that he had never agreed to it.
3. Such lessee has no option to surrender the lease.

Cox, J.

This case came on a petition in error to reverse the judgment of the superior court. George H. Pendleton et al., brought the suit to recover ground rent for property on the corner of Court and Deercreek on a lease executed by the ancestors of Pendleton in 1839. The lease was one for ninety-nine years, renewable forever, subject to the condition that for the first ten years the rent should be $700 annually, and subsequently every fifteen years the rental should be fixed by three parties, to be chosen mutually by the lessor and lessee, who should fix the value of the premises in reference to the rent which should be six per cent. on that valuation, and that, in case the parties disagree, they could appeal to judges the court of common pleas, who should appoint the arbitrators. The rent was paid for the first ten years. In 1849 the parties agreed that the premises should be valued at $20,420, on which the annual rent would be $1,200. The petition also alleged that in 1864 the parties agreed that the same valuation should continue for the succeeding fifteen years, and that for ten years after that time the lessee had paid rent in accordance with that valuation; but that in 1874 he ceased to pay rent, and is delinquent ever since.

The defendant denies that in 1864 he agreed that the premises should be valued at $20,000 for the ensuing fifteen years, and claims that no such agreement was made, or if so made, it was not made in writing, and was therefore void; he admits the plaintiff has a right to recover rent at the rate of $700, which was originally fixed by the lease; that the property is in fact of no value on account of the filling up of roads and streets, etc., in the vicinity by plaintiff; that he had had valuable tan-vats on the premises which were destroyed by fills, etc., of the plaintiff. The defendant offers to surrender the premises to the plaintiff.

The testimony consisted of the lease and that of one witness, Eli C. Baldwin. Baldwin testified that as agent for plaintiff he collected the rents of $1,200 per annum until March, 1874, at which time the defendant served him with a notice of the surrender of the tan-yard property, being one and three-quarters acres, situated at the corner of Deercreek road and Court street. It was claimed that this testimony should not have been received, because it was not an agreement to be performed within a year, and consequently was within the statute of fraud, which requires such agreements to be in writing. We do not think this case comes within the statute of frauds. The lease was in writing. It was admitted that for

†For decision of superior court affirmed by this opinion, see 5 Dec. R., 386; [s. c. 5 Am. Law Rec., 285.]

ten years of the third term the rental was paid in accordance with the previous valuation. We think it is competent for the parties among themselves to agree upon a valuation without an arbitration. For ten years of that third term the parties consented, so far as their acts show, to that being a fair and proper valuation. It is too late for the lessee to set up that he did not agree to the valuation. His payment of the rent agreed upon at the beginning of the fifteen years lease in 1849, and continued to do so for ten years after he might have applied to the court for appraisers if he could not agree with the lessor, amount, we think, to a virtual admission that he had so agreed.

It was further claimed by the lessee that, no agreement having been made in form, he occupied the premises after the expiration of the last fifteen years only as a tenant from year to year. The lease deos not terminate at the expiration of fifteen years. It runs for ninety-nine years, renewable forever. The party is subject to pay the rent during that time, as he paid it for the past ten years.

Judgment affirmed.

Glidden & Burgoyne, for plaintiff.

Paxton & Warrington, for defendant.

[Superior Court of Cincinnati, Special Term, January, 1879.] 123

MILLER BROS. v. JAS. H. LAWS & CO.

For this opinion, see 6 Dec. R., 736; [s. c. 7 Am. Law Rec., 606.]

APPEARANCE—CONTRACTS BY MARRIED WOMEN. 139

[Hamilton District Court, November Term, 1878.]

ADALINE MILLER v. ROBERT CREIGHTON.

Where an action against a married woman begun before a justice is appealed, and the defendant, instead of objecting to the jurisdiction before appearance makes this objection and also pleads payment and the general issue, this is an appearance and submission to the jurisdiction.

AVERY, J.

Creighton recovered judgment before a justice of the peace for $35 against Adaline Miller. She appealed to the court of common pleas, where Creighton filed his petition, setting forth an account for lumber and building materials, and praying judgment for the amount. She answered that she was a married woman; that she denied all the allegations of the petition, and that she had paid everything due from her. Creighton replied denying payment. Afterwards he filed an amendment to his petition, to the effect that the lumber and materials were furnished under a contract with her for the improvement of her separate real estate. She moved to strike the amendment from the files, but her motion was overruled. She then demurred, and her demurrer also was overruled. Judgment being rendered against her for the sum claimed, she has brought her petition in error here.

The objection is to the jurisdiction. A married woman may contract in her own name for the improvement of her separate real estate, but this,

it is objected, involves a question of title, and, therefore, the justice of the peace could have no jurisdiction, and the common pleas, upon appeal, none. Bridgmans v. Wells, 13 O., 43; Wood v. O'Ferrall, 19 O. S., 427, 430.

If the point be conceded it goes only to the appellate jurisdiction of the court of common pleas. The subject matter of the controversy was at all events within the original jurisdiction of that court, and the objection to be good must have been taken before appearance in the action. In Harrington v. Heath, 15 O., 483, it was held too late after answer filed. In Evans v. Iles, 7 O. S., 233, there was a similar ruling as to the filing of a demurrer; and in O'Neal v. Blessing, 34 O. S., 33, as to a motion and demurrer.

The defendant below pleaded in answer to the original petition that she was a married woman, but the answer did not stop there. It went on to plead the general issue, and also payment. This was an appearance in that action. The amendment was not a new action, but was in the existing action.

If, however, the amendments were considered as making a new case, the motion made by the defendant constituted an appearance. The motion was not put upon the ground of want of jurisdiction. There was no special ground; it was a general motion.

Even if this were not enough, there was a demurrer. One ground assigned was want of jurisdiction, but the other ground was that the facts alleged were insufficient, and this, as an appearance, was not affected by the demurrer to the jurisdiction. It was the same in effect as if upon a separate paper, and was by implication of law the entering of appearance, O'Neil v. Blessing, *supra*.

Judgment affirmed.

Lane, for plaintiff in error.

John Johnston, for defendant in error.

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156 HOW ALLEY RIGHTS MAY BE REQUIRED.

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

L. B. HARRISON ET AL. v. PIKE'S HEIRS AND EXRS.

1. One owning land on both sides of a private way, not dedicated to the public, common to all the abutting proprietors, can not be compelled by such proprietors to remove a building erected over, but so far above the way as not to obstruct the right of passage.
2. A deed describing land as bounded on an alley, and not dedicated to the public, gives an irrevocable right to the use of the way, and not only to the portion in front of the lot conveyed, but for the whole length.
3. A mandatory injunction to compel the removal of obstructions over a private way may be granted.
4. Owners of separate lots abutting on a private alley, through which they have a right of way, may join as plaintiffs to prevent the building over or obstructing the alley.

FORCE, J.

John Baker, owning inlot No. 162, made a plat of it dividing it into lots, and laying out an alley on the west side of the inlot, over the western half of the north side, and then across the inlot to its southern boundary.

Baker street, running along the south side of the inlot, connects with both ends of the alley. Baker conveyed some of the lots of this subdivision to the plaintiffs or their grantors, describing the lots conveyed as fronting on the alley. The plat was not put on record until many years after, and then was not executed so as to operate as a statutory dedication.

S. W. Pike, becoming owner of land on both side of a portion of the alley, built his opera house so as to extend over, at some considerable height above the ground, the alley and cover it. His representatives, since his decease, have also barred access to that part of the alley, by putting obstructions across it. Plaintiffs, owners of some of the lots, ask for an injunction to remove the obstructions. Defendants demur for misjoinder, and also for want of cause of action.

As to misjoinder, it has always been held, that the inhabitants of a manor, having a right of common in the common belonging to the manor, may join in an action to prevent a destruction of the manor, or for injury to it. So abutting owners on an improved street may join in an action to restrain an illegal assessment on such abutting owners for the cost of the improvement. Glenn v. Waddel, 23 O. S., 605; Uppington v. Oviatt, 24 O. S., 232. Abutting owners on a public square may join in an action to restrain a conversion of the square to other uses. See Clercq et al. v. Gallipolis, 7 O. 1, 217. Common sufferers by a nuisance may join in a bill to restrain the nuisance. Park v. Elder, 3 Sand, 126; Murray v. Hay, 1 Barb. Chy., 62; Brady v. Weeks, 3 Abb. Pr., 157; Reed v. Gifford, Hopk. 419.

The objection as to misjoinder is not well taken.

The action being for an injunction, and not for damages, the demurrer on the ground that the petition does not show a cause of action, is on the ground that it does not show cause for injunction. The petition is not sufficient if it merely states a case for money damages.

It is agreed that the alley is not a public way, but only a private way. It is claimed by plaintiffs, that they acquired by the deeds an indefeasible right-of-way through the alley as appurtenant to their ownership in the lots, while defendants claim that the original grantors never had more than a personal license, and therefore revocable.

It is well settled that there may be a valid and irrevocable dedication of a way, though the dedication be not a valid statutory dedication. In such case a plat may be of use in defining what is dedicated, though it is insufficient to operate as a dedication of itself. An unrecorded plat is not a nullity. Railroad v. Longworth, 30 O. S., 108. Nor is it necessary to actually lay out on the ground, either by improving or by staking out, the alley, in order to confer a right in its use. Stark v. Coffin, 105 Mass., 328; Falls v. Reis, 74 Pa. St., 439.

When in a deed, the land conveyed is described as running to or bounded by a stream, ditch or way, such a stream, ditch or way is not regarded as land covered by water or by improvements, but is regarded as a line, and the center of the stream, ditch or way, is held to be the line described as the boundary line. Hence, when land is conveyed as running to or bounded by a road, street or alley, the center of the road, street or alley, is held to be the boundary line, unless the land covered thereby is expressly reserved to the grantor, or unless there are words in the deed absolutely irreconcilable with the grant extending beyond the outer line of the road, street or way.

Moreover, a grant of land to a way of any sort is a covenant by the grantor that, so far as his rights extend, the way exists and will remain as an open way.

Stark v. Coffin, 105 Mass., 328; Winslow v. King, 14 Gray, 321; Doren v. Horton, 1 Disney, 401.

This right to the use of the way extends, not merely to the portion thereof in front of the lot granted, but extends to its entire length. Thomas v. Poole, 7 Gray, 83; Robinson v. Robinson, 9 Gray, 444.

The grantees, therefore, acquired and the plaintiffs held, a right to the unobstructed use of the alley, from end to end.

Does an obstruction to this right entitle the plaintiffs to the relief asked? Undoubtedly such relief, a mandatory injunction, requiring the removal of an obstruction, or other tort, is a common case of relief. Examples abound in the books of such cases as an injunction requiring the defendant to replace water gates and weirs that he removed; to take down walls and other structures which he has tortiously erected; to remove a slab with which he has wrongfully covered the top of a chimney flue, or requiring a partner to return to the place of business books which he has wrongfully taken away. Such relief is given more frequently in England, but there are cases in the American books, as in Cole Silver Mining Company v. Virginia, 1 Sawyer, 685; Camblos v. Phil. R. R., 4 Brewster, 563, and Doren v. Horton, 1 Disney, 401.

The relief asked is to remove the opera house, and also the obstructions on the surface of the alley. A city has a use, not only on the surface of the ground of a street, but for an indefinite distance beneath, for the purpose of laying water pipes, sewerage and subterranean ways, and for an indefinite distance above, to control impediments to ventilation, and for purposes of police and government. Whether the city owns the fee or not, its right of use is as large as that of the owner of a fee. But in turnpikes, and still more in private ways, the right of use is more limited—it is only a right of passage along the surface. Hence it was held, some years ago, by the district court of this county, that when the B. & O. R. R. purchased the land on both sides of the Colerain pike, and of the avenue, thereby acquiring ownership of the land to the middle of those ways, subject to their easement, the R. R. Co. were building upon their own land, and rightfully, when they carried their road over a viaduct across those ways, at such a height in the air as not to obstruct travel on the turnpike and avenue.

The present case, being a private way, the plaintiffs do not show a right to remove the opera house, but they do show a cause of action for the removal of the obstructions upon the surface of the alley.

Demurrer to petition overruled.

Thornton M. Hinkle, H. A. Morrill, for plaintiffs.

Hagans & Broadwell, for defendants.

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174 [Hamilton District Court, January, 1879.]

STATE OF OHIO EX REL. PROS. ATTY. v. BROWN ET AL.

For this opinion, see 6 Dec. R., 740 (s. c. 7 Am. Law Rec., 652).

[Hamilton District Court, January, 1879.] 189

J. & J. JOHNSON v. FRANK A. AMMONS.

For this opinion, see 6 Dec. R., 747 (s. c. 7 Am. Law Rec., 662).

RIGHT OF WAY. 194

[Hamilton District Court, 1870.]

J. M. RATCLIFF v. H. W. SCOTT.

1. The sale of a right of way to a public highway, by the ancestors of S. to R., an adjoining property owner, creates no obligation on the part of S. to keep the original highway open for the use of R. even though, upon its vacation for public use, the land used for said original highway reverted to S.
2. Moreover, upon the removal of said highway, to which R. acquired a right of way as aforesaid, R's easement in the land ceases and S. will be allowed to fence it up.

Cox, J.

In 1858, the plaintiff and the ancestor of the defendant were owners of adjoining land in Crosby township. The plaintiff not having access across his own land to a public highway, in 1858, purchased an easement or right of way to this highway, from the defendant's ancestors and continued to use it until 1870, when, on application of numerous citizens in the neighborhood, the road was changed to a point further east on the lands of the defendant Scott, so as to make a direct line from the Baltimore road to the Venice road, and thus rendering it impossible for the plaintiff to gain access to the new road, except over the lands of the defendant to which he had no right. The present defendant was no party to the application for a change of the highway, and when it was sought to be made, claimed damages from the commissioners for taking away the old road, and depriving him of access to his lands. This application was denied, and when the old road was vacated the defendant put up a fence there, by means of which the plaintiff could not have access to it. This suit is brought to enjoin the defendant from maintaining this fence opposite the private way granted to the plaintiff, or to compel him to give a further right of way on the old road as originally laid out, or the new road as recently laid out.

The court was of opinion that the new road vacated the old road, and that, running as it did across the lands of Scott, it reverted to him and became his private property. There was no agreement by the ancestor of the defendant that he should keep the highway open. The public authorities could close it whenever the exigencies of the public demanded, and the fact that the property reverted to the defendant by being vacated is no reason why he shall keep it open for the accommodation of the plaintiff.

Decree for defendant.

201 CONDEMNATION OF PROPERTY.

[Belmont District Court, 1879.]

B. & O. R. R. Co. v. City of Bellaire.

A railroad company seeking to enjoin a city from proceeding by ordinance to condemn a street across tracks used as a railroad yard, which would destroy the yard for its purposes of shifting cars, and as a standing place for cars not in use: Held, lands subject to a public use can not be condemned to a second public use inconsistent with the first.

Appeal from the Common Pleas Court.

This suit was brought by plaintiff for the purpose of enjoining defendant from proceeding by ordinance, etc., to condemn a right of way across plaintiff's railroad tracks in Bellaire, for the purpose of a street crossing. The tracks across which it was proposed to extend the street are used as a railroad yard, for shifting and dispatching cars, and as standing room for the cars not in use. The plaintiff objected to the street being made on grade, claiming that it would destroy the yard so far as the purpose for which it is now used is concerned. The plaintiff further claimed that the street crossing could be made by either a bridge or a tunnel so far as to accommodate the public. The defendant claimed the right to exercise its own judgment in this regard untrammelled by the supervision of the courts, and insisted upon its right to cross at grade, and that an injury to the yard would be a mere matter of compensation. Marsh, J.

Held: That lands subject to a public use may not be condemned to a second public use inconsistent with the first; that in the present case the testimony shows that to extend the street across their railroad tracks at grade, would in effect destroy its yard for the purposes for which it is now used.

Injunction made perpetual.

J. H. Collins, for plaintiff.

Kelley, Danford & Hope, for defendant.

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209 NOTE GIVEN FOR A PATENT RIGHT.

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

Duncan McKinzie v. John Bailie.

A defense to a note of want of consideration, in that it was for the exclusive right to put up a patented article in a certain place, and that on attempting to put it up defendant was threatened with litigation by one claiming a prior patent, is no defense, for it does not establish that the patent is void, nor does evidence of an injunction against a party holding this patent, for that is *res inter alios acta*. The state court may examine the evidence as to the patentability of the invention to see if there is a consideration for the note.

Yaple, J.

This was a suit upon a note for $1,000. The plaintiff controlled a patent, which had been issued to his wife, for a bake-oven, and in January, 1869, granted to the defendant the exclusive right to put up the oven in New Orleans, and within a radius of fifty miles from the custom house there. A part of the consideration was the note sued on.

Error to the Court of Commons Pleas of Hamilton County.

The plaintiff filed his petition in the court below setting out a contract under which he was employed as the agent of the company for the counties of Lorain, Medina, Summit and Wayne. The term of the contract was to be for twenty-five years from date unless violated by one of the parties, in which event the other might terminate it. The compensation was to be 25 per cent. upon the ordinary premiums for the first year of insurance, and 7½ per cent. for the second and subsequent insurance during the term of the contract. The petition alleged that without fault of the plaintiff the contract was terminated by the company in 1874, and that, whereas he had acquired an interest in the renewals for the term, the company had appropriated that business to itself. The amount claimed in the petition was an amount which the plaintiff estimated as the present value of the business. It was alleged as an error that at the close of the plaintiff's testimony, the court below directed the jury to render a verdict for the defendant. The question was whether the contract had been wrongly terminated by the company, or whether the plaintiff had tendered his resignation, which had been accepted by the company. The letters between the parties were in evidence, by which it appeared that plaintiff tendered his resignation of the agency on the 24th of August, 1874, after some correspondence between the company and himself with reference to his getting business for the company, and with reference to the company's permitting other agents to work in his territory. The plaintiff tendered his resignation. The company accepted his resignation, to take effect as soon as the plaintiff's accounts were balanced. The plaintiff answered that the defendants must have misconstrued his letter, claiming that the plaintiff there stated that he retained the right to collect the renewals, and again tendered his resignation, insisting upon his right to collect the renewals. The company made no response to that letter, except to introduce to him their traveling agent, who was to receive the property and money of the company in his hands. AVERY, J.

If the plaintiff had been turned out of the agency by the act of the company, doubtless he might have claimed to continue to collect the renewals, but the letter of August 24 was an unconditional tender of his resignation. The contention was that the resignation was not accepted in the terms in which it was tendered. It was argued that the resignation was qualified by an acceptance to take effect when the plaintiff balanced his accounts. Undoubtedly the resignation of a right must be accepted in the terms in which it is offered. But it was not a condition imposed by the acceptance that the agent should balance his accounts with the company. That was his duty. His resignation included the surrender of all the property held by him. Nor was the acceptance any prolongation of the term of office. It was his duty to surrender the property of the company into their hands the moment he ceased to be agent. A resignation accepted to take effect when the accounts were balanced was a resignation to take effect at once, because it was his duty to balance his accounts the moment he resigned. The contract being terminated by resignation and the company's acceptance of it, his compensation likewise terminated.

Judgment affirmed.

C. D. Robertson, for plaintiff.

Matthews, Ramsey & Matthews, for defendant.

215 **JUDGMENTS.**

[Hamilton District Court, April, 1879.]

ARCHIBALD GOODIN v. JAMES M. MCARTHUR.

An action for personal judgment on another dormant judgment may be maintained under the Ohio laws just as at common law.

ERROR to the Court of Common Pleas.

The plaintiff in the court below, who was also the plaintiff in error, filed his petition upon two judgments rendered by the superior court of Cincinnati, one in the year 1857, and the other in the year 1856 upon which, there was no proceedings for reviver, and which appears to be dormant. To this petition the defendant filed a demurrer, which was sustained by the court below, and judgment rendered for the defendant. The defendant in error did not deny that by the common law an action of debt would lie upon a judgment, but claimed that the whole history of our legislation showed that in Ohio such an action could not be maintained.

BURNET, J.

Counsel for the defendant had referred to the early statutes in Ohio, and had undertaken to trace them down to the present time, to demonstrate that this right of action did not obtain in Ohio. The court, however, had carefully looked at several statutes, and had come to a different conclusion. The supreme court, in Tyler's Exrs. v. Winslow, 15 O. E. 364. recognized clearly the doctrine that, notwithstanding the provisions of our Code, an action may be maintained for personal judgment upon other judgments, just as at common law. This also settles the doctrine under the Code, that decision having been rendered upon a cause of action arising before the Code.

Judgment reversed demurrer overruled, and judgment for plaintiff.

Archer & McNeil, for plaintiff.

Judge Whitman, for defendant.

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241 **DITCHES.**

[Pickaway District Court, April Term, 1879.]

JAMES R. HULSE ET AL. v. ENOCH F. COPELAND ET AL., TRUSTEES.

1. A ditch can not be shown not to be conducive to public health to defeat the assessment.
2. The township clerk has the right to make up his record of proceedings for a ditch during their progress, or at their conclusion, and making memoranda or a partial record does not preclude him from completing the record, or making it up, striking out the memoranda; and parties bringing an injunction against the assessment are not justified in relying on the memoranda, but are bound by the actual proceedings, though recorded afterwards.

The plaintiffs filed a petition alleging that they were owners of land sought to be affected and charged with the expense of constructing a ditch in the said township; that the trustees were proceeding to let the

contract for the construction of the said ditch, and had advertised certain sections thereof for sale, and averring that the proceedings of the trustees were illegal and void.

An injunction was granted.

The defendants filed their answer, denying the allegations of the petition, that their proceedings were illegal and void.

On the hearing of the case the plaintiffs claimed that the proceedings were illegal and void, for the following reasons, to-wit: At the time the injunction was granted the clerk of the township had not made a full record of his proceedings, but only some memoranda upon his journal.

The ditch proceedings at that time were not completed. After the injunction was granted the clerk made up a new and complete record, drawing lines over and striking out the memoranda which was on his journal. It was claimed by the plaintiffs that he, the clerk, had no right to do this.

Second—It was claimed by the plaintiffs that the jurisdiction of the trustees was lost, because there had been an adjournment for more than twenty days without consent of parties.

Third—That the trustees did not make a full and complete report of their proceedings had on said petition, to the township clerk within five days after their decision.

The plaintiffs claimed that for the errors aforesaid the court should set aside the proceedings of the trustees, and allow the plaintiffs to show wherein they had been injured, in accordance with section 29 of the Ditch Law, 71 O. L., 134.

Walling & Curtain, for plaintiffs.

The defendants claimed that at the time the injunction was granted the ditch proceedings were not finished, and the trustees had a right, after the injunction, to make up a complete record according to the facts, and to amend their record if it was defective. On this point Page & Abernethy, their attorneys, cited: Boston Turnpike Co. v. Pomfret, 20 Conn., 589; Ratcliff v. Teters, 27 O. S., 66; Braden v. Comr's Logan Co., 31 O. S., 386; Wells v. Battelle, 11 Mass., 477; Ward v. Clapp, 4 Met., 455; Carper v. Richards, 13 O. S., 219.

As to the adjournment and the delay in furnishing the report of their proceedings to the clerk, these errors were only mechanical and not substantial or manifest, within the meaning of the statute, and the statute on these points was merely directory. Sedgwick on Const. and Stat. Law, 368; The State v. Harris, 17 O. S., 608; Magu v. Commonwealth, 46 Penn. St., 358; Gearhart v. Dickson, 1 Penn. St., 224; Looney v. Hughes, 26 New York, 514; Wood v. Chapin, 13 N. Y., 509; Miller v. Post, 1 Allen, 434.

The plaintiffs also offered evidence to prove that the ditch was not conducive to the public health, etc., but was for a private purpose merely; and also, that they were damaged in the premises.

The court held:

1. Unless there was manifest error in the proceedings of the trustees, which fact must be first shown, evidence would not be received as to the ditch being conducive to public health, etc., this being a jurisdictional fact.

2. The errors complained of were not manifest, but technical merely, within the meaning of the statute, and that the evidence as to the ditch

not being conducive to the public health, etc., and as to damages, was not competent, and would not therefore be received.

3. The township clerk has a right to make up his record of the proceedings, at any time, either during their progress or at their conclusion; that the fact that he made memoranda of the proceedings during their progress, or had only a partial record at the time the proceedings were enjoined, did not preclude him from afterwards making them up or completing them in accordance with the facts, and that his doing so after the commencement of the action by the plaintiffs, did not invalidate the proceedings.

4. The plaintiffs were not justified in basing their suit upon the incomplete or only partially made up record of the township clerk, but were bound by the proceedings actually had by the trustees, although not recorded by the clerk until afterwards.

The petition was therefore dismissed. This decision was in accordance with the decision of the court of common pleas, from which court the cause had been appealed.

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270 **PARTNERSHIP.**

[Hamilton District Court, April, 1879.]

BENNINGER, IRELAND & BAILEY ET AL. v. FREDERICA FUCHS.

1. A note given by a member of a firm in his individual name for money lent him, on which he indorses the firm name before delivery, although the money would not have been given him but for such indorsement, shows on its face the want of assent of the other partners, for though the holder could sue the firm as joint makers, yet their position on the note shows their position *inter sese* is that of sureties or guarantors, and the plaintiff seeking to hold them must show their assent or authority to sign.
2. That the firm, on the discovery of the facts, did not notify the plaintiff is nothing, as they are not obliged to seek out the plaintiff.

ERROR to Superior Court of Cincinnati.

AVERY, J.

The judgment to which the petition in error is filed was against the members of the firm of Benninger, Ireland and Bailey, upon a note of September 24, 1877, at 60 days, for $2,290, made to the order of Frederica Fuchs by Jacob Benninger, one of the firm, in his individual name, and indorsed by him at the same time in the firm name. The note, and another of nearly the same amount, at 90 days, were given in renewal of two notes, at two years after date, then maturing, which were drawn in the same manner, and had been given at the maturity of a three years' note, dated in September, 1872, for the amount of such note, and some additional advances. This, likewise, was drawn in the individual name of Benninger, to the order of Mrs. Fuchs, and at the same time indorsed by him in the firm name.

There was a conflict of evidence at the trial, but the most favorable statement for Mrs. Fuchs was her testimony that Benninger in 1872 wanted the loan for himself, and she wanted a mortgage; that he then said he wanted it for the firm, and she let him have the money, taking the first note, and making the advances and taking the renewal notes in the

belief that they were for the firm; and that the same month the first note was given she told Ireland, one of the firm, that Benninger had indorsed his name.

There was also testimony that in August, 1877, Bailey and Gaff, the other members of the firm, were informed by Benninger of the notes then in the hands of Mrs. Fuchs, for which the 60 and 90 days renewals were afterwards given. It was also a fact that in October, 1877, the next month after these renewal notes, the firm dissolved, and subsequently Benninger was adjudged a bankrupt.

Upon the other hand the notes were in fact without authority from the firm, and were made by Benninger for his individual use. In the course of the business he had charge only of the curing and packing; the financial management was under the exclusive charge of another partner. The transaction did not appear upon the books, nor, so far as the bill of exceptions show, did any other transaction in which Benninger had used the name or credit of the partnership. He gave the name of the firm upon other notes, but this was first discovered in August, 1877, when it was found such notes were in banks of the city for collection. At a meeting then called of the partners, they learned, upon questioning Benninger, of the notes held by Mrs. Fuchs. To Gaff and Bailey, at least, this was the first intimation.

Notes made in the apparent exercise of authority as member of a firm, bind the firm, although in fact for individual use, except there be notice; but this may be implied from the circumstances of the transaction, or the form of the paper itself. If, upon the face of the paper, the name of the firm is written as surety, it will not be binding, without express assent of the firm be shown, or acts or omission from which such assent may be implied. 19 Johns, 155; 1 Wend., 529; 124 Mass., 6. And this will be so, although the fact that the firm is surety may not be written out in words, but simply inferred as a conclusion from the character of the note, or the position of the names of the parties. 2 Cush, 309-314; 46 Ia., 481, 485.

The name of the firm upon the notes given by Benninger was *prima facie* that of a guarantor. Champion v. Griffith, 13 O., 228. But, being written at the same time with the execution, the firm were, in law, joint makers, with the rights of sureties. Bright v. Carpenter, 9 O., 141; Stage v. Olds, 12 O., 159, 168; Gale's Adm'r v. Van Arman, 18 O., 336, 342.

The plaintiff below knew that the name of the firm was indorsed by Benninger the same time he signed his own. The title to the paper did not come from the firm as indorsers; the promise was directly to her. The consideration did not purport to have been received by the firm; the note was, "for value received, I promise, Jacob Benninger."

The plaintiff was bound to take notice of the legal conclusions arising upon these facts. That the note was in terms an individual promise, and that the name of the firm was signed on the back, did not affect the right to sue the firm as joint makers, but it was evidence of the position of the parties among themselves, and was a controlling circumstance to cast upon the plaintiff the burden of proving assent of the firm to the signature.

The evidence against Ireland, one of the parties, was that plaintiff told him of the fact, and that he answered, "humph," or was silent. He says that he made no answer. But, if the occasion required him to speak, his silence was a circumstance. He says it was in the spring of 1877,

but the time, so long as it was prior to the note in suit, was not material. If he assented to the assumption by Benninger, of authority to sign the firm name upon the notes then outstanding, it bore upon the subsequent assumption by Benninger of the same authority.

Silence, when accompanied by knowledge that authority has been assumed, may amount to ratification. Mere silence, it has been held, does not constitute ratification *per se,* 48 Cal. 545. Nevertheless, it is a circumstance, 2 G. & J., 295, 306. If Ireland, being told by plaintiff, did not deny Benninger's authority, the weight of the circumstance was for the trial court. But to bind the firm required the assent of all the members. 16 John, 38.

Bailey and Gaff, the other members of the firm, were told at the meeting of the partners in August, but the information was not received by them in silence. Benninger was at once asked if he did not know that he had no authority to sign the firm name. There was no concession of his right to give the notes, or that the credit of the firm was to be involved in taking them up. Upon the contrary, he was to take them up himself.

The plaintiff was not informed of their dissent, but she never gave them an opportunity of informing her. She never went to them, or met them, nor had she ever any business relations with them. No case goes so far as to hold that under such circumstances, and where the transaction bore upon its face an appearance of the want of partnership authority, it was their duty to seek out the plaintiff.

That the salvation of a firm may depend upon satisfying a claim against an individual member, else his ruin shall extend to all the rest, has been remarked upon as ground for presuming the consent of the firm to a pledge of their credit. *Ex parte Bonbonus,* 8 Ves., 544. But this was where the individual member was the financial manager of the firm. The circumstance has been regarded as worthy of consideration when endeavoring to ascertain from the course of dealing and practice known to all the members, whether an implied assent may be inferred, but as not alone entitled to any particular weight. 14 Wend, 140.

To bind a firm upon the ground of subsequent assent to an act originally without authority, requires facts and circumstances of a character to authorize the inference of an agreement on the part of the firm.

Slight and inconclusive circumstances will not be sufficient. 14 Wend, 146; 7 S. & M., 192; 12 S. & R., 13; Gano v. Samuel, 14 O., 593, 601.

The fact of assent may be inferred from circumstances, but it is not permitted to conjecture the circumstances.

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

Moulton, Johnson & Levy, for plaintiff in error.

Kebler & Son and E. P. Bradstreet, for defendant in error.

[Hamilton District Court, 1879.] 273

CITY OF CINCINNATI v. JOHN MATHEHS ET AL.

For this opinion, see 6 Dec. R., 755 (s. c. 7 Am. Law Rec., 734).

[Hamilton District Court, 1879.] 275

ANDREW J. SCOTT AND HENDERSON W. SCOTT v. JOHN PERLEE.

For this opinion, see 6 Dec. R., 757 (s. c. 7 Am. Law Rec., 737). It was affirmed by the supreme court. See opinion, 39 O. S., 63.

CONVEYANCE BY MARRIED WOMAN. 277

[Superior Court of Cincinnati, April, 1879.]

THE DUDLEY LAND CASES.

Conveyance of lands of married woman—Acknowledgment of deed by her only—Construction of old laws of conveyance of Kentucky.

HARMON, J. (dissenting opinion.)

I cannot concur in the opinion of my colleagues in the cases involving the Park, Sayre, Bechtle, Irwin, and first Carr deeds, all signed, sealed and delivered by Martha C Dudley and her husband, and acknowledge by her, while the deed law in force was that of 1805.

I concur with them in the opinion that the Kentucky Justice was authorized by section 2 of that law to take her acknowledgments, if he did so in the manner therein provided, and that under the various decisions of our courts the acknowledgments by him certified were sufficient, though informal; but my mind rebels against the conclusion that those deeds failed to pass title because her husband did not also acknowledge them.

Section 2 of the act of 1805 was adopted from the statutes of Pennsylvania. I can find no case in the reports of that state, in which the husband executed, but failed to acknowledge, a deed properly executed and acknowledged by the wife, but the language used by the supreme court of that state is that under this fact the husband's assent to his wife's conveyance of her estate must be shown by his joining in the execution of the deed. Trummer v. Heogy, 4 Harris Pa., 487, in which case the court refers to 2 Kent, 154, where the same language is used.

This law authorizes acknowledgments after execution, and it has been decided by our supreme court that under it (unlike subsequent laws) the acknowledgment was no part of the deed: that it was required only "as evidence of execution, or as authority for registration," except in case of married women, as to whom it was "the necessary evidence of the fact of sealing and freedom from constraint." Lessee of Foster v. Commissioners of Hamilton county, 9 O., 121, 125.

It was necessary evidence as to her, because her separate examination was imperatively required, and must be made by the officer taking the acknowledgment.

Although a strict construction of section 2 would require the husband and wife to acknowledge at the same time before the same officer, it is now well settled that this is not necessary even under subsequent laws.

It is conceded, therefore, that when Martha C. Dudley, having signed, sealed and delivered these deeds, separately acknowledged them, she had done all that was necessary upon her part to convey her title.

Now, in construing this law as to what was required of the husband, we must not consider its language abstractly, but keep ever in mind the object the legislature intended to secure. It is clear that that object was to secure to the wife the advice of the husband in the disposal of her lands by requiring his consent, and to require that consent to be evidence by his joining her in the execution of the deed. (See authorities above cited.) Why was that evidence of his consent required? Because as he had during their joint lives, and possibly for his own, the entire beneficial estate in her lands, his interest might be relied upon to sharpen his judgment as to the proposed conveyance.

It will be observed that section 2 provides only the mode of conveying the wife's estate in any lands, etc., and if strict construction is to be applied, the husband's acknowledgment therein referred to would be necessary only if the interest of the conveyance were to pass her fee without his estate, as for instance in case his estate had already been conveyed. But it is evident from these deeds, as well as from the judicial proceedings to which they refer, that they were intended to convey his estate as well as hers, and as to his estate they would be controlled by section 1, which provides for proof of deeds by the testimony of the subscribing witnesses, instead of acknowledgment. As any thing which may be proven may be admitted, and as the agreed statement admits that Ambrose Dudley signed, sealed and delivered the deeds, there can be no doubt that the deeds did convey his estate in the lands. In fact this is found by the court, and virtually conceded by counsel.

Now, in view of what I have already said, I do not believe that the legislature intended to require anything further upon the part of the husband, by way of assent to his wife's conveyance of her estate in lands than such execution of the deed as would convey his own, and I cannot so hold unless it is the necessary construction of the law. But the language of section 2 does not seem to me to require such holding. It provides that it "shall be lawful" for husband and wife, after execution, to appear and acknowledge, and that the officer shall certify such acknowledgment. As to her acknowledgment it is necessary, as well as lawful, as already shown; as to him the certificate would not be admissible evidence of execution but for this provision. But it further provides that if the wife, upon her separate examination, shall make the required declarations as to freedom from coercion, etc., then the deed shall be as valid as to her as if she had been sole, and not covert at the time of the execution. The very next law upon the subject, that of 1818, made the condition to the validity of the deed its execution and acknowledgment by both, and the officer's certificate thereof, and dispensed entirely with proof of execution. Why, then, when all has been done which the law expressly made the condition upon which these deeds should be valid as to her, shall

they be held invalid because it also provided that it shall be lawful for him to acknowledge them also, when it is admitted that he signed, sealed and delivered them, and that they are valid deeds as to him? This is certainly no more liberal construction than that which dispenses with simultaneous acknowledgment, which, like this, was reached by regarding the object sought, and the reason of the provision, rather than the mere language used. Yeates, J., in Watson v. Bailey, 1 Binney, 479, says that literal adherence to the words of this act is not necessary, if the substantial requirements by which it was intended to guard the estates of women are followed.

The real object was obtained in these cases, i. e. the husband's assent evidenced by his joining in the deed in such a way as to pass all his interest in the land, and necessarily make any other assent to his wife's conveyance a vain thing. It seems to me, therefore, making the bark outweigh the wood, to let an unnecessarily strict construction of a loosely worded law upset conveyances after a lapse of sixty years, against the manifest intent of all the parties, and to the widespread injury of innocent purchasers.

Courts are zealous in guarding the rights of married women, and justly so; but when those rights have been, as in this case, actually secured, rules intended for their protection should not be permitted to be turned into instruments of oppression.

INDICTMENT. 279

[Monroe Common Pleas, 1879.]

STATE OF OHIO v. FRIEND WILLIAMSON.

The provision of section 7206, Revised Statutes, that when an indictment is found the foreman shall indorse on it the words "a true bill," is satisfied where these words were printed on a blank indictment, and the signs under them after it is found. Whether he did so sign, having been put in issue by a plea in abatement, was submitted to the jury before the trial.

OKEY, J.

The defendant was indicted for murder in the second degree. The indictment was drawn on a blank form, in general use, with the words "A true bill" printed thereon.

The indictment averred that the defendant "did unlawfully, purposely and maliciously kill and murder" the deceased.

To this indictment the defendant's counsel interposed a motion to quash on the grounds:

1. That the indictment is not indorsed as required by law.
2. That the indictment does not charge the defendant with an intent to commit the offense therein sought to be charged.

The Criminal Code, section 18 (74 O. L., 332) provides that when an indictment is regularly found by the grand jury "the foreman shall indorse on the indictment the words 'A true bill,' and subscribe his name thereon as foreman."

It is urged by defendant's counsel that under this provision of the statute, the indorsement of the words "A true bill" must be made in fact

by the foreman of the grand jury, and must be so indorsed after the finding of the indictment. That the words having been printed on the indictment long before it was found was not in compliance with the law, and insufficient.

On the second ground of the motion, defendant's counsel claimed that an averment of an intent or purpose to kill is essential in an indictment for murder in the second degree. That the provision of the criminal code, section 6, (74 O. L., 335), was intended to do away with the necessity of setting forth the manner in which, or the means by which the death was caused; and not to dispense with any other averment essential to a good indictment prior to the adoption of that section; one of which necessary averments in an indictment for murder in the second degree was the intent to kill.

On this point defendant's counsel cited Fouts v. State, 8 O. S., 98; Loffner v. State, 10 O. S., 598; Hagan v. State, *ib.* 459; 74 O. L., 341, section 12.

To sustain the indictment, as to the first ground of the motion, the attorneys for the state cited 74 O. L., 241, section 1.

And, as to the second ground of the motion, cited Wolf v. State, 19 O. S., 248; 74 O. L., 335; section 6; Davis v. State, 32 O. S., 24; Roberts v. State, *ib.* 171-173.

The court held: 1. That the foreman of the grand jury, having subscribed his name under the printed words, "A true bill," adopted them as his own endorsement. The fact that they were printed there before the finding of the indictment made no difference.

2. That an indictment which charges the offense in the language of the statute is sufficient. It is said that a good criminal pleader will never attempt more certainty than the law requires. Spencer v. State, 13 O., 401, 407. This is an indictment for murder in the second degree, and the averment is that the defendant "did unlawfully, purposely and maliciously kill and murder" the deceased. The statute expressly says, that it shall be sufficient in an indictment for murder in the second degree to charge that the defendant did "purposely and maliciously" commit the offense. All the elements necessary to constitute the crime are averred in the exact language of the statute, with the addition of the word "unlawfully." The intent is fully expressed in the term "purposely," which is the term used in the statute.

The motion is overruled.

The defendant's counsel then filed a plea in abatement on the first ground set out in the motion, and raised a question of fact, which was submitted to a jury, under the charge of the court, and a verdict returned sustaining the indictment after which defendant demurred on the second ground set out in the motion, which was overruled, and exceptions taken.

J. P. Spriggs, Prosecuting Attorney, assisted by J. B. Driggs, Esq., for the State.

W. F. Hunter and A. J. Pearson, for defendant.

[Hamilton District Court, April Term, 1879.] 289

HENRY HILDERBRAND v. WINDISCH, MULHAUSER & CO.

For this opinion, see 6 Dec. R., 784 (s. c. 8 Am. Law Rec., 103). It was affirmed by the supreme court, without report, March 11, 1884.

[Hamilton District Court, April Term, 1879.] 291

FIRST NATIONAL BANK OF CINCINNATI v. P. M. MOORE & CO.

For this opinion, see 6 Dec. R., 779 (s. c. 8 Am. Law Rec., 97).

[Hamilton District Court, April Term, 1879.] 293

STATE OF OHIO EX REL. THOMAS v. BOARD OF PUBLIC WORKS ET AL.

For this opinion, see 6 Dec. R., 779 (s. c. 8 Am. Law Rec., 24).

[Hamilton District Court, April Term, 1879.] 294

ROBERT MITCHELL ET AL. v. RAMMELSBERG'S EXRS. ET AL.

For this opinion, see 6 Dec. R., 768 (s. c. 8 Am. Law Rec., 22).

[Hamilton District Court, April Term, 1879.] 294

M. S. TURPIN ET AL. v. JOHN M. MCGILL AND MARGARET MCGILL.

For this opinion, see 6 Dec. R., 768 (s. c. 8 Am. Law Rec., 23).

ASSIGNMENTS—CHECKS. 295

[Superior Court of Cincinnati, Special Term 11, 1879.]

DAVIS, GOULD & CO. v. ELLEN ADAE ET AL.

A banker's draft, made here the day before his assignment for the benefit of creditors, on his fund in a foreign bank, which, though immediately transmitted, was not paid on account of such insolvency, the funds now being in the hands of the assignees, who are sued here, is not governed by the law of the foreign state, but by the law of this state, whether giving such check in an assignment of part of the fund and makes a right of action against the drawee or not; yet, as between holder and drawer, the latter is estopped to deny the assignment, and if he collect the deposit himself, he holds it as trustee for the real owner.

This case having been agreed upon as a test case for a number of cases between the same defendants and various plaintiffs involving the same question and a large sum of money, was at the united request of counsel reserved for decision here, upon demurrer to the answer of

Augustus A. Bennett and Phillip Hartmann, assignees of C. F. Adae & Co.

The petition avers that on December 18, 1878, C. F. Adae & Co., bankers in this city, delivered to plaintiffs for value their check upon the Chemical National Bank of New York, in which they then had on deposit, for the purpose of meeting such checks, a sum of money more than sufficient to pay it. That said check was on the same day forwarded to New York by due course of mail, and on December 21, presented for payment which was refused, though the drawee had sufficient funds of the drawers' to pay it, because, on the 19th of December, the drawers had made an assignment to defendants Bennett and Hartmann, for the benefit of their creditors, under the insolvent laws of Ohio, which assignees, on February 13, 1879, drew from the Chemical Bank, and now hold the entire amount there deposited.

Plaintiffs claim that by the drawing and delivery to them of said check they became the equitable owners of sufficient of the deposit in the New York bank to pay the same, or acquired a lien thereon; that the said assignees hold the same in trust for them, and pray that they be enjoined from distributing such funds to the general creditors, and ordered to pay out of said fund the amount of said check.

The answer avers that plaintiffs did not, by the drawing and delivery of the check, become the assignees or owners of any part of the funds so on deposit in the Chemical National Bank, or acquire a lien thereon, because the rights of the parties are determined by the laws of the state of New York, by which, as established by the decisions of its court of last resort, the issuance of said check did not operate as an assignment of any part of the fund so deposited.

Defendants claim to hold said funds so withdrawn by them from the Chemical National Bank as part of the general assets of their insolvents.

HARMON, J.

What the law of New York is, being a matter of fact, is admitted by the demurrer to be as alleged in the answer. That the rights of the parties are to be determined by it, being a matter of law, is not admitted by the demurrer, though alleged in the answer, but is to be determined by the court upon the facts stated in the petition and not denied.

The liability of the Chemical Bank, either to Adae & Co., as depositors, or to plaintiffs, as the holders of the check, if there be any liability to the latter, arises from contract, and New York being the place of performance, i. e., payment, its law would prevail. But the question in this case does not concern that bank. It has surrendered the fund, and is not a party. This action is not to enforce the obligations of a contract to be performed in New York. The right which plaintiffs claim must arise, if at all, from a transaction between Ohio parties, fully executed here, i. e., the drawing and delivery of the check. That was all Adae & Co., were to do in consideration of the money paid them by plaintiffs. That is all the effect of which by the law of New York is alleged in the answer. It was not an executory contract. It was a completed transaction.

The fact that the deposit upon which the check was drawn was in New York, does not invoke the law of that state, at least as between Adae & Co. and plaintiffs, for it is well settled that mere credits like this

have no distinct *situs*, but, for purposes of taxation and disposal, are regarded as situated at the domicil of the owner.

We think, therefore, that the law of New York has no application to the case, and the effect of that law being the only fact alleged in the answer, the case stands virtually upon demurrer to the petition.

There is much conflict as to the right of the holder of a check for part only of a deposit, to sue the bank upon which it is drawn without specific acceptance. Some authorities hold that by universal custom the undertaking of a bank receiving a deposit is to pay it as checked upon, and that this constitutes an acceptance in advance of each check, or that the checks operate as partial assignments of the debts due the depositor, and the custom referred to works a waiver of the usual right of the debtor to pay only in a single sum. Mum v. Burch, 25 Ill., 35; Brahm v. Adkins, 77 Ill., 262; Lester & Co. v. Given, 8 Bush, (Ky.) 357; Weinstock v. Bellwood, 12 Bush, (Ky.) 139; Forgarties v. State Bank, 12 Rich., (S. C.) Law, 518; Van Bibber v. Bank of Louisiana, 14 La. Ann., 481; Union Bank v. Oceana Bank, Ill., 212; McGregor, assignee, v. Loomis, 1 Disney, 747, approved in Second National Bank v. Hemingray, Sup. Ct. Rep. 435. The principle is incidentally recognized in Morrison v. Bailey, 5 O. S., 13; Andrew v. Blatchly, 11 O. S., 89; Stewart v. Smith, 17 O. S., 83, 85.

Others hold that the check is not an assignment or appropriation and that specific acceptance is necessary to a right of action against the drawee. Bank of Republic v. Millard, 10 Wall., 152.

The authorities upon both sides are cited in 2 Daniel on Negotiable Instruments, section 1635, the author holding the former view.

Conceding, however, that such right does not exist, we do not think it follows that as between the drawer and the holder of a check the latter acquires no right to the deposit upon which it is drawn. See 2 Daniels, section 1638. In the first place, all the authorities agree that a check differs from a bill or draft in being always drawn upon an actual fund deposited to meet it; and if there be no such deposit, the drawer is guilty of a fraud, and protest is not necessary to a right of action against him, while all is otherwise in case of a bill.

Again, it is well settled that if the drawer withdraws the fund after giving his check thereon, he is guilty of fraud, giving a right of action without protest, while if the holder of the check fail to promptly present it for payment, and the drawer fail, the deposit being sufficient to meet it, the loss falls upon the holder. 2 Daniel, section 1590. Byles on Bills, p. 20.

Upon what principle can these rules be based except that as between the drawer and the holder of a check the deposit becomes *pro tanto*, the property of the holder *le instanti?* Otherwise, why should it be a fraud in the drawer to have no money on deposit, or withdraw it? Otherwise why should the holder bear the risk of the drawer's failure?

A check is not a contract like a bill or note. It is universally regarded as money, and its delivery might be said to be as between drawer and holder, a symbolical transfer of so much of the deposit, just as the delivery of a warehouse receipt is of the goods for which it calls.

But considering that the deposit in this case not being a special one, did not strictly constitute a specific fund, but was more properly a debt due from the bank to Adae & Co., the check should be regarded in equity as an assignment *pro tanto* of Adae & Co.'s claim against the bank.

Equity regards the real character of such transfers, not their form. Bower v. Hoddon Blue Stone Co., 30 N. J., Eq.

Granting that the bank might have objected to such partial assignment, Adae & Co. could not. They would be estopped to deny their right to make it after they have made it, and thereby obtained plaintiff's money. Now, when, after assigning a claim, the assignor collects it himself, should he not, by all principles of equity, be adjudged to hold the proceeds as trustee for the real owner? If the fund could be followed and identified, it might be dealt with as other trust funds, but it is usually difficult to do so, and the party is left to his action at law. And such action would be ex delicto not ex contractu.

We think, therefore, that as between Adae & Co. and plaintiffs, the latter became the equitable owners of sufficient of the deposit to pay their check. If the defendants were subsequent check holders or assignees for value, their title to the fund would prevail, because they first obtained it. But they are. By every authority, and by the very terms of the law under which they were appointed, they obtained the rights of Adae & Co., and no more. As the fund is in their hands the court is able to deal with it as the equities between plaintiffs and their assignors require.

The case of Roberts, assignee, v. Austin, 26 Iowa, 315, is identical with the case at bar, and sustains the view we have taken. It is in direct conflict with Attorney General v. Columbus Life Ins. Co., 71 N. Y. 325, but seems to us more consonant with reason, authority and the dictates of natural justice.

Demurrer to answer sustained and decree for plaintiffs.

Yaple and Force, JJ., concurred.

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309 [Cuyahoga District Court, March Term, 1879.]

N. C. BREWER v. MARTIN MAURER.

For this opinion, see 4 Dec. R., 433 (s. c. 2 Clev. Law Rep., 155). It was reversed by the supreme court, 38 O. S., 543. For common pleas decision, see 4 Dec. R., 345.

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320 **COUNTY COMMISSIONERS.**

[Hamilton District Court, May Term, 1879.]

STATE OF OHIO EX REL. KOEHLER v. JOHN FRATZ, TREAS.

The jurisdiction of the board of control includes the approval of compensation to be paid employes taking care of the court house and court rooms. This law modifies the general law imposing on the county commissioners the duty of providing and taking care of court rooms and offices.

The petition in this case was for a writ of mandamus to compel the treasurer of Hamilton county to pay the amount of a warrant drawn by the auditor in favor of the relator for $150.00, for ten weeks' services rendered by the relator as janitor, having in charge the office of the county commissioners. The treasurer refused to honor the order and pay the bill.

By consent an alternative writ of mandamus was issued. The Treasurer filed an answer admitting the appointment and services of the relator, but assigning as a reason for not paying the warrant that the appointment of the relator had never been submitted to the board of control, nor approved by that board; that the bills of the relator had been submitted, weekly, by the commissioners to the board of control, and were rejected; and that the board of control had given the defendant notice not to pay the amount, and he claims that the county is not liable to the relator in the absence of the confirmation of his appointment by the board of control, and of their allowance of the compensation embraced in the warrant of the auditor. To this answer there is a demurrer.

BURNET, J.

The question to be determined was, whether under the law it was necessary that the commissioners, before consummating an employment of any of the employes about the court house, fixing their compensation and making an allowance for the payment thereof, should submit their action to the board of control for approval. The court at a former session determined that it was competent for the county treasurer, where in his opinion a warrant was illegally drawn upon him by the auditor, to refuse payment, although *prima facie* in the payment of a warrant drawn by the auditor, he is protected by the law.

It is the duty of the county commissioners to provide a court house, or at least court rooms and offices for the use of the courts and the county officers. This is made their duty by the general law of the state, and under that law any act done by the county commissioners in their discretion in providing court rooms and offices, in furnishing them, and in making provision for their cleanliness and keeping them in a suitable condition for the use of the several officers, is valid; and when the amount of compensation of any employe is fixed by them, on their direction the warrant of the auditor will be drawn on the treasurer, and paid.

The question, however, is, whether in Hamilton county, by the law providing for a board of control, and prescribing their powers and duties, a modification of this general law is introduced. By the seventh section of this act it is provided that the board of control shall have final action and jurisdiction in all matters involving the expenditure of money, or awarding of contracts, or the assessing or levying of taxes by the said board of commissioners; and section 8 provides that no contract or release made, or liability incurred, nor appropriation or allowance, or taxes levied or assessed, shall be valid and binding, unless a majority of the members of the board of control shall vote in favor thereof. Section 11 provides that the board of commissioners shall present to the said board of control a true and accurate statement of all matters and things coming before them which involve an expenditure of money; and section 12, as amended, provides no action of the board of commissioners, in matters and things upon which the board of control is authorized to act, shall be valid or binding until the same is passed upon and approved by the board of control.

This act seems to require that the county commissioners shall submit every matter or thing to the board of control for its approval or disapproval, which involves the expenditure of any money out of the county treasury. Under this act, it was held by a member of the common pleas court, that the commissioners may not buy a carpet for the floor of the

court room except with the sanction of the board of control, and the law seems to imply that this sanction is necessary. Now, is there anything in the employment of the various employes which takes them out of the rule applied to other contracts under the provisions of this statute? The words of the statute are certainly broad enough to include them. The language of the statute is very clear, positive and emphatic. It is that no liability whatever shall be incurred, that no expenditure shall be valid, unless the action of the board of commissioners is confirmed by the voice of the board of control.

It is claimed by the relator that the law imposes on the commissioners the duty of providing a court house, the proper and necessary furniture, and the necessary attendants, in order that the rooms may be kept in proper condition, and that the power necessarily arises to employ persons for this purpose, and to fix the compensation. It is true this duty is imposed on the commissioners by the general law of the state. It is true, also, that in this county there is a board of control on which the law imposes the duty of supervising the conduct of the commissioners in all these matters, and of either confirming their action or passing their veto on it. Whether the law be a wise one in all its details, or unwise, it is not for this court to say. They have simply to declare what, in their opinion, the law is. (The court here referred to various cases to which attention had been directed by counsel and commented upon.)

Public funds in the treasury are to be paid out only on warrants drawn in conformity with the requirements of the statute, and in liquidation of the legal liabilities of the county; and if there has been no legal liability incurred, as it would seem there has not in this case, whatever the hardships to the employes, who honestly earn the money, the claim is not, under the express language of the statute, a legal one against the county, and the treasurer has no right to pay it. A claim cannot be sustained against the treasurer for compensation for services rendered in good faith where the employment of the party was by an improper officer on whom the law did not devolve the right to employ him. 13 Kan., 207.

The opinion here announced is that of the majority of the court, Judge Cox not assenting. They had examined the case with a great deal of care and anxiety. The decision may possibly result in some hardship, and they did not feel like dismissing the application without expressing their opinion of the duty of the board of control. This body was created to prevent improvident or corrupt contracts from being entered into in the county of Hamilton, under authority of the commissioners; and also it may be, although such is not expressed in the statute, to prevent improper appointments being made by the commissioners. Under the law there is no power conferred on the board of control to make appointments, or to employ any person to do anything with reference either to the court rooms or offices. The power to select persons to fill these various positions is given only to the board of county commissioners, with the power in the first instance to fix the compensation, but with the reservation that all these matters must be submitted to the board of control for its approval.

Now, looking at the object for which this board of control was created, at the duties which the law imposes on them, and the sphere to which they are confined, it would seem to be the duty of the board of

control, where the employment of any person in the necessary performance of the proper business of the county has been made by the commissioners, and his compensation fixed, unless the interests of the public require that the action of the commissioners should be overruled, to approve this action.

We have thought it proper to make this statement of our views of the duties of the board of control, that the effect of our decision may not be misunderstood. The demurrer to the answer will be overruled.

Judge D. T. Wright and A. J. Cunningham, for relator.

C. W. Baker, contra.

PUNITIVE DAMAGES—VERDICT. 323

[Hamilton District Court, May Term, 1879.]

†PATRICK HANDLEY, BY HIS NEXT FRIEND, v. CHRISTIAN SANDAU.

Where the court below explained to the jury what constituted punitive damages, but there was nothing in evidence to warrant a suggestion by the court that, though unintended, punitive damages were justified, and where the appearance of the plaintiff, caused by a subsequent accident, also conspired to have an effect on the jury, a verdict, apparently excessive, will be set aside as being excessive.

ERROR to the Court of Common Pleas.

The action below was instituted to recover damages alleged to have been sustained by the plaintiff by falling into an excavation for a cellar, made by the defendant as a contractor, on the premises of Louis Burkhardt, near Louisa and Oehler Streets. The claim was that the defendant so negligently and carelessly omitted to brace the excavation and fence it off, that the plaintiff, a boy of six or seven years of age, strayed upon the edge of the bank and fell into the excavation when the bank gave away. The depth of the excavation was thirty feet. The injuries consisted principally about the ears, permanent in their nature, being an offensive exudation from the ears, so offensive as to cause his dismissal from school. It appeared that the injury occurred in 1869, the trial in 1878. There was considerable conflict in the testimony. It appeared also that some two or three years after the accident the plaintiff was injured by falling into the cogs of a flying-dutchman, requiring one of his limbs to be amputated. From all the testimony, it would be, perhaps, very difficult to ascertain whether his present condition arose solely from the injury he first received, or from the second one. The verdict of the jury, which was for $4,000, was excessive. The appearance of the plaintiff had great effect upon the minds of the jury, no doubt creating sympathy for him. The court below in its charge took occasion to charge the jury as to what constituted punitive damages. There was nothing in the testimony which warranted the court below in including in its charge what would appear like a suggestion, though unintended, that there was wanton or gross carelessness on the part of the defendant which

†This judgment was affirmed by the supreme court, without report, December 4, 1883, on authority of Woolen Mills Co. v. Titus, 35 O. S., 253, and cases there cited.

would warrant punitive damages. The circumstances at the trial, the subsequent injury to the boy, and the charge of the court all conspired to have such an effect upon the jury as to cause them to return the verdict they did.

Judgment reversed.

J. Shay, for plaintiff.

Judge Hoadly and J. R. Von Seggern, for defendant.

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345 [Cuyahoga District Court, March Term, 1879.]

CITY OF CLEVELAND v. WILLIAM H. BEAUMONT.

For this opinion, see 4 Dec. R., 444 (s. c. 2 Clev. Law Rep., 172). It was affirmed by the supreme court, without report, March 27, 1883.

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355 [Cuyahoga District Court, March Term, 1879.]

J. H. DEVEREAUX, RECEIVER, v. FREDERICK THORNTON.

For this decision, see 4 Dec. R., 449 (s. c. 2 Clev. Law Rep., 177). It was affirmed by the supreme court, without report, October 23, 1883.

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368 DIVORCE ON THE GROUND OF FRAUD.

[Hamilton District Court, June, 1879.]

*ANNA MARIA MEYER v. HERMAN MEYER.

False representations of a party as to his respectability, connection in society, wealth, and the like, are not found in the marriage contract as ground for divorce, nor is giving himself a false name, not representing himself to be another person, but falsely representing that he was related to another. There must not be mere fraudulent representations inducing the entering into the relation, but they must be as to matters that are essential parts of the relation itself.

BURNET, J.

This was a petition in error to reverse a judgment of the common pleas. The plaintiff in error, who was the plaintiff below, filed a petition for divorce, alleging, as a ground of divorce, fraudulent contract.

To this there was a general demurrer, which was sustained and the petition dismissed. The first question arising, was whether a petition in error to reverse a judgment of dismissal on demurrer will lie. It was claimed by counsel for defendant that a judgment on a petition for divorce cannot be reversed on petition in error or appeal. The present statute provides that no appeal shall be allowed in any judgment in such case, except on an order dismissing the petition without final hearing. This statute is a revision or codification of the former statute. In the statute as found in Swan & Critchfield the provision is, that no appeal shall be

*For opinion of common pleas, affirmed by this decision, see *ante* 561.

allowed in a divorce suit, except on the dismissal of the petition, without a final hearing on the merits.

The proper construction of the section in the present Code is that an appeal may be had, where a petition in divorce is dismissed without a final hearing on the merits of the action, which implies a hearing of the case on the facts. Following the tenor of the decisions, the court would hold that there could be no petition in error, although the petition in divorce should be dismissed, if there was a final hearing on the facts. In this case there was no final hearing on the testimony, the case being simply heard on demurrer to the petition, and the demurrer sustained and petition dismissed.

The policy of the law has always been, where a case has been tried in divorce, and a decree has been granted, to allow neither appeal nor petition in error, because it would be contrary to public policy; and the contract of marriage, therefore, in this respect, stands on a different footing from any other contract. Upon it rests the domestic relations which enter into the well being of society, which public policy requires shall not be lightly disturbed, but this reason of public policy does not apply where a divorce is not granted, and especially where the petition is dismissed without a trial on the merits of the case; and hence, where a petition for divorce is dismissed without a final hearing, as a matter of course there will be allowed a petition in error. The objection, therefore, that this court has no jurisdiction to examine into the judgment of the common pleas, is not tenable.

The ground on which a divorce was claimed was fraud in the marriage contract. The allegation of the petition is that on Sept. 10, 1877, the plaintiff became acquainted with the defendant, who represented to her that his name was Herman Meyer; that he was the son of a wealthy farmer of the name of Meyer, in Westphalia, Germany, the members of whose family were persons of great respectability, and of whom she had heard, being herself a native of that region of country; that he was introduced to her as a son of this Meyer, and so representing him, and produced letters purporting to come from the family in Westphalia addressed to himself; that, induced by these representations, she married the defendant on the 2d of October, 1877, and cohabited with him until March in the ensuing year, when she learned his name was not Herman Meyer, but Herman Bruns, and was not related to the family referred to, but was a worthless, impecunious man, who married her for the sake of becoming possessed of her property, and thereon ceased to live with him. And now, on the ground that she had been induced to the marriage by the fraud of the defendant, she asked to have it annulled.

The question is, whether this petition states facts sufficient to constitute a cause of action. Among the causes of divorce mentioned in the statute is fraudulent contract. If the allegations in the petition be true, this marriage was induced by fraudulent representations on the part of the defendant, and the only question that can arise, is whether the fraud is of such a character as will warrant the granting of a divorce, and in order to ascertain what is meant by the statute, it is necessary to examine the decisions in other states and in England on this subject.

The contract of marriage is one of a peculiar character. It lies at the basis of the relation between husband and wife, and the well being of society requires it shall not be disturbed, unless for a good cause. The fraud must not be merely such fraudulent representation as induced the

performance of the contract, which otherwise would not have been entered into. In an action for breach of promise, it would be permissible to set this up as a defense, but where a contract is not only entered into, but the marriage consummated, and the parties have cohabited, a different rule will apply, and it must not only be such fraud as induced the party to enter into the contract, but it must be a fraud in some matter essential to the marriage relation itself, or effecting the legality of the contract. Hence the representations of the party as to his respectability, his connections in society, his wealth, or any other matter of that kind, although fraudulent and false, are not such frauds as will warrant the severance of the marriage relation. Reynolds v. Reynolds, 3 Allen, 605; Clark v. Clark, 11 Abbott, 228; Carris v. Carris, 24 N. J., Eq. 516; Wier v. Still, 31 Iowa, 110. Where a woman had represented herself, for instance, as a woman of chastity, and, relying on this, the man was induced to marry her, and afterwards discovered she had been unchaste, this is fraud of the grossest kind and yet it is not such fraud as will authorize a divorce. "If, however, a woman represents herself to be chaste, and, at the time, without any reason on the part of the man to suppose she was unchaste, she was pregnant with a child, begotten by another, and, ignorant of this fact, the man marries her, if, as soon as he discovers the deception, he separates from her and institutes his suit, it would be ground for divorce, because the child in that case would be born in wedlock, as apparently his child. If, however, a man is aware that the woman is pregnant, but upon her false representation that it is a child begotten by himself, and it afterwards turns out she had an intercourse with another, and the child was not his, this has been held not to be sufficient ground for divorce. And even in such a case, where a white man married a white woman, and a colored child was born to her, this was held not to be cause of divorce. These are strong cases exemplifying the character of the fraud, which alone will authorize a decree of divorce. It must not merely be fraudulent representations, which are inducements for entering into the relation, but fraudulent representations as to matters that are essential parts of the relation itself.

It is claimed, however, on the part of the plaintiff in error, that when she married Herman Bruns under the name of Herman Meyer, she married him supposing the latter was his true name, and that she did not marry Herman Bruns. There are two cases, in 3 Maule & Selwyn, in which the woman married the man under a false name, and the marriage was held to be good. In the one case the man passed under an assumed name, and under that name obtained his license. It was held that the marriage was not void, and that it was not such fraud as would warrant a dissolution of the relation. In the other case, the man was a deserter from the army, and had assumed the false name to conceal himself and avoid arrest as a deserter, but in the neighborhood he was known only by the assumed name. The court held this was a valid marriage, and there was no reason, because of his fraudulent representation, for a divorce.

In the petition in this case there is no allegation that the name of Meyer was assumed by the defendant for the purpose of defrauding the plaintiff and inducing her to marry him. In one of the cases in Maule & Selwyn's Reports, Lord Ellenborough intimated that if the name had been assumed for the purpose of inveigling the plaintiff into a marriage, a divorce might have been granted. The present case is simply one in

which the defendant had undertaken to represent that he occupied a station, a position in society, and was related to a family of respectability and wealth, which representations were all untrue. Where one personates another, and the marriage takes place under this false personation, the contract of marriage is void for fraud, because the person marrying him never consented to mary him, but simply to marry another, and there was a false substitution of one person for another. That is not this case. There is no statement that there was a Herman Meyer from Westphalia, whom his defendant personated. On the contrary, the consent of the plaintiff was to marry the person she did marry, under the false representations that he bore relationship to another that he did not bear. All this was very gross falsehood, assuming the facts stated in the petition to be correct; and yet, under the decisions as reported it does not constitute a case of fraud for which the marriage relation will be dissolved.

Judgment affirmed.

W. M. Corry and Emil Rothe, for plaintiff.

W. A. Cotter, for defendant.

ACTION TO COMPEL CONVEYANCE. 393

[Hamilton District Court.]

PHIL NISHIOTZ v. JOSEPH ULMER.

Proof that U., a stepfather, received certain sums of money belonging to N., his stepson, is not sufficient to warrant a court in ordering a conveyance of real estate, which N. claims U. agreed to transfer to him, in the absence of evidence indicating that said real estate was purchased with the money in question.

APPEAL from the common pleas, where the plaintiff filed a petition asking a conveyance from the defendant to him of a lot of land on Clinton street, in this city. He alleged that the defendant held the title in his own name, but that the consideration in fact was paid out of the money belonging to the plaintiff, derived from three sources—first, a sum given to the defendant in 1838, in Germany, when he married the mother of the plaintiff, that this sum amounted to 600 gilders ($248) given to Ulmer to raise and educate the plaintiff; that on arrival in this country Ulmer, the stepfather of the plaintiff, apprenticed him to a tailor, and that, the wages he received on coming of age ($140) were received by Ulmer; and the third source was a sum of money (about $57) which had been deposited ten years ago in the bank of Adae & Co., and he claims that these several amounts were appropriated by Ulmer for his own purposes.

Cox, J.

There is no evidence showing that even if Ulmer did receive this money he had applied it to the purchase of the property in question. Ulmer denies that he received the $140, and claims that the whole amount was taken out in store goods by the plaintiff's mother; that he never received any of it, and the testimony does not show satisfactorily that he did. As to the money in the bank, the testimony shows that another party received it. It was claimed by the plaintiff, that, before his mother died, Ulmer acknowledged that he received these amounts, and said that

he would make it all right, and that he and his wife made a will that on their death the plaintiff should have the property; but, that after the death of the wife, the defendant married again; and after the second marriage the will was destroyed, and thereupon the suit was brought.

There were circumstances showing strongly that if Ulmer received any of this money at all, it was not appropriated to the payment of the lot in question. He testified as to the sources from which he obtained the money. He also introduced certain promissory notes made by the plaintiff to him. The plaintiff denies he signed them, but experts testified the signature was his, and this fact was inconsistent with the claim of the plaintiff that the defendant was indebted to him. Taking the whole case together the court was of the opinion that no such case was made out as would support the claim of the plaintiff that the property should be conveyed to him.

Petition dismissed.

J. H. Morton, for plaintiff.

Forrest, Cramer & Mayer, *contra.*

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408 [Hamilton District Court, April Term, 1879.]

STROBRIDGE & CO. v. GEORGE D. WINCHELL ET AL.

For this opinion, see 6 Dec. R., 761 (s. c. 7 Am. Law Rec., 743).

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419 **SAVINGS SOCIETIES.**

[Hamilton District Court, April Term, 1879.]

LYDIA SHATTLER v. CHAS. P. TAFT, RECEIVER.

Where the officers of a savings society, just before assignment in insolvency, offered to a depositor for the amount of her deposit a note and mortgage owned by it, and she accepted the offer, but no delivery was ever made, she has no title thereto, but at most an equity resting in contract. And this is not such a contract as will be specifically enforced, for the assets being insufficient to pay all depositors, the contract was one for inequality.

AVERY, J.

This cause comes into this court by appeal from the court of common pleas. It is a suit to compel the transfer to plaintiff of a note and mortgage for $3,000, in the hands of the defendant as receiver of the Miami Valley Savings Society.

The defendant was appointed receiver March 7, 1878. The Savings Society was incorporated under the act of April 16, 1867 (S. & S. 188), and upon petition of a depositor as provided therein, filed in the court of common pleas, March 6, 1878, and a statement of the true condition of the society, the same day by way of answer, the appointment was made.

The claim of the plaintiff is, that on March 4, 1878, the officers of the society had offered her the note and mortgage, for $3,000 of the amount she had with them on deposit, and that on that day she accepted the offer.

The making of the offer is not disputed, but upon the question, whether it was accepted or not, there is a conflict. For the purposes of argument, let it be assumed the offer was accepted.

Acceptance of an offer may pass the property in a specific chattel. But, at common law, a chose in action was not capable of transfer. By the custom of merchants, bills of exchange were negotiable, and by statute the same character was given to promissory notes, but delivery was essential. In equity, choses in action were assignable, but there were cases that held that the assignment must be of as high a nature as the instrument assigned. 4 Mass., 117. This strictness has been relaxed, and any act which constitutes an appropriation of the fund suffices. Story Eq. section 1047. Nevertheless, to constitute an appropriation there must be a surrender of control, and, therefore, a delivery of the notes, or other written evidence of obligation. 6 Cush, 282-286; 23 Vt. 531; 3 Barb, 262; 1 Parsons on Contracts, 229.

The note and mortgage were not delivered to the plaintiff. The equitable right to the benefit of the security of the mortgage would have passed to her by the legal transfer of the debt, but for that purpose a delivery of the note was required. Exrs. of Swartz v. Leist, 13 O. S., 419, 424. At the most then she had only an equity; a right to the transfer, resting in contract merely.

It is a general rule that contracts for things personal will not be specifically enforced. There are exceptions to this general rule, but it may be doubted whether this case would come within them. 5 Price, 325; 1 Sim. & Stu., 608; 25 N. J., Eq., 265. If it would, however, there remains another objection. The jurisdiction of equity to compel specific performance will not be exercised where it would necessitate a breach of trust, or compel a person to do what is not lawfully competent to be done. Fry on Specific Performance, section 247; 4. DeG. M. & G., 115; 4 DeG. J. & S., 505; 4 Bear, 174.

By the act under which the Miami Valley Savings Society was incorporated, depositors to the amount of $50 or upward, except minors, were members, and deposits were to be for the use and benefit of the depositors; and the income or profits of all deposits, after deducting the reasonable expenses of management, were to be divided among the depositors.

Savings societies organized under similar provisions of law have been held to be mere incorporated agencies for receiving and loaning money on account of the persons to whom the money belongs. 38 Conn., 203. They have no stock and no capital. The primary idea is that they are institutions in the hands of disinterested persons, the profits of which, after deducting the necessary expenses, inure wholly to the benefit of the depositors. Huntington v. Savings Bank, 96 U. S., 388, 395.

The relation to depositors is that of trustee. All the assets, deducting necessary expenses, are held as a common fund for the security of all the depositors. Equity would interfere, if there appeared to be occasion for doing so, that is, to prohibit the payment of any depositor in full, so long as it was uncertain whether there were assets enough to pay the others in full also. Newark Savings Institution, 28 N. J., Eq., 552; Dime Savings Institution, 29 N. J., Eq., 109.

At the date of the offer of the note and mortgage to plaintiff, the savings society was insolvent. The officers had resolved to wind up, and by resolution entered upon the minutes at a meeting four days previous,

and friendly depositor was requested to take the proper legal steps for the appointment of a receiver. There are circumstances to show that plaintiff knew or had reason to know of the existing state of affairs, but, if she did not, the condition of the assets was such as to prohibit the officers from preferring her. The assets were insufficient to pay all the depositors. No one depositor had a right superior to any other, in any particular security in which investments had been made. All were entitled to share equally, and it was the duty of the officers to preserve equality among all. Any depositor might have invoked the aid of the court to prevent inequality. 29 N. J., Eq., 109. This being so, no aid can be lent to enforce a contract for inequality. The peculiar hardship to the plaintiff is recognized and appreciated, but the insolvency of this savings society has been a hardship to all depositors, and there is no ground on which to relieve the plaintiff from bearing her share.

The petition of the plaintiff will be dismissed at her costs.

Peter Keam, for plaintiff.

Taft & Lloyd, for defendant.

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441 [Coshocton Common Pleas, April Term, 1879.]

ALFRED AVERY v. MAGDALENA ROYER ET AL.

For opinion, see 4 Dec. R., 464 (s. c. 2 Clev. Law Rep., 201).

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457 [Cuyahoga Common Pleas, July, 1879.]

IN RE SIMS.

For opinion, see 4 Dec. R., 473 (s. c. 2 Clev. Law Rep., 210).

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463 [Hamilton District Court, May, 1879.]

HENRY E. JUEGLING ET AL. v. ARBEITER BUND.

For this opinion, see 6 Dec. R., 777 (s. c. 8 Am. Law Rec., 94).

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475 ## ATTACHMENT.

[Hamilton District Court, May, 1879.]

Burnet, Avery and Cox, JJ.

DANIEL MOORE ET AL. v. JAMES REES ET AL.

Where garnishment proceedings show that the fund claimed to belong to the debtor, A., was the proceeds of insurance on a boat, assigned to the holder by one M., to be distributed among a list of creditors of the boat named in the trust deed from M. to him, and he had distributed it and had a balance left, the judgment creditor is not estopped by having received part of the money as a creditor of the boat under the trust deed, from showing that A., and not M., was her real owner, and entitled to the surplus.

ERRORS to the Superior Court of Cincinnati.

COX, J.

Suit was brought upon a judgment rendered in the court of common pleas of Pittsburgh against Andrew Ackley. An attachment was issued against several persons, among them Robert S. Semple, as having funds in his hands belonging to Ackley. Semple denied having such funds; that the funds which were claimed to have been the property of Ackley were the proceeds of an insurance policy upon the steamboat Arlington which was sunk some time ago; that the policy was assigned to him by Daniel Moore, the ostensible owner and captain of the boat, and that he held the funds for the benefit of certain creditors named in a trust deed from Moore to him, which creditors he had paid, leaving a balance of $2,100 in his hands. Moore also denied that Ackley had any interest in the boat.

The court found that the boat was built and purchased by Ackley, although it was registered in the name of Moore. There was an agreement that Moore should have an interest in it upon purchasing the same, but he expressly testified that he never purchased such interest.

The trust deed, so-called, was nothing more than a power of attorney. It was executed at the demand of the creditors of the boat, who insisted that the boat should be in the name of Moore, and that it should be made for their benefit. Ackley, at that time, was thought to be in a failing condition. Rees, the judgment creditor, was not estopped from setting up a further claim on the fund by reason of the fact that he had already received the amount of his claim as put down in the assignment to Semple. At the time he received the amount he was not informed of the condition of affairs, and he took what had been reserved to him.

Judgment affirmed.

Matthews & Ramsey, for plaintiff.

Smith & Stephens, for defendant.

[Hamilton District Court, April Term, 1879.] 475

CINCINNATI SAVINGS SOCIETY v. CHARLOTTE L. JONES.

For this opinion, see 6 Dec. R., 778 (s. c. 8 Am. Law Rec., 96).

[Cuyahoga District Court, March Term, 1879.] 489

FOREMAN v. COMPTON.

For this opinion, see 4 Dec. R., 479 (s. c. 2 Clev. Law Rep., 218).

INTERLOCUTORY INJUNCTIONS. 500

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

†L. B. HARRISON ET AL. v. CRAIGHEAD ET AL.

Interlocutory mandatory injunctions, or provisional injunctions, prohibitory in form, but in substance requiring some positive act to be done, are so well established in chancery that they will not be understood to be prohibited by the Code, unless clearly inconsistent therewith. The Code defies an injunction as a command to refrain from a particular act, section 237, Rev. Stat. 5571, and as the continuance of an act is not the same as repetition of the act, there is no inconsistency.

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†For opinion in this case, on final hearing, see 8 Dec. R., 35.

Mandatory injunction.

FORCE, J.

The case is for an injunction requiring the defendants to remove obstructions with which they have closed up one end of a private alley. A demurrer to the petition was overruled, and now a motion is made for a provisional injunction. The motion presents two questions: First, the power of the court to grant such relief by interlocutory order; and second, if a case is now made out for the exercise of such a power.

It has never been doubted that upon final hearing a decree can be made ordering an act to be done; ordering a wrong, accomplished before suit brought, to be undone. I do not know of any decision or ruling that a mandatory injunction cannot be allowed by interlocutory order or motion. But in discussion it has often been claimed that under the Code which defines an injunction as an order restraining the doing or the continuance of an act, an interlocutory order requiring the performance of an act, cannot be made.

As the Code was made with a view to chancery practice as it existed when the Code was adopted, it is worth while to see what that practice was.

The practice in England has certainly been settled since the order made by Lord Thurlow is 1788, in Robinson v. Lord Byron, 1 Brown Ch. C., 588. Lord Byron, by constructing flood gates and shuttles in a water way, prevented the regular flow of water to Robinson's mill, and so prevented the operation of the mill. On motion, before answer filed, an order was made requiring the removal of the obstructions. The order, in form, restrained the defendant from "maintaining or using the shuttles, flood gates, erections and other devices, so as to prevent the regular flow of water to the mill, until answer and further order." This precedent settled two things; the right to make such an order, and the form in which such an order is made. The name "mandatory injunction", is ordinarily used to designate such an interlocutory order. Lord Hardwicke had previously, in 1740, in a final decree, directly ordered a wall to be taken down, and the indirect prohibitory form is not used in a final decree. East India Co. v. Vincent, 2 Atk., 83.

Following the precedent of Robinson v. Lord Byron, Lord Eldon, in Lane v. Newdegate, 10 Ves., 192, refused on motion to make a direct order to repair the banks and gates of a canal, but granted an injunction restraining the defendant from impeding plaintiff's navigation by continuing to keep the banks and gates out of repair. It is true Lord Eldon expressed great hesitation about allowing the order. His mind was so constituted that his hesitation was in inverse order to the difficulty in the matter. In affairs of state of great moment, his resolution was prompt almost to rashness, while in cases where the having some decision was more important than the character of the decision, his hesitation and delay were distracting to litigants.

In Rankin v. Huskisson, 4 Simons, 13, the order restrained the defendant from, etc., "and also from permitting such part of said buildings as have already been erected on said garden or plat of ground from remaining thereon, until the defendants shall fully answer the plaintiff's bill or this court make further order to the contrary."

A similar interlocutory order, requiring defendant to take down walls, by restraining him from continuing to maintain or uphold them,

was made in North Eng. Junc. R. R. v. Clarence R. R. 1 Col. C. C., 507.

An interlocutory order in a restraining form was allowed which required defendant to remove tiles which he had placed over the tops of flues leading from plaintiff's dwelling through defendant's well, in Hervey v. Smith, 1 Kay, and 2 Johns, 389.

Where a partner wrongfully removed books from the place of business, an interlocutory order was allowed restraining him from keeping them away from the place of business. Gratrex v. Gratex, 1 De Sex & Sme., 692.

A like order was made in Whittaker v. Howe, 3 Beav., 395, and in Taylor v. Davis, not reported, but cited from the rolls in 3 Beav., 388.

An interlocutory order was made, on motion, restraining the tenant of a mine from permitting a communication with an adjoining mine to continue open and water to flow through the same, the effect being to compel the defendant to close the communication. The Master of the Rolls, Lord Langdale, in making the order, said it was "the regular and established practice." Earl Mixborough v. Bower, 7 Beav., 127.

A similar order was made restraining the defendant from allowing the damp jute on his premises from remaining there. Hepburn v. Lordan, 2 Hem. and Mil., 345.

Where the defendant put up a frame-work glazed with opake colored glass within a few inches of his neighbor's ancient light, so as to obstruct his light; an interlocutory order was granted restraining the continuance of the glazing, but not interfering with the frame-work. 1 Dr. & Sm., 467.

Sir G. Jessell, Master of the Rolls, considered the subject at some length in Smith v. Smith, L. R., 20 Eq., 500. He held that there is no distinction between the conditions under which the court grants mandatory and those under which it grants other injunctions. When the court is satisfied that a wrong has been wilfully done, and there has been no delay or acquiescence on the part of the plaintiff, an injunction will be granted as readily in a mandatory as in any other form. All injunctions should be issued with care and caution, and it was a mistake to suppose that extra care and caution are required when the injunction is mandatory.

Possibly the language of Sir G. Jessell admits of some qualification. The consideration of the greater damage that will ensue from the granting or the refusal of an injunction, always has some weight upon the application for a provisional injunction. And in that way courts find a case made out for an interlocutory order restraining the future commission of a wrong more frequently than for undoing a wrong already committed.

While there was in the earlier cases an uncertainty as to this matter in the American courts, the practice in the United States is now generally in accord with the English. The supreme court of Pennsylvania, however, in Audenried v. Phil. & Read. R. R., 68 Pa. St., 370, after full consideration, held that a court cannot by interlocutory order require a thing to be done, under the form of restraining a party from omitting to do it. The decision claims to be based on authority and on principle. The opinion says: the authorities, both in England and the United States, are very clear that an interlocutory or preliminary injunction cannot be mandatory.

The English authorities cited are a remark by Vice Chancellor Kindersley in Gale v. Abbott, 8 Jurist, N. S., 987, and one in Vice Chancellor Sir W. Page Wood, in Child v. Douglas, Kay, 578. The remark of V. C. Kindersley was purely obiter dictum; there was no application for a mandatory injunction, nor any question raised about one in the case. Sir Wm. Page Wood indeed said in Child v. Douglass, "I can make no order upon an interlocutory application as to that part of the motion which relates to what has already been built." But it is clear from the report of this case, that this was simply the refusal of such an order in that case, and not the announcement of a general rule. Next year, in Harvey v. Smith, 1 K. & J., 389, and ten years later in Hepburn v. Lordan, 2 Hem. and Mil., 345, Sir Wm. Page Wood did grant precisely such an order upon interlocutory application.

The American cases cited, outside of Pennsylvania, are N. Y. Printing &c., v. Fitch, 1 Paige, 97, and some early cases in New Jersey and Maryland.

In the case in 1 Paige 97, N. Y. &c., v. Fitch, the question of mandatory injunction does not arise and is not discussed.

Of the cases cited from Maryland, it is only necessary to say they were overruled as early as 1850 in Carlisle v. Stevenson, 3 Mid. Chy., 499, where the rule made and the form used in Lane v. Newdegate, 10 Ves., 193, are adopted and followed.

And the cases cited from New Jersey are directly overruled by Longwood Valley R. R. v. Baker, 27 N. J. Eq., 166, where the English practice is expressly followed.

In a recent case in Wisconsin, where a provisional injunction was allowed, and the refusal to dissolve it was affirmed on appeal, the injunction was mandatory as well as protective. The defendants had already built a fence about, and were preparing to erect a building upon the space which they were restrained from closing up or building on. Pettibone v. Hamilton, 40 Wis., 402.

In a case in a mining district in California, where the circumstances were similar to those in Robinson v. Lord Byron, Justice Sawyer of the U. S. circuit court, granted a motion for a provisional injunction similar in terms and effect to the order made by Lord Thurlow. The decision made in Pennsylvania in Audenreid v. Phil. & Read. R. R. being then made, a motion was made before Justice Field of the supreme court, to dissolve the injunction. After a full consideration, the rule in Audenreid v. P. & R. R. R. was disapproved, and the long settled practice in England followed, and the motion was overruled. Cole Silver Mining Co. v. Virginia, etc., Water Co., 1 Sawyer, 685.

The principle stated in Audenreid v. P. &. R. R. R. as the ground of the decision is: "A tribunal that finds itself unable directly to decree a thing, ought never to attempt to accomplish it by indirection."

The whole practice as to mandatory injunctions is, indeed, in contravention of that statement. For they are defined by Joyce as "being framed in an indirect form, compel the defendant to restore things to their former condition, and virtually direct the defendant to do an act." Where a defendant was bound by covenant to continued performance for an indefinite length of time, and where, therefore, there could be no decree of specific performance, relief was on that account given by injunction. Vice Chancellor Malens said, "though I cannot directly make him lay down the pipes, I can and will make an order by means of which

he will be guilty of contempt of court, if he does not lay them and provide the supply." Cook v. Chilcott, L. R., 3 Chy. Div., 694. It is certainly common practice in chancery for the court to impose upon the plaintiff terms only upon which the relief asked by him will be granted, by which means the court indirectly, gives to the defendant relief which could not be given to him by direct decree. Indeed, the rule on which courts of chancery act is rather the reverse; where relief ought to be granted and cannot be granted directly, a court of equity will seek means to give it indirectly.

The practice of granting mandatory injunctions, or provisional injunctions prohibiting in form, but in substance requiring some positive act to be done, is then so well established as a part of ordinary chancery practice, that it will not be understood to be prohibited by the Code, unless the language of the Code is clearly inconsistent with it. The Code limits provisional injunctions to the prohibition of the doing or the continuance of an act.

The continuance of an act is not synonymous with the repetition of an act. Where one, by building a dam, overflows the land of his neighbor, he continues a wrongful act as long as he, by his dam, keeps up the overflow. The rebuilding of the dam after destruction would be the repetition of the act. So one by putting a barrier across a highway, continues his act of obstructing the highway as long as he retains the barrier. The Common Law of Procedure Act, 18 Victoria, which gave certain jurisdiction in injunctions to the common law courts, contains the same phrase, "to restrain the defendant from the repetition or the continuance of the wrongful act." The common law courts had no jurisdiction to grant an injunction except in such cases as were named in the act. Under this act, the court of exchequer in a case where a defendant had prosecuted the building of a wall, so as to obstruct the plaintiff's ancient lights, and was going on with the erection, granted an injunction restraining the defendant from erecting, keeping erected and continuing the erection of—wall and building—in such manner as to darken plaintiff's ancient lights. The keeping the wall erected was a continuance of the wrongful act, and an injunction restraining such continuance of a wrongful act, compelled the defendant to take his wall down.

Hence the authority under our Code to grant a mandatory injunction by interlocutory order, seems clear.

But to press successfully such an application the plaintiff must be prompt. The plaintiffs in this case have submitted to the obstruction complained of seven years. Certainly I do not say that will defeat the action when it comes on for final hearing. But, after such a delay, in connection with the evidence that the plaintiffs can use the alley, though of course not so conveniently, while only one end is open, and with the further evidence that the obstruction complained of is not a mere barrier across the alley, but is a building blocking it up and in constant use, it would be impossible to make an interlocutory order requiring its removal. The motion for provisional injunction is overruled.

Thornton M. Hinkle, Henry A. Merrill, for plaintiff.

Hagans & Broadwell, for S. N. Pike's executors.

Rankin D. Jones, for S. N. Pike's heirs.

512 MUTUAL BENEFIT SOCIETIES.

[Hamilton District Court, April Term, 1879.]

JOHN MATOON ET AL., TRUSTEES, v. HATTIE A. WENTWORTH, ADMX.

1. Section 1, article 21 of the constitution of subordinate Odd Fellows' lodges, providing for a right of appeal from the proceedings of a lodge "in all matters of form required by the constitution and laws of the order," does not apply to an order of the lodge to pay sick and funeral benefits, and the reversal of such order by the appollate body on appeal is not authorized. Whether there might have been jurisdiction as of an original case on notice to the parties not decided.
2. In an action against an unincorporated association (an Odd Fellows' lodge), except where the statute allows it be sued in the name adopted, the members are the proper parties; but where the trustees only are sued, if they are members, the defect is one of parties only, waived if not objected to, and the trustees will, after judgment, be presumed to have been members.

ERROR to the Court of Common Pleas of Hamilton County.

AVERY, J.

The judgment was against the plaintiffs, trustees of an unincorporated lodge of Odd Fellows, for sick benefits, funeral benefits, and nursing. In an action against an unincorporated association, except where the statute allows suit in the name assumed by the association, the proper parties are the individual members. 12 Cush., 443; 2 Brews, 563; Dicey on Parties. But no objection was taken on this ground. If the trustees were themselves members, the defect was one of parties merely; and, although the fact that they were members was not alleged in the petition, it may be presumed, at least after judgment.

The action was brought by the widow and administratrix. The defense was that the deceased was in arrears for dues to the lodge when he was taken sick. As further defense, it was alleged that his claim for sick benefits had been passed upon by the constituted authorities of the order, and this was final.

The bill of exceptions does not show that the deceased was in arrears when taken sick. He had been in arrears for three-quarters dues, payable in advance, but had paid them all up, a few days after the beginning of the third quarter. Before this payment, he had twice visited a physician who prescribed for him, but it was not until a week, or nearly so, afterwards, that he was disabled from work. He was foreman of the Times Office in this city, and had been a member of the lodge nine years.

By the rules of the order, a member, in arrears when taken sick, could not by paying the arrears restore himself to benefits during that sickness, and if not entitled to sick benefits, he was not to funeral benefits. But, by the same rules, sickness, to entitle a member to benefits, was confined to actual disability, and in that sense the sickness of the deceased had not intervened at the time of paying up the arrears. The court of common pleas charged that, even if it had intervened, the receipt of the arrears by the lodge, with knowledge of the fact of the sickness, would constitute an estoppel. To this proposition we should not be inclined to assent, because an estoppel could only arise on the ground of an implied understanding, and there could be no implied understanding against the express letter of the rules of the lodge. But there was no objection taken on behalf of the lodge to the charge.

It is true three charges were asked and refused, the first of which was that if the deceased was in arrears at the time of the sickness, there could be no recovery. But the charges were asked in a series, and the only exception taken was in gross to the refusal of all. Upon such an exception it is settled that the court will only inquire whether all the charges should have been given, since if any was properly refused, it would defeat an exception taken to the refusal of all. Railway v. Probst, 30 O. S., 104.

Whether the first charge might not properly have been refused, because the state of the evidence was not such as to warrant it, at all events it was proper to refuse the other two charges. One was that it had been agreed between the deceased and the lodge, that he should exhaust all his remedies within the lodge. But, so far as this depended upon rules adopted for the government of the lodge, the existence of any such rules was a question of fact.

The other charge was that the court had no jurisdiction, because upon appeal by a member of the lodge from an order which had been made, directing payment of the sick benefits, the appeal had been sustained, and from this no appeal on behalf of the deceased had been taken to the grand lodge. But this could not have ousted the jurisdiction. The rules adopted by a voluntary association, with the consent of its members, must control, and if these refer the question of the rights and obligations of membership to boards and bodies within the association, their determinations must be regarded as final. 13 Md., 91; 2 Whart., 309; 4 Penn. St., 519. It is not, however, a manner of jurisdiction, but of the construction of rules and articles of association, the effect of which, when ascertained, is to fix and determine the rights of the parties.

The bill of exceptions shows that the sickness of the deceased was lodge of the state, and of the subordinate lodges. In each subordinate lodge it appears there is a chief officer called the noble grand. It is made his duty to cause benefits to be paid where a member is entitled to such payment, but before drawing the order he is required to announce the fact to the lodge, and upon objection made to him by any member at a meeting, or between meetings, payment shall be suspended until an investigation is had and the lodge makes an order which shall govern him in his duty.

The bill of exceptions shows that the sickness of the deceased was reported to the lodge, and the noble grand was about to draw the order for benefits, when a member objected, and an investigation was had, the result of which was that the lodge ordered the benefits to be paid. From this a member appealed to a body, known in the order as the district grand committee, which sustained the appeal. By the constitution and laws of the order it is provided the decision of the district grand committee shall be final, until reversed by the grand lodge.

No appeal was taken on behalf of the deceased to the grand lodge. The deceased was confined to his house and never got out again. His wife visited one of the members of the district grand committee, to ask him if he could not revoke the decision, and was told that no defense whatever had been offered in her husband's favor. Neither she, nor her husband, had knowledge of the time and place of hearing, and no opportunity to be present, or to produce testimony, was afforded. All that was known to them was that they were told by the officers of the lodge, that a member had appealed, but that it would be all right. Under such cir-

cumstances the case would be a hard one, if the result of the appeal has been finally to determine the claim. The hardship, however, cannot be avoided, if it follows from a proper construction of the laws of the lodge.

The court is sensible of embarrassment in attempting a construction of these laws. It may be that they have received in practice an interpretation, which, if shown by evidence, our duty would be to uphold. The question is, whether, when a lodge has ordered payment of sick benefits, any member may appeal and suspend payment. Upon the practice prevailing in the order, the bill of exceptions is silent, and presents nothing but the written letter of the laws.

The only provision for suspending payment of benefits when objection is taken to the action of the noble grand, is that it shall be until the matter can be investigated, and an order made by the lodge. The section containing this provision makes no mention of an appeal. There are sections which provide for appeals in particular cases, for instance, section 5, article 10: "upon the refusal of a lodge to grant a withdrawal card, the member applying for the same shall have the right of appeal to the district grand committee." But there is no particular provision in this case.

The district grand committee is empowered, under article IX of the constitution of the grand lodge, to hear and determine appeals, but this still leaves the question open. Whether an appeal can be taken in a certain case, is not determined by the general power of the district grand committee to hear appeals.

The only general provisions for the right of appeal are contained in article XXI, section 1. "From the proceedings of a lodge in all matters of form required by the constitution and laws of the order, the minority, or an accused member, shall have the right of appeal to the district grand committee." Section 2. "Whenever an appeal shall be taken by the accused, or any member or members, to the district grand committee, notice of such appeal shall be given at the meeting at which the trial takes place, at the next meeting thereafter." * * *

Those sections imply that the proceedings in respect of which the right of appeal is provided, are such as involve accusation and trial, and hence that the rather indefinite phrase, "Matters of form required by the constitution and laws of the order," has reference to those observances, for breach of which there may be trial and punishment. There is no reason why these general provisions should be extended. If in other matters an appeal were desirable, it would have been easy to make provision for the case. The particular provision for the case of refusal by a lodge to grant a withdrawal card, excludes the idea that article XXI would otherwise have applied, and if not applicable to that case, why should it be to the case of an order for the payment of sick benefits. The question of the right of the sick to relief is one which, in its nature, does not admit of suspense. Where the noble grand objects to payment, provision is made for a reference to physicians, and their report, if approved by the lodge, it is declared shall be final. By parity of reason, there should be the same result, where the claim is acquiesced in by the officer charged with the duty of payment, but a member objects, and, after investigation, the lodge makes the order. Whether the order would be a grievance, of which complaint might be made to the district grand committee, or whether objection to the payment by the officer would constitute a dis-

pute or controversy between the lodge and the objecting member, it is not necessary to inquire. The question is not whether there might be jurisdiction, as of an original case, upon notice to the parties, but whether the case might be brought before the district grand committee by a proceeding without notice; that is to say, by appeal.

The laws of the lodge make no express provision for such right of appeal. The inference of any such right is excluded by the subject matter, as well as by comparison with the body of the laws. When rules and articles of association are resorted to against common rights, courts lean to a strict construction. 10 Gray, 94. 2 Bosw., 381. 4 Exch., 430. 15 Q. B. 103.

Upon the whole, we are of opinion that the plaintiff below, as administratrix of the deceased, was entitled to recover the sick benefits. This being so, and it being her duty to defray the expenses of the funeral, she was also entitled to recover funeral benefits.

The judgment, however, should not have included anything for nursing. The rules of the order provided for detailing members to watch the sick. The noble grand had also power, when a sick member needed persons to watch with him, to employ a nurse for that purpose. In view of these provisions, even if it should be conceded that a lodge could be made liable in any case for a nurse employed by a sick member, there must first, at least, have been a demand. In this case there was no demand. The deceased was nursed by his wife, and, although it is true, she was compelled, during the time, to hire a servant to relieve her from attention to household duties, she made no application to the lodge.

To the extent, therefore, that the charge for nursing may have entered into the judgment of the court of common pleas, such judgment is erroneous and must be reversed, unless the amount is remitted. Upon remitting the excess over and above the sick benefits and funeral benefits, with interest, the judgment will be affirmed.

Jacob Wolf, for plaintiff in error.

Buchwalter & Campbell, for defendant in error.

[Pickaway Common Pleas, May Term, 1879.] 540

DULGAR v. HARTMEYER, SHERIFF.

For opinion in this case, see 6 Dec. R., 763 (s. c. 8 Am. Law Rec. 15).

USURIOUS INTEREST. 549

[Hamilton District Court, June, 1879.]

JACOB METZGER, ADMR., ETC. v. ERNST H. WIECHERS ET AL.

1. Under the revised Code, section 6137, an administrator's application to the common pleas, instead of to the probate court, for the sale of real estate, is denominated a civil action, unlike the old section, S. & C. 589, section 120, and hence is governed by the provision, section 5226, Revised Statutes, that an appeal lies to all civil actions in the common pleas where there is no right to a jury. Such a case, therefore, is now appealable, though it works a revolution in the practice.
2. On a note for $7,000, and eight per cent. interest, on which only $6,720 is advanced, only $6,720 and six per cent. interest can be recovered. (Distinguishes Blackburn v. Gano, *ante* 557, for there the whole amount was advanced.)

BURNET, J.

The plaintiff, Metzger, as administrator, filed his petition for the sale of real estate belonging to the intestate, making parties defendant lienholders upon such real estate. Wiechers held a mortgage given to secure a note for $7,000, at eight per cent. interest, dated July 28, 1873. The petition alleged that the mortgage was given to secure payment of a loan made by Wiechers to the intestate; that the amount advanced by Wiechers to the intestate upon the loan was only $6,720; that the amount of interest actually paid was at the rate of ten per cent. and upon the giving of the note and mortgage there was deducted the excess of interest over eight per cent. for two years, and the petition claimed a deduction of this amount from the face of the mortgage, and also that the defendant was entitled to only six per cent. on $6,720, the amount actually advanced as the consideration of the note and mortgage.

Wiechers, in his answer and cross-petition, sets up substantially the same facts, to-wit: That the nominal amount of the loan was $7,000, but the money actually advanced upon it was only $6,720, and that the interest paid upon it was on $7,000 per annum since July 28, 1873. The judgment rendered in the court below was for $6,720, the amount of money actually advanced, with interest at eight per cent. per annum. The only question is as to the amount of interest Wiechers shall recover.

The note is for $7,000; it calls for interest at eight per cent. upon its face. If the $7,000 had actually been advanced at the time of the execution of the note, following the decision made by this court in the case of Blackburn v. Gano, *ante* 557, the mortgagee would be entitled to recover eight per cent. upon the actual amount of the loan, to-wit: the $7,000. But this was not the case. The amount of money actually advanced was only $6,720. The contract in the note, therefore, to pay eight per cent. on $7,000 is usurious and illegal, because the amount of the loan was only $6,720. The rate of interest, according to the terms of the contract, therefore, can not be enforced, and the defendant, Wiechers, is remitted to the legal rate of interest upon the amount of money actually loaned by him to the intestate, with six per cent. crediting as payment upon the principal all over six per cent. paid at any time as interest since July, 1873.

Decree accordingly.

Theodore Horstman, for plaintiff.

Von Seggern, Phares & DeWald, for defendant.

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576 [Cuyahoga District Court, March Term, 1879.]

STOPPEL V. WOOLNER ET AL.

For this opinion, see 4 Dec. R., 489 (s. c. 2 Clev. Law Rep., 252). It was reversed by the supreme court, on authority of 37 O. S., 194.

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596 [Cuyahoga Common Pleas, May Term, 1879.]

ANDERSON ET AL. V. PACK, ET AL.

For this opinion, see 4 Dec. R., 495 (s. c. 2 Clev. Law Rep., 260).

REMOVAL FROM OFFICE. 609-614

[Hamilton District Court, August, 1879.]

*STATE OF OHIO EX REL. HOGAN v. W. W. SUTTON ET AL.

Cox, J. (dissenting.)

While I agree upon one proposition that the governor had no power to suspend Hogan pending the trial, I cannot agree with the majority of the court in the other, upon two grounds. First, there was no notice, such as the gravity of the offense and the dignity of the person who was to try the offense, and the importance of the office required, and I am unwilling to say judicially, either that there was a trial or an opportunity to be heard.

So far as the notice is concerned, the testimony shows that this proceeding had been commenced before the governor in November last, the offense alleged to have been committed having taken place about the 16th, and an apology made on the 22nd to the board, and on the 25th of November the charge was presented to the governor, or at least, dated at that time. Upon that charge at that time, Hogan was removed, and that removal was set aside by this court on the 14th of March following. Hogan being reinstated. He then took his position in the board, and there seems to have been no complaint made against him until about the 10th or 20th of June, more than three months after he was reinstated in the board, when the same old charges dated the 25th of November are brought up against him before the governor.

Now, under the first notice given by the governor to Hogan, the trial was set for the 8th of July, and in the meantime he was suspended. He made his application to this court for a mandamus to compel the board to recognize him during that pretended suspension. The return in that case was on Saturday fixed for the 1st of July, which would be Tuesday, at 12 o'clock, and this the governor knew. He testified that he knew it, but at six o'clock on the evening of Saturday he gives a new notice to Hogan, fixing the time at ten o'clock on Tuesday, July 1. Now I think this is not only not reasonable notice, but extremely unreasonable. The question to be tried upon Tuesday was whether the governor had a right to suspend Hogan. Counsel would necessarily be engaged in the preparation of the case, and the governor knew it. Columbus is 120 miles from here. It was late Saturday evening when the notice was given. The defendant, being a party in this case, had a right by the constitution to appear here. He could not appear here at twelve o'clock on Tuesday and be at Columbus at ten o'clock on the same day. The governor was bound to know that. Yet at the very time fixed here, or, rather, two hours before the governor fixed the time of the trial of Columbus, and when the counsel goes there and respectfully informs him of the case here, and asks for a continuance, it is promptly refused. Not only that, but the trial goes on, and to see how it is conducted but one instance is sufficient, at least to me. The governor, at five minutes before twelve o'clock, taking his watch out, notifies counsel that he would give him five minutes to argue the case, and promptly closes at twelve o'clock when

*For majority opinion by Burnet, J., see 6 Dec. R., 786 (s. c. 8 Am. Law Rec., 135).

that hour arrives. Columbus time is seven minutes faster than our time, and at twelve o'clock by our time we knew very well, or were informed, that counsel at this table had received a dispatch that Hogan had been removed.

Now, as to the conduct of the trial. It is difficult to characterize it, in my mind, as a trial at all. I do not see how the reports of it could be called a travesty. The counsel tried to find out who were preferring these charges. That was denied him. He had a right under the constitution to know who was the informer against him. In any court or trial he had that right. But that was not given. Here was the old charge, dated the 25th of November. He had been sitting in the Board of Police Commissioners from that time down to almost the very date of the trial, and, so far as the testimony in this case is concerned, without interruption from anybody, and without ill-feeling or unpleasant remarks between the members of the board. He sought to show that he had made an apology. That was denied him. Whether it would have had any effect upon the governor or not, it ought to have been heard. It was an important element in the case. The Board of Police Commissioners is a legislative body. The injury complained of is against the dignity of debate in a legislative body. And by all the rules of legislative bodies when a member transgresses upon the order and rules of such a body, the language is taken down by the clerk at the time and entered upon his record whenever a member demands it, so that he may have an opportunity of denying the statement as made, or of having the right of showing what statements were made, but nothing of this kind was done. But before the complaint was presented, Hogan had apologized, and there was no evidence to show that it had not been accepted. The presumption was that it had been from his continuance in the board afterward. And I say that all these things ought to have been presented to the governor. Hogan had a right to have them heard whether they would have influenced the governor or not. We have a right to presume that they would. If the same testimony was presented to the governor upon that point as was presented here, showing the different language used, showing his apology, his continued good conduct and good feeling toward the members of the board down to the time of the trial, it strikes me very much that most persons would have come to the conclusion that the language as proven was simply a little righteous upheaval at the manner in which Hogan was treated by an officer under the supervision of the board from whom he repeatedly tried to get an answer in regard to business which he was entitled to receive. I cannot concur with the majority of the court in reference to the application. I think it ought to have been granted and Hogan reinstated.

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616 [Cuyahoga District Court, March Term, 1879.]

CHARLES A. CRUMB ET AL. v. JUSTINA TREIBER.

For this opinion, see 4 Dec. R., 492 (s. c. 2 Clev. Law Rep., 257).

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629 [Cuyahoga District Court, March Term, 1879.]

WILLIAM FILBERL v. F. O. DAVIS ET AL.

For this opinion, see 4 Dec. R., 496 (s. c. 2 Clev. Law Rep., 265).

[Cuyahoga District Court, March Term, 1879.]

FOOTE v. WORTHINGTON.

For this opinion, see 4 Dec. R., 500 (s. c. 2 Clev. Law Rep., 274).

PLEADING—VENUE—MUTUAL PROTECTION COMPANY. 659

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

JOHN J. SARGENT v. MUTUAL LIFE INS. ASSN.

1. A party cannot, by motion, take issue on a material allegation in the petition.
2. A mutual protection company whose members' families receive on death the proceeds of an assessment on each surviving member, incorporated under the act of 1872 (69 O. L., 82), is not a life insurance company, but is governed by the general incorporation act, and can therefore be sued only where its principal office is.

FORCE, J.

This is an action brought against the defendant on a certificate of membership, which the petition says is a policy of insurance, against the Western Mutual Life Ins Assn., which the petition claims is an insurance company. After the suit was brought the defendant filed a motion to dismiss the action, alleging by affidavit that the defendant is not an insurance company, that its principal office is not in this county, but is in Springfield, Clarke county. The motion was overruled necessarily, because a party cannot, by motion, take issue upon a material allegation in the petition.

Thereupon the defendant filed an answer, and in the answer stated that this defendant is not an insurance company, but is a mutual protection company, and that under the law, it can only be sued in Clarke county.

It appears a service was made upon an agent in this county. If the company is an insurance company, it can be sued in this county. If it is not an insurance company, it comes under the general law of incorporations, and in that case it can only be sued in Clarke county, and the court has no jurisdiction.

So the only question in the case is whether this Mutual Protection Company is a life insurance company?

As to the purposes of this company, its mode of doing business, there is some discussion. A mutual protection company has no capital, has no stock. A mutual life insurance company must have capital and must have stock in this state.

Again, in the mutual insurance company, the certificate of membership upon which this action is brought, is not for the payment of some money absolute, but is for the payment of so much of the main sum of money as can be raised by a restricted assessment upon the members, and if there are not enough members to pay the sum named in the certificate, there is no obligation on the company to pay the same. There is also this difference: that a certificate of membership is not assignable like a policy of life insurance. The holder of such certificate has no beneficial interest for himself which he can assign or pledge. The obliga-

tion is simply upon the company to pay the family of the man so much.

There being differences of such a character between these companies and life insurance companies, and at the same time there being resemblances of such a character, it is entirely competent for the legislature to class these companies as life insurance companies, as well as to class them as something different.

So the question has resolved itself into this: Has the legislature classed these companies as life insurance companies, or as a distinct species of incorporation? In 1860 the legislature passed the law authorizing the incorporation of these mutual protection insurance companies, and that law was modified by the law of 1872; while the incorporation of life insurance companies is provided for by a separate act, passed also in 1872. So these mutual protection companies are created by one act, and life insurance companies are created by a different act.

Again, the law for the incorporation of these companies provides one method of incorporation, while the law for the incorporation of life insurance companies provides for a different method, and the act of 1875 provides also that the provisions of the law affecting life insurance companies shall not apply to mutual protection insurance companies.

So, as the law stands, mutual protection companies are not created by the same law that creates life insurance companies, but by a different law. They are distinguished by the statute as being created in a different way, as being not stock companies, and the law also provides that the provisions applying to life insurance companies shall not in any way apply to mutual protection companies. Hence, the legislature has distinguished between these two classes of incorporations.

That being the case, this company, incorporated under the act of 1869, as a mutual protection company, is not a life insurance company. Not being an insurance company, it comes under the provisions of the act that applies to incorporations in general. That being the case, it can be sued in the county where it has its capital office, and in no other. This company has its capital office in Springfield, Clarke county, and it can be sued only in that county. Therefore, this court has no authority to require an answer, and has no jurisdiction to hear or determine the suit brought against it.

In the statement of facts, and in the argument, it is set forth that if this company and such companies undertake to do business, it is tauntamount to life insurance business. If that is the case, the remedy is by regular proceeding in *quo warranto*. It is claimed that this particular contract is a contract outside of the functions of this company. That is a matter which can be determined by a court which has jurisdiction. That is the court of common pleas of Clarke county, but it cannot be determined by this court.

As to the matter of costs, the defendant asks not only to be dismissed, but also for judgment for costs. There can be no judgment for costs. We have no authority to entertain the action or bring the defendant before us. We have no authority to do anything except to order the dismissal of the action from the docket, and that judgment will be rendered.

CONFLICT OF LAWS. 671

[Hamilton District Court, 1879.]

LEVY DREYFUSS v. ADAE & CO.

The contract of a drawer to pay in default of payment by the drawee, though governed by the law of the place where drawn, is enforcible only on default by the drawee, and whether he is in default depends on the law of his place of performance, and, if by that law the drawee is not obliged to inquire into the genuineness of the indorsement, and payment on a forged indorsement is good in favor of the drawers, the drawer cannot be held on a second draft given as a substitute for the first one, which was supposed to have been lost.

ERROR to the Superior Court of Cincinnati.

The action in the superior court was brought by Levy Dreyfuss against Adae & Co., as drawers of a sight draft to his order, for 3050 francs, upon Zundel & Co., bankers at Schaffhausen, Switzerland, and was submitted on an agreed statement of facts as follows: That a draft of this amount and tenor was drawn by the defendants at their banking office in Cincinnati, and was purchased of them by a son of the plaintiff, by whom it was mailed to the plaintiff residing in the province of Baden, Germany, a short distance from the borders of Switzerland, and but a few miles from Schaffhausen, that the draft miscarried and came into the hands of some unknown person, who, having forged the indorsement of plaintiff's name, presented it and obtained payment; that by the laws in force at Schaffhausen, Zundel & Co., were not bound to inquire into the genuineness of the indorsement, or to identify the party; that the existence of any such laws was unknown to the plaintiff or defendants at the time, but that afterward, when the facts were well known, a second draft, of the same date and tenor as the first, was drawn by the defendants, at plaintiff's request merely, without any new consideration, and was presented by the plaintiff to Zundel & Co., by whom it was refused payment on the ground that they had paid the first, whereupon it was protested and notice duly given the defendants. Upon these facts judgment was rendered for the defendants.

AVERY, J.

Where a contract made at one place, is to be performed at another, matters connected with the performance will be regulated by the law of the place of performance. Scudder v. Union Bank, 91 U. S., 406. Where a draft is drawn, the contract of the drawer to pay in default of payment by the drawee, is a contract to be performed at the place where the draft is drawn, and so far is governed by the law of that place. Brownell v. Freese, 36 N. J. Law, 285. But it springs into life only upon default of payment by the drawee, and whether the drawee is in default or not, is to be determined by the law of his place of performance; that is, by the law of the place upon which the draft is drawn, or where it is payable. By that law the days of grace are ascertained; Chitty on Bills, 376; Edwards on Bills, 522; and the form of the protest; Chitty on Bills, 456; Story's Conflict of Laws, section 360; 12 Wend, 444. If Musson v. Lake, 4 How., 262, contains anything to the contrary, it is to be referred to what is necessary to charge the drawer, as distinguished from what is necessary against the drawee. Generally, everything relating to the right of requiring payment of the drawee, is governed by the law of the

place where the draft is payable. Story's Conflict of Laws, section 347; Wharton's Conflict of Laws, section 461; Daniels Negotiable Instruments, sections 908-9. By the law merchant, payment upon a forged indorsement of the payee's name does not discharge the drawee. The amount cannot be charged by him against the funds of the drawer; Robarts v. Tucker, 16, Q. B., 560; or if, with knowledge of the facts, credit is allowed him by the drawer, he is liable, as for money had and received, to the payee. Dodge v. National Exchange Bank, 20 O. S., 234. And see 10 Wall, 157-8; 94 U. S., 346. To this ordinary rule, however, the law of the place of payment in the present case made an exception. A similar exception would seem to prevail under the English statute, 16 and 17 Vict. C., 59, by which it is sufficient authority to a banker to pay a draft on him payable on demand, that it purports to be indorsed by the person to whose order it is payable. This has been held to protect the banker in paying upon a forged indorsement, and to make the payment good against the drawer. Ogden v. Benas, L. R. 9 C. P., 513, 516; Arnold v. Cheque Bank, 1 C. P. Div., 578, 585; Charles v. Blackwell, 2 C. P. Div., 151, 156. The question, then, is whether upon a payment good between drawee and drawer, the drawer remains liable. The controversy in the present case is as to the first of the two drafts, for while the second was presented and protested, it had been given on no new consideration, and was not in default, if the drawees had already paid the first. It is objected that the payment was not upon the order, in fact, of the person to whose order the draft was payable. But the drawers had not contracted to pay in the foreign place on which the draft was drawn; they had only guaranteed its payment by the drawees at that place. Story's Conflict of Laws, section 315; Daniels Negotiable Instruments, section 898. The guaranty was of payment according to the tenor and effect of the draft, but, by the law of the place, although made upon a forged indorsement, it was such payment. In Charles v. Blackwell, already cited, which was an action against the drawer by the payee of a check, whose name had been forged, and the money paid by the bank; it is said by Cockburn, C. J.: "Suppose the check had been delivered back to the plaintiffs, what could they have done? They could maintain no action on the check, or for the goods in payment of which it was given, unless they presented the check, and it was dishonored and notice thereof given. But on refusing to pay it the second time, the bankers would not dishonor it. They would indeed refuse to pay it, but only because they had paid it already. If the plaintiff should say, 'Yes, but to one who had no title to the check,' the answer would be that it had been paid to one to whom the banker was authorized to pay it by the operation of the statute." This, it is true, was where the check was drawn in London and was payable there, but the same protection to the banker would exist, if it had been a draft drawn abroad. Arnold v. Cheque Bank *supra*. The same argument would therefore follow. The plaintiff was content to take a draft which, by the law of the place upon which it was drawn, was payable to his order, or what purported to be his order. In reference to that law, as to the question of payment, the parties must be held to have contracted, and by a payment good in favor of the drawees the drawers were discharged.

Judgment affirmed.

A. W. Goldsmith, for plaintiff in error.

Kebler & Son, for defendant in error.

[Cuyahoga District Court, March Term, 1879.] 676

WM. BROWN v. SAMUEL HUNKIN.

For opinion in this case, see 4 Dec. R., 502 (s. c. 2 Clev. Law Rep., 281).

OFFICE AND OFFICER. 690

[Hamilton Common Pleas, August, 1879.]

DR. C. A. MILLER v. DIRECTORS OF LONGVIEW ASYLUM.

1. It is no ground for enjoining an investigation by a board, under a statutory power, of charges against an appointee that separate committees of each house of the legislature (though no joint committee) have investigated the same charges, and made complimentary reports. This is not res judicata.
2. It is no objection to the trial, by a board, of charges against an appointee that the notice to the members of the special meeting for preferring the charges was a general notice, when the directors not properly notified were present, and took part in the proceedings by voting. They alone could object, and they thereby waived any defect.

SMITH, J.

The petition in this case was filed by Charles A. Miller against the Board of Directors of Longview Asylum, H. D. Peck, Andrew J. Mullane, Charles S. Muscroft, B. Roth and James F. Chalfant, individually, and the Asylum, and recites among other things, that defendants Peck, Mullane and Muscroft, constituting a majority of the Board and conspiring together to injure the plaintiff and remove him from office without just cause, had procured certain false and malicious charges to be made against him, upon which they, as a committee of the Board, appointed by themselves, were proceeding to try him; that they had already suspended him, and that said pretended investigation and trial were a sham, entered into in bad faith, and simply to find a pretext for his removal. He prayed that the committee be enjoined from proceeding further in said pretended investigation under said charges; that the Board be enjoined from taking action upon the charges, and asked that an order be made restoring him to the said office of superintendent.

Messrs. Peck, Mullane and Muscroft filed an answer, admitting in substance that certain charges of malfeasance in office had been preferred against the plaintiff which the Board, in the discharge of its official duty, was bound to investigate, and that they, as a committee of said Board, were conducting said investigation in good faith when restrained by the provisional order of this court.

There has been much testimony offered, partly oral and partly on affidavits, and exhibits that the case had been elaborately and ably argued by the respective counsel.

It appears by the evidence that soon after the passage of the act of April 5, 1878, providing for the reorganization of Longview Asylum, H. D. Peck, Andrew J. Mullane, James F. Chalfant, Balthazer, Roth and John C. Morris were appointed its directors, who immediately organized by the election of a president and secretary, and soon after appointed the plaintiff, Dr. Charles A. Miller, its superintendent for five years, and upon his nomination afterwards appointed two resident physicians, steward and other assistants.

Only three of the directors, viz.: Messrs. Morris, Roth and Chalfant, voted for Dr. Miller. Messrs. Peck and Mullane voted for others. Mr. Peck, however, moved to make Dr. Miller's election unanimous; but Mr. Mullane objecting, his motion was dropped. Dr. Miller being elected, however, entered at once upon the discharge of his duty.

The first section of the act of reorganization commits the government of the asylum to the board of five directors, superintendent, assistant physicians, steward and additional assistants.

The second, third and fifth sections prescribe the mode of appointing said directors; that they shall take the usual oath of office, and serve without compensation, except for loss of time and expenses while actually engaged, not to exceed $250.00 per annum, and that it shall be the duty of one or more of them to visit the asylum weekly, and all of them monthly, with the superintendent, to examine the accounts of the steward.

The said board also established rules and regulations which provided that the board should meet in regular session on the first Tuesday of each month, and at the regular monthly meeting one member of the board should be designated to specially visit and inspect the asylum during the ensuing month in rotation, and it should be the duty of the member so assigned to visit the asylum and carefully inspect the same at least once each week, and no notice of the time of such intended visits should be given to any officer or employee of the asylum.

This rule was observed and enforced by the board, and each one in rotation became a monthly visitor, and faithfully inspected the asylum.

From the time of Dr. Miller's appointment Mr. Mullane seems to have been hostile to him. He frequently said to one or more of the other directors that Dr. Miller was incompetent to fill the office. He also so stated on the witness stand. He himself had voted for Dr. Maley. He had also at a special meeting of the board on the 6th day of September, 1878, when only himself, Mr. Peck and Mr. Roth were present, made a bitter, and, it seems to me, an entirely uncalled for speech against Dr. Miller, charging him with fitting up a dissecting room at the asylum for the purpose of dissecting deceased patients, and caused this speech to be published in the Cincinnati *Daily Enquirer*. There seems to have been no sufficient ground for said charge, and Mr. Mullane, by going to see the room, or making inquiries of the resident physicians, could easily have ascertained the facts. With this exception, there seems to have been general harmony between the directors and superintendent in conducting the asylum. There had been some rumors of trouble or mismanagement, especially in some of the wards, during the months of September and October, and Mr. Peck, who became the monthly visitor for December, 1878, determined to make a thorough and satisfactory examination. He visited the asylum in season and out of season, sometimes spending as much as a half a day at a time. This examination continued through the month and was conscientious and thorough. He found the management satisfactory. He even made a special report which was entered at large upon the minutes of the board. In this report Mr. Peck stated:

"Generally speaking, the asylum and its inmates are in good condition. The house has a reputation for cleanliness, which, I am happy to say, is fully warranted. If there is an unclean spot within it I have not, after repeated inspection, been able to find it. This is in a large measure due to the labor of the patients themselves, under the intelligent direction

of the officers and attendants. Moderate employment is thus furnished many who would otherwise be idle to their detriment. By thus being made useful the institution and the patients are benefited. Experience has demonstrated that there is no better treatment for the insane, however, than that which, along with wholesome food and good beds, provides them with employment and amusement in moderation, and he then suggests that additional facilities be furnished for employment and amusement."

Mr. Peck also said upon the witness stand at the hearing of the case that he still indorsed all that was said in that report, and thus emphasizes the propriety of securing a reasonable amount of employment out of the patients.

The directors about the same time made their report to the Governor, commending the management of the asylum, which appeared among the executive documents of the year. That report contains the following paragraph:

"We are happy to state that the officers, attendants and employees are generally faithful and efficient. The wards are kept scrupulously clean, every attention and kindness is shown to the patients, as little coercion as is consistent with their safety and health is good, as large an amount of out-door exercise as possible is afforded, and manual labor as far as practicable is uniformly required. Amusements and music are judiciously employed with very satisfactory results. So quiet is everything about the buildings, both by day and night, that a stranger could hardly persuade himself he was under the same roof and in the midst of more than five hundred fellow-beings afflicted with various forms of mental disease.

When we consider that the directors personally inspected the institution and its management, and are thus certifying from their own knowledge, this approval is very complete.

As appears by these reports, and, indeed, it is corroborated by the testimony in the case, the management of the asylum under Dr. Miller, during the year 1878, and in the early part of 1879, seemed to have been highly satisfactory and all that could be desired. Some of the employees had been discharged, and these in consequence had used their influence and manifested their ill-will against him, and criticized more or less his management.

But in February, 1879, there appeared a series of communications in the *Cincinnati Enquirer* reflecting severely upon Dr. Miller and his management for certain alleged cruelties committed by some of the employees upon the patients in the laundry department, in the summer and fall of 1878, and within the time covered by the preceding report. These communications, appearing for several days in succession in a newspaper of so great a circulation and influence, attracted the attention of the governor, Hamilton county members of the legislature, directors and all others interested in the asylum.

At a meeting of the board, held in March, 1879, it was resolved that the legislature be requested to send a committee to investigate these charges; also the management of Longview, all members of the board voting for it excepting Mr. Peck. He voted against it on the ground that the board had sufficient authority in law to make the investigation without the aid of the legislature. In the meantime the house of repre-

sentatives appointed a committee of three to investigate. This committee came to the Grand Hotel in Cincinnati early in March, 1879, where they remained several days and conducted all its proceedings in secret. Neither the directors nor superintendent were permitted to appear before them to hear who the witnesses were, nor what their testimony was. Dr. Miller sent a written request to the chairman of this committee for a copy of the statement taken, the names of the persons making them, an opportunity to cross-examine and to offer testimony in his defense. The chairman declined to grant this request, on the ground that the testimony was not written out; it would take some time to do it; the committee could not wait, and it was impossible to remember the names of the witnesses or their testimony, but offered to hear any witnesses he might desire to send before them. Dr. Miller told him until he knew what charges were made and testimony taken against him he could not be expected to answer. This committee made an extended report to the house of representatives, reciting that they had examined forty-nine witnesses, and discovered many instances of cruelty practiced upon the inmates by the attendants, and finding "that the superintendent had been guilty of inattention to his duties and gross neglect."

The house of representatives seems not to have taken any action upon this report, which is extraordinary if it be believed that the charges and conclusions contained therein were true.

Before this house of representatives committee had made its report, Dr. Miller and Mr. Roth, one of the directors, sent petitions to the legislature asking for the appointment of an investigating committee that would thoroughly and fearlessly investigate the management of the asylum and the conduct of all its officers and attendants while Dr. Miller was superintendent. His communications were additional to the resolution previously adopted by the board. These petitions were presented in the senate by Senator Marsh, who offered a resolution, which was adopted, that a committee of three senators be appointed to investigate all the charges that had been made against Longview Asylum and its management. A committee was appointed, and on the 27th day of March, 1879, organized at the asylum for the purpose of said investigation. The resolution under which they acted required them to "investigate the management of the board of directors, and the official conduct of the directors and superintendent and all other officers and attendants of said asylum since its reorganization, and as to the treatment which the patients have received, with full power," etc.

This investigation was publicly conducted at the asylum. The directors were represented by counsel, and some of them present all the time. Dr. Miller was also present, with his brother acting as counsel. This investigation itself seems to have been fairly conducted, and was most thorough and painstaking. The committee examined eighty-three witnesses, including the members of the board of directors, superintendent, assistant physicians, a large number of the attendants and employees, and all others whom the committee were advised had any knowledge of the subject matter which the resolution required them to investigate. They made their report, accompanied with all the testimony. This report finds that the asylum is in good condition; that the board of directors, in the management of the business of the institution, have been economical and judicious; the superintendent and his assistants have been and are faithful and attentive in the discharge of their duties, and the attendants

generally capable and efficient; that a large number of witnesses had testified, touching the charges of cruel treatment of patients, and though some evidence was offered in support of such charges, coming from discharged employees and others inimical to the present management, the committee was clearly of the opinion that the weight of the testimony was against the truth of said charges.

This report also recommended some additional legislation, giving authority to the superintendent to appoint and remove subordinates at will and thus secure greater efficiency, which resulted in an amendment of the law, to be found in the new Revised Statutes.

In the meantime, the term of Mr. Morris, one of the directors, was about to expire, and the governor, on the 12th of April, 1879, nominated for his successor Dr. Charles S. Muscroft, his personal friend. At first this nomination failed of confirmation. He was, in fact, confirmed on the 12th of June. While the nomination was pending, it seems to have been assumed both by the friends and opponents of Dr. Miller that the confirmation of Dr. Muscroft meant hostility to the former, and his probable removal as superintendent. It is but due to the governor, however, to add that he testifies that he nominated Dr. Muscroft with no such feeling of hostility.

Dr. Muscroft was confirmed on the 12th of June, it being the third or fourth time his name was sent to the senate. His commission was made out and sent down the same evening. He was also notified by telegram. On the 17th he met Messrs. Peck and Mullane at the asylum by appointment, when the three spent several hours in consultation. On the 14th the three met at the law office of Mr. Healey, who had represented the board in the senate investigation, and agreed to prefer charges against Dr. Miller to be investigated by the board for the alleged cruelties which had already been investigated by the senate; also, to suspend him from the office of superintendent pending the examination of said charges, and appoint Dr. Samuels, one of the assistant physicians, in his place, and call a special meeting of the board for the 19th of the same month. Mr. Peck, as president, was to issue the call for the meeting. It was agreed that Mr. Mullane was to present the charges, and Mr. Healey, who was familiar with the testimony taken in the former investigation, was to prepare them. Neither Mr. Roth nor Dr. Chalfant was notified or consulted. Mr. Healey prepared a rough draft of charges and specifications, showed them to Mr. Peck, who suggested some modifications. Mr. Mullane in the meantime thinking it unbecoming for him to present the charges, one Jas. G. Saffin, a discharged employe, volunteered to prefer them. Accordingly, Mr. Saffin received the charges and specifications, which had been prepared by Mr. Healey, copied and signed them and left them in an envelope at the office of Mr. Peck, to be presented at the special meeting of the board. The call for said meeting was stated to be for the "transaction of general business." All the directors were present, including Dr. Muscroft, who then for the first time presented his commission as successor of Mr. Morris. There was some miscellaneous business about the condition of the gas works. The standing committees for the year were appointed. Then this communication, signed by James G. Saffin, was read, preferring one charge and two specifications against Dr. Miller. The charge was gross neglect of the discharge of the duties devolving upon him as superintendent, rendering it improper for him to remain longer at the head of the asylum. The specifications were, first, in know-

ingly and negligently permitting certain female patients to be overworked, maltreated, beaten, abused and subjected to cruel and unnecessary punishment by the employes of said institution in charge of the laundry and ironing department.

2. That he neglected to visit the wards of the asylum regularly and often enough to provide for the proper attention and treatment of the insane inmates.

As soon as these charges were read Mr. Mullane moved that they be referred to a committee of three, of which the president should be one; also that Dr. Miller be notified.

This resolution was adopted by the votes of Messrs. Peck, Mullane and Muscroft, Messrs. Roth and Chalfant voting in the negative. Mr. Peck at once appointed Mr. Mullane and Dr. Muscroft for the other two members of the committee.

Mr. Mullane then moved that Dr. Miller be suspended from office pending said investigation, and that he be required to deliver up all the books, papers, keys and other property in his possession to Dr. Samuels, assistant physician. This resolution was adopted by the votes of Messrs. Peck, Mullane and Muscroft. Messrs. Roth and Chalfant voting no.

Dr. Muscroft then moved that the committee appointed to investigate notify Dr. Miller of the time and place of said investigation, and that he be allowed to be present and have full opportunity to present his defense. This resolution was adopted unanimously.

On the 23rd of June, at the asylum, the time and place appointed by this committee, this investigation began. Dr. Miller appeared with Counsel General Banning. He also relied upon the aid of Mr. Jordan, who was then engaged in the trial of a cause in court, and asked for a postponement until Mr. Jordan could be present. The committee denied this motion. Dr. Miller filed an answer to said charges:

1. That this board had no jurisdiction to consider said charges, because they were alleged to have occurred during the existence of a former board.

2. Because the same manner complained of had been investigated by members of the board prior to June 19, 1879, and found to be untrue and instigated by malice.

3. Because at the request of the board of directors, and in pursuance of a resolution to that effect, the senate had appointed a committee to investigate, which committee, after a full and thorough investigation, had reported back to the senate that said charges were without foundation, and fully approving Dr. Miller's management.

4. Because said charges were false and untrue.

This investigation had the forms of a trial at law. Witnesses were called on behalf of the charges and in favor of the plaintiff, and the plaintiff was permitted to appear by counsel, General Banning having appeared in the committee room for him, and having also the advice of Isaac M. Jordan, Esq., who was at that time engaged, however, in the trial of a cause in court. The hearing of the argument in the investigation had been postponed when the provisional order of the court was granted. I have thus stated the facts in the case as brought out by the hearing.

The first question is—and it is a very grave one—whether this court can interfere by injunction, and arrest the proceedings of an independent tribunal while discharging, or professing to discharge, the duties imposed upon it by law.

To the board of directors is committed the general administration of the asylum. They are supposed to be appointed by reason of having the special skill, experience and knowledge required to administer such an institution. They can remove all resident officers except the superintendent, at pleasure, but him only for cause. But what is a sufficient cause, or, in other words, what is the kind and degree of neglect, misconduct or incompetency which renders it improper for him longer to remain at the head of the asylum, as the statute providing for reorganization prescribes, is for them alone to determine. One cause for removal stated in the act is specific—a refusal to deliver up books and papers, etc., when suspended—but all others are indefinite and rest upon the opinion of the directors for the time being. From their determination the law furnishes no appeal. Their discretion is an absolute discretion. Hence it is urged by the defendants that this board being created by law for the government of the asylum, it is a part of the administrative government of the state, and within its sphere is supreme.

It is analogous to the discretionary power vested in the legislature or executive department of the state. The court would not assume to restrain the general assembly or governor. It is claimed that subordinate boards and officers whose discretion to act is vested by law are equally exempt.

It is claimed, however, by the plaintiff that these defendants are not fairly and honestly exercising their discretion; that they are seeking to remove him without cause or going through the forms of an investigation, on a mere pretext or color when they have already predetermined his case and conspired to remove him; and that in thus removing, or attempting to remove him, without cause, they exceed their powers, and the act itself is illegal and void.

Numerous authorities were cited to show that the legislature or executive, in the exercise of their discretion, can not be restrained nor their motives inquired into by the courts; and the same rule precludes judicial inquiry into the motives of the members of municipal and other subordinate boards when acting in a similar capacity. This doctrine has been fully maintained by the courts of Ohio.

The counsel for the plaintiff admit the general principle of the doctrine, but insist that this discretion, which by the authorities is declared to be absolute and to be respected, must be an honest discretion, without fraud, corruption or caprice; and if these directors act corruptly or in bad faith, although within the apparent sphere of their duties, their acts are *ultra vires,* without authority of law, and they can be arrested in their course. Several cases were cited. But it is difficult to apply this doctrine. It concedes to the board jurisdiction to act, if it acts honestly; but denies it if it acts corruptly. It makes its jurisdiction depend, not on the statute conferring it, but upon the conduct and motives of its members for the time being. And, in fact, in most of the cases cited the court actually refused to enjoin. It suggested hypothetical cases involving fraud, corruption or even caprice where it would be proper to interfere, but refused the injunction in the particular case before it, and this proviso, or exception, of corruption is thus thrown in as if to illustrate the force of the general principle.

But this general doctrine, so far as it relates to subordinate boards, is limited to those cases where they are acting strictly within the sphere of the duties confided to them by law. For example, this board has author-

ity to remove the superintendent for certain special causes. Suppose they remove him without cause or without assigning any cause, or the cause assigned was clearly and palpably a mere pretext, they would thus act in excess of any power conferred. The tenure of his office is fixed by law, and any attempt to divest him of it except for one of the causes specified would warrant the interference of the court.

But is such this case? The proceedings were formal in the extreme. Charges and specifications were presented. A time is set for hearing. Dr. Miller is represented by able counsel. He is permitted to call witnesses in his defense. A large amount of testimony is presented. A charge of cruelty to the inmates of such an asylum is undoubtedly a very serious charge. Ten witnesses have been examined in support of the prosecution, and it must be admitted that there is certainly some evidence tending to prove the charge. It is not for me to pass upon the credibility of these witnesses, or the weight or sufficiency of the evidence. Not to speak of the report of the house committee offered in evidence in the case, we find even in the report of the senate committee some matters in their estimation requiring censure, though, as a whole, it highly commended Dr. Miller's management. In this state of the evidence, I cannot find that the proceeding to investigate and the investigation itself are clearly and palpably without cause, or supported by no evidence.

In 18 Q. B., 196, it is said that if the party whom it is attempted to remove has a hearing, the court will not inquire into the amount of the evidence upon which the board acted.

It is urged on behalf of the plaintiff that no sufficient notice was given to the directors of the special meeting held on the 19th of June, when these charges were preferred. The time was sufficient, but the business was not stated. I think the statute contemplated regular as well as special meetings. The government of the asylum was committed to a board. The directors must act as a board. The duties imposed were such as required regular meetings. And in fact, the directors so interpreted and acted under the law by prescribing regular board meetings. But excepting the special business at the annual meetings, all business could come before the special as well as the regular meetings. It seems to me that the notice in this case that the meeting was for general business did not give proper notice to the other members of the business intended. But the directors were at the meeting, and thus not prejudiced. This notice was for the directors and not for the superintendent, and whether Messrs. Roth and Chalfant protested in form or not is immaterial. The record kept by Dr. Chalfant shows no protest. But I think they waived it by taking part in the proceedings. They voted on each resolution, and voted understandingly, and thus recognized the validity of the meeting.

But it is also said that this committee is partial, biased and hostile toward Dr. Miller, and the case already prejudiced; that such a board for such reason, is incompetent to investigate. Numerous decisions are cited to show that there must be complete impartiality in courts, judges, juries and even in boards of arbitrators. In purely judicial investigations this is the law. Judges and juries should be as impartial as human infirmities will permit. But I do not regard this board as judicial, but rather as an executive board, to which have been committed the care and administration of this system. These duties require the exercise of more or less discretion, and occasionally are quasi-judicial. But, these are

merely incidental to the main purpose of their appointment. It is undoubtedly desirable that, in the exercise of this quasi-judicial discretion, its members should be impartial and unbiased. Indeed delicacy of feeling, or a proper sense of propriety, might well suggest to any one who is conscious of any bias or prejudice to decline to serve on such committee, except from extreme necessity. But it is not the province of the court to regulate matters of delicacy or propriety. It deals with the question of legal powers. The legislature has vested this power in the directors, subject to all the incidents and disadvantages of their position. It may often happen that members are witnesses of misconduct upon which they form their opinion at once. As executive officers, inspecting and superintending their subordinates, they are continually forming judgments and opinions, and sometimes, perhaps, prejudices about them. This, is presumed, was anticipated by the legislature. It is also true that this committee is passing upon very important rights and interests of the plaintiff, and it seems contrary to natural justice that the triers should be partial or prejudiced. But the answer to all this is that the legislature has so ordered it.

That the three directors should meet together and arrange for the investigation and suspension of Dr. Miller without notice to others is also subject to just criticism. But examples of this mode of proceeding are too frequent in legislative assemblies for me to declare it illegal.

It is also claimed that the hearing was not fairly conducted; that important testimony was excluded. Of course, when the prosecution is also the trier, he is liable to make erroneous rulings. Many of the rulings upon the admission of testimony, are not, perhaps, as I should have made them; but they are questions upon which there might be a fair difference of opinion, and comes fairly within their discretion, and not subject to review.

Again, it is urged that, as to all these charges and specifications, there has been a full investigation by the senate and Dr. Miller fully exonerated. This is one of the defenses set out in his answer before the committee, and is undoubtedly entitled to great weight. It is claimed to have the effect of a *res adjudicata*. It will be recollected that there was no joint investigation. Each house sent a separate committee and received a separate report. The senate committee apparently investigated with great fairness and thoroughness. As a whole it was complimentary to the management. But I cannot pronounce it such a legal bar to the action of this committee as to authorize me to interfere by injunction. The defendants are a board to consider and weight this as well as the other defenses, but their decision is not subject to be restrained by this court.

But, perhaps, the most complete answer to the plaintiff's petition is that the committee have not yet reported the result of their investigation nor the board acted. The apprehended injury to the plaintiff is not the investigation, but the removal. An honest investigation he courts. He himself applied for one to be made by the legislature. The law has given to this board the authority to investigate, and how can he or the court be assured that it will do it unfairly until it reports? These directors are public officers, acting under oath, and responsible to their own consciences and the public for the honest and faithful discharge of their duties. The law will not permit me to presume in advance that they will act dishonestly, corruptly or oppressively. Certainly, when they have

acted, I am bound to yield to them the same honesty of purpose in their official acts that I claim for myself sitting here. The statute permits charges for misconduct, gross neglect or incompetency to be preferred. It directs investigation of those charges, and permits suspension from office pending such investigation. Thus far the defendants are acting, within the letter of the statute. Nor does the apparent hostility of some of them to Dr. Miller, or their secret meeting to arrange for this investigation, necessarily impute corrupt motives, nor can I say in the face of all the testimony offered before this committee that these charges are totally and entirely groundless.

I therefore feel compelled to overrule the motion for the injunction.

T. D. Lincoln, I. M. Jordan and S. A. Miller, for plaintiff.

Judge Taft, J. W. Warrington and J. C. Healy, for defendant.

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733 HABEAS CORPUS—PROCEEDINGS IN AID OF EXECUTION.

[Cuyahoga Common Pleas, September Term, 1879.]

EX PARTE GEORGE M. LILLILAND, HABEAS CORPUS.

1. The last part of section 18, 75 O. L., 704, as to the power of the probate judge to punish for contempt, does not apply to all cases of contempt, but only to those cases in which it is provided that a justice can punish for contempt, and under the first half of that section, he can punish the same as other courts.
2. Where, therefore, an order was made by the probate judge, in proceedings in aid of execution, that defendant deliver to the sheriff a watch and chain then on his person, he is not limited, on refusal, to a punishment for the contempt which a justice could inflict.
3. Where, in proceedings in aid of execution, a probate judge makes an order in the hearing of defendant that he turn over to the sheriff jewelry or money on his person, this is binding on him from that time, and it is no defense to contempt proceedings that, before the order was reduced to writing and served on him, he had disposed of them and cannot comply.

It appears from this application and the accompanying return of the sheriff that certain proceedings in aid of execution were held in the probate court of this county, in the case of C. C. Lloyd & Co. v. George M. Lilliland, and that in those proceedings an order was made on the 9th day of September, by the probate judge in open court, in the presence and hearing of Lilliland, directing him to turn over to the sheriff, as receiver, a certain gold watch and gold chain, then in his possession and on his person. It appears further that he did not comply with the order, and three days afterwards transferred the watch and chain, as he claims, to somebody living in Philadelphia, as security for a debt of $150. On the 16th day of September, the sheriff, as receiver, served a copy of the order before spoken of on Lilliland, and demanded the watch and chain. Lilliland refused to deliver them, and the sheriff, as receiver, returned the order with an endorsement to that effect. Then on the 18th day of September, the probate judge issued an order for Lilliland to appear on the next day, and show cause why he should not be committed for contempt in refusing to comply with the order of the court. He appeared on that day, and to purge himself of the contempt, filed a sworn answer setting forth substantially that in consequence of his transferring the watch and

chain as above stated, to somebody in Philadelphia, it was impossible for him to comply with the order.

Thereupon the probate judge ordered him committed to the jail of the county until he purged himself of such contempt.

The only question for this court to decide, is whether the probate judge has jurisdiction, and to do this we shall have to decide: First. Whether under section 18, relating to Proceedings in Aid of Execution, vol. 75, page 704, O. L., the probate judge had power to commit for contempt for more than ten (10) days, or fine not exceeding twenty ($20) dollars.

Section 18 is as follows: "If a person, party or witness, disobey an order of the judge or referee, duly served, he may be punished as for contempt; and such judge or referee may enforce order and punish for contempt in like manner as justices of the peace."

It is claimed by the applicant that the above limitation applies to all cases of contempt. We are, however, clearly of the opinion that it applies only to those cases in which it is provided a justice of the peace can commit for contempt. These are found on page 806, vol. 1 S. & C., section 214. This section provides that a justice of the peace may punish as for contempt, persons guilty of the following acts, and no other:

"1. Disorderly, contemptuous or insolent behavior toward the justice, tending to interrupt the due course of trial or other judicial proceeding before him.

"2. A breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

"3. Wilful resistance, in the presence of the justice, to the execution of a lawful order or process made or issued by him."

In such cases the justice has power to fine not exceeding twenty ($20) dollars or imprison not exceeding ten (10) days. In each of those cases the probate judge would be limited to the same extent as a justice, but in all other cases we think he has the general powers conferred by statute upon a court or judge at chambers. Section 2, chap. 5, vol. 75, page 745, provides that a "person guilty of any of the following acts may be punished as for contempt," and among those "acts" we find "disobedience of or resistance to a lawful writ, process, order, rule, judgment or command of a court or an officer," and section 8, of the same chapter provides that, "when the contempt consists in the omission to do an act which is yet in the power of the accused to perform, he may be imprisoned until he performs it."

Section 18, it seems to us, is clearly to be divided into two parts, the first giving the probate judge power to commit for contempt such as is given to all courts save justices, and the second limiting him to the same punishment as justices can impose in like cases. Any other construction would place it in the power of an evil-disposed person to entirely defeat the whole purpose of the statute. Suppose, for instance, a person upon examination should disclose the fact that he had a thousand dollars in cash on his person, and he is ordered to pay it over to the sheriff to apply on an execution. If the probate judge is to be limited in his punishment for contempt to the same degree as a justice, this person could refuse to obey the order, pay a twenty dollar fine or spend ten days in jail and then walk off scot free, with his thousand dollars still safe

in his pocket. We do not believe the probate judge exceeded his authority in this respect.

It is further claimed that the order could only be binding on Lilliland until after it was reduced to writing and served upon him. We hardly think this necessary, for it appears he was in open court with his watch and chain upon his person when the order was made, and heard it. This certainly was as binding upon him as though it had been reduced to writing and served upon him. It will hardly be seriously contended that between the time an order is made in open court in the hearing of the person affected thereby, and the reducing of such order to writing, the person so affected can dispose of the property mentioned in the order, and expressly therein directed to be disposed of in a particular way, and then plead that he cannot comply therewith.

The final point made by the applicant is that the probate judge had no power to make this commitment because the applicant did not have it in his power to comply with the order, having disposed of the watch and chain. The probability is that the probate judge did not believe his affidavit in support of this claim to be true. We are inclined to coincide with him; at any rate the evidence is not all set forth, and we are to presume that the probate judge was satisfied, from the evidence, that it was still in his power to comply. We do not think we have the power to review his conclusion on this question of fact in this proceeding.

The application must be refused and the prisoner remanded.

Burke & Saunders, for applicant.

Mix, Noble & White, *contra.*

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751 [Cuyahoga Common Pleas, September Term, 1879.]

HIGGINS v. PELTON, TREASURER.

For opinion, see 4 Dec. R., 521 (s. c. Clev. Law Rep., 305).

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775 **OFFICE AND OFFICER.**

[Hamilton Common Pleas, October, 1879.]

DANIEL WEBER v. R. M. BISHOP ET AL.

Where the governor has the power, by statute, to dismiss an officer for official misconduct, the courts will not, before the trial takes place, enjoin his action, either on proof that the charges are not true, or, that the charge does not amount to misconduct.

SMITH, J.

The petition in this case recites in substance among other things that the plaintiff was duly appointed and qualified as one of the members of the board of police commissioners of Cincinnati, and entered upon the discharge of the duties and is now in the possession of said office, and has ever since conducted himself faithfully therein; that the other members of said board are two defendants, Sutten and Dorsch, and one John H. Setchell; that there is a vacancy, and by reason of said vacancy the ordinary business of the board has been interrupted, but the members have not been able to agree in filling said vacancy; that the said Sutten and Dorsch, being unable to accomplish their purposes and organize the board to attain the improper and injurious ends they had in view, did

confederate and conspire with their co-defendant, R. M. Bishop, to unjustly remove the said plaintiff from said board, and did for that end agree and conspire with said Bishop, as governor of the state of Ohio, upon false and fictitious charges, made and filed with said Bishop, to institute a fictitious proceeding against the plaintiff for such removal, and that upon such charges said Bishop should remove him from his said office as police commissioner, and thereby enable the said Sutten and Dorsch, as a majority of the remaining members of said board, to fill said vacancies in a mode to get control of the board for their own mischevious purposes; that in pursuance of said conspiracy the said Sutten and Dorsch, on the 25th of September last, filed in the office of the governor certain false charges against the plaintiff, viz.:

That at a meeting of the board on the 22d of September, the said Weber was so much under the influence of intoxicating drinks as to render him unfit, intelligently to perform the duties of his office; that he insulted his fellow member, Dorsch, by telling him to "shut his mouth; that he didn't want him to speak to him," and insulted an employee in the office, one Jerry Mudroy, by calling him a "dead head," or "dead beat."

That he also declared in an insulting manner that unless said board proceeded to fill said vacancy in said board, no other business should be transacted; that he refused to recognize the authority of the president when called to order to desist reading a list of names of persons he would vote for the vacancy he was then reading, but continued reading until he had finished the list; that he conducted himself in a boisterous manner in said meeting, and fell asleep.

That said charges were false and frivolous; that upon filing the said charges the said governor issued a notice to the plaintiff that said charges would be for hearing on the 4th of October, at 9 o'clock a. m.

That the said charges do not constitute official misconduct, and the governor, under the constitution and laws of Ohio, has no power to try the same, and that said proceeding was not begun in good faith, nor entertained and prosecuted by said Bishop in good faith, but designed to be used by the defendants as a form of proceeding in which, without respect to plaintiff's guilt or innocence, they shall effect his removal as a police commissioner; that he has no remedy at law, and prays that the said governor may be restrained from proceeding in the said hearing of said charges and all action thereon, or making any order for his removal from said office.

This petition was duly sworn to, a time set for hearing his application, and a provisional restraining order issued in the meantime.

The defendants filed their affidavits denying any conspiracy or combination whatever; the said Sutten and Dorsch alleging that said charges were true and made in good faith in the conscientious discharge of their official duty, and Governor Bishop alleging that said charges had been filed with him against the plaintiff, which he intended to investigate, as he was bound to do under the statute; that he should give the plaintiv a fair and impartial hearing, and decide according to the law and the testimony.

A preliminary question of much importance has arisen, which it is proper for me to consider. It is claimed by the governor that by reason of the high office he holds he is not subject to a restraining order, not to a subpoena even, nor any other process of the courts, and that any process issued upon or against him is a nullity and may be disregarded.

The claim is undoubtedly made in good faith, not with the intent to show any personal disrespect to the courts, or their process, but from a conscientious regard for the perrogatives of his high office, which he is bound to protect. This claim has not obstructed the present proceeding. He has readily and courteously yielded to the restraining order whilst denying its authority, and voluntarily appeared and been sworn as a witness; but the mere assertion of the claim itself in the due course of a judicial proceeding requires me to consider, if it rests upon any just foundation. In plain terms the claim amounts to this: That he is above the law. True, he is the supreme executive power of the state, but this gives him no arbitrary authority. His powers and duties are regulated and defined by the constitution. As such executive he is clothed with important powers in the exercise of which his judgment and discretion is conclusive. But the legislature frequently confers upon the governor duties which do not pertain to the executive office. Sometimes said duties are merely ministerial; sometimes they may require the exercise of some discretion and judgment, but they are such duties as might as well be performed by some one else. They form no part of the duties of the executive office as such. Is he to be exempt from legal restraint in relation to such duties merely because he is the governor? The very statute under which he proposes to act in this case fairly illustrates this distinction or rather classification of duties. A police commissioner of Cincinnati may be removed by the governor for "official misconduct." But by the same act in all the other cities in the state, including Cleveland and Toledo, a police commissioner can be removed only by three-fourths of all the members of the city council upon good cause shown, where charges have been preferred and he had an opportunity to make a defense. Thus by the same act the same duty is enjoined upon the governor as to the police commissioner of Cincinnati which is enjoined upon the respective city councils as to the police commissioners of each of the other cities of the state. Suppose the city council of Cleveland should attempt to remove the police commissioner of that city without cause or without assigning any cause, could it not be restrained by the courts? Undoubtedly, that principle has been settled by numerous adjudications in this country and England. Suppose the governor by virtue of a similar power claimed to have been conferred upon him by the same statute had attempted to remove Col. Weber without cause, or without assigning any cause, is his office of governor to prevent the latter from pursuing his remedy through the courts? Suppose the supreme court had already declared this clause in the police law unconstitutional and void, and notwithstanding the governor should persist in the effort to try him, is Weber helpless in the courts?

In the present case, it is claimed with great vigor, that this clause in the act is unconstitutional—that it deprives the citizen of a franchise—a thing of value—without due process of law—that it in fact makes the governor a court of impeachment to try and remove a civil officer for "official misconduct," when by the constitution of the state, the senate is the sole tribunal in which such offenses may be tried and the officer removed, that in giving him this jurisdiction, the statute has given him no power to enforce the attendance of witnesses, or administer oaths. Suppose the court should find, as thus claimed, and the governor should disregard such finding, can he not be enjoined? The mere statement of the question answers it if we are living under a government of laws. In the case of Marbury v. Madison, 1 Cranch, 170, decided by the supreme

court of the United States, we find this emphatic language in the opinion of Chief Justice Marshall. He says:

"What is there in the exalted station of an officer, which shall bar a citizen from asserting in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus directing the performance of a duty not depending on executive discretion, but on particular acts of congress and the general principle of law?"

In Woodson v. Murdock, 22 Wall., 351, the governor of Missouri was enjoined by the circuit court from performing a duty affecting private rights required by an act of the legislature of Missouri, and this decree was affirmed by the supreme court of the United States. And the same question has been fully considered by the supreme court of our own state in the case of the State ex rel. Whiteman v. the Governor of Ohio, 5 O. S., 528. Bartley, chief justice, in giving the opinion of the court, says:

"The first question is whether the governor can be controlled in his official action by the authority of a writ of mandamus from the supreme court."

The court unanimously answered that question in the affirmative. On page 534, Chief Justice Bartley says as follows:

"The constitutional provision declaring that the supreme executive power of the state shall be vested in the governor, clothes the governor with important political powers, in the exercise of which he uses his own judgment or discretion, and in regard to which his determinations are conclusive. But there is nothing in the nature of the chief executive office of the state, which prevents the performance of some duties merely ministerial, being enjoined on the governor. While the authority of the governor is supreme in the exercise of his political and executive functions, which depend on the exercise of his own judgment or discretion, the authority of the judiciary of the state is supreme in the determination of all legal questions involved in any matter judicially brought before it. Although the state cannot be sued, there is nothing in the nature of the office of governor which prevents the prosecution of a suit against the person engaged in the discharge of its duties. This is fully sustained by the analogy of the doctrine of the supreme court of the United States in the case of Marbury v. Madison, 1 Cranch, 170: "However, therefore, the governor in the exercise of the supreme executive power of the state may, from the inherent nature of the authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power, yet in regard to a mere ministerial duty enjoined on him by statute, which might have been devolved on another officer of the state, and affecting any specific private right, he may be made amenable to the compulsory process of this court by mandamus."

How applicable is this reasoning to the present case? The duty enjoined upon the governor is no part of his executive duties as such. It might as well have been enjoined upon some other offices, as it in fact is as to all the other cities in the state. And whether upon the ground that the law itself is void, or that the charges preferred on their face do not import official misconduct, they may be questions for judicial determination, and in the language of Chief Justice Bartley just quoted, the authority of the judiciary is supreme in determining all legal questions judicially brought before it.

But it is said that this reasoning may have reference only to the performance of such ministerial duties as may be enjoined by statute, and

the power to try and remove for misconduct in office is not ministerial. But who is to determine that question in a case brought before the court by a party asking relief, but the judiciary? Defendants counsel also, cite the case of the State of Mississippi v. Andrew Johnson, president, 4 Wall., where the supreme court refused to enjoin the president from executing the laws enacted for the protection of civil rights. This application had reference to his general executive and political duties, and the court refused to interfere.

It seems to me, therefore, from reason and authority, if in other respects the plaintiff in this case is entitled to the relief prayed for, he should not be deprived of it for the reason that the defendant, or one of the defendants, is the governor of the state.

It was alleged in the petition that there was a confederation and conspiracy between the governor and the other two defendants by which false charges were to be preferred against the plaintiff, upon which the governor was to try him, the purpose of all the parties being to remove him from his office without justifiable cause. In this attempt to establish such conspiracy or confederation, the plaintiff has utterly failed. There has been no testimony whatever implicating Gov. Bishop. These charges were preferred without his knowledge. They were filed in his office; he fixed a day for hearing, and gave notice to defendant. So far as appears, this is the sum and substance of his acts, and conscious of his own innocence, he has voluntarily appeared and submitted to a cross-examination. I must, therefore, necessarily find that so far as the plaintiff's case rests upon any alleged conspiracy between the governor and the other defendants, it falls to the ground.

It is urged, however, by the plaintiff's counsel, that he is entitled to the relief prayed for on two other grounds, viz.:

1. That the plaintiff is in possession of an office—a valuable franchise in itself—and that so much of the statute as authorizes the governor to try and remove him for official misconduct is unconstitutional and utterly void; that the governor has no power or authority whatever to act in the premises, and the mere assuming the power to try him even and giving him notice to appear and make his defense is an interference with him in his office, or disturbance of his rights which may be restrained by injunction.

2. That admitting said act to be constitutional, the charges preferred against the plaintiff by Sutten and Dorsch do not upon their face import "official misconduct," and therefore the governor is powerless to act.

These two propositions were argued with great force and vigor by the distinguished counsel for the plaintiff. It is not necessary for me to recapitulate the argument. It has already been published in the daily press. But it seems to me that the questions material to this case have already been determined by the district court of this county in the case of Hogan v. Sutten, *ante* 644 and 6 Dec. R., 786; the case of another member of the same board against whom charges of official misconduct were preferred and upon which he was tried and removed by the governor acting under the authority of this statute. That case was thoroughly tried by counsel and fully considered by the court. It necessarily determines the law for me so far as it applies. It does not appear in the printed report that the constitutional objection to the law was reversed or considered by the court. But I am assured by the counsel that it was, and I must

presume that all questions necessary for the result given were considered and determined. I must, therefore, hold for the purposes of this hearing that the act is constitutional to the extent of the power conferred upon the governor.

But what constitutes official misconduct is not so easily answered. In the Hogan case the commissioner used gross profanity at a regular meeting of the board, and otherwise behaved in a furious and boisterous manner. The governor considered this official misconduct, and the district court were of the same opinion.

The charge that Col. Weber was at a board meeting so much under the influence of intoxicating drink as to unfit him to discharge his duties is undoubtedly a serious charge. But it is due to him to say that eight witnesses besides himself have been produced, who were at that meeting, who saw him, talked with him, sat near him, and had every possible opportunity to observe and know his condition, and they all say that the charge is not true. On the contrary, both Sutten and Dorsch say that this charge is true, and Mr. Dorsch, being asked why he considered him intoxicated, answered, "By the way he conducted himself and treated him." This is all the testimony that has been produced before me on the subject. As to all the other charges, it seems to me it must depend upon all the surrounding circumstances how they ought to be considered. There may have been such aggravation in the surrounding circumstances as to constitute some of his alleged acts of misconduct. Or, they may have been meritorious, being honest, but perhaps somewhat boisterous efforts to fill the existing vacancy in the board, secure harmony and efficiency among the police and cut off unnecessary expenses.

But it is claimed by the defendants that I am not to consider the truth of these charges, nor determine whether they constitute official misconduct. I am of the same opinion.

By the provisions of the act the governor is to try these charges, and like any other officer or board exercising judicial or quasi judicial powers, he must determine when each case arises whether the case itself is within the statute; whether he has jurisdiction to act; also the kind and weight of proof to be adduced. The legislature has left it to his discretion what is misconduct in office. It has undoubtedly been thought that the high character of the office he holds, the most conspicuous in the state, with the law officer of the state to advise with, would be a sufficient guaranty of a fair and intelligent trial, and an honest and impartial judgment. Such being my views of the law as applicable to this case, I overrule the motion for an injunction.

Matthews, Ramsey & Matthews, and Warner M. Bateman, for plaintiff.

Hoadly, Johnson & Colston, for defendants.

NEGLECT IN PROTESTING A NOTE. 791

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

WHITE V. THIRD NATIONAL BANK OF CINCINNATI.

It is not *ultra vires* for a national bank to agree to receive a note for collection or protest if not paid, and if it neglects to protest it is liable on the contract, though there was no consideration therefor, the owner having relief on the bank's voluntarily undertaking to do it.

On demurrer to the petition.

HARMON, J.

The plaintiff alleges, that he was a depositor of the bank and left to it a note to be collected, with instructions to protest it if not paid; that the bank received the note and undertook its collection, but so negligently managed the matter that the plaintiff lost his right to proceed against the indorser, and that the maker is insolvent.

The defendant demurs, claiming that the bank had no authority to make a contract to collect a promissory note or to have it protested; that if it could make such a contract, no consideration was alleged for the undertaking.

To the question of it being *ultra vires* for a national bank to make such a contract, the tendency of the decisions in this country is to apply the doctrine of estoppel *in pais* to executed contract, although in the case of a corporation it may apply to an executory contract. In this case the bank undertook to collect his note and take proper steps to charge the indorser. The other party has parted with the possession of the note to the bank until the time has gone by for charging the indorser, and the bank is estopped to deny its right to undertake the collection. The court did not find it necessary to apply this doctrine in the present case because in its judgment the undertaking was not beyond the power of the bank.

It was claimed by counsel for defendant that the things a national bank is authorized to do being mentioned in the statute, and such an undertaking as this not being one of them, the rule *expressio unius est exclusio alterius* applies. In addition to the things specified, however, the statute confers on the bank all powers incidental to carrying on a banking business, and in the opinion of the court, the taking of a note from a depositor for collection and protest is clearly incidental to a banking business. The powers specified in the statute are not, in the judgment of the court, intended to be an enumeration of the incidental power conferred thereby, but are the direct powers by which the banking business is to be carried on. This view seems to have been taken in the case in 50 Vermont cited by counsel.

But assuming that the bank had power to make the contract, it is objected that there was no consideration therefor. If the contract were executory, the objection would be good. But the law is as old as Lord Holt's time, that where a party voluntarily promises and undertakes to do a thing, he is liable for negligence in doing it, although he was under no obligation to undertake it. Such was the decision in the case of Coggs v. Bernard, where the defendant undertook, without consideration, to transfer certain wine casks, and he did it so negligently as to damage the plaintiff. He was held liable in an action of assumpsit upon his agreement. That action was not, as claimed by defendant's counsel, an action of tort, but an action on the contract. The bank in this case was under no obligation to undertake the collection of this note, or the fixing of the indorser's liability; but having undertaken it, and thereby induced the trust and confidence of the defendant to his damage by its negligence, this, as decided in the case referred to, is a sufficient consideration—a consideration not of benefit to the defendant, but of harm to the plaintiff.

Demurrer overruled and ten days' leave to answer.

W. T. Porter, for plaintiff.

King, Thompson & Maxwell, for defendant.

[Hamilton District Court, 1879.] 803

McCOWN, ADMR., v. WEISKITTLE.

For this opinion, see 6 Dec. R., 805 (s. c. 8 Am. Law Rec., 303).

[Cuyahoga Common Pleas, September Term, 1879.] 834

MAX E. SAND v. ANNA M. SIRL.

For this opinion, see 4 Dec. R., 533 (s. c. 2 Clev. Law Rep., 329).

[Hamilton District Court, August, 1879.] 848

BARBARA SCHULTZ v. HOME LIFE INS. CO.

For this opinion, see 6 Dec. R., 808 (s. c. 8 Am. Law Rec., 306). It was reversed by the supreme court. See opinion, 40 O. S., 217.

[Hamilton District Court, August, 1879.] 850

JOHN M. MULLER v. JOHN G. FRATZ, TREAS.

For this opinion, see 6 Dec. R., 811 (s. c. 8 Am. Law Rec., 310). It was affirmed by the supreme court. See opinion, 38 O. S., 397.

[Hamilton District Court, August, 1879.] 851

G. H. FRIEND v. L. S. BROWN.

For this opinion, see 6 Dec. R., 809 (s. c. 8 Am. Law Rec., 308).

[Hamilton District Court, August, 1879.] 852

IVES ET AL. v. STRICKLAND.

For this opinion, see 6 Dec. R., 810 (s. c. 8 Am. Law Rec., 309).

[Hamilton District Court, August, 1879.] 885

J. W. SIBLEY ET AL. v. W. W. ELLIOTT, EXR.

For this opinion, see 6 Dec. R., 804 (s. c. 8 Am. Law Rec., 301).

898 REMOVAL OF CAUSES—BONDS.

[Fulton Common Pleas, October Term, 1879.]

SWAN, ROSE & CO. ET AL. V. MANSFIELD, COLDWATER & LAKE MICHIGAN R. R. CO. ET AL.

1. A bond for removal of a cause into the United States courts may be sufficient, though not signed by the applicant.
2. Where one of several defendants only can apply for removal of the cause to the United States courts, the other defendants being too late in their application, they having been served with summons, and issue having been made as to them several terms before, such defendant removing the cause removes it as to the other defendants also; it will not be split.

Opinion of the court on petition of the Mansfield, Coldwater & Lake Michigan railroad company, defendant, to remove said cause into the circuit court of the United States.

MOORE, J.

This cause was heard upon a petition on the part of the defendant, The Mansfield, Coldwater & Lake Michigan railway company, for removal to the United States circuit court. The suit was brought against two corporations. The Ohio corporation being the rail*way* company, and the consolidated company being the rail*road* company. Service was had on the defendant railroad company, and answer was filed and trial had, as to it, before referees, and judgment entered on the report. Service was supposed to have been had on the railway company, assessment of damages made by the jury, and judgment entered upon that verdict. The district court, it appears, has reversed both of these judgments.

It is not necessary, nor do I know that I can state fully the grounds of that reversal as to the railroad company. But as to the railway company, it was because no service had been had, and there was no jurisdiction of the court; it had neither come in voluntarily or been served with summons.

It is claimed, on the part of the plaintiffs, that there was an amended answer filed which made an appearance on behalf of the defendant, the railway company. But when we came to examine that answer, we find that it was filed before the adjudication of the district court on the petition in error, and judgment was taken against it in the common pleas court; and it was really an answer of the other defendant, in which it set up some rights of the railway company; so that we find this company first in court now, upon its voluntary appearance.

The petition for removal sets up the necessary averments required under the statute, and accompanies it with a bond such as is required. As to the sufficiency of the bond, which is urged here finally as against this application, I have simply this to say: That it is usual for the attorneys of corporations to sign the corporate name by them as attorneys of record. I know that in appealing from the common pleas to the district court, and from the district court to the supreme court, such has been the practice. But if it were not signed at all by the railroad company, I think it would answer the requirements of the statute, and so hold.

Again, it is very strongly urged as against this application, that the matter has been determined; that it is *res adjudicata*, first by determina-

tion of the United States court in 1873, when these plaintiffs commenced suit in that court to recover upon this very cause of action which it now prosecutes. That was not a determination upon the removal of a case from the state court to the United States court, but it was a determination of the United States court under a statute giving jurisdiction to that court of a suit or cause of action, and it was prior to the passage of the act of 1875; so I cannot see thot the determination of that court upon the statute which gave it original jurisdiction of the case, is a determination now under the statute passed since that time, and on which it provides jurisdiction by removal.

It is urged secondly, that because the United States court in the case of Scott and Cass against these defendants, on the foreclosure of a mortgage, dismissed these plaintiffs from the action, it thereby ruled against the jurisdiction. After having been made parties on their own motion, they moved to oust the jurisdiction of the court. The court then dismissed them, and retained its jurisdiction of the case. Had the motion been granted upon an application of that kind, it appears to me it would not have been such a determination as this court would like to have followed.

Third, they say that this defendant, the railroad company, went into the United States court from this court upon its application for removal, and a determination was had upon this case then and there, by that court. If I understand aright, that application for removal was made after trial had upon issues joined between the plaintiffs and the railroad company, judgment entered and the judgment reversed in the district court, and upon the ground that an amendment to the petition had been filed which made a new and distinct cause of action; and the claim on the part of the defendant was that it made, virtually, a new case for the court. The United States court held otherwise, and that the application was made in time. So I cannot see that the question presented to this court has been determined by the United States court.

It is argued further, that this application must be made at or before the term of the United States court at which the cause could be first tried, and before the trial. This is unquestionably the statute, and it makes the real question in this case. To sustain the position of the plaintiffs, it is argued the defendant, the railroad company, inherited the rights and liabilities of the railway company; that the railway company is simply a corpse, the shade of a corpse—to use the language of the attorney, "the shade of a shadow of a corpse"—that is, that the rights and liabilities of the latter defendant, the railway company, became merged in the railroad company by the act of consolidation, and to such extent as to lose its identity and being, and, if so, the railway company could be nothing more than a nominal party. I did not examine the statute, but my recollection of it—and it appears to be admitted here—is, that it keeps the corporate existence in being and intact; I apprehend to make it responsible to its creditors. That certainly seems to have been the view taken of it at the time of the commencement of this suit. It was made a party to the suit. Frequent efforts were made to procure service upon it. After it was supposed that service had been obtained, and it had been brought within the jurisdiction of the court, an assessment of damages was had, a judgment rendered against it for half a million of dollars. That was certainly a strange proceeding to take against a thing which was dead, which had no existence, which was entirely lifeless and irresponsible. But such were the proceedings had of this court, and whatever may be the result, what-

ever there may be of that corporation as an existing thing, there may be some very serious rights back of it that would involve the stockholders of the corporation upon a judgment; so that it appears to me that I cannot sustain the position taken as to the condition of that corporation.

We still find that although service had not been had, and these proceedings all had, this case was not dismissed as to that railway company. If it had not voluntarily entered its appearance, service could have been had upon it and it could have been made to answer. But it now comes in, as it has a right to do, and enters its appearance by answer, and asks affirmative relief by reason of the acts of the plaintiffs in the non-fulfillment of the contract which is set up in the petition.

The case cited by the plaintiffs in the Central Law Journal, p. 286, decided in the United States circuit court for the District of N. J. in August, 1879, determines this, and I read but the syllabus: "Where an equity case is pending in a state court for several years after issue joined, and has not been brought to hearing in consequence of the neglect of parties to enforce the rules of the court for the taking of testimony: *Held.* that the petition for removal was filed too late when the case could have been first tried under the local laws and practice at several terms before the filing of the petition." Now, if I understand that case aright, and I read it to some extent, the case had been at issue for several terms before the application for removal was made. The note from Dillon, pp. 5, 6, 9, virtually establishes the same thing, and again in Taylor v. Rockfeller, vol. 7 Central Law Journal, p. 349, we find the same rule laid down; that upon the question of law, it strikes me, there can be no dispute, and the enquiry now is: Has the petition for removal been filed in time? And that leads us to the further inquiry, as to what is the first term at which a case can be tried? I think it may be well understood to mean the first term after service is had, or the appearance of the defendant is entered, and the issues made up or required to be made up; that would be the first term in which a case could be tried.

In this case, the district court has held that no service was had upon the defendant railway company, and it only entered its appearance in October, 1879; and this is undoubtedly the first term at which the case could have been tried after the issues were made up.

Counsel will recollect the case of Stapleton, adm'x., v. Reynolds et al., (U. S. D. C.) I will read very briefly from the opinion of Judge Swing in that case, beginning in p. 250.

"'The record shows that as to all the defendants, except W. B. Shute, the cause was at issue before the June term of the superior court; and if a separate trial could have been had as to each defendant, such trial could have been had at a term before the June term at which the removal was made; that no such trial was demanded or claimed by either party, until the defendants were all served with process and issue joined as to each of them. The record also shows that but two of the defendants joined in the petition for the removal of the suit.

"That the suit was removal by the defendant, W. B. Shute, I think clear from the provisions of the act of March 3, 1875, regulating the removal of causes to the circuit court of the United States; the act, after providing that the amount in dispute shall exceed, exclusive of costs, the sum of five hundred dollars, and shall be between citizens of different states, says: 'and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and

which can be fully determined between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the circuit court of the United States for the proper district."

"The record shows that the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars; that it is wholly between citizens of different states, and can be fully determined between them, and that W. B. Shute is actually interested in the controversy. Possessing all these requisites, the defendant, W. B. Shute, and this suit are already brought within the express language of the act.

"The defendant, W. B. Shute, having removed the suit, what was the effect of such removal upon the other defendants?

"The language of the act is, 'may remove said suit.' The suit in this case is against the defendants jointly, and is an entirety, a single cause of action; and if the suit be removed, no part of it remains in the court from whence the removal was made. But a subsequent section of the act, after providing for the steps which must be taken by any one of the defendants entitled to remove the suit, to-wit: the filing of the petition and bond, says, 'it shall be the duty of the state court to accept said petition and bond, and proceed no further in said suit. The suit having been removed to the circuit court, such court obtains full jurisdiction of the entire subject-matter, and of all the parties thereto, and can fully determine the controversy between all the parties to the suit. To give the construction contended for by plaintiff would divide the suit, placing a part of it to be tried in one court, subject to its rulings and decisions in the trial, and a part of it in another court, whose rulings and decisions might be entirely at variance, and increasing greatly the costs and expenses of the litigation; this would be contrary to judicial policy, and such a construction as could not have been contemplated by the makers of the law. In the judgment of the court, therefore, the entire suit was, upon the petition of defendant Shute, removed into this court, and it was not necessary to such removal, that the other defendants should have joined in the petition for removal. The motion to remand is therefore overruled."

As in this case, it was at issue as to all the defendants, except one, prior to the time of the application made for removal, and a term of court had passed before the term at which the petition was filed. It was a case that could have been tried before as to all the defendants, except the one asking the removal. That appears to be the holding of Judge Swing.

And, lastly, it is urged that the reason of the rule of law being, that the state court or tribunal would be prejudiced towards the citizen of such state, that, hence, he should not have the benefit of the legislation.

However good this reasoning may be, the legislature has evidently overlooked it in the statute of 1875, for it gives the right of removal to the citizen of the state as well as to the citizen of another state. There can be no dispute upon this point.

It is urged further to some extent, that the plaintiffs continued a partnership, doing business in Ohio, and, as such, the partnership was a citizen of the state. Now, a corporation is a creature of the law, made so by legislation; it becomes a citizen of the state by virtue of that; but a mere partnership composed of individuals, it appears to me, could not claim any such right; so that, looking at this case as I have—and I have taken considerable pains with it, for the reason that it has been in the

United States court before on another petition—I must come to the conclusion, and I can come to no other, that the defendant railway company has made its application, or filed its petition and bond in time. We do not any longer split these cases. If it has a right to go up, it takes the whole cause with it to the United States court. The court is not responsible for delay in this case. If parties come into court they must submit to the delay of the law. It is the law and not the court that makes the delay.

There is another matter connected with the hearing of this case. It strikes me if we proceed to hear it, it would be doing almost a vain thing; because, if the party filing this petition has a right to take the case to the United States court, and have that court take jurisdiction of it, it seems to me that to hear it here would, as I said, be in vain. So that, it being a question to be determined by the United States court, as it is held by the authorities, we should not proceed. It is an entirely different question from the one which has been presented to the United States court and been adjudicated upon; and taking either view of the case, I think that the order asked should be made, and the case should go at least for the determination of that court upon the question made; and the entry can be made up accordingly.

C. H. Scribner, in support of the petition for removal, cited Dillon on Removal, p. 12, note 16, 21, 22, 25, 26, 27, 28, 29, 30, 57, 62, 63, 65, 66, 67, 68; Taylor v. Rockefeller, 7 Cent. Law Journal, 349; Girardey v. Moore, 4 Amer. Law Times, N. S., 387; Stapleson v. Reynolds, 1 Weekly Cincinnati Law Bulletin, 249; Wormser v. Dahlman, 7 Reporter, 740; New Jersey Zinc Co. v. Trotter et al., 17 Am. Law Reg., N. S., 376.

L. A. Russell, *contra,* cited Dillon on Removal, pp. 16-56-7, notes; Fulton v. Golden, Cent. L. J., Oct. 10, 1879, p. 286; 1 S. and C., Statutes, 327-8.

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908 PARENT AND CHILD—COMPENSATION FOR SERVICES.

[Hamilton District Court, 1879.]

JOSEPH F. FINCH v. ANNA M. FINCH.

The rule that the relation of parent and child repels the presumption that services rendered by the child after becoming of age are in expectation of payment, applies in case of an adopted child, designated as heir-at-law of the husband, rendering services to the widow, and the burden is on him to show an express or limited contract.

ERROR to the Court of Common Pleas.

Plaintiff in error was plaintiff below.

He had been brought up by the defendant and her husband as their son, although not in any way related to them, and when five years old had been designated as heir-at-law of the husband, in accordance with the provisions of the act of April 29, 1854. (S. & C. 506.) After the death of the husband, which happened a short time before plaintiff was twenty-one, he continued to live with defendant, working her farm on which they lived, and for the value of these services during the three or four years he remained there after becoming of age, his action was brought. The court found for the defendant, finding as a fact that plaintiff had lived with defendant as her son, sharing the products of the farm in common with her, as their only means of support.

AVERY, J.

The relation of parent and child repels the ordinary presumption that services rendered are in expectation of payment. Nothing less than an express promise will enable a child to recover from a parent, because nothing less will suffice to remove the presumption that affection rather than interest had prompted the services. Smith v. Milligan, 43 Penn. St., 107, 109. And so usual and natural is it for children to continue to work for their parents, after arriving at full age, that the law implies no contract, even in that case. Poorman v. Kilgour, 26 Penn. St., 372; Herzog v. Herzog, 29 Penn. St., 465.

This rule has been held to extend to grandparent and grandchild, Duffey v. Duffey, 44 Penn. St., 399; sister and brother, Hall v. Finch, 29 Wis., 278; uncle and nephew, Defrance v. Austin, 9 Penn St., 309. It has been held, likewise, in the case of step-parent and step-child, Williams v. Hutchison, 3 Const., 312; Lantz v. Frey, 14 Penn. St,. 201. It is otherwise in the case of uncle and niece by marriage, (Gardner's adm'r v. Heffley, 49 Penn. St., 163); and of father-in-law and son-in-law, Wright v. Donnell, 34 Tex., 291; Amey's Appeal, 49 Penn. St., 126. And where a daughter recovered against her step-father for domestic services performed after the death of her mother, the verdict was permitted to stand. Meller v. Lanagan, 6 Phila., 232.

From this it is argued that some relation of blood or affinity is required, affinity being defined to be the relation between a husband and the blood relatives of his wife, or the wife and blood relatives of her husband. 1 Denio, 25; 2 Barb. Ch., 331. And attention is called to the fact that here there was no relation.

The cases, however, do not support the distinction. Where the rule prevailing between parent and child is extended to remoter degrees, it is not because of the relationship in itself, but because in the particular case it has happened that the position of parent and child were assumed. The same result follows the assumption of the relation of husband and wife, although without marriage. Swires v. Parsons, 5 W. & S., 357.

When an infant is taken into a family and brought up, the presumption always is that neither its support nor its services are to be paid for, except as one compensates the other. Thorp v. Bateman, 37 Mich., 68 The case of Hauser v. Sain, 74 W. C., 552, is not an exception to this, since there the grand-daughter did not go to live with her grand-father until after she was of full age. The case of father-in-law and son-in-law is likewise the relation of adults; Miller v. Lanagan was rested not upon any principle of law, but upon the verdict which enabled the court as it thought, to make certain inferences of facts. The rule relating to children by blood applies equally to children by adoption. Mountain v. Fisher, 22 Wis., 93. Here the finding of fact is that the plaintiff had been brought up from the age of a year and a half by the defendant and her husband, as their son, and that he continued after her husband's death to live with the defendant as her son. Having been received into the family as a child, during infancy, although not of kin, the burden of proof was upon him to show, either an express contract for wages, or circumstances from which a contract could be implied. Tyler v. Bunington, 39 Wis., 376. That this was not shown appears from the findings and judgment.

Judgment affirmed.

Stallo & Kittredge and Joseph Wilby, for plaintiff in error.

I. J. Miller, for defendant in error.

909 [Hamilton District Court, August, 1879.]

T. SCHNEIDER v. EUGENE BUCKLEY.

For opinion, see 6 Dec. R., 826 (s. c. 8 Am. Law Rec., 357).

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910 AMENDMENT—VERIFICATION.

[Hamilton District Court, 1879.]

CONSOLIDATED STREET RAILROAD CO. v. HENRY BARLAGE.

Permitting a plaintiff to amend during trial by interlining, without new verification by stating that the injury sued for was without his negligence, is no injury to the defendant justifying reversal.

Petition in Error to the Court of Common Pleas.

Cox, J.

The action was brought to recover damages for injuries sustained to a horse belonging to the defendant by the running of a tongue of one of the street cars into its side. During the progress of the case the court below permitted the defendant in error to amend his petition by inserting by interlineation that the injury was without his negligence, the amendment being made without a new verification.

The court held that no substantial injury was done plaintiff in error by permitting the amendment. After verdict rendered the plaintiffs in error moved for judgment *non obstante veredicto* and also made a motion for a new trial. The motions were overruled. The plaintiffs in error claimed there was error in both these rulings. The testimony showed that the plaintiffs in error were not responsible for negligence; that the accident was a casualty that could not have been avoided. Both motions should have been granted.

Judgment reversed.

Stallo, Kittredge & Shoemaker, for plaintiffs in error.

J. L. B. Bogardus, for defendant in error.

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911 HUSBAND AND WIFE.

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

†JOHN A. HAMILTON v. AMELIA H. LEAMAN ET AL.

A married woman giving a note and mortgage on a particular piece of her separate estate (in this case, to secure the purchase money and the proceeds of foreclosure, leaving an unsatisfied balance), negatives an intention to charge her separate estate generally.

HARMON, J.

The claim of the plaintiff is that Amelia H. Leaman bought property from him, and gave her two notes and mortgage for part of the purchase money, and the mortgage being foreclosed and failing to pay the purchase money, he brings suit to recover judgment on the note, alleging that the

†This decision was criticised in Hubbard v. Harris, 4 Dec. R., 577 (s. c. 2 Clev. Law Rep., 403). A contrary decision may be found in Avery v. Van Sickle, 35 O. S., 270.

defendant was a married woman at the time she made the note, but that she charged her separate estate for the payment.

The court remarked that the only evidence was as to the execution of the notes, and that it was secured on part of the real estate of the defendant, on which it was made an express charge. It was claimed by the defense that to entitle the plaintiff to recover he must show facts—as in the case of Levy v. Earl—which raise the necessary implication that she intended to charge her general real estate, or make out that it would be just in equity it should be so charged. One circumstance that will make it just would be that otherwise no means were provided for its payment. Where a married woman gives a note and does not expressly charge her separate estate the court will not presume an intent to do so. In this case, L, the defendant, gave a mortgage on a particular piece of property to secure the note; and while no authority had been cited, and he (Judge Harmon) had not been able to find any, it is clear to his mind on principle that where a married woman's note is specifically charged upon part of her separate estate, the intention to charge her general estate is completely negatived.

Judgment for defendant.

Francis Lampe, for plaintiff.

Henry Snow, for defendant.

LOANING MONEY TO AN EXECUTRIX. 911

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

GEORGE VELDMAN v. HERMAN LINDEMAN ET AL.

One who loans money to an executrix to save the estate from forced sale by paying off claims which she had transferred to him, a security can recover such loan from the estate.

On demurrer to the petition.

HARMON, J.

The petition alleged that Bernard Eichnoder died, leaving his widow sole devisee and executrix under his will; that certain creditors becoming clamorous for payment of their claims, and the executrix being desirous of saving the estate from loss by a sale, obtained money from the plaintiff to pay off certain of these claims, which were transferred to the plaintiff. The widow, having married again, the defendant was appointed in her place as administrator, and having rejected the claim of the plaintiff, he brings this action to enforce payment of the claims. It was contended by the defendant that the executrix had no authority to borrow money, and that all she could do was to pay off from the assets in her hands. The plaintiff claims he has the same rights as the creditors whose claims he holds.

It has been decided that an administratrix has no right to borrow money to carry on the business of the deceased, and although the running of the business paid off the debts, it gave no right of recovery to the parties loaning the money. In this case the money was borrowed to buy the claims, and they were transferred to the plaintiff, who still holds them. The court was unable to say that he had not the same rights the

original owners had. This court has decided, Licht v. Behrens, 2 Sup. Ct. Rep., that the estate is liable for money borrowed by the executrix to pay off debts, though the supreme court in the same case on error declined to pass upon this question, Dodge v. Bank, 20 O. S., 235. This case does not go so far. Plaintiff's claim is upon claims against the estate. Transferred to him, no fraud being charged, the executrix had the right to do as she did. The facts being admitted entitled the plaintiff to a judgment.

G. Tafel, for plaintiff.

George Lindeman and L. R. Von Seggern, for defendant.

912

JUDICIAL SALES.

[Hamilton Common Pleas, August, 1879.]

DAVID BANNING v. H. R. PENDERY ET AL.

That a judicial sale was made on election day, and sold at two-thirds of the appraisement, is sufficient ground to grant a motion setting it aside.

SMITH, J.

The motion was made on the ground that the appraisement was too low, and that the property sold for less than half its value. The plaintiff claimed that the motion to set aside the appraisement was not presented until long after the appraisement was made. The sale was made on election day.

The court found no sufficient reason for setting aside the appraisement, but was of the opinion that the sale should be set aside. The sale took place on election day, a day on which citizens would not be expected to be at the court house bidding on property. It was the day of the annual election; the election was known to be an exciting one, and the day was not a proper day for the master to fix for the sale of property. As well might the master fix on the day of the annual Thanksgiving or the 4th of July. It turned out that the property was bid in by the mortgagor for two-thirds of the appraisement. It appeared from affidavits of well-known citizens that the property was valued at $16,000 by witnesses, but it was bought for $7,000. This was an injustice to the debtor.

Sale set aside.

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932 [Cuyahoga District Court, March Term, 1879.]

JAMES BOHASLAV v. STANDARD OIL CO.

For opinion, see 4 Dec. R., 537 (s. c. 2 Clev. Law Rep., 337). It was affirmed by the supreme court, on authority of 24 O. S., 83, without report, November 28, 1882.

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935 [Hamilton District Court, 1879.]

A. S. MILLS v. LIFE ASSOCIATION OF AMERICA.

For opinion, see 6 Dec. R., 827 (s. c. 8 Am. Law Rec., 358).

LIFE INSURANCE—MISREPRESENTATIONS. 935

[Hamilton District Court, 1879.]

†ALICE PENNISTON v. UNION CENTRAL LIFE INSURANCE CO.

1. A life insurance broker, who receives a percentage from the agent of the company for risks brought, is the agent of any person who employs him to obtain insurance, and the assured is responsible for a false answer by him that no other company had refused to insure the applicant.
2. Where an answer in an application for life insurance made a warranty, to the question, "Is there any insurance now on your life?" fails to divulge a certificate in a mutual protective association, this is no breach.

Petition in Error to the Superior Court of Cincinnati.

COX, J.

Plaintiff brought suit to recover $5,000 upon a policy of insurance issued to her on the life of her husband, John P. Penniston. At the former trial, after the plaintiff had rested her testimony, the defendant moved the court to overrule the testimony as insufficient to sustain the suit, and the court sustained the motion, and directed the jury to find for defendant. Error is assigned in this. One Cross was the agent of the defendant. Mr. Wilson, a third party, was an insurance broker. He was paid a percentage by the agent of the company on first premiums. He was not the agent of the life insurance company, but was the agent of any person who saw proper to employ him to obtain insurance in any company. Wilson made application on behalf of Penniston, to Cross, the agent of the company. Among other statements in the application were these:

Q. Is there any insurance now on your life? A. Yes, sir; in the St. Louis Life Ins. Co., for $10,000.

Q. Has any company ever declined to grant an insurance on your life? A. No.

These representations were made warranties by express terms of the policy. It was claimed by defendant that plaintiff's own testimony showed that the deceased also had an insurance of $5,000 in Chicago. The court, however, found that this Chicago association was not a life insurance company within the meaning of the language of the application. It was simply a mutual association, formed by a number of persons agreeing to pay an assessment on the death of either of them.

The question raised by the second question and answer above, however, was more serious. It appeared from the testimony of Wilson, the broker, that he answered in the application, on behalf of Penniston, that no other company had declined to insure the deceased. The court found from the testimony that Wilson was solely the agent of Penniston; that he had at the time of making this application, knowledge that an application by Penniston for insurance to the Brooklyn Life Ins. Co., and also to the Charter Oak Life Ins. Co., had been declined. The answers being made warranties, the falsity avoided the policy.

Judgment affirmed.

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†See also another report of the case, 6 Dec. R., 830.

This judgment was affirmed by the supreme court commission April 15, 1884. The court published the following syllabus of the opinion, but the decision was never printed:

GRANGER, J.

1. The rule that notice to an agent is notice to the principal may be abrogated as between parties to a contract by stipulation to that effect.
2. A stipulation in a contract made by parties uninfluenced by misrepresentation or fraud, and with full knowledge that one party shall be absolutely released in case a statement made by the other shall be found to be not in all respects true, is valid, and must be enforced, where it does not affirmatively appear that the party making said statement, with reason, believed it to be true.

951 COMMON CARRIER—EXPULSION OF PASSENGER.

[Williams Common Pleas, 1879.]

RICHARD A. HASKINS v. L. S. & M. S. RY. CO.

1. A railroad ticket from T. to E. entitles the passenger to ride to E. on any train that stops at E. But he has no right on any train that stops short of or beyond, but at E., without paying a separate fare, and the conductor should not take up his ticket, and eject him, but should demand a cash fare, and on refusal, eject him. Taking up and cancelling his ticket waives the condition, and entitles him to stop at E. on that train unless the passenger has actual notice that the conductor has no authority to stop at E.
2. If the conductor proposed to the passenger as a condition of the cancellation of the ticket, that he should ride to the point short of E. and stop there, and the passenger gives the conductor to understand that he accepts, neither party can disregard the agreement without the other's consent, and where the passenger, in compliance therewith, gets off at such point, and gets on again, refusing to pay further fare, he may be rightfuly ejected.

Haskins alleges in his petition, that on the 10th day of August, 1878, he purchased of the defendant at Edgerton (a station on the Air Line Division of the defendant's road, sixty-four miles from Toledo), a ticket reading:

"The Lake Shore & Michigan Southern Ry.
Edgerton
To
Toledo & Return.

Good only for thirty days from date of sale, and for one continuous passage each way. J. W. CARY, Gen. Ticket Agent."

paying therefor; and on the same day rode to Toledo on the passenger cars of the defendant, which indicated one passage one way had been had upon said ticket by punching a hole through it; and on same day got on board another passenger train of defendant at Toledo, which train by its destination would, and did, pass through Edgerton. That to pay his fare to Edgerton he offered the conductor of said train said ticket, who took it, punched, cancelled, and kept it, and did not offer to return it to the plaintiff. That before reaching Edgerton, the conductor and other servants of the defendant, assaulted him and ejected him from said train, doing damage to his person and clothing, and leaving him in the night season at a point (Bryan Station) ten miles from Edgerton without fault on his part, and he asks $5,000.00 judgment.

The defendant denying that the conductor took said ticket for the plaintiff's fare to Edgerton, and did not offer to return it, and all injury answers that on the 10th and 11th days of August, 1878, it ran two trains daily, properly fit for passengers, from Toledo through Edgerton, that regularly stopped at Edgerton for the accommodation of passengers, and also a train known as "Number Five" or "Pacific Express" that did not stop at Edgerton, but at Bryan, ten miles east of Edgerton, and at Butler, Indiana, ten miles west from Edgerton; and that by the rules and regulations of the company, his said ticket was good only for passage each way on trains that ran directly to, and stopped regularly at the stations named thereon, as provided by the published time tables of defendant, and was

not good on said train "Number Five," from Toledo to Edgerton, nor for any part of the route, and they averred knowledge on behalf of the plaintiff of all the foregoing facts.

The defendant avers that on the morning of August 11th, 1878, the plaintiff, without knowledge of the defendant, seated himself at Toledo, in a car of said train "Number Five," and that at Airline Junction, two miles from Toledo, he was called upon by the conductor of said train for his fare, when he presented said ticket, and the conductor, before punching and cancelling said ticket, tendered the same back, and told plaintiff that train did not and could not stop at Edgerton, offered to let him off at Airline Junction without charge, and told him said train did not stop, and could not stop nearer Edgerton than Bryan on the east and Butler on the west, and if he continued on said train, he must leave the same at Bryan or pay twenty-five cents fare from Edgerton to Butler. That thereupon plaintiff agreed with conductor to ride to Bryan only on said ticket, and there leave the train; whereupon the conductor cancelled said ticket, and did carry Haskins to Bryan, at which place he refused to leave the train, or to pay fare from Edgerton to Butler, whereupon the conductor and other servants of the defendant lawfully ejected him from said train, using no more force than needful therefor.

The plaintiff replying, denied knowledge of the rules, order and regulations of the company, and denied the agreement set forth in the answer.

Verdict for defendant.

Kent, Newton & Pugley, Toledo, O., for plaintiff.

Pratt & Bentley, for defendant.

OWEN, J., (charge to the jury.)

The purchase by the plaintiff of the ticket described in the petition, entitled him to a safe and comfortable passage from Edgerton to Toledo, and from Toledo to Edgerton, upon any train which, by the regulations of the company, regularly ran to and stopped at the stations named upon the ticket.

Such ticket did not entitle him to passage upon any other train.

It was the duty of the plaintiff when purchasing his ticket, or before taking his seat in the cars upon his return trip, to inform himself of the published regulations of the company, for running its trains; and the fact that the ticket was sold to him, and that he was permitted to enter the cars on his return trip, without express notice or actual knowledge of the published running regulations of the company, did not entitle him to passage on such train, nor to require that the train be stopped at Edgerton, if it was not in accordance with such regulations of the company to stop such train at Edgerton; and it is admitted that it was not.

Whatever you may find the facts to be concerning the plaintiff's actual knowledge of the running regulations of the company, and of the train in question not stopping at Edgerton, he was charged with such knowledge on this subject as he could in the exercise of reasonable care and inquiry have obtained; and he cannot be heard to say now that he was ignorant of the regulations of the company for the running of its trains. For all the purposes of this case you are to regard the plaintiff as having had such knowledge.

It follows that the fact of the plaintiff's having purchased, and being the rightful holder of the ticket, did not entitle him to take passage at all on the train he boarded at Toledo.

When he tendered that ticket to the company—that is, to its conductor in charge of that train—upon the latter's call for "tickets," the company could rightfully have refused to accept it, and have demanded, in money, the plaintiff's fare from Toledo to any station where the train regularly stopped, and to which he desired passage; and in default of such payment, the company could have rightfully stopped the train and have ejected the plaintiff therefrom with such force as was reasonably necessary for that purpose, and no liability to respond in damages would thereby have attached to the company.

But that ticket entitled the plaintiff to a safe, speedy, comfortable passage from Toledo to Edgerton, and a safe landing there, on such train as by the running regulations of the company regularly stopped at Edgerton.

He had a right either to his ticket or his ride.

By boarding that train he became liable, like any other passenger without a ticket, to pay the company for every mile he was conveyed by it, but he did not thereby forfeit his ticket. That ticket did not entitle him to passage upon that train, but he was not, by reason of being the holder of it, an intruder or trespasser upon that train—that is, he was not wrongfully upon the train, because he held that ticket. The company had no right to take up and keep his ticket, and demand in addition thereto his fare in money to a station beyond Edgerton, and in default of payment of such fare remove him from the train. Such removal would in that case, entitle the plaintiff to damages against the company.

When the company took that ticket (for the conductor's act in taking it was the act of the company), cancelled it, kept it, so that it became lost or valueless to the plaintiff, it accepted it according to its terms, waived the regulations which it had a right to insist upon and enforce, and thereby and thereupon became liable to furnish to the plaintiff, on that train, passage to, and a safe landing at Edgerton, unless the surrendering of the ticket by the plaintiff and its cancellation and retention by the company were upon the terms (then mutually entered into, understood and agreed upon by the company and the plaintiff) that he should have passage to an intermediate station and there leave the train; or unless some other arrangement than stopping the train at Edgerton, was so entered into as a condition of such surrender and cancellation, in which case the company was justified in forcibly ejecting the plaintiff from the train if he persisted in remaining therein after arriving at, and departing from, such intermediate station, or otherwise refusing to observe the new arrangement.

If the company, through its conductor, proposed to the plaintiff, as a condition of the surrender of the ticket, and its cancellation, that the plaintiff should proceed to, and stop at Bryan, and the plaintiff purposely gave such conductor to understand that he accepted the proposition on these terms, this would constitute such new contract, no matter what the secret intention or mental reservation of the plaintiff may have been.

If such new arrangement was entered into, neither party could, without the consent of the other, withdraw his consent to it, or disregard it, and if the plaintiff voluntarily left the train at Bryan, in compliance with

such previous arrangement, and again mounted the train and refused on demand to pay fare to Butler, the company could rightfully eject him.

If, however, the conductor in charge of the train, and collecting fares and tickets upon it, had no authority to stop the train at Edgerton, and the plaintiff knew it, the surrender and acceptance of the ticket would not bind the company or the conductor to stop the train at Edgerton, or constitute a new contract, for passage to, and a landing at the latter place.

Such limitation, or qualification of the authority of the conductor, however, must be shown to have been brought within the actual knowledge or to the actual notice of the plaintiff, in order to impute to him knowledge of such want of authority on the part of the conductor to stop the train at Edgerton. He was not bound to know, nor charged with knowledge of such want of authority as he was of the published running regulations of the company. Knowledge of the contents of the framed card, given in evidence, did not involve knowledge of such want of authority on the part of the conductor.

If, however, the surrender, cancellation and retention of the ticket was unaccompanied and unqualified by any new terms, conditions, or arrangement mutually understood and agreed upon by and between the company (acting by its conductor), and the plaintiff, then the plaintiff was entitled to be conveyed to, and landed at Edgerton, on that train, and for his ejection therefrom, he is entitled to compensation at your hands.

If the evidence in this case, considered in the light of these legal propositions, satisfies your judgment that the plaintiff is not entitled to recover, then return your verdict for the defendant—remembering that the burden is upon the plaintiff of proving his case by the fair preponderance of the evidence before you; that is, by the superior weight and effect of the evidence.

If, on the other hand, you find that the probabilities in the case bear with the greater weight or force in favor of the plaintiff, then, by your verdict, fully compensate him for his injury.

You are not required to enter upon a mere, cold-blooded, mathematical calculation, in dollars and cents, of each item of loss and damage which the plaintiff sustained at the hands of the defendant; but you will award such full, fair and just sum as will reasonably compensate him for whatever bodily injury he sustained; for any bodily pain he suffered; for any disability—physical disability—from labor he incurred; for all injury to his clothing; for all loss of time; for any sense of humiliation and disgrace, or other injury to his feelings, in being forcibly ejected from the car in the presence of other passengers therein.

You may also take into account, in determining what sum will fairly compensate him, the fact that he is necessarily put to the expense of employing counsel, and other preparation for the prosecution of this case.

So much concerning compensatory damages. You are at liberty, in addition to such compensatory damages, to award the plaintiff such further sum as, in your calm, dispassionate judgment, will, as vindicative, or exemplary damages, serve as an admonition to all persons in the future, to avoid the commission of like wrongful acts.

The interests of the injured party and of the public are blended in this case, and you may not only compensate the plaintiff, but in a qualified sense, punish the defendant. Upon such sum as you may find the plaintiff entitled to, he is entitled to interest from the date of his injuries.

You are to take good care that your verdict shall be the calm expression of your cool, deliberate judgment, as reasonable and just men, and not the reflection either of your sympathies or your prejudices, and bearing in mind that in this court all parties are equal, no matter what their relative wealth or position may be, and that these parties may be regarded by you, as if they were two of your own neighbors, standing in all things equal before you.

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956 **REPLEVIN.**

[Hamilton District Court, 1879.]

†PETER F. STRIKER v. JOHN BEATTIE ET AL.

1. A replevin suit certified from a justice into the common pleas, on the value of the property being greater than a justice's jurisdiction, the plaintiff being in default in the common pleas for a petition, and the court thereupon finding the right of property to be in the defendant, and ordering the cause to be sent to a jury to assess damages: Held, on the trial of damages, it is not error to overrule a motion for leave to file a petition.
2. To enable the defendants to become actors and recover damages, some pleading on their part was necessary (cites Louden v. Clark, 2 Dec. R., 161, (s. c. 1 W. L. M., 598); the plaintiff, though in default, is entitled to a jury on such inquiry (Averill Coal Co. v. Verner, 22 O. S., 372). On such trial, the plaintiff may offer any evidence reducing damages, even to showing that they were entitled to nothing, because the right of possession is in plaintiff.

ERROR to the Court of Common Pleas.

Striker replevined a mare from Beattie and Joseph E. Heart, sheriff, in an action before a justice of the peace. The mare was appraised at $625.00, which, exceeding the jurisdiction of the justice, the cause was certified to court of common pleas. There Striker failed to file a petition, and the following order was made: "Upon default of plaintiff to file his petition, court find right and title to the property in John Beattie, as judgment creditor of Silas M. Anery, who was owner before property was levied on by sheriff, and court find right of possession was in Joseph E. Heart, sheriff, at commencement of action, for the use and benefit of said Beattie. Court orders cause sent to a jury to assess the damages sustained by defendants." At a subsequent term a jury was called and damages assessed, but the verdict was set aside by consent. Jury was then waived, and the court tried it. Before trial, motion by plaintiff for leave to file petition was overruled. Upon the trial, evidence that plaintiff was the owner and entitled to possession at commencement of action was excluded. Defendant's witnesses testified that the mare was worth from ten to fifteen hundred dollars; and this was all of the evidence. The judgment was for $1,015. Motion for new trial was overruled.

AVERY, J.

It was no error to overrule the motion for leave to file petition. It was a matter of discretion, and in the absence of a showing of abuse of discretion cannot be reviewed. Nor are we prepared to say that under section 183 of the Code, as in force before the revision, it was error to inquire into the property and right of possession, without impanelling a jury. In Latimer v. Motter, 26 O. S., 480, it was held a justice of the peace has power to make the findings and assessments of damages in replevin, the same as a jury, if one were demanded; and while the case

†A shorter opinion in this case appears in 6 Dec. R., 834.

was distinguished from Wolf v. Meyer, 12 O. S., 432, on the ground that before a justice, a jury is not required unless it is demanded, this applies as well to section 183, since by that section a jury is to be impanelled only upon demand.

The effect of finding the property and right of possession, and then sending to a jury for the assessment of damages, is however, a different question. The finding was not a judgment, since the damages remained to be assessed to enable the court to pronounce judgment. It was not a finding upon any chain or demand of the defendants, since no pleading whatever had been filed by them. Being against the plaintiff by default merely, it could not reach beyond what was the only consequence of the default, namely, that plaintiff was not entitled to possession, and yet that the case should not be dismissed, but should remain to enable defendants to become actors and recover their damages. Reed v. Carpenter, 2 O., 79, 88. For this purpose some pleading on their part was proper, and should have been required. Such has been the practice of the court of common pleas in this county, as well as elsewhere in the state. Louden v. Clark, 2 Dec. R., 161 (s. c. 1 W. L. M., 598). But if submitting to trial without objection on this ground was so far a waiver, the damages remained to be assessed. Although in default, plaintiff, upon this inquiry, was entitled to a jury. Averill Coal Co. v. Verner, 22 O. S., 372. This right of trial involved of necessity the right to offer evidence. Nor was it to be limited to questions of value, and all inquiry into the property and right of possession forbidden. Whatever would go to the question of loss to defendants by the taking, was competent, even to the point that they could have lost nothing, because of the property and right of possession not being in them, but in the plaintiff. Harman v. Goodrich, 1 Greene, Ia., 13. The property and right of possession had not been put in issue and decided, but the finding had been made upon default for petition. So where the plaintiff in replevin had become non-suit, it was held in an action on the bond, that he might show he was in fact the owner of the property. Wallace v. Clark, 7 Blackf., 298; Belt v. Worthington, 3 Gill & J., 247. And again, in a like action, where the process in replevin was wholly irregular and defective, and might have been dismissed without reference to the question of ownership, it was held that the principals on the bond, plaintiffs in replevin, might show that two-thirds of the interest in the property was in them. Bartlett, v. Kidder, 14 Gray, 449. The evidence offered by plaintiff, therefore, should have been admitted, and there was error in excluding it.

There was error also in overruling the motion for a new trial. The only evidence was the value of the mare, and the only showing of the interest of defendants was the finding of the right of possession in Heart, sheriff, for Beattie as judgment creditor. Without the finding there was no evidence of any title in defendants; and with it, the title being merely that of judgment creditor, there was no evidence of the amount of the judgment.

The judgment of the court of common pleas must be reversed.

Jordan, Jordan & Williams, for plaintiffs in error.

I. J. Miller, for defendant in error.

961 Tressel v. Longworth.

958 [Hamilton District Court, 1879.]

HENGEOLD & CO. v. JUSTINA GARDNER, EXECUTRIX.

For opinion, see 6 Dec. R., 822 (s. c. 8 Am. Law Rec., 352).

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959 [Hamilton District Court, 1879.]

MARY C. KENNETT ET AL v. REBHOLZ & CARR ET AL.

For opinion, see 6 Dec. R., 824 (s. c. 8 Am. Law Rec., 354).

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961 LANDLORD AND TENANT.

[Hamilton Common Pleas, 1879.]

†JULIUS TRESSEL v. NICHOLAS LONGWORTH.

1. A lessor leasing land in bulk to an association, who subdivides and deeds the lots to its members, or contracts to deed them on payment of the price fixed, the association becoming in arrears for rent, such lessor not seeking a forfeiture of the lease, but obtaining judgment for the arrears against the association, levying on the property and buying it in at the execution sale, stands in the shoes of the association, and has only the rights it had, and cannot oust and have a writ of possession against the lot holders.
2. If one leases a large tract of land, with an agreement to convey in fee the different lots into which it should be divided to the purchasers thereof, if the ground rent on the whole should be paid, and rent being due, brings suit to foreclose his lien for rent, and sell the whole, such other purchasers of lots as were omitted to be made parties to the foreclosure have the right to bring an action to redeem, and the right to redeem will be granted on payment of the amount due on the lease for which time (ninety days), will be granted.

SMITH, J.

The action grew out of the incorporation of the Undercliff Land and Loan Association No. 2, being brought for the purpose of restraining the defendants from causing a writ of restitution to issue, putting plaintiff out of the premises occupied by him, and for other relief. It appears that in 1874 the association leased a strip of ground on the Wooster turnpike, in the eastern part of the city, the land previous to the lease having been subdivided into 105 lots. The annual ground rent under the lease was $4,100, and the lease contained a privilege of purchase at $69,000. A large number of the lots were sold to different members of the association, who put buildings thereon. The association got behind in their rents to the defendants, the defendants even being compelled to pay taxes. In 1879 the plaintiffs brought suit to subject the property, including the leasehold and improvements, to the payment thereof. It was not an action of forfeiture. Judgment was obtained, and on the property being offered for sale, no one else bidding, the executors purchased the leasehold and the improvements, the sale being confirmed.

The plaintiffs alleged that the defendants are threatening to turn out of their tenements the various parties who purchased from the association, and to restrain them from doing this, as stated, this suit was brought. The plaintiff alleged that he had spent $1,100 in improving his lot, and that, not having been made a party to the proceedings in which the executors obtained their judgment and order of sale, his rights are not concluded by any action in that case, and he asks for an order enjoining the defendants from disturbing him until his rights are determined; and

†For decision of district court sustaining this opinion, see 6 Dec. R., 1100 (s. c. 10 Am. Law Rec., 480).

that if the sale be allowed, that the defendants be required, first, to sell the vacant property, and then the property in the order in which sales were made to the members, and of the improvements by the association.

The court held, with reference to the relief asked in the latter part of the petition, that it was clearly against the law and the rights of the defendants. The rent under the lease was assessed on the entire tract, and no purchaser or member of the association can come in on a claim to have his lot and building set off to him on his paying off the proportion at which the property was appraised, unless at the time a tender be made to the defendants for all arrearages for rent and taxes. That motion must be overruled.

The court, however, was of the opinion that a writ of restitution could not be issued under the decree so as to dispossess the plaintiff. He has an equitable estate in the house he occupies, having bought it and paid his money for it. As a member of the association he is a stockholder. But as between him and the association, equity would require the association to make him a deed in fee. The defendants having become the owners of the lease by purchase, stand in the shoes of the association; they have no right to remove the various occupants of the houses, simply by a writ of possession. The rights of the executors are not impaired, but exist as they always did. The rights, however, that grew out of the proceeding by which they became purchasers, gave them no further rights than the association had. The application to restrain the issuing of the order of restitution must be granted. The other will be refused.

Mallon & Coffey, for plaintiff.

T. M. McDougall, for defendant.

CRIMINAL LAW—EVIDENCE. 963

[Hamilton Common Pleas, 1879.]

STATE OF OHIO v. JAMES NUTTLES.

Crime cannot be inferred from proof of intent to commit it. Proof that accused discharged his pistol, and that he expressed an intent to shoot the person shot, in the absence of proof that he shot such person, or that the pistol was pointed toward such person, is not sufficient to convict.

C. J. Blackburn, counsel for defendant, moved the court to instruct the jury to return a verdict for the defendant, upon the testimony for state.

LONGWORTH, J.

I know of no way of administering justice in a criminal court except by administering the law strictly, just as it stands, without regard to what the circumstances in any particular case may be. If this man is guilty, he is entitled to the benefits of the law just as much as if he was innocent; if he is a bad man, he is entitled to the benefits of the law just as much as if he was a good one. The only rule for the court is to administer the law strictly upon each point as it arises, without regard to any outside questions, be their character what they may.

Now, you are perfectly right in saying that the court and jury are bound by their oaths to presume every man innocent until he is strictly proven to be guilty in a legal manner, pointed out by the law.

I started with, and still hold, therefore, the presumption that this man is innocent unless he is proved guilty. Now, the office of the court and jury is well understood at the close of the case. It is not for me to say whether the evidence adduced is true or not. That is for the jury to say; but it is the duty of the court to see what the evidence is, and what effect it shall have if it be true. If when the state has closed its case,

the evidence, admitting it all to be true, does not tend to prove the essential elements of the crime, then it is the duty of the court to arrest the case from the jury and instruct them to bring in a verdict of not guilty. If there is evidence tending to show the essential facts necessary to constitute crime, however slight it may be, it is for the jury to determine whether it be true or not, and what its effects shall be. The question, therefore, and the only question upon the motion is: Was there any evidence, even a *scintilla* of evidence, tending to make out the essential elements of the crime with which the prisoner stands charged in the first, second and third counts of this indictment?

Now, what are the elements of the crime? The statute provides that whoever maliciously shoots, stabs, cuts or shoots at, any other person, with intent to kill, wound or maim, such person shall be deemed, etc. The elements are these: He must do it with intent to kill, if he is guilty under the first count; or with intent to wound, if guilty under the second; or with intent to maim if guilty under the third count of the indictment. The law makes certain presumptions even against a prisoner, from certain facts proved. For instance, where an unlawful act is done under certain circumstances, the law steps in and presumes an intent, though the intent be not affirmatively proved; but I have never heard of a case where, from proof of the intent, the law will presume the performance of the act.

It is a maxim of law that the act and intent must both be proved to constitute a crime. The fact that you prove that a man shoots, will not make him guilty under this statute. The fact that you prove that he shoots at somebody will not make him guilty unless, as a matter of fact, he had the intent to kill, wound, or maim. From the proof that he shot and that he shot at somebody, the jury are at liberty to infer the intent. But from proof of the intent to kill alone the jury would not be authorized to infer that he shot.

Now, here we have proof tending to show that this man (the prisoner) shot his pistol off; that he discharged his pistol. We have evidence tending to show an intent on his part to kill from the expression: "You son-of-a-bitch, I will put the rest of it into you," or whatever the words were.

Now, is there any evidence tending to show that the pistol, at the time it was discharged, was pointed at the person of John Graham? That is the fact which must be proven affirmatively, and if there is no evidence tending to show that the pistol was pointed at him, then it is my duty to instruct the jury to find the defendant not guilty. It might be possible that the defendant, being about to be arrested because he had a loaded pistol in his hand on a public thoroughfare, fired the pistol off so that it would appear to have been empty, and so that he might claim it was not a deadly weapon. We can conceive a great many facts which would not be inconsistent with the evidence offered and be consistent with innocence on the part of the defendant of the crime charged in the indictment.

Now, the court is bound to presume that his intent was innocent; that his act was no crime, unless it is affirmatively proved that it was. I cannot see any evidence in this case to show that this pistol was pointed at officer Graham and discharged at him. Possibly it was; very likely it was; but where is the evidence? The evidence of Mr. Graham is that he approached the prisoner to take his pistol from him, and called upon

him to deliver up his pistol and go with him, and thereupon that the prisoner discharged his pistol. That is all; Mr. Graham did not say that he discharged it at him. Officer Maloney does not say so. Maybe he did so, or he may have discharged it in the air and, yet everything that Officer Graham has said be true. I cannot presume that he pointed it at him. I cannot presume it from his statement at the time, because that statement is competent only to prove an intent to kill on his part, and, as I said, from the intent you cannot infer the act. Possibly, as a matter of fact, very probably as a matter of fact, he did discharge it at Officer Graham with intent to kill him, but there is not a *scintilla* of evidence to show this, and I should be violating the laws if I were to guess at anything against the prisoner or presume, anything against him which has not been proved. I shall, therefore, have to grant the motion.

Counsel for defendant asked the court to instruct the jury to return a verdict for the defendant on the first, second and third counts of the indictment.

COURT:

Gentlemen of the Jury—You are relieved of all responsibility in this case. There is no evidence in this case to show what it is necessary the state should show in order to make out a case against this man. There is no direct affirmative evidence that he pointed the pistol at Officer Graham. As a matter of law he cannot be convicted unless that is the fact. There being no evidence tending to show this to be the fact, it is your duty to return a verdict of not guilty as charged in the first, second and third counts of the indictment. You will, therefore, return that verdict under the direction of the court, and the prisoner be remanded for sentence under the fourth count of the indictment.

Whereupon the jury returned a verdict in accordance with the instructions of the court.

EXEMPTION FROM EXECUTION. 986

[Hamilton District Court, 1879.]

JOHN G. LONG v. JAMES HOBAN.

1. No particular notice of a demand of exemption from execution in lieu of homestead is required, if it is in such form that it ought not to be misunderstood. It may be made any time before sale.
2. Where several members of a firm retire, and convey all their interest to a single member, he is entitled, as against subsequent attachments and judgments against all the former partners, to claim an exemption in lieu of homestead out of the assets.
3. Where a petition to recover for selling property selected by the debtor as exempt from execution in lieu of a homestead, states the necessary facts, and the answer alleges that the property is partnership property, and the judgment was against the firm, such new matter amounts only to a denial, and does not require a reply.

ERROR to Court of Common Pleas.

Action in the court of common pleas was against Hoban, a constable, and his sureties, for selling under judgment in attachment, six barrels French oxide of zinc, of the value of $108, claimed by plaintiff as exempt. Issue was joined by Hoban alone. Petition alleged plaintiff was

a resident of the state, head of a family, and not the owner of a homestead; that the judgment was against him, and the zinc was his property, and that before the sale he demanded it to be set off to him. Answer denied all allegations, except the fact of the sale and the service of notice of the demand, which it alleged was insufficient, and further alleged that the judgment was against the plaintiff and two others as a firm, and that the zinc was firm property. On the trial, plaintiff proved the necessary facts to entitle him, under the statute, to select as exempt, $500 in value, and put in evidence notice of his demand served four days before the sale. He also testified to the value of the zinc, and that it was manufactured by him, and was his property. Defendant offered no evidence, but rested on the answer and transcript annexed as an exhibit, from which it appeared that the attachment was against plaintiff, on the ground of a fraudulent transfer of property made or intended, and that judgment was against him and two others composing a firm, but not that the zinc was owned by the firm; on the contrary, that the firm had dissolved, before the attachment, and had conveyed all interest in the process or patent of manufacture to plaintiff. Judgment was for defendant.

AVERY, J.

The demand of exemption was sufficient in form. The notice described the property, and claimed to have set off out of it the amount to which in lieu of a homestead, plaintiff was entitled. The statute allowed the selection at any time before the sale. 70 O. L., 51. No particular form of notice was required. It was enough, if in such a form that it ought not to have been misunderstood. Keller v. Bricker, 64 Penn. St., 379. The other question is as to the pleadings.

If this were partnership property, there was no right of exemption. Gaylord v. Imhoff, 26 O. S., 317. The evidence showed it to be the property of plaintiff, but the answer alleged it was partnership property, and there was no reply.

New matter set up by answer, and not put in issue by reply, is for the purpose of the action to be taken as true. But if an answer sets up new matter, which amounts only to a denial, no reply is necessary. Bliss on Code Pleadings, section 396. Except for the purposes of a denial, the new matter in such case is irrelevant. So the answer of a defendant, charged with committing a certain act, that it was committed by a third person, is merely a denial. Hoffman v. Gordon, 15 O. S., 211, 214, 215. And so in an action to recover for the breach of a contract, averments in the answer setting up a different contract are immaterial, except as they operate to deny the contract sued on, and require no reply. Simmons v. Green, 35 O. S., 104. The pleadings then did not conclude plaintiff on the question of ownership. As the testimony stood, he was entitled to select his exemption out of the property, and there being no evidence of a waiver, the right continued up to the time of the sale. Butt v. Green, 29 O. S., 667, 673. In selling after notice of the selection, defendant was a trespasser.

Judgment reversed.

A. G. Collins, for plaintiff in error.

[Hamilton District Court, December, 1879.] 988

JOHN H. TAPHORN ET AL. v. THE MARIETTA & CINCINNATI R. R. CO.

For this opinion, see 6 Dec. R., 842 (s. c. 8 Am. Law Rec., 420). See also case between same parties, 6 Dec. R., 865 (s. c. 8 Am. Law Rec., 489). The latter was reversed by supreme court. See note to it.

[Hamilton District Court, 1879.] 989

COMMISSIONERS OF HAMILTON COUNTY v. ECKSTEIN, HILLS & CO.

For this opinion, see 6 Dec. R., 843 (s. c. 8 Am. Law Rec., 421). It was affirmed by the supreme court, without report, June 5, 1883.

[Hamilton District Court, 1879.] 990

JAMES M. LOVE v. OHIO & MISSISSIPPI RAILWAY CO.

For opinion, see 6 Dec. R., 839 (s. c. 8 Am. Law Rec., 417).

BONDS—SCHOOLS. 992

[Hamilton Common Pleas, 1879.]

†DAVID SINTON v. BOARD OF EDUCATION OF WESTWOOD.

Where, under a special law (66 O. L., 402) authorizing a board of education to issue bonds not exceeding in the aggregate $20,000, the time of maturing not to exceed ten years, and providing that, for paying the same as they became due, such tax might be levied annually as would be sufficient to pay the principal that should fall due each year, and the interest on all the bonds, the board of education issued bonds payable to bearer, and before the expiration of the ten years took up some of the bonds, but instead of cancelling or defacing them, left them in the hands of the treasurer, who negotiated them to a *bona fide* purchaser, as collateral for a loan to himself: Held, the board of education is liable on such bonds in the hands of such purchaser.

This action was brought to recover the amount due upon the interest coupons attached to certain bonds issued by the board of education of the school district of Westwood, in September, 1869, and payable to bearer on the first day of September, 1879, with interest at the rate of 8 per cent. The defense is that the bonds have all been taken up and paid.

SMITH, J.

The plaintiff received the bonds in November, 1876, as collateral security for a loan then made by him to William E. Davis. He paid full value without notice of any defects, and is in every sense an innocent holder for value. The bonds were issued in pursuance of an act of the legislature, passed in 1869, to pay for building a schoolhouse. It is not disputed that they are genuine. It is in proof, however, that in the spring and summer of 1874, Davis was the treasurer and one of the

†This judgment was affirmed by the district court, 6 Dec. R., 878 (s. c. 8 Am. Law Rec., 567). The judgment of the district court was reversed by the supreme court. See opinion, 41 O. S., 504.

members of the school board, and was directed by the board at different times to pay a portion of said bonds. He made the purchases ordered by the resolutions, and was then ordered to cancel the same. The bonds sued on are among those purchased by the defendants and ordered to be cancelled. Mr. Davis was the proper custodian of the bonds, but instead of cancelling the bonds, he kept them and put them again into circulation by thus pledging them to the plaintiff.

The rules of law applying to commercial paper in the hands of an innocent holder for value are well understood. If the paper has been once issued, delivered and put into circulation, though it may be afterwards lost, and even stolen, yet, if before its maturity it comes into the hands of one who has paid value for it, without notice of any infirmity, this holder can enforce its payment. The protection to commercial paper is fully recognized in this state, and municipal bonds, duly issued and made negotiable by authority of law, duly delivered and put into circulation, have all the privileges of ordinary commercial paper.

These general doctrines are not disputed by defendants, and did not constitute payment. But it is urged that by the payment, and taking the bonds back into their own possession, their negotiability was destroyed, and could not acquire any new vitality by being wrongfully used by the treasurer.

The answer to this is that the acts of the defendants did not constitute payment; it must be in due course, according to the tenor of the instrument, and when it becomes due. This precise question arose in Morley v. Culverwell, 7 Mason & Walsby, 193, and Baron Parke, on p. 182, uses this language:

"The question, therefore, is whether the fact of the acceptor having satisfied the bill before it came due, is any defense against the *bona fide* indorser. I am of opinion that nothing will discharge the acceptor or the drawer except payment according to the law merchant; that is, payment of the bill at maturity. If a party pays it before he purchases it and is in the same situation as if he had discounted it. The rule is laid down correctly by Lord Ellenborough, in Burbridge v. Thanners, that a payment, before a bill becomes due, does not extinguish it any more than if it were merely discounted, and that payment means payment in due course, and not by anticipation. The party who takes a bill before it becomes due, has no means of knowing whether payment has been anticipated or not."

And in the same case Lord Aberger says: "Therefore, a bill is not properly paid and satisfied according to its tenor, unless it be paid when due, and consequently if it be satisfied before it is due by an arrangement between the drawer and acceptor, that does not prevent the acceptor from negotiating it, or an innocent indorsee for value from recovery upon it." Unconsciously, perhaps, but with strict propriety, the school board, in their resolutions to procure the bonds, used the term purchase and not payment. The treasurer was required to purchase, and in one case at a premium of 1 per cent. He afterward reported he had purchased, thus adopting the language used by Baron Parke in defining this transaction. It seems to me, therefore, that this purchase by defendants did not destroy the negotiability of these bonds in the hands of Mr. Sinton.

But if the question of negligence were to be considered, the plaintiff ought to prevail. Where one of two innocent parties is to suffer by fraud or misconduct of a third, the loss ought to fall upon that party who furnishes the opportunity for fraud. Here the first error was with the defendant in not seeing to the destruction or actual cancellation of the bonds. They intrusted the matter to Mr. Davis. They left these bonds, valid, existing, negotiable securities, in his custody. He misappropriated them, and is there any doubt where the loss ought to fall?

Judgment for plaintiff.

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994 [Lucas Common Pleas, October Term, 1879.]

FRANKLIN HUBBARD v. HANNAH M. HARRIS ET AL.

For this opinion, see 4 Dec. R., 577 (s. c 2 Clev. Law Rep., 403).

DEEDS—RESCISSION. 1006

[Coshocton Common Pleas, 1879.]

PHOEBE CORBIT ET AL. v. GEORGE CORBIT ET AL.

1. Though incapacity cannot be inferred from extreme age, yet it is an element to be considered.
2. Where there is imbecility, any act that would induce a conveyance beneficial to the actor, and on plainly inadequate consideration, and constituting a preference for certain children connected with the act of conveying, to the exclusion of others without reason, will be held to amount to undue influence, and in such case unjust influence may be inferred from circumstances and results.

VOORHES, J.

The petition declares the fact that Robert Corbit, deceased, late of this county was for a number of years before 1871, seized in fee simple of 390 acres of land in Coshocton county. That on the 2d day of March, 1871, he, Robert Corbit (his wife then being deceased), executed a deed to his son James Corbit for 170 acres of said land; to his son George Corbit he executed a deed for 135 acres, and to his son Adam for 85 acres, thus conveying to these sons all the lands of which he was then seized. The consideration expressed in the deed to James was $4,500; in the deed to George, $4,000; and in the deed to Adam, $4,000. These deeds reserved and provided that they each would deliver to Robert Corbit during his life, one-third of the grain that might be raised upon said premises so conveyed to each respectively excepting James. George to make a note for $200 to Catherine Phillips, and Adam a note for $200, payable to Isabella McFarland. Afterwards, on the 15th day of March, 1871, Adam, George and Robert again met at the office of Morris Crater, in New Comerstown, when George and Adam surrendered to Robert their deeds, and he then executed to them each a deed for 110 acres of land, for a purported money consideration of $4,000 each. George made his note for $500 to Catherine Phillips, and another payable to his brother John Corbit for $300, both payable at the death of Robert. Adam then executed his note for the sum of $800, payable to Isabella McFarland, payable on the death of her father, Robert Corbit.

These deeds also, by provision therein written, provided that George and Adam should deliver to Robert one-third of all the grain, and one-half of the hay raised upon said premises, so long as he should live. The notes and James' deeds were left with Crater to be afterwards delivered.

The deed to James provided that he was to pay to Phoebe, his sister, $500, and to John Corbit, $200, both payable as a further consideration of the land so deeded to him, to keep and maintain during his life Daniel Corbit, who was regarded as an imbecile son of Robert; the deed also reserves to Robert in the property so conveyed to James, the use of the dwelling house, the garden and hog yard, so long as he should live, and to Phoebe, one room in the house as long as she might need or occupy it.

The plaintiffs now seek to have the deeds so made to James, George and Adam, by Robert, declared null and void, and that they shall in no wise interfere with an equal distribution of the estate of Robert Corbit among his eleven children, with the exception of his son Lewis, to whom it is claimed, he made a full advancement of his whole share. As a reason

for so cancelling and revoking said deeds, they aver that Robert, at the time of their execution, was not of sound mind or memory, but that he was of the age of 81 years—in his dotage, and so weak and feeble in his mind and memory as to be wholly incapable of transacting business or making a just and proper disposition of his property.

They further claim that he was under improper restraint and the undue influence of George and Adam at the time he so executed said deeds. That the deeds were the result of the fraud and undue influence of George and Adam upon Robert, who was at the time so weak of mind that he did not know or comprehend what he had done.

James is in default of an answer, and appears in court to admit all the charges made in the petition, so far as they effect him.

George and Adam file an answer in which they deny all the charges of fraud and undue influence, and aver that the said Robert at the time of making the deeds was competent, and that the whole transaction was one of his own, wholly uninfluenced by them, and that the same was in accordance with his intention long before expressed, and intended as his wish and desire as to his property and his children.

The issue made in the petition, answer and reply is, simply: are the deeds made by Robert to James, George and Adam his acts and intentions, or are they the productions of George and Adam through fraud and undue influence practiced by them upon their father, when he was incompetent from mental weakness to transact the business, or so restrained and controlled by their undue influence that it was their act, and not his.

This is the question, and for the last eight days with great zeal, energy and ability have the counsel for the parties sought a solution of this question from the judgments, knowledge and opinions of a vast number of the neighbors and acquaintances of Robert, aided so far as it is proper to be aided in such an inquiry, by the circumstances attending and inherent to the transaction, which resulted in the execution and delivery of the papers now sought to be avoided and declared inoperative upon the estate of Robert.

The plaintiffs have offered the testimony of thirty-four witnesses, many of whom are the near neighbors and intimate acquaintances of Robert—some for a quarter, some for a third, and some for half century, who knew him when he was in the prime of his manhood, and continued to know him until his death. They have had, to a limited extent, business transactions with him; not important nor numerous, for it appears that the old man acquired his real estate early in life, and that it was cleared for farming purposes long before his death.

The business of the old man appears to have been confined to marketing the fruits of his industry, and occasionally loaning a little money. This he did until the latter part of his life, without attracting any special attention from his family or neighbors; but in 1868, and from that time on till his death, in the transaction of his business, small and unimportant as it was, the attention of his family and the neighbors was attracted to the fact that to accomplish it, more than his own ability and capacity was required, and the aid of Phoebe and James was invoked silently, and perhaps on their part unobtrusively, in doing what the old man had always theretofore done efficiently for himself.

The old man had raised a family of twelve children. Most of them have appeared upon the witness stand. They are all at least, if not more

than ordinarily capacitated to do and transact business, and none appear to have been more a pet of the old man than the rest, yet in all the long and happy years of that family, it is not made to appear that in order to accomplish the business necessary to the advancement of such enterprises as were by the old man and his family deemed prudent, that any but the old man himself was necessary for its accomplishment. Such was the common observation of the family and his neighbors until about the year 1868. At this time he claimed that he had received a sun stroke, though such a sad event was not known to the family or neighbors, yet he himself claimed it. He was then an old man of 78 years, had always been favored with good health, but now he claims to be impaired with a sun stroke. His family, his wife and his neighbors, all became cognizant of some change in the old man's mind. It is manifested in the incoherency of his conversation; in the mode and manner of dress. He then talked foolishly with reference to business; talked of going to the western country to engage in stock raising and milling. His attempts to do business with persons who had long known him were so unsatisfactory that Phoebe and James had to render him aid. These things were new in the man, and attracted the attention and challenged the judgment of his neighbors to tell the cause. He was looked at by his acquaintances, tested by them in reference to business, and they now come into this court to the number of thirty-four, declaring it as their judgment, that this old man had become changed in his mind, too enfeebled and impaired to transact business. Most of them say that he became as a mere infant or child in his thoughts and actions. Some of the witnesses date this change and incapacity as early as 1868 and '69; some put it later, but all concur that in about 1875 his mind had totally perished, verifying the words of the Psalmist that: "The days of our years are three score years and ten; and if by reason of strength they are four score years, yet is there strength, labour and sorrow, for it is soon cut off, and we fly away."

The first heard of the sun stroke comes from James and Phoebe, corroborated by several of his neighbors, and they say it was in 1868, and from that time we witness the old man negligent with his person, inattentive to his dress, strongly guarding, as he supposed, against a future affliction, by filling his hat with papers and leaves, and covering his head with a grain sack. These strange manifestations indicated to the judgment of his neighbors that something was wrong with the man, and they are here to declare that from a man of ordinary, uneducated intellect, he had now, as the symptoms and badges would indicate, become a mere child, wholly irresponsible for his eccentricity, and utterly incompetent to manage or transact business.

The defendants have brought a score or more witnesses, who testify to an acquaintance with the old man dating back to 1868. That they, too, have had business transactions with him, and that prior to 1875 they saw nothing in the old man indicating a want of business capacity.

It would scarcely be claimed that from a single business transaction, or from a few isolated transactions of an individual, we could with accuracy determine his capacity for business. We are not to expect that the incapacitated mind will at all times, and under all surroundings and circumstances, prove to be a blank. If such were required, then the Chancellor would have no duty to perform beyond the mere finding of the fact that the mind under investigation was a mere blank. But we are to take the mind as we would a web, covering a period of the old

man's life, and within that period look at it in all its phases and manifestations, and from the whole determine its character and capacity to comprehend and transact the ordinary business of men. Dr. Beers, one of the defendants' witnesses, and who is apparently honest, candid and truthful, says "he saw the old man in 1872, and conversed with him; that he then acted as other persons of sound mind. Says he had seen him frequently before, and conversed with him satisfactorily; that he perceived nothing to indicate or justify the conclusion that his mind was not sound, or that he was not competent to transact business. But he says that he again saw him in 1875, when the old man failed to recognize him; that after telling him who he was, he in a few moments forgot him again; that when he talked on one subject the old man would talk on another; that his negligence of person and dress, his incoherency of speech, then induced him to think that his mind was so impaired that he was wholly incompetent to transact business."

The same facts upon which the doctor predicates his opinion of his incompetency to do business in 1875, is proven by other witnesses, Phoebe, James, Lewis and John Corbit, McGuire, Pinkerton, Daugherty, and many other witnesses in the case, to have been manifested by the old man in the years of 1868, '69, '70 and '71, so that if the testimony of Dr. Beers is valuable to aid us to a just conclusion, then are we not logically bound to date his incapacity back at least as far as 1869?

The opinion of Dr. Beers in 1875 was, that the old man was totally incompetent to transact business, making no allowance that on tomorrow, or next day, the old man might have been able again to repeat again of the scenes and reminiscences of his early life, but taking into the account his age, appearance, his inability to converse, he with a professional certainty, aided by the lights of science, I have no doubt formed a correct judgment of his utter incapacity to transact ordinary business.

The rules of determining the weight of testimony, and the credit due to witnesses are clear, distinct, and in accord with the common sense judgment of men. The credit to be given a witness will depend upon his interest, honesty, intelligence and means of knowing the facts about which he testifies.

The testimony of the defense comes from men of fair intelligence, without interest, who, upon the stand, have so demeaned themselves that no discredit should follow them, and the same remark may, with justice, be applied to the witnesses on behalf of the plaintiffs.

One of the greatest merits of a witness is his means of knowing the facts about which he affirms. The witnesses of the defense are neighbors who occasionally saw the old man from 1868 to his death in 1878; who had occasional intercourse, and very seldom a little transaction of business with him, seeing him, if we regard the whole testimony in the case, at times most favorable for him to be presented, as well as showing the extent of his great infirmities.

The interviews were short; the old man's attention would be arrested to a single item of business, such as loaning money, selling stock or making a purchase of tobacco, and not under all circumstances were these satisfactory to witnesses, for he has offered to pay a bill twice, failed to remember his debtor, and from these hasty and unimportant items in the life of the old man, many of the witnesses have formed their opinions *pro* and *con* of his capacity to do business.

Turning our attention to the testimony of James, Lewis and Phoebe, we find whole chapters in the history of this old man and his infirmities that no other witness professes to know or to have had the means of knowing. George and Adam, though sons, from eighteen to twenty years ago married and went to themselves. For some reason they seldom did more than to drop into the old man's home for a casual visit; rarely there, feeling somewhat estranged towards James and Phoebe, who had intimated objections to Adam's building and living on the farm. Lewis had years ago received all he expected from his father, and for years was ever ready to aid by his advice and counsel the old man in his business affairs, such as writing and making calculations for him.

It was Lewis that he always applied to to have done what he could not do for himself, and he says a short time before the making of the deeds the old man called on him, and said: "The boys have been wanting me to make a will." He then informed his father that he had put it off too long; that to make it now would only make trouble. Lewis certainly was not operated upon by interest to refuse to write a will, but he says he refused because of the old man's incompetency.

Phoebe says her father was incompetent from 1868 to the time of his death to transact ordinary business, and she was the daughter and housekeeper of the old man and her mother, and remained with them until their death.

She says she is thirty-three years of age, and that in 1868 her father claimed to have had a sunstroke; that she observed a marked change in his mind from that time forward. Instead of doing and transacting his business after that time alone, she and James came to his aid. She repeats the oft-told story of his wearing leaves in his hat and a sack over his head. She says he was forgetful, incoherent in his talk, would wander without an object in the fields, would get lost in the house, call upon the absent and the dead; that he became careless and heedless of his dress, would attend to the calls of nature in the house and in the bed; at the table she had to place his food upon his plate; that he would then eat it without regard to the cleanliness of his person; that he would help himself to stewed tomatoes with his hands, while at the table; that when he would go out the whole family were anxious and solicitous for his safety and return; she watched him and thus cared for him from 1868 until his death.

She says he declined and went down from 1868 till his demise in 1878, and that at no time, between those years, was he competent to transact ordinary business.

In this witness we have the whole web of the old man's life for the period of ten years from 1868. We have him in his out-goings and incoming; we have him in the hours of slumber, in his eating and drinking, in his wanderings and weakness, with apparent attempt at business as he had done in former days, and in all, his daughter says, he had become as a mere child, unable longer to be the business man and head of the family, and unable to guard and protect their financial interest. His shield was broken, and he became the sport and subject of instinct, rather than of reason.

This is the judgment of the witness whose opportunities to know the true status and condition of this old man were the best, and she is strongly corroborated by many of the witnesses, whose opportunities for knowing story is only less extensive.

We are authorized to investigate the transaction complained of and see what inherent evidence, if any, it may afford of the incapacity of the old man. It is claimed that we cannot infer his incapacity from extreme old age.

The case in 72 N. Y. R., 269, is clear upon this point. The court will not take old age, and from that alone infer incapacity; but the court must not forget that all old age may be the cause from which emanates inbecility, weakness and incapacity, so that age is an item of proof competent and worthy of being considered in an investigation to determine the question of competency.

We are not to shut our eyes to the fact that great age has its weaknesses and infirmities. We are to look for it in the evidence and see to what extent were they present in this case at the time of making these deeds. If present, it is an item in the evidence, and when taken with the other evidence, such as physical weakness, sickness and mental disorder, tends to establish a total incapacity to do business. But we may, in order to fairly comprehend a transaction and determine whether or not it is the result of a mind that comprehended it, or whether it is demonstrative of a fraud successfully practiced upon the party to it, take into consideration the object, purpose and scope of the transaction.

Men seldom act without motive, and so consonant is this principle with our notions of truth, that when an act is done by a person for which we can assign no motive, we begin to suspect that it was the result of insanity.

Undue influence may exist and may render a transaction void when there is a total absence or want of capacity to contract: In other words, undue influence may exist without impairment of mind; but where there is imbecility and want of capacity, any act that would induce a contract would be undue and improper, and should void all the benefits sought from such a source.

There is no such thing as equitable incapacity where there is a legal capacity. The court will not measure the size of men's understanding and capacities. The law will not relieve a man who is capable of taking care of his own interest, except where he is imposed upon by fraud and deceit, against which ordinary prudence could not protect him. But however clear this proposition may be, it is a principle of equity not to be forgotten or overlooked, that weakness of mind may constitute a very important circumstance to prove that a contract has been obtained through fraud, imposition or undue influence. The law requires that good faith should be observed in all the transactions between man and man, and those who from imbecility of mind are incapable of guarding themselves against fraud and imposition, are under the special protection of the law.

"When there is imbecility or weakness of mind arising from old age, sickness, intemperance, or other cause, and plain inadequacy of consideration, or when there is weakness of mind and circumstances of undue influence and advantage, in either case a contract may be set aside in equity."

Apply this rule to the case before us, and in which we are wholly unable to resist the conclusion established by the proof that Robert Corbit was on the 2d and 15th days of March, 1871, when he executed these deeds, 81 years old, and that from 1868 he had been extremely weak in his body and mind, yet, that he was then the owner of from $16,000 to $20,000 worth of real estate, and from $3,000 to $5,000 worth of personal

property; that he was the father of eleven children for whom he had made no special provision in the division of his estate, and yet the deeds then executed divested him and invested James, George and Adam with title to all his real estate, loosely and insufficiently providing for his own future support, securing to four of his children a mere memento of his property, and leaving unnoticed and unprovided for two of his chlldren for whom he could not be supposed to entertain anything but the kindliest parental regard.

We have then an old, superannuated man, weak of mind; so weak as to be a mere child, and all the circumstances loud in proclaiming that he was the victim of undue influences. His acts were in conflict with his oft repeated determination that when he should distribute to his children his estate, that they should all share alike. They shared alike of his parental regard, and he desired they should share alike in his bounty.

But how comes it, that after these oft repeated declarations for an equal division, and his severe denunciations against some of his neighbors who had discriminated in favor of their boys, that he has deeded his $20,000 worth of real estate to his three sons, James, George and Adam?

Is it not patent and manifest that the finger of undue influence was present at the execution of these deeds, and that the old man in his weakness was forced to do an act which had been most abhorrent to him in the days of his true manhood?

Who are the persons whose influence is made manifest in these acts of the old man? Was it Lewis? The proof shows that he was provided by advancements with all that he could claim or expect.

Was it Phoebe, Jesse, John, Isabello, Mary or Catherine?

It would be a violent presumption, for those of them who are not entirely ignored, have received but a mere memento of the estate.

Was it James? We think him clear of the charge, for he asserts that he knew nothing of the transaction until it was consummated, and he is now in court to repudiate the whole transaction as an imposition successfully practiced upon his father, when he was so weak mentally as to be a mere child.

To George and Adam the finger of the law points with unerring significance, saying, "Thou art the men" with whom and from whom emanated the undue influence that swept from the old man his estate, and stifled his affection for the fruits of his own loins.

On the 29th of February, 1871, George was seen at his father's house. His talk and intercourse with his father was to some extent secret. He was with Phoebe and James, his protectors, who looked after him with the tenderness of dutiful and faithful children, yet they knew nothing of the object of his visit.

He sought the services of Esquire Maxwell to do writing for his father, the purport and character of which he professes not to have known or understood.

He then called upon Morris Crater and solicited his presence and services at his father's house to do writing which he did not attempt to explain, and which was not inquired for by Crater.

On the 2d of March, 1871, George took his father to Crater's office, studiously avoiding to learn of his father what papers he was anxious to execute, and there in the absence of his whole family, Crater prepared, and the old man executed three deeds. One to George, who had kindly taken him to the magistrate's office, and to James and Adam each one,

whereby the old man was wholly stripped of the accumulations of a long life of toil and economy.

George professing to have so little interest in the matter that he hardly entered the office when the work was being accomplished that would make him worth $5,000, and his father dependent for charity upon his children. George would not himself confer with his father as to the purposes and objects of his visit to Crater's office.

Lewis, the son in whom the old man had theretofore had confidence, was in town, not knowing what was being transacted, and which was studiously kept from him by George.

The arrangements proving unsatisfactory to the old man, or to George and Adam, interviews were had by George with the old man, and he again aided his father to the office of Crater, when the deeds to Adam and George were surrendered, and the old man executed to each other deeds for 110 acres.

These were made without any definite knowledge of George and Adam as to what was being done, both studiously avoiding the old man and Crater's office, where and while the same was being made; but when accomplished they each received their deed in silence, and on no occasion did they or either of them speak of what had been done to the other children.

The very inattention on the part of George and Adam as to what was being done, their determination to take no part in it or have no overt knowledge thereof, is a badge of fraud pointing directly to them as the source of the influence that was so operating upon the old man as to induce him to do an act which had always been his boast that he would not do.

It is contrary to our whole knowledge of men and their actions to suppose that George and Adam would not have been officious to know the object of all these meetings of the old man; what he intended and what he was doing, instead of their absenting themselves, and ignoring all that was going on, the law would have expected them to be there and to be fully cognizant of all that was being done, participating in the arrangements to get him to the place where the acts were to be done resulting in their favor and a studied effort not to be seen there and to have no knowledge of the objects and purposes of the old man, is regarded in the law as a mere sham; a mere pretense to avoid the suspicion that they knew and were parties to the arrangement, and is one of the badges which is competent to be considered in connection with all the evidence in the case, stamping the whole transaction as a successfully practiced fraud by George and Adam upon the weakness and incompetency of the old man to obtain his estate.

A decree may be entered setting aside the three deeds made by Robert Corbit to James, George and Adam Corbit, and that George and Adam pay the cost of this suit.

R. M. Voorhes and L. R. Critchfield, for plaintiffs.

Spangler & Pomerene and Nicholas & James, for defendants.

GUARDIAN AND WARD. 1034

[Hamilton District Court, 1879.]

†CHARLES J. STRONG ET AL. v. MICHAEL HOPE ET AL.

The statute only requiring an order of court to empower a guardian to sell in case of real estate, the sale for full value, by a guardian, of a note and mortgage to one who had no reason to suppose that the guardian would misappropriate the proceeds, is a good transfer, and the buyer need not look to the application of the purchase money nor to the necessity of a sale.
Appeal from Court of Common Pleas.

William Rankin, as guardian of the estate of certain minors, held two promissory notes for $627 each, payable to his order as guardian, and secured by mortgage. Through the agency of a bill broker he negotiated these notes to Raphael Strauss, who paid full value, and to whom also the mortgage was assigned. Afterwards he became insolvent and resigned or was removed without accounting to his wards. The plaintiffs were sureties upon his bond, and seeking to protect themselves, brought this suit to enjoin payment by the maker of the notes. Afterward the guardian appointed to succeed Rankin was made party, and prayed for an order that the notes be paid to him. Upon the other hand Strauss, as indorsee, prayed judgment.

AVERY, J.

The probate court made no order for the disposition of the notes and mortgage by Rankin. But the statute distinguishes in that respect between real and personal property. Formerly (Swan's Statutes, 430) power was conferred on the court of common pleas, upon good cause shown, to authorize a guardian to sell all or any part of the property of his ward, whether real or personal. The present statute only requires an order of court for sale of the real estate, and confers power on the guardian himself to sell all or any part of the personal estate. S. & C., 670, sec. 22.

Nevertheless, it is argued the fact that the sale is for the interest of the ward must be found by the court to which supervision of the guardian is entrusted; in other words, that the matter is not to be determined at the discretion of the guardian, and in the absence of a proper order of court, that the purchaser must take the risk of an honest application by the guardian of the proceeds.

Among the duties of a guardian prescribed by statute are the education of the ward in such amount as the estate may justify, the investment of the money of the ward, and generally the management of the estate for the best interest of the ward. These duties involve discretion. While it may be a general principle, although not indeed universally true, that a purchaser having notice of a trust is bound to see to the proper execution of the trust, the principle does not prevail where the purchase money is to be applied by the trustee himself to purposes requiring time, deliberation, or discretion on his part. Clyde v. Simpson, 4 O. S., 445, 464; Coonrod v. Coonrod, 6 O., 115, 116; Story Eq., section 1134; Redfield's Ed., section 977a.

Where a guardian has the legal power to sell or dispose of the personal estate of his ward in any manner he may think most conducive to the purposes of his trust, a purchaser who deals fairly has a right to presume that he acts for the benefit of his ward. He is not bound to inquire into the state of the trust, nor is he responsible for the faithful application of the money, unless he knew or had sufficient information at the time that the guardian contemplated a breach of trust, and intended to apply the money, or was, in fact, by the very transaction applying it to his own private purposes. Field v. Schieffelin, 7 Johns Ch., 150; Conrad v Griffey, 16 How., 37, 38; Elliot v. Merryman, and notes, I Lead Cas., Eq., 74, 110.

Where a guardian takes a note payable to his order as guardian for the property of his ward, and indorses it to an innocent purchaser for value, it is a good transfer, the words as guardian being mere *descriptio personae*. Daniels on Negotiable Instruments, section 271.

In Thornton v. Rankin, 19 Mo., 193, notes payable to the order of one Cooper, as guardian, were indorsed by him before due to the plaintiff for value, but with

†This decision was reversed by the supreme court. See opinion, 40 O. S., 87.

notice of the fact that he was guardian, which was apparent on the face of the paper. Afterward, Cooper being removed from his office of guardian, the defendant was appointed guardian, and gave notice to the maker of the notes not to pay the plaintiff. Upon interpleader between plaintiff and defendant, the former was held entitled to the money.

In Fountain v. Anderson, 33 Ga., 372, a guardian on the eve of absconding from the county, and with the intention of converting to his own use a note belonging to his ward, payable to him as guardian, sold it to a purchaser with knowledge that it belonged to the estate of the ward, but without knowledge of the contemplated fraud. Upon bill by the guardian appointed in his stead, for injunction against collection of the note by the purchaser, and for its surrender, the court held. "Guardians may assign or transfer notes, taken by and payable to them as guardians, and the purchaser or assignee who buys in good faith acquires a good title thereto. Courts will not disturb such assignment unless it appears there was a contrivance between the purchaser and guardian fraudulently to convert the fund."

In the present case Strauss, the indorsee of the note, knew nothing of any fraud, actual or intended, on the part of the guardian, nor had he reason to know. Whether the notes and mortgage were for property of the ward that had been sold, or for money that the guardian had invested, did not appear upon the face of the paper, and Strauss had no other knowledge than was conveyed by the face of the paper. And even if the fact may have been that the notes and mortgage were an investment for the ward, the power of the guardian to invest included the power to change the investment. The necessity or expediency of the measure would rest entirely in the judgment and discretion of the guardian. As between him and the purchaser, he would be the exclusive and proper judge.

Judgment and order of sale in favor of Strauss.

Hagans & Broadwell, and W. T. Judkins, for Strauss.

John A. Shank, *contra.*

1036 [Hamilton District Court, 1879.]

SOPHIA DOMEIER v. MARY WAGNER ET AL.

For opinion, see 6 Dec. R., 849 (s. c. 8 Am. Law Rec., 427).

1037 [Hamilton District Court, 1879.]

EDWARD L. PEYTON v. ALFRED R. MULLINS ET AL.

For opinion, see 6 Dec. R., 850 (s. c. 8 Am. Law Rec., 428).

1038 HUSBAND AND WIFE—MORTGAGE.

[Superior Court of Cincinnati, 1879.]

†HELENE HERBST v. LOUIS MAUSS ET AL.

1. A mortgage on a wife's property to secure repayment of money embezzled by the husband, though there was an intention not to prosecute on the part of the grantee on obtaining it, and a hope against prosecution as a part motive for giving it, yet in the absence of an agreement to that effect, is not on consideration of forbearance to prosecute.
2. A mortgage made by a wife of the amount of money embezzled by her husband from the mortgagee, his employer, is not accounted as made under duress because a warrant for the husband's arrest had been taken out, and he was threatened with arrest and prosecution, where he was actually guilty, and the arrest would have been lawful.

†This decision was affirmed by the district court. See opinion, 8 Dec. R., 215.

HARMON, J.

Plaintiff sues, making her husband, Frederick Herbst, a party defendant, to set aside a mortgage given by herself and husband upon their homestead, owned by her, to defendants, partners as Mauss, Ault & Co. As grounds of relief she avers that she gave the mortgage to secure repayment of large sums of money which defendants falsely informed her had been embezzled by her husband while in their employ; that it was therefore wholly without consideration, as well as obtained by fraud; that she was in duress when she gave it, by reason of the presence of an officer who had arrested, or was about to arrest her husband for such alleged crime; and that, moreover, she was subject to heart disease and not of sound mind, so that, being prostrated by the charge made against her husband, she was incapable of giving, and did not give her free and voluntary consent to the transaction; she avers further that the real consideration of the mortgage was the promise of defendants that they would forbear to prosecute her husband. It was also claimed at bar that she was not examined separate and apart from her husband when she gave her acknowledgment.

Frederick Herbst has not answered, but the other defendants deny all and singular her allegations, except that the mortgage was given for money so embezzled from them which they aver amounts, with interest, to over $12,000. They allege by cross petition that the premises mortgaged were purchased with the money so embezzled, and the title taken in the name of Frederick Herbst who, a short time before the giving of such mortgage, conveyed the same to plaintiiff to defraud his creditors, especially defendants. They pray therefore that said conveyance be set aside, and plaintiff adjudged to hold the title only in trust. These allegations are all denied by the reply, except that the property was transferred to the plaintiff.

The first question is, was plaintiff's husband guilty as charged by defendants? If he was not, it is admitted there was no consideration for the mortgage, and that she is entitled to the relief prayed. If he was, the credit of six months given him by the acceptance of his note secured by such mortgage was a sufficient consideration.

The rule which long prevailed in Ohio requiring proof of crime beyond a reasonable doubt in civil cases, has been almost if not quite abolished. Jones v. Greaves, 26 O. S., 2; Lyon v. Fleahmann, 34 O. S., 151 anad 157. But without regard to such rule, the clearest and most convincing proof is required to overcome the presumption of innocence, which grows stronger with the enormity of the crime, 66 Me., 406.

The books of defendants were kept by plaintiff's husband for nearly fifteen years. They are in evidence. During the first six years they were correctly kept. He was a witness, and challenged by defendants' counsel to point out a single error during that period. He was given ample time to do so, but failed. Then discrepancies in items of cash paid in and paid out appear, small and few at first, but growing in number and amount, up to the time he was discharged, and occurring most frequently when, by the absence of the managing partner, the books and cash were in his hands without supervision. These discrepancies are always in dollars, never in cents. They invariably result in making the books show less cash on hand than there really was. He admits he never entered or reported any such surplus. The books were in all cases made to balance by errors in addition exactly corresponding to the discrepancies in the items. These discrepancies are hundreds in number, and extend over many years. In his examination in chief, Frederick Herbst positively denied the charge made against him. Upon cross-examination he admitted making such entries and incorrect additions, but failed to make or even attempt any explanation, and refused to answer pertinent questions because they would tend to criminate him.

It is not necessary to consider his frequent confessions, as their competency in this action is questioned; nor the unusual size of his bank accounts and transactions in real estate for a man of small salary and little means for these he has attempted to explain. Accepting such explanation, it only goes to parry the circumstantial evidence arising from the possession of an unusual amount of money. It does not affect the direct evidence of his false entries and additions, and his utter failure to explain them. These are utterly inconsistent with innocence. They exclude all doubt. If but few, they might be mistakes. Though many, they might still be mistakes if occurring during a short period, and not always in one direction. As they are—many, constant, uniform, long continued, they become strands in a rope that cannot be broken. It would help defendant's case but little to show what he did with the money. It hurts it as little to fail. It is not always easy to trace the rapid flight of the wages of crime.

The circumstances attending the giving of the mortgage must now be considered. Defendants, having discovered the fact of embezzlement and partly investigated its extent, swore out a warrant, and in company with an officer and their attorney confronted the husband in their office, and charged him with the crime. He at once confessed it, and was discharged from their employ. He was informed of the presence of the officer, but never arrested. He was asked whether he was willing to make restitution by mortgaging his homestead, whose conveyance to his wife they had just learned from their counsel. He said his wife was ignorant of his crime, but would no doubt, be willing to join in a mortgage, whereupon the officer, the attorney and himself visited his wife. He was asked by his attorney to explain, but replied that he could not, and requested the attorney to do so. He informed the plaintiff of her husband's crime and the object of their call. She showed no unwillingness, but on the contrary, at once declared that if there was stolen money in the property she did not want it, though no one had said or intimated that such was the fact, and expressed her willingness to give a mortgage, whereupon it was drawn, a blank having been brought for that purpose, executed and acknowledged before the attorney, who was also a notary, and a note signed by both, payable in six months. It was agreed between them all, that if the defalcation should upon fuller investigation, prove less than this amount, the note should be reduced by a credit. Thereupon the attorney and officer departed, leaving the husband at home. He has never been prosecuted.

It is clear that, even as to the husband, there is no duress; and the wife can claim no more than that duress as to him would have been the same as to her. Actual imprisonment, if lawful, is not duress in law, still less the mere threat or fear of it. Moore v. Adams, 8 O., 373; 17 Me., 146; 5 Hill, 154; 9 Vroom (N. J.), 329; 26 Mich., 70; 45 Tex. 4, 539.

Fear of lawful imprisonment is the most that can be claimed here. The presence of the officer, if known to the plaintiff, which is doubtful, only emphasized this fear. Courts of equity, however, will grant relief from contracts made under circumstances not amounting to duress at law, when it appears that the influence of terror, threats, or apprehensions or extreme necessity for distress have prevented the exercise of free will. Story's Equity, section 239; Leake on Contracts, 427.

The House of Lords has carried this doctrine to a great length in a case similar to this, Williams v. Bayley, L. R., 1 H. L. 200, in which securities given by a father to take up notes in his name, forged, by his son, were cancelled, because the court found that the impending danger to his son, and consequent disgrace to his family, robbed the transaction of free will upon his part. No other case goes so far, and in Smith v. Rowley, 66 Barb., 502, the court in a similar case refused relief. Although some of the language of the chancellor in Williams v. Bayley might imply that he thought free will impossible under such circumstances, it will be observed that the real basis of the decision was the manifest pressure exerted upon an unwilling mind. The father was loth to give the securities. He was advised by his counsel not to do so. The respondents thereupon reminded him of the severity of the punishment and the certainty of conviction, whereupon he at last gave an evidently unwilling assent.

In this case the evidence shows neither hesitation nor unwillingness upon the part of plaintiff. There was no threat, no pressure, no influence, upon the part of either attorney or officer. Plaintiff's first remark showed that her husband's ability to purchase so much property had raised in her mind inquiry, if not suspicion. She recognized at once the natural equities of the case, and consented to do what justice would dictate and probably a court of justice compel—make restitution with the property. This element, which was entirely wanting in Williams v. Bayley, and is one of great weight even if inability to show that the purchase money, or a definite amount of it, was their own or other persons, would prevent defendants from reaching the property directly. There is no doubt that some part of the money embezzled entered into the purchase, nor that the transfer to plaintiff was void as to defendants. I am clear in the conviction that plaintiff acted voluntarily in giving the mortgage—not voluntarily in the sense in which she would have made a gift or ordinary deed of sale, but in the legal sense. The former sense relates rather to the motive, the latter to the will. No wife who is compelled by the exigencies of business to devote her property to aid or relieve her husband—no man who so parts with his own property, does so voluntarily in the former sense; yet no one would claim such transactions to be voidable in equity. Absolute free will is seldom the lot of mankind. All the law guarantees is the exercise of free power of determination in view of the circumstances which legitimately exist. As in cases of fraud, there can be no rule. The question in each

case must be, whatever the circumstances, did the party have such free power? To say that plaintiff did not exercise such free will in this case is to say that as a matter of law, it is impossible to do so in such a situation. In subsequent conversation she repeated the remark above referred to, declared that defendants had acted rightly, and uttered no word indicative of unwillingness or compulsion. More than all, it being discovered that the defalcation amounted to more than $6,000, she gave a second mortgage upon other property in the presence of her friends, and without the presence of any officer, three days after giving that in question.

There is no evidence of such state of mind or health as alleged in the petition Plaintiff was shown to be somewhat eccentric, and very, perhaps morbidly, religious, and the sudden disclosure of her husband's guilt no doubt affected her greatly; but she was certainly of sound mind, and such disclosure certainly did not affect its soundness, however deeply it may have grieved her.

Was the real consideration of the mortgage forbearance to prosecute plaintiff's husband? There are no authorities holding such transactions unlawful where there is not some mutual understanding or agreement that prosecution shall be stifled, or some act done which will render prosecution more difficult or impossible, such as the giving up of forged paper or counterfeit money. Such acts are executed agreements tending to prevent prosecution. In cases of embezzlement, where a definite pecuniary injury is done, for which the law gives a civil remedy, it certainly is lawful for the injured party to obtain restitution, and the old English rule requiring previous criminal prosecution has never obtained here. Now an unlawful agreement is not to be presumed. It must be proven—not necessarily a contract in express terms, but the circumstances must fairly satisfy the court that such was the mutual intent and understanding. It certainly is not an agreement to stifle criminal proceedings for one party to make restitution actuated partly or entirely by the hope that the other party will refrain from prosecuting, nor for the other to accept restitution intending upon receiving it not to prosecute. Probably no guilty person ever so acted without such hope, and no injured person, unless especially severe, ever received amends without more or less willingness to show mercy. But there are no elements of an agreement in such cases. There is no meeting of minds. What is agreed upon is a perfectly lawful transaction—the payment without suit of what a court, without reference to criminal proceedings, would order to be paid. Failure to prosecute must be one of the things upon which the transaction is mutually based. Plant v. Gunn, 2 Wood's C. C., 372. In this case there is no evidence whatever, of any request or promise, much less agreement, to forbear prosecution. Criminal proceedings were begun in the heat of discovery of the crime, and they were not pushed after security was given to make good the loss, but these facts are just as consistent with the theory that defendants afterwards relented and forbore to punish an old servant already heavily afflicted, as with the theory of an agreement not to prosecute. It is not unlawful to merely forbear to prosecute, and that is all that can be claimed here. Such failure is not connected by the evidence with the consideration of the mortgage.

As to the separate examination, the Notary certifies that it was had. That certificate is conclusive, unless directly impeached for fraud. Baldwin v. Snowden, 11 O. S., 203. It is not so impeached here. On the contrary, it is admitted by the pleadings that the mortgage was properly executed and acknowledged.

Finding and decree for defendant.

Tilden, Buchwalter & Campbell, and Howard Tilden, for plaintiff.

McGuffey, Morrill & Strunk, for defendants.

TAX AND TAXATION. 1043

[Superior Court of Cincinnati, 1879.]

MANCK & BAUER v. JOHN G. FRATZ, COUNTY TREASURER.

It is no excuse for the non-payment of taxes that, on the day when they were due, the proprietor gave his check to the treasurer in payment which, by reason of not being presented the next day, the bank having failed in the meantime, was not paid. The ordinary rule does not apply to the state. The treasurer received the check as an accommodation to the party, and has no power to bind the state. And where it is known to the party that it is impossible to present all the checks the next day, and that it was presented as soon as practicable considering the crowded state of the business, such non-presentment is no defense.

HARMON, J.

The plaintiffs have brought this action to obtain an injunction. They aver that having gone to the county treasurer's office in December, 1878, to pay their taxes, they found that they had not enough money, and that thereupon they drew a check upon the German Savings Institution and gave it the defendant, receiving a regular receipt; that defendant failed to present the check the next day at the bank, and that the bank failed, and now the defendant is threatening to sell the property to pay such taxes.

He remarked that the only question in the case was whether the ordinary rules between business men where checks are taken, apply to a public officer. It was certain, if the defendant had received the check in his individual capacity, and failed to present it the next day, the bank being in the same town with the defendant, he would have to lose it, and not the person drawing it. But this action was not against the defendant individually. It was against him as a representative of the state of Ohio, and the relief asked was that the sovereign right of the state of Ohio to collect its taxes should be enjoined. The defendant, as the agent of the state, has no implied power. His duty is to collect in money the taxes due the state. If the taxes are not paid, his duty is to proceed to sell the property. He had no right to receive the check, so as to bind the state if the check was not paid. If he received the check as a matter of accommodation, the state could not be bound. It is not subject to the ordinary rules in such cases. The taxes were assessed against the plaintiffs. The plaintiffs had never paid them. No money of theirs ever got into the treasury. It is against public policy to hold that in any way a person can be excused. Moreover, the evidence showed that by the course of business in that office at the time of year the check was given, it is impossible to present all of the checks received the next day after they are received, and that this check was presented at as early a day as practicable, considering the crowded state of business.

Injunction refused.

Butterworth & Vogeler, for plaintiff.

C. W. Baker, for defendant.

1060 [Hamilton District Court, 1879.]

D. SINTON v. M. EZEKIEL.

For opinion, see 6 Dec. R., 845; [s. c. 8 Am. Law Rec., 423.]

1062 [Hamilton District Court, 1879.]

HENGEHOLD & CO. v. JUSTINA GARDNER, EXRX.

For this opinion, see 6 Dec. R., 822; [s. c. 8 Am. Law Rec., 352.]

FRAUDULENT CONVEYANCE—ATTACHMENT. 1064

[Hamilton District Court, 1879.]

THOMAS MCFARLAN ET AL. V. JAMES MILLS ET AL.

A conveyance without consideration to his wife by a person whose solvency is doubtful, made without intent to defraud creditors, will not sustain an attachment, even though it might justify a bill to set aside the conveyance.

BURNET, J.

Mills, the defendant below, and the defendant here, was a machinist, having his place of business on Central avenue. The plaintiffs in error brought the action to recover the amount of a debt due to them, and upon their affidavit that defendant was disposing of part of his property to defraud his creditors, procured an attachment. The specific act justifying the attachment was a conveyance to his wife of a lot in Newport, Ky. There were affidavits submitted on the motion to discharge the attachment. The facts were about these: Mills went to his attorney, who had a desk in the office of Hoadly, Johnson & Colston, and laid before him his condition, and asked whether in that condition of affairs it would be proper to make a conveyance to his wife, alleging that he had been under a promise to her to convey to her the property, and that the means with which it was purchased had accrued largely from her economy in household affairs. The young attorney consulted with a member of the firm in whose office he transacted his business, and both concurred in the opinion that Mills had the legal right to make the conveyance. It was claimed on the part of the attaching creditors that he was in fact insolvent at the time of the conveyance. On the other side, Mills presented an affidavit stating that if left undisturbed by creditors he was not insolvent, having assets worth more than his indebtedness, and that if his business had been suffered to proceed he would have paid all his debts. These affidavits were submitted to the court below, and this court was not able to say from an examination of them that the defendant was not solvent at the time he made the conveyance to his wife. The finding of the court below was either that the affidavits of the plaintiff did not show the defendant was insolvent, or else that in making the conveyance there was no intent to defraud his creditors. The statute giving the right to attachment under such circumstances requires the plaintiff to show that the defendant made a disposition of part of his property with intent to defraud creditors. The fact of a conveyance alone when he was insolvent will not justify an attachment, although it might justify a bill in chancery to set aside the conveyance.

The order discharging the attachment would be affirmed.

A. M. Warner, for plaintiff in error.

W. L. Granger, for defendant in error.

1065 SCHOOLS—CONTEST OF ELECTION.

[Hamilton District Court, 1879.]

STATE EX REL. LANGDON V. LEVI GOODALE.

The relator, having received a certificate of election as school director, was sworn in, and some months afterwards, the board having become satisfied that he had not received a majority of votes, and that defendant had, swore in the latter and excluded the relator from their meetings, and the relator thereupon filed an information in the nature of a *quo warranto*, against defendant: Held, as the law for the election of school directors makes no provision for contest of election, the method adopted in this case is available. Therefore, the fact that the relator had received a certificate is not conclusive, for the court must go behind the certificate to ascertain who had the majority of votes.

BURNET, J.

The relator, John P. Langdon, filed in *quo warranto* an information against Levi C. Goodale, alleging that at the spring election, 1879, he was elected one of the directors of the school district of Linwood for the term of three years; that having received the certificate of the judges of election, he was duly sworn in at the next meeting, and continued to hold the office until the following September, when, after the adjournment of the regular meeting, Goodale, conspiring with three members who remained at the place of meeting, was sworn into office in his stead; that the relator is excluded from any participation in the meeting of the board, and he desires a judgment of ouster against Goodale, and induction of himself. The defendant answers, denying that the relator was elected a member of the Board; he denied that he presented a valid certificate to the Board at the time he was sworn in, and alleges that he, himself, received a majority of all the legal votes cast at the election; that two votes cast for relator were illegal, giving sixty-two votes to defendant, and only sixty legal votes to relator; that the Board becoming satisfied of this state of facts, he was sworn in.

In the law providing for the election of school directors, there is no provision made for contested elections. The method, therefore, adopted in this case, is the only method by which a contest can be had. The answer is demurred to. For the purpose of deciding the demurrer the answer must be accepted as true. The answer avers that relator was not elected, although he received his certificate of election, but that, on the contrary, the respondent was, he having received a majority of the legal votes cast. The court, necessarily, must go behind the certificate to ascertain for whom the majority of the votes was actually cast. Unless leave was asked by the relator to reply, judgment would be given for the defendant.

Leave was taken to reply.

Crawford & Goebel, for relator.

Wm. E. Jones.

CONSTITUTIONAL LAW. 1066

[Hamilton District Court, 1879.]

*EX PARTE WILLIAM WIGGINS.

A statute constituting an offense in cities of the first grade of the first class, is not in violation of constitution, article 2, sec. 26, requiring a law of a general nature to have a uniform operation. Uniform does not mean universal, but only requires operation on all who come within the range of its designation or class.

This was an application for a writ of habeas corpus.

BURNET, J.

Wiggins alleges that he is illegally detained in the Work-house. The mittimus showed that Wiggins had been sentenced to the Work-house for one year by the police court, under a conviction of the charge of unlawfully having burglar's tools in his possession. The prisoner was arrested for a violation of section 55, of chapter 5, and division 5, of the act for the organization and government of municipal corporations. This section reads: "Any person found in any such city, or within four miles of the corporate limits thereof, having in his possession any burglar's tools," etc. It is claimed on behalf of the prisoner that this law is unconstitutional in this, that it is a law of a general nature, and yet has not uniform operation throughout the state of Ohio. This section refers only to cities of the first grade of the first-class.

The court held that the mere having of such tools in one's possession would not constitute the offense; it was necessary that there be an unlawful intent to use the same. It was to be presumed that the police court had evidence of such intent.

As to the objection of want of uniform operation throughout the state because it applies only to cities of a certain grade and class, an important distinction must be made between the words uniform and universal. In order to constitute uniformity of operation, it is not necessary that it shall operate upon all citizens, but if it operates upon all the persons who come within the range of its designation (or class), then it meets the requirements of the constitution. Laws are general and uniform, not because they operate upon every person in the state, but because every person brought into a like situation is subject to their operation.

Writ discharged, and prisoner remanded.

[Hamilton District Court, 1879.] 1067

MARK BURNS v. DORINDA SEEP.

For opinion, see 6 Dec. R., 847; [s. c. 8 Am. Law Rec., 425.]

*A contrary holding will be found in Ex parte Falk, 42 O. S., 638.

1079 HUSBAND AND WIFE.

[Hamilton District Court, 1879.]

SARAH E. HINMAN v. HENRY J. WILLIAMS.

1. In an action against a married woman on her contract, merely averring that she has separate property is sufficient without specifically describing it.
2. An indorsement by a married woman as the payee of a note which is her separate property, is a contract by her which raises the implication that she intended to charge her separate property for its payment, and that such indorsement is for the benefit of her separate property, the proceeds of the note being hers.

ERROR to the Court of Common Pleas.

AVERY, J.

The action was upon a note and mortgage to the order of Sarah E. Hinman, a married woman, and indorsed by her for value. The petition alleged that the note had been taken by her in part payment for the mortgaged property, which she had sold and conveyed, and which was her separate property; that the note was her separate property, and that she was possessed of other separate property. Judgment was prayed on the note. The answer alleged that the title to the mortgage property had been put in her simply for the purpose of its transfer; that in conveying it neither she nor her separate estate received any compensation or benefit, and that her indorsement of the note was not in intention or in fact a charge upon her separate estate. These allegations were denied by reply.

Upon the hearing a personal judgment was rendered against her. What the evidence was does not appear, since there is no bill of exceptions. It must be assumed, then, to have sustained what the petition alleged. Were the allegations sufficient?

It is objected that the action was to charge the separate estate of a married woman, and that although it was alleged she was possessed of separate real and personal estate, no description was set out. This, we think, is a mistaken view of the case. The action was brought under section 28 of the Code of Civil Procedure, as amended, 71 O. L., 47, and was for judgment as provided in that section. The section did not enlarge or change the liabilities of a married woman, that is, she was not made liable in respect to her separate property, where she would not have been before. But whereas, before, the liability must have been enforced by proceedings specifically to charge her property, the provision by the section in question was for an ordinary action and judgment. This is what we understand the supreme court to mean by saying that it was merely intended to change the form of remedy. Jenz v. Gugel, 26 O. S., 527. And in this court, heretofore, it has been so held. Kurtz v. Murray. 2 *ante* 330.

It is objected, again, that to create a liability in respect to separate property, there must have been an intention to charge it, and that such intention was not alleged. But the facts were alleged, and if the inference of intention naturally followed as a conclusion from those facts, it was not essential to set out the conclusion. The only question is, whether from the facts alleged, the inference of intention followed.

When the case was argued, stress was put upon the fact that the note indorsed was secured by mortgage which was at the same time assigned, and it was likened to a note and mortgage made by a married woman, in which case it was maintained the inference of intention to charge any other than the mortgaged property would be repelled. Since then the supreme court has announced in Avery v. Van Sickle, 35 O. S., 270, that upon the note of a married woman for property acquired by her by purchase, an implication arises, in the absence of proof of a different understanding, that she thereby intended to charge her separate estate with payment of the note, and that this is not affected by the fact that she and her husband join in executing a purchase-money mortgage to secure the payment.

This is not in conflict with Levi v. Earl, 30 O. S., 147. In that case a wife had indorsed a note for the benefit of her husband. The court refused to yield to the artificial rule that she must have intended to charge her separate estate, otherwise she would have done a vain thing, and held that as the indorsement was not for the benefit of her separate estate, or her own benefit, but for the accommodation of her husband, the intention to charge her estate would not be implied. Nor is it in conflict with Rice v. Railroad Co., 32 O. S., 380. In that case a married woman had signed an agreement of subscription for shares of railroad stock, but it did not appear that the company acted upon the credit of her property, either in accepting the subscription, or in building the road; nor that the construction of the road had inured to her benefit, or to the benefit of her property, in any other manner than to the public generally. And she had not received the stock.

The decision is consistent, as we understand it, with Phillips v. Graves, 20 O. S., 371, and falls under the first branch of the alternative proposition in the syllabus of that case. A note for the purchase of property by a married woman may well be said to be for the benefit of her separate estate, since under the statute, the property acquired by the purchase becomes in the very transaction, part of her separate estate. The proposition in Phillips v. Graves, *supra,* is that she may charge her separate estate with debts incurred for its benefit, and that her intention to do so may be inferred from her executing a note; or that she may charge it with debts incurred for her own benefit, upon the credit of her separate property. Not falling within the latter branch of this proposition, the suggestion that the credit was given to the property mortgaged, would not affect the question.

The same reason applies to an indorsement by a married woman, where the note is her separate property, and she received the proceeds as her own; nor in that case, any more than where she makes a note for the purchase of property, would the existence of a collateral security by mortgage affect the question of her intention. True, an indorsement is the transfer of title, but it is something more. It is a contract besides, and upon its face is no less a contract when made by a married woman, although whether it shall be binding or not may require other evidence of intention. The intention to contract, at least, will be conclusively presumed from the indorsement itself; if the intention had been simply to transfer the title, it should have been without recourse. From the fact that the note was hers, and that she received the proceeds upon indorsement, the other evidence of intention to charge her separate estate is

supplied. The note was her separate property, the money into which she converted it by her indorsement became so; in that sense the indorsement was for the benefit of her separate estate.

Judgment affirmed.

Wilby & Wald, for plaintiff in error.

C. B. Matthews, for defendant in error.

1082 LIBEL OF OFFICE AND OFFICER.

[Superior Court of Cincinnati, January, 1880.]

†R. M. BISHOP v. CINCINNATI GAZETTE CO.

A publication in a newspaper of the plaintiff in a public office, as governor of the state, in a matter of which the court will take judicial notice that he must exercise *quasi* judicial functions, such as the hearing of charges against a subordinate officer, which publication in its headline uses the word conspiracy, and in indirect language charges him with entertaining with alacrity groundless charges and unreasonableness in conducting the trial, tends to diminish public respect and confidence in such officer, and to accuse him of a breach of trust, and is actionable. Such language is not legitimate criticism, for it charges facts. False charges are not criticism.

HARMON, J.

The case came up on a demurrer to the petition, which seeks damages for two alleged libels, each one of which is made a separate cause of action. The ground of the demurrer is that the publications are not libelous. That in the first cause of action, upon which the main contest is made, is based upon an article alleged to have been published by the defendant of and concerning the plaintiff, headed "The Sutton, Dorsch and Bishop Conspiracy Case," as follows:

"Judge Smith, of the court of common pleas, yesterday decided the case of Weber's application for an injunction to restrain the conspirators from securing his office, under pretenses of charges of official misconduct. Judge Smith held first, that there was no testimony implicating Gov. Bishop in the conspiracy. Yet the groundlessness of the charge of Sutton and Dorsch, apparent upon their face; the obvious intent of taking these fraudulent means of usurping the control of the Police Board; the alacrity with which Gov. Bishop entertained the pretended charges; his unreasonableness in summoning Weber to undertake the expenses of carrying witnesses to Columbus to prove a negative, and that peculiar proceeding which Gov. Bishop called a trial in the case of Hogan, will cause citizens to have their own opinion upon this point."

The innuendos properly point this language to the plaintiff, and allege that the fair meaning and intent of it was to charge that Gov. Bishop, as governor of the state, had entered into a conspiracy to unlawfully deprive Mr. Weber of his office.

It is a settled law that an innuendo cannot enlarge the natural meaning of words, and that words not libelous, not capable of libelous meaning without an innuendo, cannot be given that capability by an innuendo. But, where the language is ambiguous, where it is in the shape of a question, or in the shape of an ironical expression, an innuendo may be used to allege what the real meaning was. The most logical definition of the office of an innuendo is to be found in the case of Sturt v. Blogg, 10 Q. B., 908, where it was held that the court is to decide whether the language is fairly capable of the meaning ascribed by the innuendo, and for the jury to say whether that was the meaning under the circumstances under which it was used.

Now, it must be considered that many things are actionable as libels, which would not be actionable as slanders, and that many things are actionable when printed of and concerning a man in his office or profession, which would not be so if spoken of him as a private individual. To say that a man is drunk is ordinarily

†This decision was affirmed by the district court. See opinion, 6 Dec. R., 1113; [s. c. 10 Am. Law Rec., 488.]

not actionable. To say it of a minister of the Gospel has been held by the supreme court to be so. Hayner v. Cowden, 27 O. S., 292. It has even been held by the Supreme Court of North Carolina libelous to publish of and concerning a judge that he improperly participates in politics so as to influence his opinions, in matter of Moore, 63 N. C., 397, although it certainly would not be libelous to say of a private person that he took such a part in politics that it warped his judgment; and the general rule as to an officer is that "language concerning one in office, which imputes to him want of honesty or malfeasance in office, want of capacity generally as to his official duties, which is calculated to diminish public confidence in him, or which charges him with the breach of a public trust, is actionable." Townshend on Libel, section 196.

Now, it seems to me that this publication which is alleged and admitted by the demurrer to have been pubished of and concerning the plaintiff in his office as governor of the state concerning his action in a matter of which the court must take judicial notice, that he had *quasi* judicial functions, is capable of the meaning applied to it by the allegations of the petition.

It is claimed by the defendant that a fair construction of the language is not that Gov. Bishop was a party to the conspiracy, but that all the paper alleged was that the facts were evident that he was a party to the conspiracy, and that, therefore, it is a mere matter of logic, which the publication charges, and not a matter of fact that these things are evidence of something.

Upon the trial, if it should appear that the facts referred to in the publication as evidence of his complicity with the conspiracy were true, and the jury should find that the publication simply alleged that these facts so found to be true were evidence, of course that could not be libelous, but on demurrer to the petition it is admitted that these things alleged to have been evidence are false. The party cannot shield himself from an action for libel by putting the libel in that shape. It is not prefaced by the word "if." If that word were used it might be said that the defendant did not charge the fact in specific language, but only said if it were true, then he was in the conspiracy. They are alleged as facts, and their tendency would certainly be to diminish the public respect and confidence in the governor of the state. His sworn duty was to hear charges, and, if they were proven and sufficient to remove the officer. He was *loco judicis*. He is falsely charged with entertaining, with alacrity, charges groundless upon their face. The meaning of the round-about language as to the opinion of citizens in spite of the decision is charged and admitted to be that he was a party to a conspiracy to remove an officer by fraudulent means, and while conspiracy is no crime in Ohio as at common law, so as to be libelous *per se*, it is certainly so of a *quasi* judge to charge him with conspiring concerning a matter he was sworn to decide impartially upon the law and evidence.

It is also claimed that this language is legitimate criticism of a public officer, which, by the law and public policy, is permitted to the press. But the very learned and able decision of Judge Force, in the case of Wahle v. Cincinnati Gazette Co., 6 Dec. R., 709, at the March term of this court, last year, is conclusive upon the point that because a man is a public officer, and because the criticising person is a newspaper, the right to publish things which otherwise would be libelous is not enlarged; while a public officer is open to criticism, and while his motives, possibly, as to acts admitted to have been done, may be criticised, yet when facts are falsely charged against a public officer which tend to degrade or disgrace him, it is no answer to say that he is a public officer and his course open to criticism. False charges are not criticisms. The demurrer to the first cause of action will be overruled.

The court does not understand it to be seriously contended that the second cause of action was open to demurrer. It differs from the first only in this, that it is more plain and explicit in charging that the plaintiff was a party to an unlawful conspiracy; stronger in that regard, though possibly not in regard to which attention is called in the first cause of action by counsel, which probably should not be considered upon demurrer, but would only be a matter for damages, and that is that the publication is, that although the court has decided that the plaintiff was not a party to the conspiracy, yet the object of the publication is to say that he was. But the second cause of action is positive and direct, saying that if there were doubt before, the doubt has been removed.

The demurrer to this cause of action must also be overruled, with leave to answer.

C. B. Simrall, for plaintiff.

Sage & Hinkle and Matthews, Ramsey & Matthews, for defendant.

1123 [Superior Court of Cincinnati, General Term, January, 1880.]

JOSEPH S. COOK AND CATHARINE M. COOK, PLAINTIFFS, V. JOSEPH SCHEID, DEFENDANT.

For opinion, see 6 Dec. R., 867; [s. c. 8 Am. Law Rec., 493.]

1126 INJUNCTION—STREET RAILROADS.

[Superior Court of Cincinnati, General Term, January, 1880.]

HASKINS EX REL. CINCINNATI V. CINCINNATI CONSOLIDATED ST. R. R. CO.

1. Upon the refusal of the solicitor a taxpayer may maintain an action under the municipal code, against a person who has made an unlawful contract with the city, to enjoin its performance by him although the city has done everything to be done upon its part.
2. The city has the right under its general powers to renew its permission for the continued operation of an existing street railroad, for a period not exceeding twenty-five years, such use having been legalized by the general assembly; competition is not required in such case as in case of the construction of a new road, and it is no objection that a vested right is given where it is not made exclusive.

HARMON, J.

This case was reversed upon general demurrer to the petition. It is admitted by the demurrer, that plaintiff is a taxpayer of Cincinnati, and that he duly applied to the city solicitor to bring this action, which he refused to do. Plaintiff, therefore, sues, on behalf of the city, to enjoin the defendant, a corporation under the laws of Ohio, from the performance of certain contracts made by it with the city, relating to the further use of the streets for its roads. He alleges as grounds for relief, that defendant was operating its various roads under contracts with the city, granting it the use of the streets for that purpose upon certain terms and conditions for terms of years which were about to expire, when on February 7, 1879, the city council passed a general ordinance providing terms and conditions upon which, for terms of twenty years, street railroads should thereafter be constructed and operated. Section 12 of that ordinance provided that the owner of any existing street railroad might avail himself of the stipulations thereof by filing with the board of public works, within thirty days after its passage, his written acceptance of such stipulations with a bond conditioned to secure their faithful observance, and to save the city harmless from all claims by reason of the continued existence or operation of each road. Certain specific terms as to rates of fare upon certain of defendant's roads were also set forth in the ordinance, to which defendant was required to agree in availing itself of its provisions.

The petition alleges that defendant duly availed itself of the provisions of said section 12 as to all of its routes, and claims by virtue of such action to have the right to operate its roads for twenty years from the passage of said ordinance upon the terms therein prescribed, and is now operating its roads accordingly. The terms and conditions of said ordinance are alleged to be different from those contained in the original grants of consent for the defendant's roads, and to be less advantageous to the city. Whether more or less so to the public is not averred.

Those provisions of said ordinance, granting to existing companies the city's consent to the further operation of their roads, are alleged to be unlawful and void, because no advertisement was required, and no bidding provided for, as alleged to be required by law in such cases.

The first question raised by the demurrer, relates to plaintiff's right to maintain the action against the defendant. It is claimed that the "performance of any contract" to enjoin which suit is authorized by the solicitor, or by a tax-payer upon the solicitor's refusal, is performance by the city; that in this case nothing remains to be done by the city, which is not even made a party, and that in effect this is a proceeding in *quo warranto*, requiring defendant to show by what right it is operating its roads in the streets. We do not understand the language of the court in Cincinnati St. R. R. Co. v. Smith, 29 O. S., 291, 303, i. e., that these provisions of the municipal code were simply intended to regulate the practice in such cases, equity having long taken jurisdiction to enjoin illegal acts in municipal corporations, to mean that the language of these provisions is to be limited by the former practice in spite of their express terms. On the contrary, they are highly remedial, and therefore entitled to a liberal construction. The language could hardly be made broader. While any unlawful contract entered into by the city is still unperformed, its performance may be arrested by injunction. If the city has not yet performed its part, the action lies against it. If the city has done all to be done upon its part, no action can lie against it. The only party then suable is the one against whom alone the injunction sought could operate.

If the action were to enjoin "the abuse of its corporate powers," it could be maintained only against the city, but the language of the other clause, "the execution or performance of any unlawful contract," cannot by any fair construction be limited to execution or performance by the city. In the Smith case, just referred to, the solicitor sought to enjoin the companies from tendering their bonds in acceptance of an ordinance already passed, and from exercising any privileges thereunder, and the court said (p. 306), that this might be done. The demurrer being general, does not raise the question whether the city is or is not, a proper or necessary party.

It is no objection to this action that the question it raises might also be raised by proceedings in *quo warranto*. This is a special statutory remedy given to a tax-payer. The other remedy belongs to the state alone. The statute does not require it to appear that the plaintiff has no remedy at law as is usually required in actions for injunction. If it did, he has no such remedy. All he must show is that the contract whose performance he seeks to enjoin is unlawful.

This brings us to the question whether the action complained of was authorized by law, which requires an examination of the legislation of the state upon the subject of street railroads.

It is well known in the profession that the first street railroads in this city were organized under the general railroad law of 1852, and acquired their right to use the streets by agreement with the city council as authorized by the 12th section thereof, which this court by Judge Hoadly, in the per capita license case, and by Judge Taft, in the package ticket case, held to be broad enough to include street railroads though they were unknown when it was passed.

The first mention of street railroads was in the act of March 3, 1860, relating to cities, etc., (4 Curwen 3388), section 15 of which forbade the

council to permit their construction without the consent of property owners, and section 16 of which provided that the council "shall prescribe by ordinance the terms, etc., upon which the streets, etc., may be used and occupied by street railroads, and the proper authority to grant permission for such purpose" and that no such grants should be made, except to the person agreeing, after public competition, to carry passengers at the lowest rates of fare. Grants already made were excepted from these provisions.

Next came the act of April 10, 1861, 1 J. R. Sayler, 80, to provide for and regulate street railroad companies. This, which is still in force, permits the incorporation of such companies in the usual way, requiring the certificate to state among other things "the names of the streets, etc., through which such road shall pass" and its termini. The second section grants the usual corporate powers, and in addition, authority "to construct, operate and maintain a street railroad, with single or double track, on the street, etc., specified in the certificate." Sections 15 and 16, of the act of 1860, were made parts of this. Companies which had organized and constructed roads under the act of 1852 were authorized to come under this act, and consolidation of companies was provided for.

The act of March 27, 1866, 2 J. R. S., 958, amended and supplemented the act of 1861, substantially re-enacting its provisions as to competition, and granting consent only to the lowest bidder. Section 2, like the former provisions, was in terms broad enough to include both permission to construct and renewal of consent to operate—"The council shall prescribe by ordinance the terms, etc., upon which the streets, etc., may be used or occupied by street railroads, and shall make no grant and give no consent for the use or occupation of the streets, etc., for a street railroad," except to the person who, after advertising for proposals, should agree to carry passengers at the lowest rates.

These provisions were in turn repealed by the municipal Code of 1869, sections 411 and 412 of which provided that "before the work of constructing" any street railroad should be commenced, council should grant permission, prescribe terms, etc., upon which such road should be constructed and operated. Further, that "no ordinance for such purpose shall be passed" without inviting competition, and only to the lowest bidder as to rates of fare "upon such proposed railroad."

The revised Code of 1878, in force when the ordinance in question was passed, provides that "no corporation, etc., shall perform any work in the construction of a street railroad until council by ordinance shall have granted permission and prescribed the terms, etc., upon which the road shall be constructed and operated." Further that "no ordinance for such purpose" shall be passed without advertising for proposals, and "no such grant" shall be made except to the person offering the lowest rates of fare "upon such proposed railroad;" "provided, that no grant nor renewal of any grant for the construction or operation of any street railroad shall be valid for a greater period than twenty-five years from the date of such grant or renewal." (75 O. L., 359.) The recommendation of the board of public works is also required, before any grant "for the use of a street, etc., for the purpose of a street or other railroad shall be made or renewed." (75 O. L., 303.)

The provisions of the above named laws prior to the Code of 1869, seem broad enough to require competition before any grant or permission to use and occupy the streets could be made either for a proposed

road or for the continued operation of an existing one. It is clear, however, that the terms of the Code of 1869, still clearer than those of the Code of 1878, are much narrower, and cannot, by any fair construction, be held to require competition except for the "construction" of a "proposed road." So that even conceding, what we do not concede, that a renewal must be made upon the same terms and conditions, and to the same person as the original grant, competition is not required where they are not the same. Renewals are not excepted from a general requirement. The requirement itself is special, including only grants for construction, the same as that of the consent of property owners.

With the wisdom of thus narrowing these provisions, we are not concerned. The danger of favoritism by the council, if competition be not required, suggested by counsel for plaintiff, and the reasons for not requiring it in renewing the licenses of existing roads, presented by counsel for defendant, might affect legislation, but cannot aid construction. It was competent for the general assembly to impose no restrictions at all upon the city council. It was just as competent to impose them in some cases and not in others. The power to extend an existing road is just as liable to abuse as the power to renew a grant of permission to operate one, yet it is admitted that competition is not required in cases of such extensions.

A material change in the phraseology of a law implies an intention to change its meaning. Bloom v. Richards, 2 O. S., 387, 403. The introduction of the phrase "proposed road" in the clause requiring a letting to the lowest bidder, and the substitution of the phrase "construction of a street railroad" for "the use and occupation of the street railroad" are changes too marked to be meaningless.

The real question to be determined, therefore, is not whether competition is required in granting permission for the continued operation of an existing road, but whether there is any authority to grant it at all.

It seems to us that the assumption of plaintiff's counsel is unwarranted that what the city grants in such cases, or even in cases of new roads, is a franchise, where the grantee is a corporation as here. The franchise not only to be a corporation, but "to construct, operate and maintain a street railroad. * * * upon the streets, etc., specified in the certificate, is directly granted to defendant by the act of 1861, under which we must, from the petition, presume defendant to come. The city's consent is required before the franchise can be actually enjoyed; so is that of owners of abutting property. But the consent of the one is strictly no more the source of a franchise than that of the other. What both consent to is the possible interference with their interests by the exercise of a franchise already obtained from the state. The city in addition to protecting its strictly municipal interests by requiring street repairs, etc., is also charged by reason of its general control of streets, travel, etc., with the duty of protecting the traveling public, but all it grants in any case, by the express terms of these laws, is its permission. The power to grant permission implies the right to make terms upon which such permission may be had, which terms, when accepted, may constitute a contract, but do not create a franchise in any proper sense.

It will be observed that in all the above laws, in force when this ordinance was passed, the language is that of restraint upon the council. None of them authorize it expressly to grant permission or prescribe terms, but it is forbidden in one place to do so without advertising for bids; in

another to do so without the recommendation of the board of public works, and in still another to do so for longer than twenty-five years. None of them authorize it to renew such grant, but it is forbidden to do so without like recommendation, or for longer than such term. And it is argued that no grant of power to do an act at all is to be inferred from a provision that it shall be done only upon certain conditions. It seems very strict construction to hold that enactments that council shall not renew any grant for the use of the streets for a street railroad unless recommended by such board, and that no such renewal shall be valid for more than twenty-five years, do not necessarily imply that council may renew it upon such recommendation, and that such renewal shall be valid for twenty-five years or less. We will, however, not pass upon the correctness of such construction, because, considering these laws as merely restrictive, we find elsewhere sufficient authority for the action of the city in this case.

The general powers over its streets, vested by law in the city, are very broad and full. It has "care, supervision and control" of them. It is authorized to "improve, keep in order, and repair" them; "to regulate the use of * * * every description of carriages," and "to license vehicles used for transportation of persons and property for hire, and fix rates for such transportation." (75 O. L., 388, 198-9, 394.) It has had these powers ever since it became a city.

These ordinary powers, it is held, are "ample enough to authorize them (cities) to permit or refuse the use of the streets for such purposes (i. e., for street railroads, not for other railroads), but they cannot, by implied power, confer corporate franchises." 2 Dillon, section 575. The same views are held in Brown v. Dupessis, 14 La. Ann., 842; Moses v. R. R. Co., 21 Ills., 523; R. R. Co. v. Phila., 58 Penn., 119. The only case which seems to conflict with this view is Davis v. Mayor, etc., 14 N. Y.; but the conflict is only apparent, because there the council attempted to confer corporate powers and the perpetual franchise to use the streets. The majority opinion is expressly upon the ground that legislation was necessary. Had there been such a law as ours of 1861, or as those parts of the Code above cited, and council had simply granted its consent upon agreed terms, there would have been no ground for that opinion.

In every state except New York where the question has arisen, it has been held as in Ohio, in St. R. R. v. Cumminsville, 14 O. S., 523, that so far as "the carriage of passengers by this mode is concerned it differs in nothing from the exercise of the common right of carrying them by coaches and omnibusses, and everything needing a grant or further authority of law is the right to place and maintain in the highway the necessary conveniences for this new description of carriages." In Ohio, that authority of law is supplied by the act of 1861, its exercise being subject to municipal supervision by reason of the city's control of the streets, and the right of so carrying passengers subject to like supervision by reason of the city's power to regulate vehicles and fares.

If the law of 1861 stood alone upon the subject of street railroads, the city would, under the general powers above recited, have had the power to take action upon the subject to which the provisions of the ordinance in question here complained of relate. All other enactments except that as to time and recommendation of the board of public works, relate to the construction of new roads. They do not limit these general

powers in any other respect as to roads already constructed. This ordinance was so recommended; it is for only twenty years. It is, therefore, lawful and valid, unless made otherwise by reason of containing unlawful provisions.

This view of the law relieves the general assembly from the imputation of absurdity in limiting and restricting a right which does not exist. And conceding that a restriction may not by implication be a grant of power, it is a recognition of its existence which, though it is not in the province of the legislature to construe laws, is not without weight in the construction of other grants of power seemingly broad enough to include that contended for.

The position we take is fortified by the fact that individuals as well as corporations are included in the foregoing provisions of the municipal Code. That they may have any effect whatever as to individuals, much greater scope must be given them, either as an implied grant of power, or as a recognition of existing powers, because individuals, given by ordinance the use of the streets, could not look to the act of 1861 as the source of their franchise, but must look to the ordinance alone.

An individual with a grant from council could contend with great reason that the provisions of the Code alone authorized the city to make it, because, the grant being for a use recognized as lawful, such strict rule of construction should be applied as it was in the Gas Co. case, where the power contended for was to make a grant condemned by every principle of public policy. We need not go near so far as this case.

The claim that the ordinance is unlawful because it grants exclusive permission to defendant cannot be maintained. The ordinance in the Gas Co. case, 18 O. S., 262, was in terms exclusive. That in Smith v. St. R. R., 29 O. S., 291, was in fact so, because it provided that no consent should be granted for other tracks in the same streets without the consent of the defendant. This one is exclusive neither in terms nor in fact. The city by reserving the right to permit other roads to run its cars over the tracks of defendant, not exceeding one-tenth of their length, does, it is true, leave it the exclusive right to the other nine-tenths of its own tracks. But the tracks are its own property, over which the law gives it the exclusive right to run cars without express agreement. The city would have no such right to any portion, though the public has the ordinary right of travel over them. The city may at any time give consent to the laying of other tracks in the same streets. The only exclusiveness of defendant's use of the streets, is that necessary from the very character of the use. For such exclusiveness the general assembly is responsible, not the city.

In seeking in the general powers of the city authority for its action here we are met by the further objection, that those powers being of a public legislative character, cannot be taken by one council from its successors. The next council, it is said, may be of the opinion that the public interests require the absence of street railroads from these streets, yet if this ordinance be sustained, it is in the nature of a contract, and the council will be powerless.

It is true that this ordinance purports to be in the nature of a contract, giving vested rights for twenty years. So did the ordinance in Smith v. R. R. Co. Yet the right of council to impose contractual obligations upon the city in such cases, was expressly recognized, p. 307. The same is true of State v. Gas. Co. The charter of the Gas Company was

similar to that of street railroad companies under the law of 1861. It gave the right to lay pipes in the streets, requiring first the consent of council. Council consented for a term of twenty-five years, but went further and disabled itself from giving like consents to others. It was sought to justify the city's action by its control and ownership of the streets. The court after saying that these general powers were all conferred upon the city "for the purpose of rendering the enjoyment of the easement more convenient," etc., and that they were "all of a public municipal character, and their exercise quite different from the acts of a private corporation dealing at its own discretion with property over which it may exercise all the rights incident to absolute ownership," said p. 292, "Now we concede that the streets of a city may be appropriated to authorized purposes promotive of the convenience and welfare of the inhabitants, and not substantially interfering with the public easement or right of travel. And from partial appropriations of this character, rights of private property may arise which cannot rightfully be disturbed; but when it is sought to couple with such partial appropriation a stipulation that no further use of unoccupied portions of the streets shall thereafter be permitted or used for similar purposes, this is not the exercise of the power of the appropriation, but an attempt to prohibit its exercise * * * and the power of the city council thus to divest iself of authority conferred upon it as a public agent for the benefit of others must be clearly shown."

In these cases, as in Street Railroad v. Cumminsville, *supra,* the court recognized the fact that expenditures of money are necessary to adapt the street to this new use, and that unless some assured right were given, these expenditures would never be made. The doctrine of necessarily implied powers would therefore apply when the legislature has legitimized such use of streets. The general assembly also has recognized the city's right to bind itself for a term of years by fixing the limit of twenty-five years. See also Mayor v. Troy R. R., 49 N. Y., 657. In Mayor v. Davis, as before said, this use of the streets had not yet been authorized by law.

There has been in this case no parting with any right of the city beyond that so necessary from the nature of the case. It still has for all public purposes full control of the streets.

The demurrer to the petition is therefore sustained, and unless amendment is desired, the petition will be dismissed.

Force and Foraker, JJ., concurred.

1147 [Hamilton District Court, 1879.]

JAMES F. WILLIAMS v. E. T. HOLCOMB, ADMR. OF JOHN MITCHELL ET AL.

For opinion, see 6 Dec. R., 860; [8 Am. Law Rec., 484.]

LANDLORD AND TENANT—SPECIFIC PERFORMANCE—INJUNCTION. 1149

[Superior Court of Cincinnati, General Term, January, 1880.]

VAN TYNE v. CHARLES SHORT.

Where defendant agreed with plaintiff, who was his lessee with privilege of purchase, that if plaintiff would surrender the lease defendant would build and lease him another house on the ground, and meanwhile allow him to occupy a third house rent free, but after plaintiff had surrendered, refused to build the new house, and seeks by forcible entry and detainer proceedings to eject him from the third house, and plaintiff seeks specific performance of the agreement and an injunction against disturbing his present possession: Held, although the court cannot undertake to enforce and supervise a contract to build a house, it would enjoin disturbing the plaintiff's present occupation until such house were built and leased, if there were no other difficulty in the way; but that the agreement to build not specifying what size, cost, material, or dimensions, cannot be decreed to be performed, or known when it is performed, or what is to be done, so that relief against the forcible detainer proceedings is relief against an action at law merely, and all relief can be granted in the action at law and all rights enforced there, and the injunction will therefore be refused, and the action dismissed.

Reserved from special term on the pleadings and certified bill of evidence.

FORCE, J.

The plaintiff avers that while he was lessee with privilege of purchase of a house and ground belonging to the defendant, the defendant agreed upon consideration of the plaintiff's surrendering the lease and moving from the premises, to build and deliver to the plaintiff on other ground a smaller house, leasing it with privilege of purchase, and meanwhile to give to the plaintiff till such delivery the occupation, free of rent, of a third house; that the plaintiff did surrender his lease, vacate the premises and move into the temporary house; but, that defendant refuses to comply with the agreement to build a new house, and has instituted before a justice of the peace, proceedings in forcible entry and detainer to eject him from the temporary home; and prays for a decree for the specific performance of the agreement; for an injunction restraining the defendant from disturbing him in his present possession, and for such other and further relief as may be appropriate.

The defendant admits that the plaintiff has been and is in occupation of a house belonging to the defendant free of rent, and that proceedings in forcible entry and detainer have been begun to oust him; and denies all other allegations.

The agreement is proved substantially as alleged. The surrender of the first lease and the giving up by the plaintiff of his home, is a sufficient consideration.

If the plaintiff is entitled to a decree for the specific performance of the agreement to build the new house, he will have at the same time, as a matter of course, an injunction restraining the defendant from disturbing his present possession until such performance is complete.

Where a decree of specific performance is made, a master commis-

sioner is, or may be, appointed to see to its execution. But where the execution of a decree would require the long continued performance of personal acts, especially of acts requiring skill, it would be a public inconvenience for courts, through their officers, to undertake to surpervise such performance. Hence courts refuse to make decrees for the specific performance of contracts to construct a railway, to work a quarry, to build a house, and such.

But where the purpose of such a contract is to produce a definite result that can be easily measured, as a contract to erect water works, and to supply the plaintiff daily with a specific quantity of water, the practice has grown up lately in England, of indirectly securing performance, by allowing mandatory injunctions restraining the defendant from neglecting to produce the result; as in the case named, restraining the defendant from neglecting to supply the stipulated quantity of water. Cook v. Chilcott, L. R. 3 Ch. Div., 694. But this practice has not yet been adopted in the United States.

In some cases, however, where a decree of specific performance would be refused, it is common practice to allow a restraining injunction enjoining the defendant from doing any act in violation of the agreement. As in the case of articles of partnership.

In Lumley v. Wagner, it was held that where a contract contains important stipulations which cannot be directly enforced, an injunction will be allowed restraining the defendant from doing acts in violation of other stipulations in the contract, and this is done with a view to constrain the defendant to perform the entire contract. This case has been repeatedly followed in England, and recognized in the United States, and ten years ago, in Catt v. Tourle, L. R. 4 Ch. Ap., the Court of Chancery Appeals, affirming Lumley v. Wagner, expressly overruled so much of the earlier case of Hills v. Croll, reported in a note, 1 D., M. and G., 627, as is inconsistent with it.

Hence, unless there is some other difficulty in the case, the plaintiff is entitled to an injunction restraining the defendant from disturbing the plaintiff's occupation of the premises where he now is, whether by proceedings at law or in any other manner, until the defendant shall build, lease and deliver the new house to the plaintiff.

But the agreement put in evidence is merely to build a house smaller than the house formerly occupied by the plaintiff. There is no agreement as to its material, whether frame or brick or stone; none as to its plan, or its cost; none as to its dimensions beyond the fact that it is to be smaller than another designated house. How is such an agreement to be performed? How shall we know when it has been performed? Who can say what the agreement is? The difficulty is, not the performance of the execution of the decree, but the impossibility of framing a decree. The difficulty is not in securing performance either directly or indirectly, but in knowing what it is that is to be performed.

The agreement offered in evidence is so entirely vague, indeterminate and incomplete that the court cannot undertake to require it to be carried out either directly by a decree of specific performance, or indirectly by an injunction.

Since there can be no relief based upon the agreement to build, the agreement for the gratuitous occupation of the premises where the plain-

tiff now lives, stands by itself. The prayer for an injunction to restrain the proceedings in forcible entry and detainer, is then simply a prayer to restrain an action at law, instituted to oust the plaintiff from premises which he claims he is entitled to occupy by virtue of a written agreement. All questions concerning that agreement, whether or not there is such an agreement, what is its effect, whether a lease or a license, whether it is still in force or has expired, can be presented, and can be as effectually determined in the forcible entry and detainer suit as in this court. This court, therefore, has no authority to restrain the parties from proceedings there.

The prayer of the petition must, therefore, be denied, and the action dismissed.

Jordan, Jordan & Williams, for plaintiff.

King, Thompson & Maxwell, for defendant.

INDEX

ACKNOWLEDGMENT—

1. The act of June 1, 1831, S. & C., 458, "to provide for the proof, acknowledgment and recording of deeds," etc., requires the joint, but not simultaneous evidence of a deed for the conveyance of real estate from husband and wife. Ludlow v. O'Neil. 186

2. Where a grantee takes a conveyance mortgage having a proper notarial certificate of a married woman's acknowledgment, and without knowledge or means of knowledge of any defect, the grantors cannot impeach it as against him; and the fact that the notary was a clerk in the grantee's lawyer's office does not charge him with notice. Catholic Institute v. Gibbons. 516

AGENCY—

1. Settlement of loss by agent of a foreign insurance company. Millville Ins. Co. v. Flesher. 510

2. An agent having property of his principal for sale, cannot transfer it in payment of his own debt, and the creditor so receiving it will be liable to the principal. Murdock & Co. v. Tube Works Co. 465

3. Parol evidence is not admissible to change the legal effect of a contract made by an agent, so as to make it the contract of the principal. Post & Co. v. Kinney. 439

4. Question of agency upon the absconding of an attorney. Stone v. Davenport. 229

5. One who *bona fide* sells bonds for another, which afterwards turn out to be forgeries, cannot be held personally liable, that if at the time of the sale he stated that he was selling as agent, his principal not being disclosed, because not inquired about. Souther & Co. v. Stoeckle. 511

6. An agent to relieve himself, must not only disclose that he is an agent, but must name the principal, and in such a way that the other party must understand that he is dealing with the agent only as such, and the credit is to be given to such principal, and that the agent is not dealing in his own name. *Ib.*

7. A life insurance broker, who receives a percentage from the agent of the company for risks brought, is the agent of any person who employs him to obtain insurance, and the assured is responsible for a false answer by him that no other company had refused to insure the applicant. Pennisten v. U. C. Life Ins. Co. 678

8. An insurance company is not permitted to defeat a policy by shifting over to the insured its responsibility for the acts of its own agents. Amazon Ins. Co. v. McIntyre. 577

9. In a loan proposed upon mortgaged security, it was required that the title be examined, etc., the borrower to pay the fee: *Held,* that the service to be performed was for the lender, and the person selected was the agent of the lender rather than of the borrower. Stone v. Davenport. 83

10. Authority of such agent in perfecting the title to such property. *Ib.*

11. Money paid to such agent and dishonestly appropriated to himself, as between borrower and lender. the loss must fall upon the lender. *Ib.*

12. Where an agent of the absent owner of a note or mortgage in the hands of attorneys for collection, obtains money by representing himself as the owner of the note or mortgage and giving an order in his own name on the attorneys to pay the lender the proceeds, and the attorneys accept the order so drawn, the acceptors are liable. Keys v. Cox. 57

13. The failure of the lender to examine the records of the suit on the note and mortgage was not negligence. *Ib.*

14. A suit against the acceptors is not premature on the ground that they have not yet collected the judgment, where they have renounced all liability to the payee of the order. *Ib.*

15. An acceptance of a bill of exchange drawn on one as agent, thus: "Accepted, J. A. Robinson, Agent K. & O. C. Co.," giving only initials of principal's name, it cannot be said these are *descriptio personae* merely, and that he is personally liable, but parol evidence of their meaning is admissible. Bank v. Robinson. 474

16. A person selected to wind up the business of a firm and engages a room for that purpose, has power to pay the debtor partner in cash for the use of such room, instead of crediting the rent to his account. Mitchell v. Runk. 491

ALTERATION OF INSTRUMENTS—

Mere knowledge of an alteration of an instrument without action is not ratification, but affirmative assent by acts or words is sufficient, and the ratification may be by parol. Horr v. Hawkhurst. 168

AMENDMENT—

1. Permitting plaintiff to amend during trial by interlining, without new verification, is no injury to defendant justifying reversal. Con. St. Ry. Co. v. Barlage. 675

2. Where a pleader has mistaken the relief to which he is entitled, the petition may be amended to that effect. Bloch v. Koch. 54

ANIMALS—

1. Whether defendant harbored and kept the dog that bit plaintiff, or it belonged to a boarder at his house who had gone away, leaving the dog in his charge, is for the jury to determine. Nordeck v. Loeffler. 376

2. Owner of land is not bound to fence against stock habitually breachy and unruly. Phelps v. Cousins. 172

APPEALS—

1. The filing of the notice of appeal with the clerk at his residence is not a compliance with the law. Taylor v. Wallace. 328

2. When an act requires that notice of appeal in an election case shall be filed within twenty days from a certain time, and that day falls on Sunday, Sunday cannot be excluded so as to give until the next day. *Ib.*

3. An appeal may be taken by a creditor from the order of the probate court, approving an election of an assignee by creditors. Starbuck v. Brigel. 477

4. Contempt proceedings against a receiver for not paying as ordered by decree, in which, on his answer being found insufficient, an order of attachment was issued against him, from which he took an appeal, is not appealable. Campbell v. Shotwell. 473

5. Where counter-claim set up in an action is for more than $20, but has no connection with the subject of the action, and was disregarded by the justice, the justice will not be compelled to allow an appeal. State v. Linn. 468

6. A petition to obtain a new trial because the party was prevented by misfortune from being present at the trial, is not a civil action, but a proceeding in an action after judgment, and not appealable. Meier v. Weber. 461

7. Where an appeal bond is not perfected by reason of some irregularity, or defect or oversight, the common pleas has the right to amend the bond, such amendment being made in furtherance of justice. Hellebusch v Richter. 341

8. The undertaking of a surety on an appeal bond, is not that the judgment debtor would pay, but that the surety would pay. Poll v. Murr. 574

9. An appeal bond with one surety being offered, the clerk stating that he would accept it unless objections were made, and no objections being made the bond will be held to have been approved by the clerk. Broadwell v. Cody. 539

APPEARANCE—

1. Where an action against a married woman begun before a justice is appealed, and defendant, instead of objecting to the jurisdiction before appearance makes this objection and also pleads payment and the general issue, this is an appearance and submission to the jurisdiction. Miller v. Creighton. 602

2. Appearing before a justice and moving for the discharge of an attachment issued, on the ground of concealment so that service cannot be made, is not entering an appearance. Mawiecke v. Wolf. 476

ASSESSMENTS—

1. Assessments assessed upon real estate, are a personal obligation and liability, for which the owner of the property may be sued personally. Cummings v. Fitch. 36

2. Where, pending partition proceedings, a husband, who is seized of a purport of real estate, by virtue of a devise to his wife for life, prior to the Key law—the property being sold to pay a street assessment—buys it in; before the court will decide whether he holds the title so purchased in trust for the heirs and is liable under 67 O. L., 80, paragraph 541, to pay such assessment in full, the answers and cross petitions of such fee owners as seek to disaffirm such sale, must be filed. Cook v. Gilpin. 291

3. Where the original resolution for an improvement was broad enough to cover a retaining wall and afterwards such wall being found necessary, may be constructed by a separate contract, and a separate assessment levied for it on the property abutting without

the passage of another resolution. Cincinnati v. Shaw. 500

4. A petition against property owners to collect an assessment levied for the cost of a main sewer, need not allege that the lots need local sewerage. Hartwell v. Building Ass'n. 397

5. Where all the resolutions and ordinances for the improvement of a certain street are passed, but the contract was let for only part of the street, on the completion and acceptance of which an assessment ordinance was passed; *Held*, that the assessment ordinance was premature and unauthorized, for the work was not that contemplated in the resolutions and ordinances. Great Western Stock Co. v. Cincinnati. 47

6. Owners of assessed lots can not be permitted to prove that, by mistake and unskillfulness of the contractor, work was done in excess of the original amount. Mack & Verity v. Cincinnati. 49

7. Damages for abuse of privilege granted by a lot owner to the contractor can not be set up in an action upon the assessment. *Ib.*

8. Collection of assessments by the contractor. Cincinnati v. Wright. 234

9. Owners of property abutting on a strip of land on the side of an improved street, are liable to be assessed as owners of property abutting on the improvement. Cincinnati v. Richards. 295

10. Where an assessment for a street improvement was levied at a uniform rate upon the abutting property, the fact that the city, by payment to the contractors, voluntarily relieved part of the property from the assessment above a certain amount, does not render it invalid for inequality. Cincinnati v. Schoenberger. 342

11. The board of education is liable for its proportion of an assessment levied by the city for improving a street in front of school property. Cincinnati v. Bd. of Education. 362

12. Where part of the terms of annexation of a special road district to a city where that all grades of streets theretofore established should be respected, an assessment for street improvement, where there was a change of grade, can not be resisted unless the property holders are shown to have objected to such change. Cincinnati v. Corry. 415

13. Where an assessment for a street improvement is without authority of law and therefore void, it is not such irregularity or defect as is contemplated in sec. 550 of the Municipal Code. *Ib.*

14. An assessment by the front foot is to be restricted to the average depth of lots in the neighborhood. *Ib.*

15. An assessment for the improvement of two streets, one of which is the continuation of the other, comprising substantially one street, cannot be invalidated on this ground. *Ib*

16. Where a city contracts for the improvement of a street, to be paid for by certifying an assessment on the abutting property to the contractor, and there is no power to make the assessment the city is liable to the contractor, though there was no money in the treasury at the time of the contract. Cincinnati v. McErlane. 535

17. Where on affirmation of a judgment enforcing the collection of a street assessment without awarding penalty, no exception was taken to the omission of the penalty, the appeal not having been prosecuted for vexation or delay a subsequent motion to award the penalty will be refused. Evans v. Cincinnati. 540

18. An improvement of a street by a contractor under a contract to look for payment only to assessments, without recourse to the city for balance remaining unpaid, the municipal corporation is not liable for loss from deficiency in the value of the lots. Cincinnati v. Crowley. 596

ASSIGNMENT FOR CREDITORS—

1. Where an assignee has qualified and entered upon his duties, and an election by the creditors is subsequently held to choose an assignee, if such election does not result in a removal of the assignee originally appointed, a second election upon another petition cannot be held. Starbuck v. Brigel. 477

2. Assignee not entitled to compensation for services and attorney fees out of the proceeds of the estate, where there is no surplus. Moore v. Feldwisch. 467

3. The assignee for creditors has no better title than his assignor. and the law of Ohio does not require notice to be given to the debtor of the fact of assignment in order to perfect it as between the assignor and the assignee. Adae & Co. v. Moses. 419

4. Rent of premises is a part of the costs of administering the trust, and should be taken out of the pro-

ASSIGNMENT FOR CREDITORS—Concluded—

ceeds of the property sold. *In re* Carter. 317

5. A debtor who pays to second assignee of a non-negotiable chose in action, without notice of former assignment is protected by such payment. Burge v. Miner. 156

6. As between holder and drawer of a banker's draft, the latter is estopped to deny the assignment, and if he collect the deposit himself, he holds it as trustee for the real owner. Davis, Gould & Co. v. Adae. 620

7. Where the officers of a savings society, just before assignment in insolvency, offered to a depositor for the amount of her deposit a note and mortgage owned by it, and she accepted the offer, but no delivery was ever made, she has no title thereto, but at most an equity resting in contract. Shattler v. Taft. 631

8. Continuance of business by assignees under authority from creditors. Brigel v. Starbuck. 587

ATTACHMENT—

1. It is a good defense to an action before a justice, that the amount due by defendant had been garnisheed in another action against plaintiff by third parties, and the order of attachment served on defendant the day before this trial. Fitzgerald v. Sweet. 305

2. An attachment on the ground of non-residence cannot be obtained in an action for damages, for breach of promise of marriage. Conley v. Creighton. 241

3. Where garnishment proceedings show that the fund claimed to belong to the debtor, A., was the proceeds of insurance on a boat, assigned to the holder by one M., to be distributed among a list of creditors of the boat named in the trust deed from M. to him, and he had distributed it and had a balance left, the judgment creditor is not estopped by having received part of the money as a creditor of the boat under the trust deed, from showing that A., and not M., was her real owner, and entitled to the surplus. Moore v. Rees. 633

4. A conveyance without consideration to his wife by a person whose solvency is doubtful, made without intent to defraud creditors, will not sustain an attachment, even though it might justify a bill to set aside the conveyance. McFarlan v Mills. 706

5. What is a debt fraudulently contracted under the attachment law of Ohio. Devinney v. Smith & McAlpin. 31

6. Commission for selling real estate is a demand arising on contract for which an attachment on the ground of non-residence may be issued. Ammen v. Morris. 304

7. To support an attachment issued by a justice upon affidavit showing that defendant so conceals himself that a summons cannot be served upon him, it is not necessary that a summons be issued in the first instance and returned "not found." Mawicke v. Wolf. 299

8. A proceeding under sec. 218 of the Code, against a garnishee for failing to answer satisfactorily, cannot be maintained in any other county than where the garnishee resides. Gaughan v. Squires. 289

9. The party against whom an attachment is sought must stand in the relation of a debtor to the plaintiff in the action. Gaughan v. Squares. 142

10. An attachment cannot be issued against a garnishee, based upon a judgment in the case until that judgment shall be one against him for his unsatisfactory answer. *Ib.*

11. An action brought against a garnishee under sec. 218 of the Code, plaintiff may obtain an attachment against such garnishee as in other cases, he being subrogated to the rights which the attachment debtor had against the garnishee. Squair v. Shea. 71

12. Sufficiency of affidavit made under sec. 218 of the Code, to sustain an order of attachment. *Ib.*

13. Only debts, claims or demands sounding in contract, or settled by the judgment or decree of a court can be garnisheed. *Ib.*

14. Where an action is brought against defendant, a non-resident, and in aid of such action, an attachment is sued out and a person is garnisheed, who owns or holds property of a non-resident co-partnership, of which firm the attachment defendant is a member, the interest of such defendant in such property, may be garnisheed in the hands of such person, in whose possession or under whose control the same may be. Myers v. Smith. 46

ATTORNEY AND CLIENT—

1. Attorneys retained by the defense for general purposes of the case in which property of defendant is held

by attachment, and is in a receiver's hands, have no lien for their fees on the property, or its proceeds in the receiver's hands, the attachment having been defeated. Goslin v. Campbell. 456

2. While communication to an attorney are privileged, the privilege does not extend to any person but a regular attorney. State v. Burkhardt. 537

BANK AND BANKING—

1. It is not *ultra vires* for a national bank to agree to receive a note for collection or protest if not paid. White v. Bank. 666

2. If it neglects to protest, it is liable on the contract, though there was no consideration thereof, the owner having relief on the banks voluntarily undertaking to do it. *Ib.*

BANKRUPTCY—

An action for slander of plaintiff's title to a patent is stayed by the pendency of proceedings in bankruptcy of one defendant. Mason v. Stacey. 567

BASTARDY—

1. A proceeding in bastardy is in its nature a civil proceeding. Grieve v. Freytag. 304

2. Being a civil proceeding, however, the presence of the accused at the trial is not essential, and for the same reason, a plea is not essential. *Ib.*

BILL OF EXCEPTIONS—

Neglect to file a bill of exceptions, effect. Weilman v. Wright. 118

BILLS AND NOTES—

1. It is not *ultra vires* for a national bank to agree to receive a note for collection or protest if not paid. White v. Bank. 666

2. If it neglects to protest it is liable on the contract, though there was no consideration therefor, the owner having relied on the bank's voluntarily undertaking to do it. *Ib.*

3. A note given by a corporation for the purchase of its own stock in the hands of one having notice is void. Hubbard v. Riley. 473

4. Distinction between the security of a negotiable note and a mortgage. Hellebush v. Richter. 355

5. Action against the maker and indorser of a promissory note, judgment having been first taken against the indorser. Bussing & Co. v. Scott. 252

6. Validity of note made payable to an insurance company which afterwards transferred all its assets, including this note, to another company. Life Ins. Co. v. Ehrman. 237

7. Where the signature of one of the makers of a note, was made by some one else without authority, and was a mere forgery, such signing could only be ratified on a consideration moving to such maker or from the payee. Hood v. Nichols. 174

8. An indefinite promise to forbear suit, is not a sufficient ratification of a forged signature to a note to make it binding. Hood v. Nichols, 157

9. An averment in an answer that the notes and guaranty sued on were without consideration is sufficient, if the detailed statement of facts is not inconsistent with the plea of want of consideration. McMillan v. Burkham. 100

10. A transferee who receives a note from his debtor, indorsed in blank to collect, apply the proceeds to his debt, and account for the surplus, may sue upon the note in his own name. McCoy v. Hornbrook. 143

11. An endorser cannot be sued until the notice of non-payment is served upon him. *Ib.*

BONDS—

1. A bond for removal of a cause into the United States courts may be sufficient, though not signed by the applicant. Swan v. Railroad Co. 669

2. A petition on an official bond is bad if it merely states that the bond was according to law. Bisack v. Pope. 115

3. Bonds issued by a board of education and afterwards, before maturity of some of the bonds, the board took them up and ordered them cancelled, but instead of cancelling them it left them in the hands of its treasurer, who negotiated them to a *bona fide* purchaser as collateral, for a loan to himself: *Held,* that the board is liable on such bonds in the hands of such purchaser. Sinton v. Bd. of Ed. 690

BREACH OF PROMISE—

1. A charge in a breach of promise case that "plaintiff is entitled at least to such damages as would place her in as good pecuniary condition as if the contract had been fulfilled," without stating whether they are to be measured as of the time of the breach or as of the trial, is not ground of reversal where the party failed to call the court's attention to the subject. Cooper v. West. 470

BREACH OF PROMISE—Concluded—

2. 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. Conley v. Creighton. 241

3. 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. *Ib.*

BROKERS—

1. Evidence of the custom of brokers to hold each other is good. Souther & Co. v. Stoeckle. 511

2. The mere facts that one selling bonds is known by the other party to be a broker, and states he has got the bonds from a person not named, is not sufficient to relieve the broker of responsibility for the genuineness of the bonds. *Ib.*

BUILDING ASSOCIATIONS—

A premium bid for the right of precedence in taking a loan cannot be collected after the maturity of the loan. People's Sav. & Loan Assn. v. Stevens. 435

CARRIERS—

1. Though a bill of lading is silent as to the goods being delivered within a reasonable time, yet that obligation is part of the written contract. Waring & Co. v. B. & O. R. R. Co. 553

2. It is not negligence in a carrier to receive goods to be forwarded at a time when by reason of a low stage of water his boat is so delayed that the goods spoil before arrival. Starbuck v. Railroad Co. 97

3. The fact that there was a standing advertisement that a boat would run daily during low water, is not a warranty, by a representation and only good faith is required in making it. *Ib.*

4. A railroad ticket from T. to E. entitles the passenger to ride to E. on any train that stops at E. Haskins v. Railroad Co. 679

5. But he has no right on any train that stops short of or beyond, but at E., without paying a separate fare, and the conductor should not take up his ticket, and eject him, but should demand a cash fare, and on refusal, eject him. *Ib.*

6. If the conductor proposed to the passenger as a condition of the cancellation of the ticket, that he should ride to the point short of E. and stop there, and the passenger gives the conductor to understand that he accepts, neither party can disregard the agreement without the other's consent. *Ib.*

CHARGE OF COURT—

1. A passage in a charge as to contributory negligence of plaintiff's decedent, that if a man of ordinary prudence, knowing what the deceased did, and seeing what he saw, situated as he was, would have done as he did, he was not guilty of negligence is not erroneous. P., C. & St. L. Ry. Co. v. Wernsing. 520

2. A charge to the jury, until reversed by a reviewing court, will be held in the same case to the court that pronounced it, as stating the law. Gessel v. Ins. Co. 159

CHATTEL MORTGAGE—

The statute does not require a chattel mortgage to be filed as against antecedent purchasers. Anonymous. 158

COMPOSITION WITH CREDITORS—

A creditor signing a compomise paper cannot recover upon a secret understanding to be paid in full. Ray v. Brown. 494

CONFLICT OF LAW—

Where a contract made at one place, is to be performed at another, matters connected with the performance will be regulated by the law of the place of performance. Dreyfuss v. Adae & Co. 648

CONSTITUTIONAL LAW—

1. The effect of article I, section 7, of the constitution, is to declare religion, in the widest and most comprehensive sense of the word a good. Humphreys v. Sisters of the Poor. 194

2. A mechanics' lien law applicable only to building of railroads is not unconstitutional. Railway Co. v. Cronin. 224

3. The act authorizing appointment of guardians for inebriates, by the court of common pleas, is constitutional. Hageny v. Cohnen. 88

4. The act of February 18, 1875, imposes no new obligations, and therefore does not conflict with sec. 28, art. 2, of the constitution. Cummings v. Fitch. 36

5. A statute constituting an offense in cities of the first grade of the first class, is not in violation of constitution, art. 2, sec. 26, requiring a law of a general nature to have a uniform operation. Wiggins, ex parte. 708

6. Uniform does not mean universal, but only requires operation on all who come within the range of its designation or class. *Ib.*

CONTEMPTS—

1. The last part of sec. 18, 75 O. L., 704, as to the power of the probate judge to punish for contempt, does not apply to all cases of contempt. Lilliland, ex parte. 659

2. It applies to those cases in which it is provided that a justice can punish for contempt, and under the first half of that section, he can punish the same as other courts. *Ib.*

3. Where, therefore, an order was made by the probate judge, in proceedings in aid of execution, that defendant deliver to the sheriff a watch and chain then on his person, he is not limited, on refusal, to a punishment for the contempt which a justice could inflict. *Ib.*

4. Where, in proceedings in aid of execution, a probate judge makes an order in the hearing of defendant that he turn over to the sheriff jewelry or money on his person, this is binding on him from that time, and it is no defense to contempt proceedings that, before the order was reduced to writing and served on him, he had disposed of them and cannot comply. *Ib.*

CONTINUANCE—

Obtaining a continuance without raising the objection to the jurisdiction waives it, so that on the day when the continuance has expired the objection cannot be made. Mack v. Stephens. 92

CONTRACTS—

1. A contract to pay an insurance agent certain commissions on renewals for twenty-five years, unless the contract is broken by either party, is terminated by the agent's unconditional resignation. Moses v. Union Cent. Life Ins. Co. 609

2. Construction of contract for paving blocks with the city and custom of measurement. Malone v. Cincinnati. 513

3. Construction of a contract in which the contractor agrees to assume all the risks of accidents to the work. Benedict v. Cincinnati. 261

4. If, during the work, the contractor abandons the contract, and a new contract is made, such new contract is binding on the contractor. *Ib.*

5. Waiver of a stipulation in the contract which provides that no additional compensation shall be claimed for extra work. *Ib.*

6. Speculative option contracts in grain upon the Chicago market are illegal and void. Pickering v. Chase. 156

7. Where a contract was awarded other than to the lowest bidder, by mistake, this irregularity does not defeat the contract. Cincinnati v. Hopple. 91

8. In an action to recover damages for breach of contract, plaintiff is entitled to recover only such damages which have accrued before the commencement of the action. Cullen v. Bimm. 388

9. Where an act is unconstitutional, it is not simply a nullity, but may be taken by the other party as a violation of the contract, relieving him from his further observation. State v. Lessees. 446

10. 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. Telegraph Co. v. Telegraph Co. 284

CONVERSION—

1. Action against the owner of a mill for conversion of machinery contained in the mill belonging to plaintiff, he having acquired title by purchase under foreclosure of a chattel mortgage. Crawford & Co. v. Hartzell. 63

2. Where the purchaser of a mill in which the machinery of a third person is, sub-lets the mill, but not such machinery, such purchaser cannot be held liable for conversion of the machinery of such third person, by reason of his lessee's using it. *Ib.*

3. Where a devise is made of real estate, after a contract for the optional purchase of said real estate, and such devise is not of the specific real estate to which the contract relates, said real estate becomes converted into personalty from the date of the exercise of the option to purchase. Buckwalter v. Klein. 73

CONVEYANCE—

1. Conveyance of lands of married woman—Acknowledgment of deed by her only—Construction of old laws of conveyance of Kentucky. Dudley Land Cases. 616

2. Proof that U., a stepfather, received certain sums of money be-

CONVEYANCE—Concluded—
longing to N., his stepson, is not sufficient to warrant a court in ordering a conveyance of real estate, which N. claims U. agreed to transfer to him, in the absence of evidence indicating that said real estate was purchased with the money in question. Nishiotz v. Ulmer. 630

CORPORATIONS—
1. A note given by a corporation for the purchase of its own stock in the hands of one having notice is void. Hubbard v. Riley. 473

2. A society has inherent power to expel for offenses in addition to those enumerated in the by-laws, if against the member's duty as a corporator. State ex rel. v. Aurora Relief Society. 334

3. Where a usurious security taken by a corporation, is void as being *ultra vires*, it may be that the corporation could recover in an action founded on the loan. West v. Allison. 428

4. There is no provision in the statute making it the duty of a corporation to issue certificates of stock to subscribers. Richardson v. Mining Co. 133

5. A creditor of a corporation formed in Ohio to do business in N. H., taking the note of its stockholder for his debt, to be credited on their individual liability as stockholders, is estopped to deny the legality of the incorporation, and to claim that it was the note of two partners of a co-partnership. Beebe v. Thomas. 319

6. Contract to pay one creditor, how interpreted. *Ib.*

7. It is not necessary that a subscriber to stock shall have paid up his stock in order to be entitled to vote thereon. Henderson v. Hogan. 173

8. Ownership of stock is necessary to eligibility for directorship in a manufacturing corporation. *Ib.*

9. When election of directors will be set aside and a new one ordered. *Ib.*

10. Refusal of transfer on books of corporation, of stock, under a by-law, void as unreasonable and unjust discrimination against one class of bondholders, entitles party to recover value of stock for conversion. Andes Ins. Co. v. Waters. 152

11. Where a subscriber for stock in a corporation, instead of making the cash payment required by law, gives his note for the amount, such act will not invalidate the stock issued to him or be ground to cancel the note. Latham v. Ins. Co. 117

12. Where a corporation has power to increase its capital stock and the directors having determined to do so, the defendant's subscription is taken and stock issued in anticipation of such increase. *Ib.*

13. Subsequently taking the formal steps required to take the stock after its issue invalidates such issue. *Ib.*

14. If the individual in whose name stock stands is in fact trustee for another, it is no defense to an action to subject them as stockholders, to the statutory liability. Stewart & Co. v. Triumph Ins. Co. 86

15. A note executed by a corporation which note is not usurious in its inception, no subsequent event could make it *ultra vires*. Kilbreath v. Bates. 50

16. A specific performance of a contract by a corporation to purchase its own stock, cannot be enforced, where the corporation was not authorized by its charter to make such a purchase. Coppen v. Greenless. 571

COSTS—
1. Where the record does not show that a dismissal at plaintiff's costs is for want of jurisdiction, the judgment should be affirmed as to costs. Miller & Sons v. Truman. 374

2. An allowance by court to counsel for fees out of the proceeds in an action to set aside a fraudulent conveyance is to be taken from the shares of creditors who had no liens and for whom the proceedings preserved the property. Richter v. Schoenfeldt. 120

COUNTER CLAIM—
1. It is not error to refuse to consider a counter-claim on which defendants have already instituted an independent suit then pending. Becroft v. Dossman. 322

2. An alleged secret conveyance between a debtor and a creditor cannot constitute a valid counter-claim. Marthens v. Dudley & Co. 215

3. In an action on a judgment by an assignee thereof, a counter-claim that, in an attachment in the action in which the judgment was rendered, plaintiff, as surety, and the then plaintiff, jointly gave the attachment bond, but the attachment was dismissed as being wrongful, whereby there arose a liability on the bond, is not a valid counter-claim. Dougherty v. Cummings. 184

COUNTY COMMISSIONERS—

1. The jurisdiction of the board of control includes the approval of compensation to be paid employes taking care of the court house and court rooms. State v. Fratz. 623

2. Jurisdiction of county commissioners to appoint commissioners for a free turnpike is not conclusive and can be inquired into in a collateral proceeding against the commissioners so appointed. State ex rel. v. McClymon. 109

3. The finding of an inferior tribunal of limited and special jurisdiction is conclusive until regularly reversed and vacated. *Ib.*

COURTS—

1. Jurisdiction of the district court to reverse, vacate or modify judgments of the superior court of Cincinnati. Gibbons v. Catholic Institute. 548

2. The probate court has chancery powers to determine controversies between parties to a sale of a decedent's property to pay debts. Borntraeger v. Borntraeger. 551

CUSTOM AND USAGE—

1. The existence of a special custom whereby the rights and obligations of parties to a contract are affected and controlled is in all cases a question for the court to determine. Nolte v. Hill. 297

2. A custom in the pork trade, that the year closes on October 31, and that dealers on commission, carrying stock over to another year, charge additional commission, is unreasonable. Matthews v. Briggs, Swift & Co. 23

CREDITOR'S BILL—

A creditor's bill will reach money earned, or indebtedness existing, whether then due and payable or not, but it will not lie to seize prospectively upon what is to be thereafter earned, or to subject an indebtedness thereafter to arise. Whitney v. Ott. 231

DAMAGES—

1. Rule of damages for failure to issue a paid-up endowment policy. Gates v. Ins. Co. 40

2. In the absence of evidence of malice, the damages for the rejection of a vote will be one cent. Mallannee v. Hills. 281

3. Right to claim damages for an improvement is waived when the claim is not filed within the statutory time, although filed before the city has incurred any liability. Kriege v. Cincinnati. 405

DEDICATION—

Where lands within a municipal corporation are laid out into lots, streets, etc., and the streets are dedicated to the public by deed containing a condition that the lots be exempt from charges for the improvement of the streets, such dedication of the lands for streets will take effect, but the condition is inoperative. Cincinnati v. Richards. 295

DEEDS—

1. Deed for a different parcel of real estate from that which the contract describes, effect. Ray v. Quinn. 221

2. Parol evidence is admissible to show what is meant by "village plat" in a deed. Fitzgerald v. Railway Co. 173

3. A deed for life to two and the survivor of them with remainder to the heirs of one, gives a fee to one on his surviving the other. Kepler v. Reeves. 34

4. The "east half" of a certain parcel of land means the exact half in quantity. Schleif v. Hart. 170

DEPOSITIONS—

1. The court may refuse, in a submitted case, to give credence to depositions, just as a jury may believe a witness on the stand. Carr v. Carr. 136

2. In depositions taken on behalf of a defendant in a criminal case, on interrogatories, matter in an answer entirely irresponsive to a question must be excluded. State v. Finney. 22

DEVISE—

A devise to a wife of "the interest accruing on said loan" for life, being a loan represented by notes in the testator's hands, gives her interest thereafter accruing, but interest accrued and in arrears belongs to the estate. Diehl v. Diehl. 452

DITCHES—

1. A ditch can not be shown not to be conducive to public health to defeat the assessment. Hulse v. Coffland. 611

2. The township clerk has the right to make up his record of proceedings for a ditch during their progress. *Ib.*

DIVORCE AND ALIMONY—

1. Misrepresentation as to name, fortune or social standing, will not

DIVORCE AND ALIMONY—Con.—
annul the marriage contract. Meyer v. Meyer. 561

2. False representations of a party as to his respectability, connection in society, wealth, and the like, are not fraud in the marriage contract as ground for divorce. Meyer v. Meyer. 627

3. Gross neglect of duty need not exist for any particular length of time, but varies with the character of the neglect. Ziegler v. Ziegler. 139

4. Willful absence for less than three years cannot be made into a cause for divorce by changing its name. *Ib.*

5. Letting the wife support the entire family by her labor, the husband being able to work though he spends all his money for drink, is gross neglect of duty. *Ib.*

6. A wife may be guilty of extreme cruelty, entitling the husband to a divorce. Moulding v. Moulding. 139

7. A single act will not constitute extreme cruelty unless very outrageous, or the culmination of a series of persecutions. Hummel v. Hummel. 138

8. Simply using the phrase, "gross neglect of duty" in a petition, without stating wherein or what duty has been neglected, is not alleging a cause of action. Burner v. Burner. 140

9. Imbecility of husband is not sufficient ground upon which to maintain an action for alimony. Parker v. Parker. 525

10. In an action for alimony alone, the testimony of the plaintiff in her own behalf is admissible. Wolfert v. Wolfert. 138

DOWER—

1. Questions arising in a partition suit in respect to dower. Renner v. Bird. 290

2. In petition for dower against the grantee of the deceased husband, the grantee is not estopped to deny the title of his grantee, the husband. Holmes v. Spinning. 451

3. The widow of a deceased husband is not entitled to dower in land held by him during coverture under a lease for ninety-nine years renewable forever, but of which leasehold estate he did not die in possession. Abbott v. Bosworth. 300

4. A deed purporting to convey the land of the husband, duly signed, sealed and acknowledged by the wife on one day, for the purpose of relinquishing her dower and duty signed, sealed and acknowledged by the husband on a subsequent day bars the wife of dower in the premises so conveyed. Ludlow v. O'Neil. 186

EASEMENTS—

1. An alleyway used for light and air is not abandoned by allowing its ingress and egress to be closed for over twenty-one years. O'Ferrall v. Chase's Heirs. 242

2. An abutting owner on an alley which it is sought by the action to have opened and remove obstructions, has leased his property for 99 years, renewable forever, does not prevent such owner from also urging a right to have the alley opened. Hoyt & Wife v. Heister. 420

3. One owning land on both sides of a private way, not dedicated to the public, common to all abutting proprietors, cannot be compelled by such proprietors to remove a building erected over, but so far above the way as not to obstruct the right of passage. Harrison v. Pike's Heirs. 603

4. A deed describing land as bounded on an alley, and not dedicated to the public, gives an irrevocable right to the use of the way, and not only to the portion in front of the lot conveyed, but for the whole length. *Ib.*

5. The sale of a right of way to a public highway, by ancestors of S. to R., an adjoining property owner, creates no obligation on the part of S. to keep the original highway open for the use of R. even though, upon its vacation for public use, the land used for said original highway reverted to S. Ratcliff v. Scott. 606

6. Upon the removal of said highway to which R. acquired a right of way aforesaid, R's easement in the land ceases and S. will be allowed to fence it up. *Ib.*

EJECTMENT—

A general verdict for plaintiff is sufficiently definite and responsive in ejectment where the answer was a general denial. Kennedy v. Keating. 500

ELECTIONS—

1. Manner of contesting the election of a school director. State v Goodale. 707

2. A notice of appeal in an election case, taken to the clerk's office after it had closed for the day, and handed to the janitor employed by the county commissioners to sweep out the office, is not "entering with the clerk." Kienborth v. Bernard. 359

3. To enter notice of repeal with the clerk of the common pleas, is, however, the beginning of a proceeding in that court, and if the notice is entered in time, the case is pending there. Straub v. Wilson. 358

4. A pauper having no home elsewhere, and residing in the county infirmary, with the present intention of making it his home, does not thereby lose his right to vote after residence for the proper length of time. Mallannee v. Hills. 281

5. In the absence of evidence of malice, the damages for the rejection of the vote will be one cent. *Ib.*

6. The duties of the clerks and justices constituting the board to count the votes given in an election are purely ministerial, and they have no authority to determine whether the returns are valid or invalid. *In re* Cappellar. 399

EMINENT DOMAIN—

1. Lands subject to a public use cannot be condemned to a second public use inconsistent with the first. B. & O. R. R. Co. v. Bellaire. 607

2. A city acquires the fee simple in lands appropriated to public uses. Cincinnati v. Kemper. 251

3. The claim for damages, required by sec. 575 of the municipal code to be filed before beginning suit, refers only to such damages as are provided for in section 571. *Ib.*

4. Section 575 of the municipal code, refers to such damages only as are provided for in section 571 of the said code, and said section 575 does not relate to a suit for compensation, for land appropriated by the city, without condemnation to her own use. Cincinnati v. Kemper. 245

5. The measure of compensation for land so appropriated is the full value of the fee-simple of the land. *Ib.*

6. A corporation having an election to apply either to the probate or common pleas courts, and by proceedings in the probate court condemning land, and being dissatisfied with the verdicts, cannot condemn the same land over again by proceeding *de novo* in the common pleas. Railway Co. v. O'Meara. 346

7. A municipal corporation need not proceed to appropriate private property by publication in a newspaper. *Ib.*

8. The court will presume a necessity of an appropriation to exist from the fact that the corporation resolved that it was necessary, no abuse being shown. *Ib.*

9. The fact that the owner of property sought to be condemned has agreed with the railroad company seeking its appropriation, on the terms of a right-of-way, on a different part of the property, is no defense to the appropriation on a different line as to which they cannot agree. Railroad Co. v. Railroad Co. 364

10. In a proceeding to condemn lands for a railway, where the lands are platted, the inquiry, as to the depreciation of the lands not taken should be confined to the remainder of the lots taken, and not to those not touched by the land sought to be appropriated. Trustees v. Banning. 396

11. Where a city, in building a street, is compelled to place a slope necessary to support it upon adjacent private property, the city does not become liable for the land in fee simple, as it takes only an easement, leaving the title in the owner for all purposes consistent with this right. Cincinnati v. Dodson. 504

12. The compensation of the owner is the difference in the value of the land without the easement, and its value so burdened. *Ib.*

13. Where the owner of a tract of land subdivides it, and the plat is recorded, and where one buys land previously so subdivided, the lots are subdivided for all purposes as if actually separated by real lines, and a corporation seeking to condemn some of the lots, cannot be compelled to pay damages to the remainder of the lots, no part of any one of which was taken. Banning v. Trustees. 560

14. Condemnation proceedings in the probate court having been reversed on the application of one of several defendants in the common pleas, the case should be remanded to the probate court and not retained for further proceedings. *Ib.*

ERROR—

1. The refusal to allow an alternative writ of mandamus is not reviewable on error. State v. Cappeller. 537

2. Refusal of a court to certify after verdict as to who was principal and who was surety on a note is not subject to review on error. Scully v. Krucke. 495

3. A petition in error to a judgment of the common pleas reversing a justice's judgment and retaining the case for further proceedings, is premature. Mawicke v. Wolf. 476

ERROR—Concluded—

4. A reviewing court should not review alleged errors in the ruling of a trial court which the bill of exceptions does not show were excepted to at the time. Eilers v. Nat'l Life Ins. Co. 407

5. A plaintiff in error against whom no judgment was rendered has no standing in court, and a petition in error by him will not be entertained. Buschhausen v. Schlick. 307

6. No reversal for erroneous exclusion of a book entry, when it does not tend to prove the party's case, but tends to prove that of the other side. Hunt v. Daggett. 260

7. Failing to file the original papers with a petition in error, in the district court, is sufficient cause for dismissal, but is amendable. Stevenson v. Seymour. 453

8. Where the original papers are lost, the remedy is not by motion to file copies, but suggestion of diminution of the record, and to supply the loss by proceedings in the common pleas. *Ib.*

9. A supersedeas bond to stay a judgment against three, where the judgment was affirmed in whole, but only against one, and reversed as to the others, secures the payment of such judgment. McNeale v. Fackler. 431

10. A plaintiff in error is a legal entity, whether including one or several persons. *Ib.*

11. 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 asked final judgment on the demurrer. Kruse v. Kruse. 426

12. A demurrer to an answer having been sustained, and the cause suffered to remain until the following term, there being no application on the part of defendant to amend, or of plaintiff for judgment, and at such next term judgment was rendered by default, this is not error. Goeckel v. Averment. 554

ESTOPPEL—

1. That an adjoining proprietor sees the building of a public institution, without objecting, does not amount to an equitable estoppel to object to sewage being run into a stream flowing into his land. Cilly v. Cincinnati. 344

2. Where a party has an election to adopt one of two inconsistent courses, and takes decisive action with knowledge of his right and the fact, his election is determined and he is estopped. Am. Ex. Co. v. Triumph Ex. Co. 51

EVIDENCE—

1. Crime cannot be inferred from proof of intent to commit it. State v. Nuttles. 686

2. Parol evidence is not admissible to change the legal effect of a contract made by an agent, so as to make it the contract of the principal. Post & Co. v. Kinney. 439

3. A man's recollection as to a date four years ago is not a binding warranty. McMurray v. Williams. 378

4. Parol evidence is admissible to show what is meant by "village plat" in a deed. Fitzgerald v. Railway Co. 173

5. In an action for alimony alone the testimony of plaintiff in her own behalf is admissible. Wolfert v. Wolfert. 138

6. In an indictment for obtaining goods by false pretenses, in order to show fraudulent intent, the state may show similar fraudulent representations made to third persons by the defendant. State v. Finney. 22

7. The testimony of an insane witness on a former trial cannot be proved by reading a bill of exceptions, prepared by the attorneys purporting to contain all the evidence. Sherlock v. Globe Ins. Co. 17

8. A witness can read his notes of former testimony of an insane witness, if from such notes he can swear to the substance of all that the witness said. *Ib.*

9. Where from the nature of the action defendant has notice that plaintiff intends to charge him with possession of a written instrument, formal notice to produce it at the trial is not essential as a foundation for introduction of parol testimony touching its contents. Railway Co. v. Cronin. 224

10. Where a writing is relied on as a foundation of plaintiff's claim and is in possession of the other party parol evidence of the contents may be proved without having given notice to the adverse party to produce it. *Ib.*

11. When the court permits an incompetent question to be put to a witness, excepted to by the party objecting, the witness mistaking the object of the question, answers, giving testimony which is competent, there is

no error which would justify a reversal of the judgment. Nolte v. Hill. 297

EXECUTIONS—

1. Where a levy has been made upon a stock of goods, by a sheriff, a subsequent levy, made by a constable, creates no lien upon the property, although made with the sheriff's consent. Benedict v. Deckand. 231

2. A judgment creditor, though he may direct the officer to collect the debt from part of the judgment debtors, yet the execution must follow the judgment and issue against all. Dunn & Co. v. Springmeier. 339

3. But the execution having been ordered to issue against part of the debtors only, though irregular, is not void, and will not be restrained by injunction. *Ib.*

4. Where a husband has an estate in two pieces of property, until he makes an election which he will take, he is presumed to hold both, and an execution creditor cannot make an election for him. Cunningham v. Simpson. 154

5. A right to receive rent of a house for a term of years, does not give the devisee an interest in the premises that is subject to execution. *Ib.*

6. Where a constable levied certain executions on property, and it was replevied from him before defendant, a justice, and appraised, but the justice did not certify the case to the common pleas, nor did he make any record of his proceedings, and the constable sued on his bond for the amount of the appraisement: *Held,* that the constable is the real party in interest, and can maintain the suit. Deuble v. Kolbe. 177

7. It is no defense that, without any fault of the justice, the papers were stolen so that he could not make any record of the case, or certify up. *Ib.*

8. It is no defense that plaintiff in the replevin case is, and was, willing to consent to a substitution of such papers as would give the common pleas jurisdiction. *Ib.*

EXECUTORS—

1. An administrator is entitled to such expenses as were the result of obtaining the appointment. Huston v. King. 575

2. He is not entitled to expenses incurred in prosecuting the interest of his wife who was one of the heirs. *Ib.*

3. Where a debtor is appointed executor of the estate of his creditor, but yet, as executor, he still remains liable for the debt and must account for it as assets. Collins v. Nugent. 485

4. Under an agreement by an uncle to compensate a nephew in consideration of services to be performed by providing for him in his will, and the uncle dying intestate, recovery for the services may be had against the estate. Norris v. Clark. 564

5. Proof of value of the estate is not incompetent in connection with statements that decedent would give plaintiff a child's share as tending to show the uncle had made a fair estimate of the value of the services and that he had agreed to compensate them. *Ib.*

6. One who loans money to an executrix to save the estate from forced sale by paying off claims which she has transferred to him a security can recover such loan from the estate. Veldman v. Lindeman. 676

7. Under the revised code sec. 9137, an administrator's application to the common pleas, instead of to the probate court, for the sale of real estate, is denominated a civil action. Metzger v. Wiechers. 642

8. An administrator *de bonis non,* whose predecessors' powers have ceased by death, cannot maintain an action against the administrator of the estate of the deceased administrator, for money received by such deceased administrator. Montgomery v. Goepper. 581

9. The only remedy afforded by the statute to such administrator *de bonis non,* is an action on the administration bond of the deceased administrator. *Ib.*

EXTRADITION—

1. An extradition warrant to which the governor's name was signed by his private secretary, without special instructions, in his absence and without his knowledge, will not be treated as the warrant of the governor, and the prisoner will not be allowed to be delivered up on it. *In re* Payne. 288

2. Where an extradition warrant, issued by the governor of this state to the sheriff, recites the requisition of the governor of the remanding state, and that a copy of the affidavit making the charge duly certified as authentic, has been filed, this recital prevails. *Ex parte* Moore. 272

3. That the affidavit charging the crime charges that the name of the person murdered is unknown to the affiant, does not touch the sufficiency of the charge, though it could have been ascertained. *Ib.*

FENCES—

Owner of land is not bound to fence against stock habitually breachy and unruly. Phelps v. Cousins. 172

FIXTURES—

The terms of sale of machinery to be put up in a factory, by which the purchase money was secured by mortgage on the machinery, preserves the chattel character thereof as against a prior mortgage on the real estate, as to parts bolted to the foundation, and other parts not attached, by, in, and on which other structures so rest as to fall if such part is removed. Hine v. Morris. 482

FORCIBLE ENTRY AND DETAINER—

There is no provision authorizing a review of the findings of a justice in forcible entry and detainer as being against the weight of evidence. State v. Harmeyer. 509

FRAUD—

1. The return of a gift induced by fraud may be rescinded. Jaeger v. Herancourt. 1

2. The term "discovery of the fraud" in the statute of limitations, means where the party defrauded ought, by the exercise of due diligence, after facts sufficient to put him on inquiry have come to his notice, have discovered the fraud. Bohm Bros. & Co. v. Cunningham. 382

FRAUDULENT CONVEYANCES—

1. An action to set aside a fraudulent conveyance is barred by the four years' limitation of the code, unless the fraud was not earlier discovered. Stephenson v. Reeder. 411

2. When plaintiff in action to set aside a fraudulent conveyance does not publish the required notice, his suit is for the benefit of all creditors. Mack v. Wright. 93

3. A debtor pending a suit against him to recover a debt, may transfer real estate to another creditor, a near relative, in payment, the transaction being *bona fide*, and the property transferred not being of greater value than the debt. Thacker v. Newell. 576

GIFT—

The return of a gift induced by fraud may be rescinded. Jaeger v. Herancourt.

GOOD WILL—

A note given in consideration of the purchase of the good will if the seller has violated his agreement, and a referee has found that he has deprived the maker of the enjoyment of the good will to the extent of three-fourths, and is entitled to this deduction, will only be enforced to the extent of one-fourth, if at all, the good will being an entirety. Burkhardt v. Burkhardt. 258

GUARANTY—

1. The rule that on a note made in one state and payable in another, the parties may adopt the rate of interest which is legal in either state, applies to guarantors signing in the latter state. Wilson v. Lead & Spar Co. 223

2. Plaintiff is entitled to a joint judgment against joint guarantors for the whole amount and cannot be compelled to take a *pro rata* judgment against each. *Ib.*

GUARDIAN AND WARD—

1. The act authorizing appointment of guardians for inebriates, by the court of common pleas, is constitutional. Hageny v. Cohnen. 88

2. A court appointing such guardian has no power to appoint a person other than the guardian, to carry on the inebriate's business. *Ib.*

3. A purchaser dealing fairly with a guardian, and who purchases from such guardian a note and mortgage belonging to the ward, takes good title, though the rate is without order of court and the guardian misappropriates the proceeds. Strong v. Hope. 700

4. A petition by a guardian to obtain sale of his ward's lands, is defective if the lot is described by the wrong number, and the purchaser obtains no title. Maurr v. Parrish, 54

5. The proceeding may be attacked collaterally. *Ib.*

HOMESTEAD—

1. The valuation of appraisers setting off from property levied on an exemption claimed in lieu of homestead, is conclusive in the absence of fraud or collusion. Levi v. Groves. 508

2. A debtor cannot hold property exempt from execution in lieu of a homestead when his wife owns a homestead, though mortgaged for

more than its value. Lippelman v. Boning. 450

3. A claim for exemption in lieu of homestead from the proceeds of sale by an assignee for creditors, need not be made before sale. Hellebusch v. Richter. 341

4. No particular notice of a demand of exemption from execution in lieu of homestead is required, if it is in such form that it ought not to be misunderstood. It may be made any time before sale. Long v. Hoban. 688

5. Where several members of a firm retire, and convey all their interest to a single member, he is entitled, as against subsequent attachments and judgments against all the former partners, to claim an exemption in lieu of homestead out of the assets. *Ib.*

6. Where two partners hopelessly insolvent, and knowing themselves to be so, one sells out to the other, and the purchasing partner makes an assignment for benefit of creditors, such partner is entitled to a homestead exemption. Mortley & Pinkerton v. Taylor. 531

HOMICIDE—

1. Killing having been proven, the presumption is that it was done without premeditation, and is murder in the second degree. State v. Adin. 25

2. To convict of murder in the first degree the state must show affirmatively premeditation and deliberation. *Ib.*

3. To reduce it to manslaughter the accused must show matters in extenuation. *Ib.*

HUSBAND AND WIFE—

1. A contract of sale signed by husband and wife cannot be enforced against the wife alone. Starbuck v. Hynod. 132

2. It is error to pay the individual debts of the husband out of the residue of a joint fund, which was really the fund of the wife. Glaser v. Hellsman. 134

3. A married woman may sue alone for slander *per se* concerning her. Cornell v. Durkee. 580

4. No recovery can be had against a married woman upon her note, unless it is averred and proved that she has separate property to be charged. Jenz v. Gugel. 85

5. A married woman having no separate estate, cannot, by contract charge separate estate thereafter to be acquired. Fallis v. Keys. 8

6. In all actions against a married woman concerning her separate property, it is not necessary to unite the husband as a defendant. Callahan v. Rose. 384

7. A married woman giving a note and mortgage on a particular piece of her separate estate, negatives an intention to charge her separate estate generally. Hamilton v. Leamon. 675

8. To obtain a judgment against a married woman on a note made by her jointly with her husband, it is necessary to aver that it was given to benefit her separate estate. Becroft v. Dossman. 322

9. In an action against a married woman on her contract, merely averring that she has separate property is sufficient without specifically describing it. Hinman v. Williams. 709

10. An endorsement by a married woman as the payee of a note which is her separate property, is a contract by her which raises the implication that she intended to charge her separate property for its payment. *Ib.*

11. A married woman who has sold real estate and agreed that a debt of her husband be deducted from the purchase price, cannot afterwards repudiate the agreement and compel the purchaser to pay her the entire amount, because the debt was not chargeable upon her separate property. Butler v. Hughes. 90

12. A petition to recover a judgment against a married woman need not describe any specific separate property; but it must aver that she is the owner of separate property, to warrant judgment by default. Kurtz v. Murray. 330

13. A petition averring that said goods were bought for her mercantile business, in which she was engaged on her own account, does not necessarily imply that she was the possessor of her separate property. *Ib.*

INDICTMENT—

The provision of sec. 7206, that, when an indictment is found the foreman shall indorse on it the words "a true bill," is satisfied where these words were printed on a blank indictment, and he signs under them after it is found. State v. Williamson. 618

INFANT—

The enlistment of a minor without the consent of his parent or guardian is unlawful. Wiesenberger, *In re.* 529

INJUNCTIONS—

1. Where a case stands on a petition, and a full square denial by answer, and there is no testimony, a motion by defendant to dissolve an injunction will be granted. Afsprung v. Althoff. 550

2. In an action to recover specific personal property, an injunction lies to prevent defendant from disposing of it. Atkins v. Veach. 176

3. A court has no authority to grant an injunction to restrain a proceeding at law, as for instance, to restrain an action of forcible entry and detainer. Van Tyne v. Short. 720

4. In granting a restraining order before final judgment only such restraint should be imposed as will keep the property in its actual condition until trial. Street R. R. Co. v. Cincinnati. 125

5. Injunction to prevent the removal of a county seat. Newton v. Commissioners. 32

6. A mandatory injunction to compel the removal of obstructions over a private way may be granted. Harrison v. Pike's Heirs. 603

7. Interlocutory mandatory injunctions, or provisional injunctions, prohibitory in form, but in substance requiring some positive act to be done, are so well established in chancery that they will not be understood to be prohibited by the code, unless clearly inconsistent therewith. Harrison v. Craighead. 634

8. The code defines an injunction as a command to refrain from a particular act. *Ib.*

9. A city which has granted a certain street railroad route, subject to certain conditions, will not be compelled to seek specific performance of the terms of the grant in case of violation, but is entitled to an injunction. Cincinnati v. Street Ry. Co. 249

10. Mandatory injunction will not be granted on the preliminary hearing, if it amounts to a decree for specific performance and the defendants desire to answer to the merits. *Ib.*

11. An injunction against the sewage of a large city infirmary being run into a brook flowing through plaintiff's land being sought, it was held, that no physical impossibility of disposing of the sewage in some other way being shown, the difficulties of complying do not affect the right to an injunction. Cilly v. Cincinnati. 344

12. Mere delay, though it may deprive a party of the right to an interlocutory injunction, will not, in the case of injuries of a constantly increasing character, deprive him of relief on final hearing. *Ib.*

13. An injunction will not be granted against taking water out of a brook by an upper proprietor, when taken for domestic use, and leaves a sufficiency of water for plaintiffs below. *Ib.*

14. The action of a taxpayer to enjoin the city, on the refusal of city solicitor to enjoin, is a bar to another action, by another taxpayer, for the same cause, the same as if the solicitor had brought both actions; each represents the public. Mathers v. Cincinnati. 496

15. A person cannot seek as taxpayer to enjoin a city on refusal of solicitor from awarding a contract to a certain person when he is himself a competitor for the award. Mathers v. Cincinnati. 521

16. The action of a taxpayer to enjoin the city, on refusal of the solicitor to enjoin, is a bar to another action, by another taxpayer, for the same cause, the same as if the solicitor had brought both actions; each represents the public. *Ib.*

17. Upon the refusal of the solicitor a taxpayer may maintain an action under the municipal code, against a person who has made an unlawful contract with the city, to enjoin its performance by him although the city has done everything to be done upon its part. Haskins v. St. R. R. Co. 713

INSANITY—

1. Where a person prior to the commission of a crime had been adjudged insane, and afterwards commits a crime, the burden is on the state to show that prior to such commission, the accused was so far restored to reason as to be responsible. State v. Bowsher. 442

2. The defense of insanity will not avail when the accused committed the crime from some irresistible impulse of insanity, knowing that it was morally wrong, and knowing the legal consequences of the act. *Ib.*

3. A person without the light of reason is not capable of committing a crime. State v. Atlin. 25

4. The accused in a criminal case is not entitled to an acquittal on the ground of insanity, if at the time of the alleged offense, he was able to distinguish between right and wrong, and understood the nature of his act. *Ib.*

5. The burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury, rests upon the defense. *Ib.*

6. Good character may be shown by the defense, as a circumstance rendering it more probable that if sane he would not have committed the crime. *Ib.*

INSURANCE, FIRE—

1. A section in a charter that all policies of insurance shall be subscribed by the president and attested by the secretary, does not prohibit parol contracts altering a policy. Halliday v. Ins. Co. 193

2. An insurance company is not permitted to defeat a policy, by shifting over to the insured, its responsibility for the acts of its own agent. Amazon Ins. Co. v. McIntyre. 577

3. Subsequent assignment of the policy by the mortgagee to the purchaser, and a verbal agreement between the latter and an agent of the company, having power to make contracts and issue policies, such assigned policies shall have the force and effect of a new policy to the purchaser and will bind the company. Wall v. Ins. Co. 408

4. Effect of the transfer of a mortgage interest on a policy of insurance. Wall v. Ins. Co. 323

5. A company insuring a mortgagee is, after payment of loss, subrogated to the mortgagees claim against the mortgagor. *Ib.*

6. Where, by the conditions of a policy of insurance, it is provided that the interest of the assured in personal property must be absolute, in an action on such policy, the assured must prove an absolute ownership in the property. Cochran v. Amazon Ins. Co. 276

7. Evidence that premises were used for conducting an illicit or unlawful trade. *Ib.*

8. False swearing to any matter in making the proof, it must be shown that the assured intentionally made such false oath, and that it was in a material matter connected with the loss. *Ib.*

9. Effect of defense to an action on a policy that proofs of loss were not furnished in time, will not be assumed to be a forfeiture. Farmers' Ins. Co. v. Frick. 247

10. Defense that plaintiff did not own the property at the time of the loss, effect. *Ib.*

INSURANCE, LIFE—

1. Where an answer in an application for life insurance made a warranty, to the question, "Is there any insurance now on your life?" fails to divulge a certificate in a mutual protective association, this is no breach. Penniston v. U. C. Life Ins. Co. 678

2. A petition by a life insurance company to cancel a policy which shows that a suit for the collection of the policy has been begun by the defendant, puts the party out of court. Guardian Mut. Life Ins. Co. v. Sandal. 503

3. Applications for insurance are nothing but propositions which the companies have a right to accept or reject. Sykora v. Ins. Co. 372

4. An agent having no power to effect insurance can not impose a liability not arising under such applications. *Ib.*

5. Mistaken declarations of insured as to health in application, though made without intention to defraud. U. C. Life Ins. Co. v. Cheever. 254

6. Knowledge of fact of former disease by agent of company, as estoppel of company. *Ib.*

7. Insurance company not entitled to interest on unpaid notes from the time the assured ceased to pay interest and up to the time of his death. Bonner v. Ins. Co. 207

8. Where a life insurance company, a foreign corporation, makes, within a state, a contract of insurance upon the life of a citizen of such state, and receives from him the premium for such insurance, the insurance company cannot set up as a defense to an action upon the policy, that, by the laws of such state, it had not authority to make such contract of insurance. Life Ins. Co. v. Reif. 200

9. Where certain warranties and representations are made in an application for life insurance, the plaintiff, in making out his case, is not bound to prove the truth of such warranties and representations. *Ib.*

10. Where the party insured, in his application, represents that his habits have always been sober and temperate, and that they are still so, his intemperance must amount to a habit to render the representation false. *Ib.*

11. Where the insured answers that he is not afflicted with a certain disease, in order that his answer amount to a misrepresentation, he must have been afflicted with symp-

toms reasonably indicative of such disease. *Ib.*

12. Representation as to name and residence of medical attendant. *Ib.*

13. Representation as to cause of the insured's father's death. *Ib.*

14. Grounds for returning the premium and forfeiting the policy. Smith v. Life Ins. Co. 188

15. Failure of assured to tender the premiums thereafter accruing before his death, which occurred about nine months afterward, is not a forfeiture. *Ib.*

16. Where statements in the application are made warranties and the jury find that such statements are not true, defendant is entitled to a judgment. Gessel v. Ins. Co. 159

17. Rule of damages for failure to issue a paid up endowment policy. Gates v. Ins. Co. 40

INSURANCE, MARINE—

1. A defense to a policy of insurance on a steamboat, being that its voyage was illegal for want of a licensed pilot, is not good where it is not averred and proved that the boat was carrying passengers. Insurance Co. v. Frank. 302

2. Settlement of loss by agent of a foreign insurance company. Millville Ins. Co. v. Flesher. 510

3. When the expense of repairs on a boat damaged by accident will be equal to more than half the value of the vessel when repaired, it is not practical to repair and she may be abandoned. Packet Co. v. Peabody Ins. Co. 30

4. An act of congress which prescribes a penalty for carrying vitriol, which is merely a penal statute, does not render the voyage illegal as to a policy. Sherlock v. Globe Ins. Co. 17

5. Where a boat is destroyed in specie, by collision and fire, the basis of ascertaining the liability of each insurer for the fire loss, is to deduct from her original agreed value, the damage caused by collision or a sum necessary to bring her to port and repair her, fixing the damage not insured against. *Ib.*

6. If the boat remained in specie and was repaired by the owners, the cost of recovering and bringing her to port for repairs, caused by the collision, but not the increase of cost of so doing caused by the fire, and all proper items in the repairs account, would be added together, and one-third new for old deducted, and the proportion of such loss which the policy bears to the original value to the liability. *Ib.*

7. A repair means where the boat can be restored substantially to what it was before the injury. *Ib.*

8. Under a clause that on loss greater than half the agreed value of the boat, the owner might abandon her and claim total loss, an abandonment vests the wreck in the insurers. *Ib.*

INTEREST AND USURY—

1. On a note for $7,000, and eight per cent. interest, on which only $6,720 is advanced, only $6,720 and six per cent. interest can be recovered. Metzger v. Wiechers. 642

2. Usurious interest if paid voluntarily cannot be recovered back. Hulbert v. Cist. 545

3. Usury in a mortgage on partnership property having been assumed by a succeeding firm, which agreed to pay the liabilities of its predecessor, cannot be set up by the firm assuming to pay, and hence, not by its assignee for creditors. Moore v. Feldswich. 501

4. The fact that the principal contract is usurious does not render the agreement to pay in installments void, so that no recovery of the six per cent. interest can be had until the principal is matured; but recovery can be had on the interest notes as reduced as they severally mature. West v. Allison. 428

5. A written agreement by a partner, to pay the firm ten per cent., compound semi-annually, his share of the capital stock withdrawn, is not usurious. Chase v. Chambers. 377

6. A lienholder, after consenting to a decree, cannot set up the plea of usury against the judgment. Riggs v. Hulbert. 306

7. Insurance company not entitled to interest on unpaid notes from the time the assured ceased to pay interest and up to the time of his death. Bonner v. Ins. Co. 207

8. An accommodation maker of a usurious note may maintain an action, to recover the usury, against the person who exacted it. Bloch v. Koch. 54

9. The only penalty for usury to which a national bank is subject, is forfeiture of double the amount of interest. Bank v. Chambers. 53

10. A rate of interest stipulated in a note, made at a place where such rate is legal, will not be usurious in

Ohio, though larger than legal rate in Ohio, and the note made payable in Ohio. Mining Co. v. Winsor & Randall. 16

11. Where a note bears on its face eight per cent. interest, and the whole amount of the note was advanced to the borrower, and usurious interest is paid by him, only the excess over eight per cent. will be credited on the principal. Blackburn v. Gano. 557

INTOXICATING LIQUORS—

In an action for damages under the Adair law the jury must be satisfied beyond a reasonable doubt that the sales were unlawful. Oesterkamp v. Overbeck. 58

JUDGMENTS—

1. A finding for plaintiff and sending the issue to a jury to assess damages on failure to answer is a mere interlocutory order and not a judgment. Burns v. Luckett. 483

2. Additions of items in the petition on appeal from a justice, and the rendition of judgment for the full amount therein is erroneous. Hannon v. Tallman. 45

3. A judgment before a justice for a greater sum than was endorsed on the summons may be opened on suit to marshal liens and subject equities. Buck v. Huntley. 155

4. The announcement by a justice of the conclusion at which he has arrived, regarding the decision of a case before him, is not rendering a judgment therein. Keith v. Fairchild. 162

5. A judgment will not be reversed because the verdict is contrary to the evidence, unless it is manifestly so, and the reviewing court will always hesitate to do so where the doubts of its propriety arise out of a conflict in oral testimony. Life Ins. Co. v. Reif. 200

6. In an action against one of two railroad companies for breach of their agreement, a judgment as to one is a bar as to any future action upon the agreement against the other companies. Reynolds v. Railroad Co. 293

7. A judgment is too serious a matter to be set aside for the mere convenience of an attorney. Clark v. Delorac. 325

8. Misnomer in judgment, validity of such judgment. Mack v. Schlotman. 525

9. An action for personal judgment on another dormant judgment may be maintained under the Ohio laws just as at common law. Goodin v. McArthur. 611

10. A personal judgment in a decree in a chancery suit, where the original bill did not ask it, is not void but voidable, and if not attacked in time is good. Reeder's Exrs. v. Stephenson's Exrs. 568

11. Where an answer is filed without leave of court, after default accrued and judgment ordered, it is not error to strike such answer from the files and enter a judgment. Lyons v. Fidelity Lodge. 313

12. Rendering a judgment by default in a case not triable until placed on the trial docket is a clerical error, and should be corrected by motion, and not by petition in error. Haswell v. Henley & Co. 453

13. That a defendant has demurred to the petition before the affidavit and other proceedings in interpleader does not authorize a judgment against him personally. Cozad v. Shannon. 542

JUDICIAL SALE—

1. That a judicial sale was made on election day, and sold at two-thirds of the appraisement, is sufficient ground to grant a motion setting it aside. Banning v. Pendery. 677

2. A judicial sale to Mary Inod, confirmed, and deed made to *May and* Inott cannot be enforced against her. Starbuck v. Hynod. 132

3. Suit to foreclose a trust deed. Railroad Co. v. Phillips. 591

4. Where a party purchases real estate under and by virtue of judicial proceedings the rule of *caveat emptor* applies with all its rigor. Callahan v. Rose. 384

5. Where, in a foreclosure suit, the summons on the mortgagor and his wife were returned as personally served and judgment by default was regularly taken, the purchaser at the sale will be protected in his title. Miller v. Erdhouse. 294

6. Where, on appeal from the judgment of a justice against a married woman, she demurs generally as well as for want of jurisdiction, her general demurrer in the common pleas is a submission to the jurisdiction. Miller & Sons v. Truman. 374

JURISDICTION—

1. Facts which do not amount to a waiver of a party's right to demand a jury on the day of trial. Tanzky v. Blatchford. 99

2. Defendant may waive his right to object to the jurisdiction of a magistrate in another township. Mack v. Stephens. 92

JUSTICE OF THE PEACE—

1. The bill of exceptions must be entered at length upon the docket. Building Assn. v. Robb. 107

2. In an action begun before a justice, taken to the common pleas on error and thence to the district a transcript filed, but not attached to the petition in error, will not be considered. Hartman v. White. 45

3. A justice is not obliged to separately state his conclusions of law and of fact. *Ib.*

4. An action will lie on the official bond of a justice for failing to perform certain ministerial duties. Keith v. Fairchild. 176

5. There is no provision authorizing a review of the findings of a justice in forcible entry and detainer, as being against the weight of evidence. State v. Harmeyer. 509

6. Where a justice improperly refused to allow a party to execute an appeal bond, the court cannot, after the time in which it can be done has passed, compel the justice, by mandamus, to allow it. State v. Block. 532

7. The enforcement of the provisions of the mechanic's lien law of March 31, 1874, as to railroads, 71 O. L. 51, may be had before a justice of the peace. Railway Co. v. Cronin. 224.

8. The bill of particulars before a justice's court is not to be tested by the strict rules applicable to pleadings, but to be liberally construed. *Ib.*

LANDLORD AND TENANT—

1. An existing unexpired lease is not forfeited by operation of law by use of premises for purposes of prostitution. Ryan v. Kirkpatrick. 219

2. The lease is still subsisting and the landlord has only a right to enter and proceed by ejectment. *Ib.*

3. Landlord agreeing to improve need not finish after lessee's renunciation. Kirkland v. Wolf. 436

4. It is no defense against the liability of the owner of premises for a defective sewer, that his premises are in the control of a tenant, where such owner had control of the sewer. Williams v. Macready & Co. 381

5. If the lessor makes a new lease to the assignor of the lease he loses any lien he may have had against the original lessee for taxes. Rothert v. Westmeier. 472

6. Under a written lease providing for a periodical re-valuation by arbitration every fifteen years, a re-valuation may be by parol agreement, and if not evidenced by writing is not within the statute of frauds. Hepworth v. Pentdleton. 601

7. The lessee having paid on the re-valuation for ten years, cannot then say that he had never agreed to it. Such lessee has no option to surrender the lease. *Ib.*

8. Defense of eviction to a claim for rent. Steifel v. Metz. 308

9. To constitute an interference with a tenant which will be a defense to an action for the rent or part of it, the act must be the landlord's, or in some way chargeable to him. Forbus v. Collier. 331

10. One leasing part of his property, does not hold the rest at the risk of being made chargeable for invasion of his tenant's rights by his subsequent grantees. *Ib.*

11. Failure to commence mining within a period stipulated in a coal lease. Andrews v. Cook. 283

12. Parol surrender of a perpetual lease without change of possession, will be deemed to have ended at the time of such mutual agreement; and the heirs of the lessee cannot, after his death, maintain ejectment against the lessor. Fruett v. Gallup. 462

13. In such case the lessee and his heirs are estopped from setting up the perpetual lease. *Ib.*

14. There is no implied agreement on the part of a lessor that leased premises are in a safe condition. Burns v. Luckett. 483

15. A lessor leasing land in bulk to an association, who subdivides and deeds the lots to its members, the association becoming in arrears for rent, such lessor not seeking a forfeiture of the lease, but obtaining judgment for the arrears levying on the property and buying it in at the execution sale, stands in the shoes of the association, and has only the rights it had. Tressel v. Longworth. 685

LIBEL AND SLANDER—

1. A married woman may sue alone for slander *per se* concerning her. Cornell v. Durkee. 580

2. Publication of false charges of a public officer are not criticism, but tend to diminish public respect and confidence in such officer and to assure him of a breach of trust and is actionable. State v. Gazette Co. 711

LIMITATIONS—

1. The statute of limitations does not run against notes payable upon demand which subscribers to the stock of an insurance company organized before the adoption of the present constitution, gave to the company for stock subscribed by them. Kilbreath v. Gaylord. 487

2. The statute of limitations will not begin to run on a contract to compensate services by provisions in a will, until death of the promissor. Norris v. Clark. 564

3. Where defendants are joint parties, and where, by reason of the absence from the state of one of joint debtors, the right of action against him is saved; the right should be to bring action against him together with his joint debtors, and hence, the right be saved as against all. Casey v. Kimball. 584

4. A petition filed in 1876, claiming that a personal judgment in decree rendered in 1872, in a chancery suit pending when the code took effect, was introduced therein surreptitiously and by fraud, regarded as a bill of review, is barred by lapse of five years. Reeder's Exrs. v. Stephenson's Exrs. 568

5. An action against a common carrier for failure to deliver in a reasonable time is not barred in six years, but in fifteen years. Waring & Co. v. B. & O. R. R. Co. 553

6. The five years for which back taxes erroneously paid can be recovered runs from the time for payment. Commissioners v. Wood. 533

7. Part payment only prevents the running of the statute of limitations when on a claim founded on contract. Mitchell v. Cincinnati. 310

8. An action to set aside a fraudulent conveyance is barred by the four years' limitation of the code, unless the fraud was not earlier discovered. Stephenson v. Reeder. 411

9. A party to avoid the bar of the statute of limitation in case of fraud, need merely aver ignorance and that due diligence would have been ineffectual to discover the fraud. *Ib.*

MALICIOUS PROSECUTIONS—

1. In malicious prosecutions, defendant to show probable cause, is not confined to the transactions of plaintiff alone, but proof of the acts of associates of plaintiff tending to give defendant a belief of plaintiff's guilt is relevant. Johnson v. Corrington. 572

2. An action cannot be maintained for damages for the malicious institution and prosecution of a civil suit, without cause, such suit being unaccompanied by an arrest of defendant or the seizure of his property. Sax v. Laws. 41

MANDAMUS—

1. Mandamus to compel a justice to sign a bill of exceptions, where he answers that he is ready to sign a true bill, but that the bill offered is not true, refused. State v. Linn. 468

2. The refusal to allow an alternative writ of mandamus is not reviewable on error. State v. Cappeller. 537

3. Where a justice improperly refuses to allow a party to execute an appeal bond, the court cannot, after the time in which it can be done has passed, compel the justice by mandamus, to allow it. State v. Block. 532

MARRIAGE—

1. Proof of living together as husband and wife not accepted as proof of marriage. Maynard v. Maynard. 141

2. While marriage may be proved by reputation, time will be given to produce record proof from the marriage records of the county. Lipen v. Lipen. 141

MASTER AND SERVANT—

1. Whether a servant who was injured by the negligence of another servant was subordinate to the latter, may be left to the jury. Cincinnati Ice Co. v. Higdon. 239

2. The negligence of a third servant, not a superior over the injured one, and therefore for whose negligence the company was not responsible, contributed to the injury, is no defense. *Ib.*

3. That the injured person did not remonstrate against the conduct resulting in the injury, does not constitute contributory negligence. *Ib.*

4. A railroad company is not liable for injuries caused to one of its employees by a co-employee. Dick, Admx. v. Railroad Co. 59

5. Action for damages for an injury received from a falling elevator. Sinton v. Butler. 489

6. A railroad company is not liable for the voluntary act of a conductor. Hughes v. C. & S. Ry. Co. 502

7. An employee takes upon himself the risk of being injured by his own negligence, but does not thereby

excuse negligence on the part of his employer. Werk & Co. v. Armburst. 544

8. One who lets a hack and horses to another to carry on the latter's business of a hack-driver, without control over him, is not liable as a master to a person run over by the negligence of such hack-driver. Lefkowitch v. Harper. 369

MECHANIC'S LIENS—

1. A mechanic's lien law applicable only to building of railroads is not unconstitutional. Railway Co. v. Cronin. 224

2. A mechanic's lien law, giving a person the means of securing the fruits of the contract he has made, is not in violation of the obligations of a contract. *Ib.*

3. The enforcement of the provisions of the mechanic's lien law of March 31, 1874, as to railroads (71 O. L., 51), may be had before a justice of the peace. *Ib.*

4. Under the above mentioned act a substantial compliance with the conditions of the statute providing for service of written notice upon the owner of the road is essential to create any obligation on the part of such owner toward the person performing labor or furnishing materials under a contractor or sub-contractor, or to give such person any right of action against such owner. *Ib.*

5. Section 1, 72 O. L., 166, that when attested accounts are delivered to the owner he shall retain out of subsequent payments the amount of such labor, means that if the amounts are found and ready to be paid, but are, in fact, not paid, but retained for the benefit of those filing such accounts, this appropriates the amount to them the same as if paid, and the priority is not changed by subsequent accounts being filed. Cincinnati v. McNeely. 216

6. If, on sub-contractor's filing attested accounts with the owner, the chief contractors abandon the contract, the owner is not obliged to notify the sub-contractors of such abandonment. Sturm v. Ritz. 135

7. The sureties of the contractor for performance of a public work are not bound to the sub-contractor by any privity of contract. Greenless v. Shinnick. 385

8. But such sureties may become bound by entering into a certain agreement when the contractor becomes insolvent. *Ib.*

MORTGAGES—

1. An existing indebtedness is a good consideration for a mortgage. Bank v. Dondna. 532

2. A mistake in recording the name of the officer before whom a mortgage is recorded does not affect its priority. *Ib.*

3. A mortgage to a man after his death is void for want of a grantee in *esse*. *Ib.*

4. Sufficient delivery of a mortgage, what will constitute. Catholic Institute v. Gibbons. 516

5. Where a five-year lease contains an agreement to give a mortgage "as security for the rent due at the end of any one year," such mortgage secures the rent for a fraction of a year beyond a complete year of default. *Ib.*

6. An action for personal judgment on a note and foreclosure of a mortgage securing it, if no personal judgment is taken, but simply a foreclosure, an appeal may be taken to the order of distribution. Moore v. Feldswich. 501

7. Action on a note and mortgage asking a personal judgment and foreclosure. Marks v. Goldmeyer. 454

8. In an action to foreclose a mortgage on land held in the name of a married woman, it is no defense that her husband is not made a defendant. Callahan v. Rose. 384

9. Distinction between the security of a negotiable note and a mortgage. Hellebush v. Richter. 355

10. Where the name of the grantee was not inserted until after the execution of the mortgage, and then inserted at the request of one of the mortgagors, and with the acquiescence of the other, such filling in of the name is sufficient to make a valid mortgage. Langhorst v. Shutteldryer & Co. 333

11. A mortgage cancelled, because the debt was supposed to be paid in full, can still be enforced as to any part found to be not paid, except as against purchasers without notice. Challen v. Clay. 259

12. What will amount to an unauthorized mortgage. Case v. Kinney. 178

13. A mortgage on a wife's property to secure repayment of money embezzled by the husband, though there was an intention not to prosecute on the part of the grantee on obtaining it, and a hope against prosecution as a part motive for giving it, yet

in the absence of an agreement to that effect, is not on consideration of forbearance to prosecute. Herbst v. Mauss. 701

14. A mortgage made by a wife of the amount of money embezzled by her husband from the mortgagee, his employer, is not accounted as made under duress because a warrant for the husband's arrest had been taken out, and he was threatened with arrest and prosecution, where he was actually guilty, and the arrest would have been lawful. *Ib.*

MOTION—

A motion to a cross-petition separately docketed as a distinct case, can only be granted where there is a misjoinder of actions and a demurrer therefor has been granted. Hoyt and Wife v. Heister. 420

MUNICIPAL CORPORATIONS—

1. A city may grant a right of way through a park to a street railroad, and may reserve a rent therefor. Mathers v. Cincinnati. 496

2. A municipal corporation has no power to condemn any less than the whole portion of a turnpike within its limits. C. & W. Turnpike v. Cincinnati. 337

3. Right to claim damages for an improvement is waived, when the claim is not filed within the statutory time, although filed before the city has incurred any liability. Kriege v. Cincinnati. 405

4. Officers of a municipal corporation cannot, in compromise of an injury sustained in its service, entail an annuity or pension upon it. Mitchell v. Cincinnati. 310

5. Such a contract would be *ultra vires* as against public policy. *Ib.*

6. A contract by a board is not enforcible merely because the board had sufficient money in the treasury at the time to its credit, but had afterwards expended it on other contracts. Lowry v. Cincinnati. 81

7. In order to assess an abutting owner for a sidewalk laid by a city along a turnpike company's road, the consent of the company necessary to enable the city to lay down and assess for the sidewalk, must be such that the property owner shall get the full benefit of the work. Sprague v. Linwood. 123

8. An estoppel cannot be invoked against such property owner from knowledge that the authorities were doing the work. *Ib.*

9. An ordinance for condemnation of land to widen a street, providing that the expense shall be assessed on abutting property and property benefited, sufficiently, designates the property without specifying the lots. Gamble v. Wise. 469

10. The recommendation of the board of improvements is not necessary to enable the city council to pass an ordinance for condemning property. *Ib.*

MUTUAL BENEFIT SOCIETIES—

1. The constitution of subordinate Odd Fellow's lodges, providing for a right of appeal from the proceedings of a lodge "in all matters of form required by the constitution and laws of the order," does not apply to an order of the lodge to pay sick and funeral benefits, and reversal of such order by the appellate body on appeal is not authorized. Matoon v. Wentworth. 639

2. A mutual protection company whose members' families receive on death the proceeds of an assessment on each surviving member, incorporated under the act of 1872, is not a life insurance company, but is governed by the general incorporation act, and can therefore be sued only where its principal office is. Sargent v. Mutual Life Ins. Assn. 646

3. Expulsion from a society for wrongfully drawing benefits. State v. Algemeiner Verein. 449

4. A mutual protection association, to pay widows of members a monthly sum, which has the right to dissolve on the votes of a certain number of members, if so dissolved cannot be administered by a court of equity in perpetuity by the continued collection of dues, but the funds on hand must be distributed, and the association wound up. Collier v. Steamboat Captains' Assn. 10

5. Where, by investments of the fund after dissolution and before final distribution, it has increased, the widows are entitled to the portion of the net accumulations produced by the investment of the amount due her on her annuity value. *Ib.*

6. The widows of members who have become such since the dissolution, are not entitled as such to participate in the fund, but their rights must be worked out through the estates of their deceased husbands. *Ib.*

7. The rights of widows who remarried ceased upon such marriage, and did not reinvest in her on the death of her second husband. *Ib.*

NEW TRIAL—

1. New trial granted where the jury ignore evidence that is uncontradicted. Souther & Co. v. Stoeckle. 511

2. Where a defendant having died, and plaintiff being thereby rendered incompetent to testify, unless defendant's deposition is read, a verdict and judgment will not be reversed for misconduct, where the plaintiff's attorney stated in the presence of the jury, that if this deposition was not introduced, he would comment on the fact. Cooper v. West. 470

3. When it is claimed that a verdict and judgment are against the weight of evidence, a motion for a new trial should assign that as the ground of the motion, and failing to allege it, the ground is waived. Wheat & Sons v. Cooper, Stevens & Co. 460

4. Granting a motion for a new trial on the ground that the verdict is against the weight of evidence, on condition of payment of costs, or part of them, is void. Doyle v. Younglove. 124

5. Where the granting of a new trial is discretionary, terms may be imposed, but not where it is a matter of right. *Ib.*

6. If the verdict is not instanced by the evidence, there is a right to a new trial. *Ib.*

NUNC PRO TUNC ENTRY—

The right of a court, to enter a *nunc pro tunc* judgment, should never be exercised, except in furtherance of justice, and where some substantial right would be defeated if it were not entered. Aurora Fire and Marine Ins. Co. v. Building Assn. 469

NUISANCE—

A person owning lands through which a public road passes, who gives his assent to the cutting down of a tree standing thereon, is guilty of obstructing the highway if the tree falls within the road and is suffered to remain therein to the hindrance or incommenience of travelers, and the common pleas has jurisdiction to hear such case. Nagle v. Brown. 316

OFFICE AND OFFICER—

1. Publication of false charges of a public officer, are not criticisms, but tend to diminish public respect and confidence in such officer and to accuse him of a breach of trust and is actionable. State v. Gazette Co. 711

2. Where the governor has the power, by statute, to dismiss an officer for official misconduct, the courts will not, before the trial takes place, enjoin his action, either on proof that the charges are not true, or, that the charge does not amount to misconduct. Weber v. Bishop. 661

3. It is no ground for enjoining an investigation by a board, under a statutory power, of charges against an appointee that separate committees of each house of the legislature have investigated the same charges, and made complimentary reports. Miller v. Directors of Longview Asylum. 650

4. It is no objection to the trial, by a board, of charges against an appointee that the notice to the members of the special meeting for preferring the charges was a general notice, when the directors not properly notified were present, and took part in the proceedings by voting. *Ib.*

5. Power of governor to remove a member of the board of police commissioners of Cincinnati, from office (dissenting opinion). State v. Sutton. 644

6. The police commissioners cannot be compelled to reinstate a policeman improperly discharged by the mayor. State ex rel. v. Board of Police Commissioners. 326

7. A statute which provides that certain "officers" shall be abolished, in effect abolishes their offices. Friend v. Lessees. 56

PARENT AND CHILD—

1. If an unmarried daughter living with her father releases to him without consideration interests which he held for her, the release will be presumed to have been made before emancipation and is fraudulent. Jaeger v. Herancourt. 1

2. The rule that the relation of parent and child repels the presumption that services rendered by the child after becoming of age are in expectation of payment, applies in case of an adopted child, designated as heir-at-law of the husband, rendering services to the widow, and the burden is on him to show an express or limited contract. Finch v. Finch. 673

PARTIES—

1. It is no misjoinder for two taxpayers to unite in enjoining the city from doing a certain act on the refusal of the city solicitor to act. Mathers v. Cincinnati. 496

2. In an action by the assignee of an insurance policy for reformation

and enforcement, the assignor is a necessary party. Sykora v. Ins. Co. 372

3. Owners of separate lots abutting on a private alley, through which they have a right of way, may join as plaintiffs to prevent the building over or obstructing the alley. Harrison v. Pike's Heirs. 603

4. In an action against an unincorporated association, except where the statute allows it to be sued in the name adopted, the members are the proper parties. Matoon v. Wentworth. 639

5. But where the trustees only are sued, if they are members, the defect is one of the parties only, waived if not objected to, and the trustees will, after judgment, be presumed to have been members. *Ib.*

PARTITION—

Questions arising in a partition suit in respect to dower. Renner v. Bird. 290

PARTNERSHIP—

1. When a foreign firm, sued in the firm name, came in and answered and a verdict was taken, it was too late to object. Critchell v. Cook & Co. 314

2. A foreign firm cannot be sued in its firm name, nor could a domestic firm, except for the statute. *Ib.*

3. A note given by a member of a firm in his individual name for money lent him, on which he indorses the firm name before delivery, the plaintiff seeking to hold them must show their assent or authority to sign. Benninger v. Fuchs. 613

4. That the firm on the discovery of the facts, did not notify plaintiff is nothing, as they are not obliged to seek out the plaintiff. *Ib.*

5. An action brought against D, on a contract made by P and G, on the theory that they were agents and D their undisclosed principal, but the evidence showed that all three were partners, such action may be sustained as the partnership liability, the non-joinders of the others not having been objected to. Caldwell v. Devinney. 599

6. The joint owners of a vessel are not generally, nor necessarily, partners. Coffin v. Marrata. 379

PATENTS—

The state court may examine the validity of a patent when desired in defense to a note. McKenzie v. Bailie. 607

PLEADING—

1. A plaintiff can recover only on the causes of action stated in his petition. Stein v. Crossley. 506

2. It is necessary to have the cause of action stated in his petition, and therefore, a case cannot be made by reply, for that is a clear departure. *Ib.*

3. An answer to a petition demanding a money judgment on a note, which answer states an equitable defense, presents a case for petition on error and not appeal. Coffin v. Marrata. 379

4. A reply to an answer in another case cannot be offered as an admission by plaintiff therein, when the admission consists merely in an omission to plead a fact. Farmers Ins. Co. v. Frick. 247

5. Omission of petition cured by verdict. McCartin v. Sullivan. 218

6. If no objection be made to a reply to an answer until during the trial and words in the reply must be constructed as a denial, or as meaning nothing, the court will construe them as amounting to a denial, though such denial be argumentative. N. Y. Life Ins. Co. v. La Boiteaux. 182

7. A party cannot, by motion, take issue on a material allegation in the petition. Sargent v. Mut. Life Ins. Assn. 646

8. Amendment during trial by interlining, without new verification is no injury to defendant justifying reversal. Con. St. R. R. Co. v. Barlage. 675

9. An action for money in which an attachment is issued and the property attached put in the hands of a receiver, and an action by judgment creditors of the same defendant in the nature of a creditor's bill, should not be consolidated. Goslin v. Welte. 456

10. Where a petition to recover for selling property selected by the debtor as exempt from execution in lieu of a homestead, states the necessary facts, and the answer alleges that the property is partnership property, and the judgment was against the firm, such new matter amounts only to a denial, and does not require a reply. Long v. Hoban. 688

11. A party to avoid the bar of the statute of limitations in case of fraud, need merely aver ignorance and that due diligence would have been ineffectual to discover the fraud. Stephenson v. Reeder. 411

12. A pleading averring, in avoidance of the statute of limitations, that the fraud complained of was not discovered until within four years, etc., will be held sufficient. *Ib.*

13. Where a pleading shows affirmatively a claim barred by the statute of limitations, the bar may be taken advantage of by a general demurrer. *Ib.*

14. A petition on an official bond is bad if it merely states that the bond was according to law. Bisack v. Pape. 115

PRACTICE—

1. Where a case stands on a petition, and a full, square denial by answer, and there is no testimony, a motion by defendant to dissolve an injunction will be granted. Afsprung v. Althoff. 550

2. An answer cannot be filed without leave of court where the case is in default and the judgment is ordered and the papers are in the hands of the court for decree. Lyons v. Fidelity Lodge. 313

3. Where in a case on demurrer to the petition, plaintiff's attorney frankly admits in open court that the case made by the petition is not the actual case, the court will not decide the demurrer, as it presents a fictitious, not an actual case, but will remand for amendment. Kinze v. Kinze. 303

4. The answer day is the third Saturday after the expiration of six full weeks of seven days each. Harmon v. Whittemore. 92

5. Default can be taken in the Monday following and not before. *Ib.*

RAILROADS—

1. Agreement between a railroad and telegraph company, for the construction and operation of a line of telegraph. W. U. Telegraph Co. v. A. & P. Telegraph Co. et al. 163

2. Effect on such agreement where the railroad is afterwards sold under foreclosure, the telegraph company not being a party. *Ib.*

3. Where such agreement binds the railroad company not to deliver any materials, except at regular stations, for any competing line: *Held,* that this stipulation was against public policy. *Ib.*

4. The owner of a commutation ticket, who has failed to sign its conditions is not entitled to ride upon if after it has been taken up by the company. Shelton v. Railroad Co. 161

5. The owner of a commutation ticket is not entitled to ride on the cars of the railroad company after such ticket has been taken up and cancelled by the company. Shelton v. Railway Co. 175

6. The right of one railroad company to cross the track of another at will. Railroad Co. v. Railroad Co. 364

7. Suit to foreclose a trust deed. Railroad Co. v. Phillips. 591

8. A rule of a railroad company requiring a conductor to eject from the train a passenger who refuses to produce his ticket or pay his fare on demand is a reasonable one. Crawford v. Railroad Co. 122

REFERENCE—

1. Submission of issues of fact and law to referees for decision. Benedict v. Cincinnati. 261

2. As to the finding of ultimate facts, the referees are not required to set out the evidence of such ultimate facts. *Ib.*

REFORMATION—

1. A claim made in 1878 to reform a contract made in 1861, in a suit already pending three years before such claim is made, will not be granted unless the proof amounts almost to demonstration. Whitney v. Denton. 547

2. Where a tract of land is by mistake included in the report of a judicial sale, such mistake can be corrected after confirmation of deed only by petition in error. Stites v. Weidmer. 134

RELIGIOUS SOCIETY—

A religious literary and scientific corporation, incorporated under the act of 1852, has power to lease part of a building owned by it for theatrical and operatic purposes. Catholic Institute v. Gibbons. 516

REMAINDER—

Real estate was conveyed to C. for life, and after her death to her children by E., during the life of each of the children, and after their death to E. and to his heirs, *habendum* to C., during life, and after her death to the "said surviving children," and after the death of each of them, to E. and his heirs: *Held,* that the provision for the children was contingent upon their surviving their mother, and only such of the children as survived her took the estate. Smith v. Block. 212

REMOVAL OF CAUSES—

1. A bond for removal of a cause into the United States courts may be sufficient, though not signed by the applicant. Swan v. Railroad Co. 669

2. Where one of several defendants only can apply for removal of the cause to the United States courts, the other defendants being too late in their application, they having been served with summons, and issue having been made as to them several terms before, such defendant removing the cause removes it as to the other defendant also; it will not be split. *Ib.*

3. Article III, sec. 2, of the federal constitution, expressly extends the judicial power of the U. S. to all cases in law or in equity, arising between citizens of different states. Kaufman v. McNutt. 60

4. The act of March 3, 1875 (18 U. S. Stat. at L. ch., 137, p. 470), providing for the removal of causes to the U. S. C. C., brought and pending in a state court, between citizens of different states, takes the place of all preceding statutes upon the subject. *Ib.*

5. Where no application for removal had been made under such statutes prior to March 3, 1875, the right of removal under such acts was waived. *Ib.*

6. When application for removal will be considered to have been made in time. *Ib.*

7. A party failing to file his transcript in the U. S. court in due time will be held to have waived the right of removal, and have elected to try his cause in the state court. *Ib.*

REPLEVIN—

1. Finding of property and right of possession in defendant, without pleading, but merely upon default of plaintiff, does not preclude plaintiff, on inquiring of damages, from showing he had in fact the property and right of possession. Striker v. Beattie. 683

2. A petition to replevy money, generally, is not demurrable, for if the money was marked or in a parcel, replevin lies. Knapp v. Springmeier. 570

3. In an action of replevin, on the issue of whether plaintiff was entitled to the possession, defendant, a constable who had levied on the goods, need not aver that plaintiff had bought the goods to aid the seller to defraud his creditors. Nenbrand v. Myers. 315

4. Where execution is levied on chattels, and they are replevied by a third person, the execution creditor may defeat such replevin by proof that such person's right is founded on a chattel mortgage given him by the execution debtor to secure the price of furniture sold to equip a house, a house of prostitution. Kusworm v. Hess. 224

5. In a replevin case by a mortgage of the chattels, another person cannot come in and by cross-petition claim that he has a prior mortgage on the same goods, and permitted plaintiff to take possession and sell the goods, and that they realized more than the claim of such cross-petitioner. Colwell v. Aitchison. 101

RESIDENCE—

Evidence that plaintiff has been living at a boarding house eleven months before suit was brought, is not sufficient as to residence. Wagenfuhr v. Wagenfuhr. 142

RES JUDICATA—

An action before a justice of the peace is not a bar to an action to reform a contract. Anonymous. 158

REVIVOR—

Where a petitioner for dower died before final decree in a partition case, the action may be reviewed in the name of her administrator. Renner v. Bird. 290

SALES—

1. If a vendee refuse to accept personal property tendered in accordance with the terms of the contract of sale, he is liable in damages for the difference between the contract price and its market value. Cullen v. Biem. 388

2. Where a person refuses to receive the articles contracted for, the seller can treat the property as his own, and if its market value, at the time of the breach, is less than the contract price, he may, by action, recover the difference and a sum equal to the interest. *Ib.*

3. One who was employed to buy a certain quantity of pork at a specified figure cannot object that his employer furnished part of the pork from his own stock. Matthews v. Briggs, Swift & Co. 23

SCHOOLS—

1. Manner of contesting the election of a school director. State v. Goodale. 707

2. A teacher has the right in pursuance of the rules of the school known to the parents, to inflict reasonable corporal punishment upon a pupil deserving it. Quinn v. Nolan. 585

3. The board of education is liable for its proportion of an assessment levied by the city for improving a street in front of school property. Cincinnati v. Bd. of Education. 362

4. A judgment having been had against a township board of education, there being a balance in the hands of the treasurer to the credit of the sub-district which contracted the claim, a peremptory mandamus will be issued to the board to instruct its treasurer to pay the same. State ex rel. v. Bd. of Education. 326

5. Township boards of education are liable for an unpaid part of a teacher's salary, who was employed by the directors of a sub-district of a township. Bd. of Education v. O'Hara. 312

6. The court cannot interfere with the classification of schools, where the colored children have their own schools. State ex rel. v. Bd. of Ed. of Cincinnati. 129

SET OFF—

Mutuality is an essential condition of a valid set-off. Dougherty v. Cummings. 184

SEWERS—

1. Consent of turnpike company to lay a sewer under the road is not sufficient, the consent of abutting property holders must also be obtained. Cilly v. Cincinnati. 527

2. The principle laid down in the case of Oviatt v. Upington, 24 O. S., 232, applies as well to the building of sewers as to the improvement of streets. Davis v. Cincinnati. 89

3. Where the ordinance providing for the building of a sewer is defective, and the assessment is invalid on that account, still the property abutting on the street not specified in the ordinance and the owner of the same is liable to the extent of the value of the work done. *Ib.*

SPECIFIC PERFORMANCE—

1. Courts will refuse to make decrees for the specific performance of a contract to build a house. Van Tyne v. Short. 720

2. A specific performance of a contract by a corporation to purchase its own stock cannot be enforced where the corporation was not authorized by its charter to make such a purchase. Coppen v. Greenless. 571

3. It is no defense to a specific performance of a contract to buy land, that the advertisement called for more land than was there, when this fact was announced on the day of the sale and defendant made acquainted with it before signing. Bd. of Ed. v. Eversman. 571

STATUTES—

1. When two statutes are irreconcilable the later repeals the earlier to the extent of the inconsistency. Straub v. Wilson. 358

2. A statute which provides that certain "officers" shall be abolished, in effect abolishes their offices. Friend v. Lessees. 56

STATUTE OF FRAUDS—

1. Under a written lease providing for a periodical revaluation by arbitration every fifteen years, a revaluation may be by parol agreement, and if not evidenced by writing is not within the statute of frauds. Hepworth v. Pendleton. 601

2. An agreement to abstain from competing in business for an unspecified time, though it may be forever, is not within the statute of frauds. Slocumb v. Seymour. 563

3. An original promise to pay the debt of the promisor himself may be enforced by such third party by an action in his own name. Laws v. Scales. 220

STREETS—

Adoption of a surface grade of a street by a municipal corporation by acquiescence is a question for the jury. Chatfield v. Cincinnati. 111

STREET RAILWAYS—

1. The city has the right under its general powers to renew its permission for the continued operation of an existing street railroad, for a period not exceeding twenty-five years, such use having been legalized by the general assembly. Haskins v. St. R. R. Co. 713

2. Competition is not required in such case as in case of the construction of a new road, and it is no objection that a vested right is given where it is not made exclusive. *Ib.*

3. Where the construction of piers of an inclined railway is a lawful act, there can be no recovery for an injury by vibration caused by running the cars, there being no previous wrongful acts. Lewis v. Inclined Plane Ry. Co. 566

4. Under sec. 412 of the Municipal Code as it stood in 1878, consents of property holders given to one bidder for a street railroad route would inure to the benefit of another bidder, who states that he does not file consents because consents are obtained by others. Mathers v. Cincinnati. 521

5. Where a part of a street railroad route is over unimproved streets, the title in which is not yet obtained by the city, the city may allow a temporary track on streets not in the route around such unimproved squares, and without consents of abutting proprietors, this not being a grant, but a revocable license. *Ib.*

6. No one can object that a street railroad is putting a double track where only a single track was authorized by the grant, except owners of lots abutting on the double track. *Ib.*

7. A city may grant a right-of-way through a park to a street railroad, and may reserve a rent therefor. Mathers v. Cincinnati. 496

SUBSCRIPTIONS—

1. Parol evidence is not admissible to show that a written subscription to a railway, payable on completion, was given in consideration of certain culverts and bridges to be put in at defendant's farm, as promised by the soliciting agent. Freeman v. Muth. 555

2. A subscription to a railway being payable, half if graded to a certain point in a year, and half if completed to that point in two years, where the road was not graded in the year, but was completed in the two years, the latter half is collectible, not the earlier half. Johnson v. Railroad Co. 466

SURETIES—

1. Where a surety has purchased the note on which he is surety, and a relative of the maker's wife having funds of hers, takes up the note then in bank for collection, but the maker failing to keep an agreement as to its payment, such relative cannot recover from the sureties where he agreed to look to the maker only. Dreher v. Sick. 579

2. The undertaking of a surety on an appeal bond is not that the judgment debtor would pay, but that the surety would pay. Poll v. Murr. 574

3. To entitle a plaintiff to his remedy against the surety on a bond for stay of execution before a justice, it is only necessary that there should be a return of execution on the judgment unsatisfied at the expiration of the stay. Gockel v. Averment. 554

TAXES AND TAXATION—

1. The annual city boards of equalization have authority to increase or decrease the valuation for taxation of any lot or parcel of land within their respective city limits. Gazlay v. Humphreys. 102

2. An addition by the board of equalization, to the valuation of personal property returned by a taxpayer, without evidence is unauthorized. Wise v. Kromberg. 541

3. It is no excuse for the nonpayment of taxes that, on the day when they were due, the proprietor gave his check to the treasurer in payment which, by reason of not being presented the next day, the bank having failed in the meantime, was not paid. Manck v. Fratz. 704

4. Petition by county treasurer for unpaid taxes on assessments. Cummings v. Fitch. 36

5. The five years for which back taxes erroneously paid can be recovered runs from the time for payment. Commissioners v. Wood. 533

6. There will be no refunder of back taxes granted where one is assessed 55 feet front, and owns only 54½ feet, where there is no proof that the assessor valued the property by the front foot. *Ib.*

7. A purchaser at the auditor's delinquent tax sale cannot compel the auditor to issue to him a certificate of purchase, where a lien-holder learning of the fact went the same day and paid to the treasurer the amount of the delinquent tax. State ex rel. v. Humphreys. 131

8. A person purchasing property in a partition proceeding, has the right to have the taxes discharged before taking title, and failing to do so, such person takes the title subject to the taxes and must pay them. Callahan v. Rose. 384

9. Under the act of March 30, 1877 (74 O. L., 424), the commissioners of Hamilton and Clermont counties are to erect a bridge, to be paid for in special proportions; but the act does not provide that a tax must be levied in the first instance, but only to replace the cost. State v. Commissioners. 357

10. Article 12, sec. 2 of the constitution and the act of March 21, 1864, S. & S., 761, do not require that such institutions shall be public; they may be private, the charity only in furtherance of which the same are employed,

TAXES AND TAXATION—Con.—
is required to be "purely public." Humphreys v. Sisters of the Poor. 194

11. Article 13, sec. 4, of the constitution, does not require the property of a private corporation, employed for purely public charitable purposes, to be taxed. *Ib.*

12. It is the use to which the property is devoted, that is to determine whether it is actually employed for the purposes of a purely public charity. *Ib.*

13. The word "belonging," in the act of exemption, is not there used in the sense of ownership. *Ib.*

14. On a trial to determine the question of exemption from taxation, the rules prescribed for the mere government and conduct of its inmates by an institution claiming to be one of purely public charity are, *prima facie* immaterial. *Ib.*

15. All the property employed in maintaining the religious and benevolent order known as "The Little Sisters of the Poor," will be exempt from taxation. *Ib.*

16. If, at the time such institution obtains its real property, the lien of the state for the taxes of that year has already attached in such real property, such year's taxes must be paid, though for the residue of the year such property be employed solely in carrying on such purely public charity. *Ib.*

TRIAL—
Section 266 of the code, which prescribes the mode of conducting a trial by jury, and is divided into seven parts, is directory and not mandatory. Life Ins. Co. v. Reif. 200

TURNPIKES—
1. A municipal corporation has no power, under sec. 570 of the Municipal Code, to institute proceedings to condemn any less than the whole portion of a turnpike within its limits. C. & W. Turnpike v. Cincinnati. 337

2. In injunction against a turnpike maintaining a toll-gate within eighty rods of the city limits, will not be granted at the suit of a private individual, suffering no special injury. Kelley v. Turnpike Co. 119

UNDUE INFLUENCE—
1. Though incapacity cannot be inferred from extreme age, yet it is an element to be considered. Corbit v. Corbit. 692

2. Where there is imbecility, any act that would induce a conveyance beneficial to the actor, and on plainly inadequate consideration, and constituting a preference for certain children connected with the act of conveying, to the exclusion of others without reason, will be held to amount to undue influence, and in such case unjust influence may be inferred from circumstances and results. *Ib.*

VENDOR'S LIEN—
1. A vendor's lien for balance of purchase money, for which a note was taken, can be enforced by an executor. Hunter v. Hunter. 79

2. An attaching creditor of the vendor is not such a *bona fide* purchaser, as can hold the land free from a vendor's lien. *Ib.*

VERDICT—
1. A verdict, apparently excessive, will be set aside as being excessive. Handley v. Sandau. 626

2. A general verdict for plaintiff is sufficiently definite and responsive in ejectment where the answer was a general denial. Kennedy v. Keating. 500

3. Where there is any doubt which way the evidence inclines, the fact of a second verdict in favor of either party must always have some influence on the result. U. C. Life Ins. Co. v. Cheever. 254

WAIVER—
1. Waiver is a thing of intention, and there can be no intention to waive where there is no knowledge. Am. Ex. Co. v. Triumph Ex. Co. 51

2. The question of waiver is a mixed one of law and of fact. *Ib.*

WATERS—
The rule as to diverting subsurface percolating water is different from surface water, and if a structure causes such water to be diverted, and it thereby, by softening the ground, injures plaintiff's house, there can be no recovery. Lewis v. Inclined Plane Ry. Co. 566

WILLS—
1. Payment of funds into court not required if party's share would equal the fund. Bates v. Smith. 454

2. Although mere moral depravity does not of itself unfit a man to make a will, yet a jury may consider it as a circumstance casting suspicion upon his soundness of mind. Josyln v. Sedam. 350

WITNESS—
"Competent to be a witness" means competent at the time the act was done, not competent at the time of subsequent litigation. Sieving v. Seidelmeyer. 609

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