REPRINT

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Ohio Decisions, and Ohio Decisions Reprints, Contain all the Decisions of Ohio Courts Below the Supreme.

NORWALK, O.
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PREFACE.

This volume is a reprint of the cases decided by the state courts of Ohio, found in the Weekly Law Gazette, Volumes 2, 3, 4 and 5, published at Cincinnati, from 1872 to 1887; three volumes of Daily Law and Bank Bulletin, 1857-59, preceding the Gazette, and the weekly edition considered as volume one of that publication; thirty-four volumes of American Law Register, published at Philadelphia, 1853-85; and five volumes of Ohio Law Journal, published at Columbus, 1880-84. The forty-six original volumes are compressed into one reprint, as all editorial, correspondence, cases decided in other states, and out-of-date matter, in the periodicals as first issued, have been omitted.

This volume is the third of a series of reprints embracing the Western Law Journal, Western Law Monthly, Weekly Law Gazette, Law and Bank Bulletin, American Law Register, Ohio Law Journal, Cleveland Law Record, Cleveland Law Reporter, American Law Record, Weekly Law Bulletin, and Circuit Court Reports, the republication of which has been undertaken and carried on at large expense. These reprints, with the current volumes of Ohio Decisions, form a library which embraces all the Ohio case law emanating from courts inferior to the Supreme, except what is found in five volumes of the Cincinnati Superior Court Reports.

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

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

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

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

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

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

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

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

Sept. 1, 1897. THE LANING PRINTING CO.

TABLE OF CASES.

Giving Volume and Page of Original Publications and of this Book. Where no letter is given indicating the original volume, the case is found in the Weekly Law Gazette. J, refers to the cases found in the Ohio Law Journal. B, refers to the cases found in the Weekly Law and Bank Bulletin. R, refers to the cases found in the American Law Register.

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

OHIO COURTS OF RECORD

PUBLISHED IN

THE WEEKLY LAW GAZETTE.

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*DEATH BY WRONGFUL ACT. 1

[Superior Court of Cincinnati, Special Term, 1858.]

ADMINISTRATOR OF MCCLARDY V. CHANDLER.

In the absence of a special averment, no recovery can be had for any injury to the business of the deceased, but only for the general value of the life of the individual growing out of the situation of those who were dependent upon him.

SPENCER, J.

Judge Spencer charged the jury. The action was brought under an act of the legislature, passed in 1851, entitling the personal representatives of a deceased party, whose death was caused by the wrongful act or default of another, to sue for damages on behalf of the widow and next of kin. It appears that Neil McClardy being sick, a physician wrote a prescription for him—one of the ingredients being cinnamon water—that it was taken to the drug store of defendant, and that in making the preparation, he used liquid

ammonia in place of the cinnamon. It was claimed by plaintiff that the death of McClardy resulted from the ammonia; while the defense urged it was the natural consequence of a cancerous affection of the stomach.

The first question, therefore, under the provision of the law was, whether the deceased had died in consequence of any wrongful act of this defendant, and, under such circumstances, that, if he had not died, but was only injured, he, himself, could have recovered damages for that injury. Was his death the want of proper care on his own part? To charge carelessness on him in a case of this description, it should be shown that he was acquainted with the dangerous properties of the medicine. Before finding negligence on the part of defendant, they should inquire whether the prescription itself was legibly written, so that a man with ordinary care, suitable to the situation this defendant occupied, would have known what it was? If it was so written that it could not be readily mistaken, it was the obligation of the druggist to put it up accurately; and if he did not, he would be responsible for the evil consequences. If the jury should find there was a want of proper care, they would next determine whether the effects of the mistake were injurious to the deceased and contributed to his death.

It was not necessary to show the deceased, at the time the medicine was taken, was in the full vigor of life. The law regards life in any of its stages as valuable; and though an individual should receive a wound of which death must be the inevitable and speedy result, yet if it is hastened or contributed to by another, he would be responsible for the consequences. Though the deceased, in this case, was laboring under a mortal disease, if this ammonia produced inflammation and thereby shortened life, the circumstances would bring the case within the provisions of the statute, and the defendant would be responsible for the shortening of life.

If the jury were not satisfied ammonia caused the death, it would not be necessary to pursue the inquiry. Where an individual in apparent health dies after the administration of a medicine adequate to produce death, it was natural to refer the effect to that particular cause; but here the defendant claimed in the first place, that ammonia administered in such a quantity as was given here, was not capable of producing death; and, in the second place, that, at the time it was administered, the deceased was laboring under a mortal disease—cancer in the stomach—and that, during the progress of the disease, a rupture took place, causing blood to lodge in the abdomen to a degree sufficient to cause death. This defense was presented in a manner calculated to require serious consideration. The court here referred to the testimony of various physicians examined as experts—of Dr. Tibbat's, (who made the post mortem examination), that deceased was laboring under a cancerous affection, from which he would not probably recover—of Dr. Muscroft, who thought death might have resulted from the tumor or the ammonia—of Dr. M. B. Wright, who would think it strange if the stomach should be seriously affected by this quantity of am-

monia—and supposed the suddenness of the death arose from a lesion, which threw blood into the abdomen—of Dr. Potter, who did not think, in a healthy man, so small a quantity of ammonia would produce death—of Mr. Wayne, chemist, who did not think this ammonia produced the death—of Dr. Comegys, who said a teaspoonful of ammonia would produce much distress in the stomach, but thinks the cancer might have resulted in death, and that the disease was hastening to a crisis; also the testimony of Drs. Baker, Cooper, Fries, Foote, Cox, Carey, Newton, and Blackman, the latter being of opinion that no one could tell whether death was caused by the ammonia or the disease.

Though the deceased had an incurable disease, if his death was materially hastened by any act of negligence on the part of defendant, the latter would be responsible to the personal representatives for the pecuniary damage sustained by the widow and next of kin, in such sum as the jury "should deem fair and just," not to exceed $5,000. In the absence of any special averment, no recovery could be had for any injury to the business of deceased, and it could be only for the general value of the life of the individual, growing out of the situation of those who were dependent on him.

The jury then retired, and, after a deliberation of some hours, brought in a verdict for plaintiff for $500.

Snow & Bradstreet, for plaintiff.

T. C. Ware, for defendant.

JUDGMENTS—PRACTICE.

[Superior Court of Cincinnati, Special Term, 1858.]

RENNIMAN ET AL V. DEAN ET AL.

In a suit on a foreign judgment, it is not proper practice to insert a copy of the transcript sued on, or annex a copy as an exhibit.

STORER, J.

A suit on a judgment rendered in New York. Dean demurred, because the petition did not contain a transcript of the judgment record; and he was unable to determine from the petition whether the proceedings in New York were regular and valid.

The court held that the petition contained substantially all that would have been required in a declaration before the code; and since the code excludes from the petition all mere matters of evidence, and a transcript from the record is evidence merely, the court would be compelled to order it to be stricken out, if it were included in or attached as an exhibit to the petition. If defendant wished to see the record it was public property, and equally open to him with plaintiff. Demurrer overruled and leave to answer.

Collins & Herron, for plaintiff.

Ranney, Bachus & Noble, for defendants.

ARREST.

[Hamilton Common Pleas Court, 1858.]

OHIO v. JOHN MCGINNIS.

If an officer undertakes to make an arrest without a warrant, where the exigency which renders a warrant unnecessary does not exist, and full opportunity is afforded to procure a warrant, the officer is not under protection of the law, and any aggression by him form a proper basis for acts of self defense and resistance.

OLIVER, J.

The defendant is charged with murder in the second degree—taking the life of John H. Mackendorf, marshal of the town of Reading.

It was contended, on the part of the defendant, that, it appearing from the testimony of the state that the marshal had attempted to arrest the prisoner, and other of his friends, without warrants, and (according to the testimony for the defense,) that John McGinnis had been actually struck with a slung shot by the marshal three times before he made any assault upon the latter, there could be no conviction upon the indictment; that the whole trouble arose from the fact that a newly-elected officer was anxious to display his vigilance in office, and to let the people understand that there was an authority vested in police officers beyond what they had been in the habit of supposing, or the officers of the town of Reading in the habit of exercising. The marshal had brought a *posse comitatus* of
3 the town of Reading about that house, when the law gave *them no right to interfere with what was going on; and if the state claimed that the marshal was acting under the authority of his office, the defendant's counsel would insist that they were entitled to call for the production of the ordinance of the town.

The court called the attention of the counsel to the provision in the statute in relation to sporting or rioting on the Sabbath—quarreling was embraced.

The counsel for defendant replied that there was no quarreling until the marshal interfered. That law, however, was intended to apply to wilful violations of the Sabbath; and they could not, under the term of "sporting," extend the signification to a dance in a private house; and, as to the use of "murderous weapons," did they not prove here that one of the guardians of the sanctity of the Christian Sabbath had used a slung-shot upon the head of an unresisting man, who had violated no law of the land?

Mr. Brown urged, in his closing argument for the state, that the offense as charged had been established; that the prisoner had purposely and maliciously inflicted a mortal wound on Wackendorf, this appearing as well from the weapon employed, as the circumstance attending the use of it. The counsel examined the leading portions of the testimony, with a view to sustain this argument.

Judge Oliver in his charge to the jury defined the law in relation to the several degrees of homicide. On the main question, as to whether a case of provocation or self-defense had been made out, the jury were informed they should investigate it by inquiring whether the marshal was acting in pursuance of the duties imposed on him by law; for if he was acting within the discharge of those duties, the shield of the law was thrown around him, so as to make it the duty of the citizens to acquiesce in the assertion of his authority—acting otherwise by resistance or interference, the citizen would manifest a disregard of his duty, from which the jury would have a right to infer malice, and the defense growing out of a legal provocation, (where such an issue as the present had arisen,) could not be relied on.

If the marshal had personal knowledge of a breach of the peace, he might on this actual view, make the arrest of the parties implicated. Whether it was necessary that the officer should clothe himself with the special authority of a warrant, would depend on the circumstances of the case—whether, for instance, is was necessary for the proper discharge of the police regulations of the state, that the arrest should be made forthwith. If, however, the exigency does not exist, and full opportunity is afforded to procure the warrant, then it would be reasonable and proper, and within the spirit of the rule, that the officer should clothe himself with that special authority. If the officer should act outside of his duty, or exceed the proper line of it, he has no protection from the policy of the law, but was remitted to his individual rights, and any aggression on his part would form a proper basis for an act of retaliation.

The jury brought in a verdict of "manslaughter."

T. A. O'Connor & O. Brown, for the state.

P. & S. McGroarty, for defendant.

SALE—SPURIOUS BANK BILLS.

[Hamilton Common Pleas Court, 1858.]

E. HAIRE & CO. v. H. BEATTUS & CO.

Where the defendants, prior to closing a sale, took the money offered them for it, being the bills of a bank of another state, to the plaintiffs, who were brokers, to ascertain their value, and on being told there was a discount of two and one-half per cent., sold the funds to plaintiffs at that price, and closed the sale with their customer. *Held*, if the bills prove to be spurious, the defendants are bound to refund to plaintiffs what they received for them, provided the plaintiffs offer to return the same bills within a reasonable time.

This action was to recover a sum of money paid by a broker for bank bills, purporting to be of the Bank of Knoxville, Tennessee.

The defendants were jewelers, and a man buying a lot of watches from them, offered them this money. They declined taking

it until inquiry of a broker; and calling upon Haire & Co., they were informed there was a discount of two and one-half per cent. upon it, and they gave it to H. & Co., at a rate of discount, and gave the watches to their customer. H. & Co. forwarded the money to Tennessee, and found it to be spurious.

The defendants allege that the money sent to Tennessee was not the identical funds sold by them.

The court charged the jury that the first question to be determined was whether the money was spurious; and next, whether it was the same money offered to the broker; and whether the broker offered to return it within a reasonable time. If the money was spurious, and was the same that was received from Beattus, the
4 latter was bound to refund what he received for it. * The transaction between the parties was for the purpose of establishing what was the market value of the bills; and the broker, although supposed to be the better judge of the genuineness of the money, still, if it turned out to be spurious he had a right to recover from the other party; though the case would be different if it had been a check or draft upon himself.

Verdict for defendants.

Collins & Herron, for plaintiff.

J. G. Douglas, for defense.

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11 [Superior Court of Cincinnati, General Term, 1858.]

CHAS. E. MATTHEWS v. JAS. C. CALDWELL.

For opinion in this case, see 2 Disney, 279.

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27 [Superior Court of Cincinnati, Special Term, 1858.]

REBECCA STODDARD v. ANN MARSHALL ET AL.

For opinion in this case, see 1 Disney, 527.

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33 [Superior Court of Cincinnati, Special Term, 1857.]

JAMES L. VAN INGEN v. R. S. & O. E. NEWTON.

For opinion in this case, see 1 Disney, 482.

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37 Superior Court of Cincinnati, General Term, April Term, 1857.

ADMINISTRATOR OF JOHN T. CHAMBERS v. THE OHIO LIFE INSURANCE AND TRUST CO.

For opinion in this case, see 1 Disney, 327.

*ATTACHMENT—SERVICE BY PUBLICATION. 44

[Superior Court of Cincinnati, Special Term.]

GEORGE CLARK v. EVAN D. SOUTHGATE.

A service on a nonresident defendant by publication, in a case where jurisdiction has been obtained by attachment on real estate, to be valid must give some pertinent description of the property. Where the publication only says "that attachment has issued and levied on real estate," such publication is no description, and is not sufficient.

GHOLSON, J.

This case has been submitted, to have the court examine and approve an order of publication, with a view to ask a judgment by default. It is an action to recover a money demand, and an attachment has been levied on the real estate of the defendant, who is a nonresident of the state. The object of the action is to subject that estate to the payment of the debt. The publication, to fairly accomplish the purpose intended, should give some pertinent description of the real estate. It has been so held by the court in a number of cases, and after a consultation between the judges as to the proper practice. All that is said in this case is, "That attachment has issued and levied on real estate." This is no description, and is not sufficient.

[Superior Court of Cincinnati, Special Term, 1858.] 49

JOSEPH A. JAMES v. CINCINNATI, HAMILTON AND DAYTON RAILROAD CO. ET AL.

For opinion in this case, see 2 Disney, 261.

[Superior Court of Cincinnati, Special Term, 1858.] 65

HARRIET MASKELL ET AL. v. JOHN PRESTON ET AL.

For opinion in this case, see 2 Disney, 282.

[Superior Court of Cincinnati, Special Term, 1858.] 81

MARY E. JAQUES v. THE BOARD OF COMMISSIONERS OF HAMILTON COUNTY.

For opinion in this case, see 1 Disney, 121.

89 *SPOLIATED WILLS.

[Hamilton Probate Court, 1858.]

JOHN F. CAHILL v. PHILIP OWENS ET AL.

A will lost or spoliated since testator's death, being shown to the satisfaction of the court to have been duly executed, and not revoked at the time of the testator's death, though the only witness testifying can remember only some of the names in the will, and can state only as to two of these. The nature and amounts of the gifts will be held established and good as far as proven, and the administrator appointed will be set aside in favor of the executor shown to have been named in the will.

PETITION to admit lost will to probate, and remove administrators.

The petition represents that the deceased died about the 23d day of May, 1858; that letters of administration were issued by this court to Philip and Patrick Owens, brothers of deceased, on the representations of said Philip and Patrick that the deceased died intestate; that the petitioner (Jno. F. Cahill) was a nephew of deceased; that some time previous to his decease, the said Thomas Owens executed his last will and testament, in due form of law, which he preserved unrevoked to the time of his death; that the said administrators have possession of the papers and effects of deceased, and that said will has, since the death of said Thomas Owens, been lost, spoliated or destroyed; that the next of kin who would inherit the property of deceased, are his said brothers, Philip and Patrick (and others named). The petition prays that testimony may be taken to establish the contents of said will; that the same may be admitted to probate, and that the letters of administration to Philip and Patrick, aforesaid, may be revoked.

A citation was accordingly issued to Philip and Patrick Owens and others, to appear and contest, if they desire to do so.

HILTON, J.

By the testimony in this case, it appears that about the last of August or 1st of September, 1854, Chas. S. Young drew a will for Thomas Owens, now deceased, in accordance with the form laid down in Swan's Treatise; that the same was then signed and sealed by said Owens, in presence of the said Young and Dr. W. A. F. Bauer, who were the subscribing witnesses, and that at the time of its execution the testator was of legal age and of sound mind and memory. Charles S. Young is the only witness who testified to its contents, and he can only remember the names of some of the parties mentioned in the will, but cannot state the nature or amount of the devises to any, except the sum of $500 to St. Patrick's Church, Cincinnati, and the sum of $500 or $700 to St. Peter's Orphan Asylum, Cincinnati; that it was one or the other amount, to be paid out of his estate. The rest of the devises are left in uncertainty.

*From this, however, it is clear that the will was legally executed, and that the testator was competent at the time to make it. But several other questions arise from the testimony elicited on the trial. 90

First—Was this will in existence and in full force at the death of the testator? This is a simple matter of testimony and of proof. There is no presumption to be taken that the will was then in existence, merely because it was once made. But do the words of the testator, at the time of his last sickness, or immediately before, in connection with other facts and circumstances in proof, go to establish beyond a reasonable doubt, that the will was in existence and unrevoked at his death?

Suffice it to say, that it appears by several witnesses, that he had repeatedly said that his will was in his chest, up stairs, in the house in which he boarded. Mr. Young, who drew it, read it in December last (1857); that the testator spoke of altering it in some particular, but it was not done; that he mentioned to Mr. Kruse, with whom he boarded, about *three days* before his death, that his will was in his chest upstairs, and that it was the will Mr. Young drew up. It was in proof that his chest was locked, and that Mrs. Ginder had the keys at this time and until after his death, when she gave them to the present administrators, who took the chest away; that the will cannot now be found. It is in proof, also, that in March or April, 1857, he tore an envelope in two, which contained white paper, and that he said that it was his will, and put the two pieces in his pocket. Mr. Young, however, testifies that he saw it in December, 1857. The court reviewed at length the case of Betts v. Jackson, 6 Wendell, 173. From all of which the court came to the conclusion that it was clearly established that the will was in existence, and unrevoked, at the death of the testator.

The next question then arises, can a will, the contents of which are only partly proven, be established and held good so far as proven?

Upon this point the court is not only satisfied that the leading authorities in the books clearly establish the affirmative of the proposition, but that it is equally founded in common sense and natural right. It is merely asserting that a person competent, shall have the liberty of disposing of his own property, in such manner as he may desire, and his judgment and affections dictate; subject, of course, to the limitations upon entailment, and, therefore, what difference, whether his will can be ascertained as to one or two devises, or as to all? That which can be clearly ascertained, should pass to that extent, and the will thus far be carried out. The residue of the estate would pass according to the laws of descent and distribution.

Probably one of the most thoroughly contested cases upon this subject to be found in the books, whether viewed as to the ability of the counsel employed on both sides, or as to the important questions involved, is the case of Steele v. Price and wife, 5 B. Monroe, 58. This was a case to establish by parol evidence, the will of William Steele, on the ground that the written will executed by

him was lost. The case is quite analogous to the case at the bar. The full contents of the will in that case were not proven, and two of the principal devises were proven by but one witness (p. 65), and he not the one who drew the will, as in this case, but merely one who had once read it, and also once heard it read. The court there say—"according to the rule laid down in the case of Baker v. Dobyns, *supra*, and which is evidently
91 *implied in the case of N. Beauchamp's will, and is sanctioned by the practice in proving by a single witness, the execution and attestation of wills which are produced, and in proving the contents of written documents not produced, the foregoing evidence, independently of the strong confirmation which it receives from the corroborating proof, must be deemed amply sufficient to establish the devises of the land, and of the three slaves, as recorded in the circuit court."

But the evidence in the case at bar is much stronger, for the devises to St. Patrick's Church and St. Peter's Orphan Asylum in the will were proven by three witnesses, besides the person who drew it, from the admissions of the testator at various times before his death, of the fact.

In the same case the court further said, page 73: "As the principal devises, those in which the testator took deepest interest, and about which he showed most solicitude, are sufficiently proved, the failure of proof as to minor provisions of the will should not defeat the whole by preventing the admission to record of that which is proved."

Offut v. Offut, 3 B. Monroe, 162, favors this conclusion, and it conforms to the practice as understood in the English courts of probate in establishing wills of *personalty*, without regard to the question of their sufficiency as wills of reality.

The statutes of Ohio, (Swan, p. 1029,) section 50, of the act relating to wills, provides: "If the court, upon such proof, shall be satisfied that such last will and testament was duly executed in the mode provided by the law in force at the time of its execution, that the contents thereof are substantially proven, and that the same was unrevoked at the death of the testator, and has been lost, spoliated or destroyed, subsequently to the death of the testator, such court shall find and establish the contents of such will, as near as the same can be ascertained, and cause the same, and the testimony taken in the case, to be recorded in said court."

The court is, therefore, of the opinion the will should be established, "so far as is ascertained," by the testimony, and that the same should be recorded.

The court, ordered the will to be admitted to probate; decreed that the lowest sum proved as a bequest to St. Peter's Orphan Asylum be adopted, namely, $500, and that the letters of administration issued to Patrick and Philip Owens be revoked, and that letters testamentary be issued to the executor named in the will.

N. Headington, for plaintiff.

W. S. Groesbeck, P. T. Williams, Coverdill and Snelbaker, for defendants.

*TAXES AND TAXATION. 103

[Clark Common Pleas Court, 1858.]

GEORGE SPENCE, ASSIGNEE, v. WILLIAM C. FRYE, TREASURER.

1. Taxes are not a lien upon personal property until actual seizure and distraint by the treasurer.
2. The right of distraint does not exist for the current year's taxes until after the 20th of December, and can only be exercised while the property is owned by the person against whom the taxes are assessed.
3. A person can dispose of his personal property before distraint, free of all lien or claim for taxes.

The facts in this case are substantially as follows: In the spring of 1856 taxes were assessed against H. B. Grove, on a stock of dry goods, to the amount of $65.86. On the 9th of September following, H. B. Grove executed and delivered to Wm. Y. Grove a mortgage on said stock of goods; and on the 12th of the same month he made an assignment of all his property to the plaintiff, subject to the rights of said Wm. Y. Grove under his mortgage. About the first of February, 1857, the auditor and attorney general of the state having decided that the treasurer had a lien upon said property for said taxes, and a right to distrain the same in the hands of the assignee, the defendant caused the property to be distrained for the payment of the tax; and the plaintiff brought this action to recover possession of said property.

WHITE, J.

Judge White decided that the plaintiff was entitled to the property, and held: 1. That taxes are not a lien upon personal property of the person against whom they were assessed, until actual seizure and distraint by the treasurer. 2. That the right of distraint did not exist until after the 20th of December, for the taxes of the current year. 3. That it could only be distrained whilst owned by the person against whom the taxes were assessed. 4. That the decision of the attorney general did not conclude the right of parties claiming the seizure to be illegal. 5. That a person could dispose of his personal property at any time before distraint, free of all lien or claim for taxes.

TRUSTS.

[Hamilton Probate Court, 1858].

E. J. DENNIS ET AL. v. J. J. DENNIS, EXECUTOR.

Where an executor was by a will authorized to keep on interest certain money until the children to whom it was bequeathed should respectively come of age, when the executor was to invest the principal and interest in lands at his discretion for such adults, and the executor, before any of the children were of age, invested a certain sum in land, taking the deed in his own name, and on exceptions to the account, he tendered a trust deed, which was accepted, this acceptance is a tacit acquiescence in the fulfillment of the trust as to the children then adult, but as to the minors, the conditions of the will were not complied with nor acquiesced in.

HILTON, J.

This case came up by citation on exception to an account. The controversy arose under a provision in the will of Jacob Dennis, deceased. By the sixth section in the will, the executors were authorized to retain and keep on interest, in some safe place of deposit, certain money, until the children to whom it was bequeathed should respectively come to full age, when the executors were to invest the principal and interest in lands at their discretion, for such adults.

In October, 1852, J. J. Dennis, the executor, invested in reag estate on Third street, and in College Hill property, $3,250, takins. the deed in his own name, the children at that time being minord,

In February, 1856, exceptions were filed to the account, ano particularly, to this item of $3,250. At that time the execut r came in and stated he had invested the money for the benefit of the heirs, and tendered to them a trust deed, and subsequently, A. Brower, attorney for the heirs, received from Dennis the trust deed, and had it placed on record.

The question now was, whether the conditions of the will were complied with by making this investment in trust.

It was held by Judge Hilton that they were not complied with, 104 so far as *those were concerned who were under age at the time. Secondly, that the acceptance of the trust deed by the attorney for the heirs, was a tacit acquiescence in the fulfillment of the trust, so far as concerned those who were of legal age at that date, but did not affect the rights of those who were minors.

A. Brower, for plaintiffs.

J. J. Dennis, for defendant.

[Superior Court of Cincinnati, General Term, 1857.]

CHARLES PIERSON, ASSIGNEE, ETC., v. ELIZABETH SMITH, ETC.

For opinion in this case, see 1 Disney, 305.
This case was affirmed by the supreme court. See opinion 9 O. S. 554.

*EXECUTORS. 120

[Hamilton Probate Court, 1858.]

In re Charles Phelps.

The executors of one who died in this state and whose will was admitted to probate here, and bond given and letters testamentary issued, this being the parent source of administration, are held to render an account in this state of the estate situated in another state, although an account may be also required in the other state. The manner in which the account may be rendered here is to obtain a certified copy of the account which may be rendered in the other state, with a certificate of the proper court that the same has been examined, allowed, and confirmed, and that the orignial account and necessary vouchers are on file there.

The defendant was cited before the probate court to show cause why he should not file an account current as one of the executors of the estate of the said decedent, situated in the state of Vermont.

The defendant made answer in writing stating that, subsequently to himself and his co-executors giving bond and taking out letters testamentary here, he gave bond, satisfactory to the probate court of Westminster district, state of Vermont, to account for the settlement of the estate situated within that state, agreeable to their laws; that he is ready to render an account of his administration there, and is awaiting the action of said court in the premises.

The court remarked that this was one of the difficult questions often arising in the administration of estates. A proper regard to comity between sister states should be observed in such case. There is no doubt that the probate courts of Vermont have proper jurisdiction of such cases, arising under her laws, as to all property situated within her territorial limits, and have the right to require an account of the administration of that particular property in this case. It is equally well settled that such administration is but auxiliary to the parent source of the original administration of the estate. It appears that Chas. Phelps, the decedent, died in this county; that his will was proven and admitted to probate here, and, thereupon, bond given to cover the whole estate, and letters testamentary granted to all the executors in the will named; that this is the *parent 121
source of jurisdiction and administration of the estate, and, therefore, although the executor in question will have to render an account of his administration of the property in the state of Vermont to the proper court there, he is also still held under his bond to render an account of the same here. The manner in which the court will require this to be fulfilled, will be for the executor to obtain a certified copy of the account he may render there, with a statement in the certificate, under the seal of the court, that the same has been examined, allowed and confirmed, (if such be the fact,) and that the original account, together with the necessary vouchers for the items stated in the same, are on file in his office. When this account and vouchers thus certified are presented and filed here, the court, upon examination in the usual mode required

by the laws of Ohio, for the settlement of estates, will, if the same are found to be correct, order them to be recorded, and thus preserve here the evidence connected with the entire settlement of the estate.

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121 [Superior Court of Cincinnati, Special Term, 1858.]

MUELLER & GOGREVE v. ISAAC BATES ET AL.

For opinion in this case, see 2 Disney, 318.

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161 [Superior Court of Cincinnati, General Term, 1857.]

JOHN HUFF v. RICHARD ASHCRAFT.

For opinion in this case, see 1 Disney, 277.

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163 [Superior Court of Cincinnati, Special Term, 1857.]

FREDERICK BUTTERFIELD v. WM. E. OGBORN ET AL.

For opinion in this case, see 1 Disney, 550.

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177 *PROCEEDINGS IN AID OF EXECUTION.

[Hamilton Probate Court, 1858.]

BUTTERFIELD ET AL., v. O'CONNOR & BROTHER.

In proceedings in aid of execution against judgment debtors, being a partnership, of which one member only is before the court, he may be committed for contempt for refusal to obey an order to deliver to the sheriff property brought to light in the examination within the control of the firm, and in the county.

HILTON, J.

In these cases the plaintiffs (Eastern merchants), had obtained judgments in the Superior Court of Cincinnati, on which judgments executions were issued to the sheriff, and returned "no property found whereon to levy."

Under the Code, (Chapter II, entitled "Proceedings in aid of execution,") on petition of plaintiffs, a writ was issued from the probate court to the sheriff of Hamilton county, commanding him to summon the defendants, James W. O'Connor and John X. O'Connor, to appear personally before the probate judge and

answer concerning their property, which the petition or affidavits alleged the defendants concealed, and refused to apply to the payment of plaintiffs' judgments. Both of the defendants were "served" by the sheriff; but neither of them appeared to answer, in obedience to the command of the writ. Attachments were issued for the bodies of the defendants, and James W. O'Connor was brought into court, when the case was passed for the return of Mr. Corwine, on suggestion of his partner, Mr. Hayes; and on the pledge of the latter that the defendant would be in attendance on the Thursday following, (the time fixed for the return of Mr. Corwine), the defendant was allowed to depart, without giving bond for his appearance. An order was made restraining the defendants from disposing of or removing their property. On the day appointed Mr. Corwine appeared in court, but Jas. W. O'Connor failed to appear, having, as was alleged, gone to Covington, Ky., on that morning, and taken with him the books, assets, &c., of the firm. Two days afterward. the other defendant, John X. O'Connor, while attending the theater, was arrested by the sheriff on the attachment, and brought before the probate court, the question as to the alleged contempt committed by him (John X. O Connor,) was passed for the time being, and an examination of the party took place, concerning the assets of said firm.

Thompson & Nesmith, for plaintiffs.

Corwine & Hayes, for defendant. John X. O'Connor.

The examination is quite lengthy, but we have deemed it proper to give a full statement of the testimony.

Q. What amount of assets had O'Connor & Brother on the first day of May, 1858, and in what did they consist?

A. As to the amount of assets I can not state. They consisted on the first of May of goods, accounts and notes.

Q. What goods?

*A. Our stock of dry goods, at 81 Pearl street. Previous to that time, if I remember rightly, we had sold the stock on Fifth street. 178

Q. To whom did you sell the Fifth street stock?

A. To John A. Smith.

Q. What did the sale amount to?

A. I do not know the precise amount; I think about $16,000.

Q. In what did you take your pay?

A. The notes of John A. Smith, indorsed by his father.

Q. What became of these notes of John A Smith?

A. Of that I know nothing. I know nothing of the disposition of any effects we had.

Q. When did you last see these notes?

A. I never saw them.

Q. Do you know what become of these notes?

A. I do not. I never saw them.

Q. What did you get for the Pearl street stock of goods?

A. We got the notes of Merritt, Kempton & Co., and lands.

Q. What amount of notes, and what amount of lands?

A. I can not say.

Q. About what amount?

A. The amount of stock was about $24,000—it might have been $25,000.

Q. What became of the notes and the land?

A. I can not tell you.

Q. Have O'Connor & Bro. disposed of the notes and land they obtained of Merritt, Kempton & Co?

A. I can not say.

Q. Have you personally had anything to do in the disposition of the notes or the land obtained from M., K. & Co.?

A. I have not seen these notes. I have never had any control over the trade between M., K. & Co., and O'Connor & Bro.; the opening and closing of said trade was made by James W. O'Connor. In the meantime, I had seen the parties with whom the trade was made, and transacted some business with them in reference thereto—but its opening and closing was with James W. O'Connor.

Q. Where are the books of O'Connor & Bro.?

A. In October, 1857, James W. O'Connor took charge of them. Since that time I have not interfered in any shape or form in their management. He sold, in May, to Merritt, Kempton & Co., and since that time I have not seen any books of O'Connor & Bro., nor do I know where, for the last three months, they have been.

Q. Have you, for the last three months, been making collections for O'Connor & Bro., in the country, and if so, state what amount you have collected?

A. From the first of May I collected, in Virginia, about $600. Outside the collection in Virginia I have no recollection of collecting any amounts.

Q. What did you do with the $600.

A. My family and self lived upon it.

Q. Have you during the last four months settled any accounts due O'Connor & Bro., by taking notes?

A. No sir—at no time since we sold out, and the reason is, I had no basis to make a settlement upon.

Q. Were any goods taken from the Pearl street store to the store formerly occupied by O'Connor & Bro., on Fifth street, just before the sale of the Pearl street stock—if so, what amount?

A. As to that I can not state positively. We were sending goods daily to our Fifth street store, and I do not know of any unusual quantity of goods being sent there previously. At that particular time the store was in want of a good many articles. I will say, outside of that there was not one-third of the amount of goods
179 sent to the *Fifth street store as heretofore at the same time of year.

Q. Was there not a large amount of goods not included in the sale to J. W. Smith?

A. Not one dollar not included in the sale to him, which covered the entire amount of goods in the store, No. 22 Fifth street.

Q. What was the indebtedness of O'Connor & Bro. in the month of February last?

A. About $160,000, including merchandise and confidential debts.

Q. How much merchandise, and how much confidential?

A. The merchandise debt, I think, was about $138,000; that would leave the confidential debt about $22,000, at that time.

Q. What were the assets of O'Connor & Bro. at that time?

A. I can not say as to the assets.

Q. Did you take any statement of the firm of O'Connor & Bro. to New York, and, if so, what did that show the assets to be?

A. About $40,000 of surplus. I desire to state here that our nominal surplus was $40,000 or $50,000 at the time; but I stated to our creditors, in New York, that, if we were compelled to drop business, the probability was, we could not pay fifty cents on the dollar.

Q. To whom did you make that last statement?

A. I do not know—to every party I called upon—to Messrs. Bliss, Butterfield, Carter, Quinan & De Forest, and others. I would also state, in this connection, that I proposed to settle all accounts at 100 cents, if they would give me time, but in no case did I propose to settle with any party unless I had the time—they to send me the amount of our indebtedness, and, in this way, that we could pay them 100 cents on the dollar and the interest—probably having to work about two years ourselves without realizing anything.

Q. Did you not tell one of the firm of Carter, Quinan & De Forrest that, after paying all your debts in full, you had between $50,000 and $60,000 of good assets, and did not said member of said firm ask if you had included in your assets bad and doubtful debts, and you reply to him that your surplus was between $50,000 and $60,000 after deducting all your bad debts?

A. I did not make any such statement. I had a personal difficulty with Quinan when I was there. I then called on Mr. Butterfield and endeavored to get him to arrange the account between Messrs. C., Q. & De F. and ourselves, but he failed to make the arrangement. I afterward called on C. & Co. again, but also failed to make a settlement with them.

Q. Did you make any statement (as in the last questions) to James Armstrong, of the firm of C., Q. & De F.?

A. Never made any statement to him.

(The witness also denied having made to any parties a statement as to his firm having a clear surplus of between $50,000 and $60,000.)

Q. What amount of debts were settled since February last?

A. I can not say; I think $15,000 or $18,000 were settled previous to the first of June. I do know of anything being settled since.

Q. Then, from your own statement, the firm of O'Connor & Bro. must have had $200,000 of assets—now state where all or some of these assets are?

A. I deny *in toto* that O'Connor & Bro. ever had $200,000 of assets. I do not know where the whole, or any part of the assets are. I had no connection with the books since May; nor do I know, since that, of any settlement either for or against O'Connor & Bro.

180 Q. What amount of notes and *accounts were due O'Connor & Bro., on their books, about the first of May last?

A. I can not inform you.

Q What amount of assets did the statement you took to New York show?

A. The amount, I think, then shown was something between $180,000 and $190,000.

Q. What proportion of notes, and what proportion of goods?

A. I do not know; from my recollection I think that the main portion of the assets were in notes and accounts due the firm; but I can not swear positively.

Q. Give the names of some of these parties who owed you these notes and accounts?

A. That, I can not.

Q. Could you not give the names of your customers in Ohio, Indiana and Illinois, up to that time?

A. You might as well ask me who is the owner of the opposite house. I do not remember the names of the parties.

Q. Have you owned or had any interest in any real estate since October last; if so, what has become of it?

A. I have had; I sold it to W. McCormick, and the notes I disposed of to pay our debts. I sold it, I think, for $3,000.

Q. Is that all the real estate you had since October last?

A. We bought property, which we sold to pay our debts.

Q. When you sold your Pearl street stock for notes and real estate, did you not have the deeds made in other names than those of O'Connor & Bro.?

A. We made, I think, two deeds in the name of W. C. Smith; at the same time Mr. Smith had been our indorser to an amount fully equal to the value of the property. I do not think we had deeds made to any other parties.

Q. Was not all the property sold firm property?

A. It was traded for and paid in firm goods. It was sold to other parties before the deed was made to us. Did not know of goods being sold to parties in Illinois or Kentucky, for property in Cincinnati.

The defendant, in reply to the interrogatories of plaintiffs' counsel, said that James W. O'Connor was in Covington—that he had been there eight or ten days, and that he presumed his residence was there.

The defendant's counsel objected to the line of examination, in an inquiry, the object of which was to ascertain whether John X. O'Connor, as a member of the firm of O'Connor & Bro., had fraudulently disposed of or concealed the effects of said firm—it was not pertinent to the issue, nor calculated to elucidate the proposition as to whether the firm had property subject to the payment of the

plaintiffs' debt, to propound a series of questions in relation to the residence, etc., of Mr. James W. O'Connor. What had that to do with the right of pursuing property? It was an inquiry directed to a different object, and had as much to do with the matter in hand as if the witness were to be asked "where was Queen Victoria at this time? and why she had not answered the President, or why Mr. Buchanan had not replied with more courtesy to the Queen?"

Mr. Thompson conceived that the Queen had been answered fully and completely, and he was as fully satisfied that his own question was a pertinent one—this was a partnership firm—the examination of John X. O'Connor showed that Jas. W. O'Connor had the property, if any one had it—he was already in contempt of court, and it was very important to know where he was. If the property was concealed in Hamilton county, they had a right to know it. There was no limits under the practice, but always the utmost *license, where property was attempted to be concealed. 181

Mr. Corwine said that Mr. O'Connor had not once yet failed to answer any question put to him, and he did not object now supposing any thing of importance involved in the question, but lest the door might be opened to an interminable examination.

Judge Hilton admitted the question. An attachment was out against J. W. O'Connor—he was not yet found. Why he evinced such a disposition to avoid the process of the court, it was difficult to divine. The object of the law was to bring dishonest persons to justice, or, if innocent, to clear their skirts before the body politic; and it might be here remarked that where the credit system prevails to such an extent, no law was more beneficial to the honest man who lends his credit to other persons, or to the unfortunate overtaken by the disasters of an unsuccessful trade.

Mr. Corwine objected.

The testimony proceeded.

Q. In whose house is J. W. O'Connor staying in Covington?
A. I do not know.
Q. How long since you have seen him?
A. This morning.
Q. Where was he when you saw him?
A. At my house.
C. Where did he sleep last night?
A. I do not know.
Q. When did you go to Covington?
A. About two months ago.
Q. Did you not go to Covington after you were served with process in this case?
A. I never had a process served on me to appear before the probate court.
Q. Were you not residing on Longworth street, Cincinnati, up to about the 27th of June last?
A. I think so.
Q. Did you not know that a citation from this court was left at your residence on the 27th of June?

A. It is unnecessary to multiply your questions—I say "no." The first intimation I had of any service was from deputy sheriff Glass. I was then about to leave for Louisville. I told Mr. G. I would probably come to the court house at ten o'clock; but I was absent some three days, and, on my return from Louisville, reported myself to Judge Hilton. He referred me to his clerk, who knew as little about the case as anybody else.

Q. When did you move your family to Covington?

A. They moved while I was away.

Q. Did you tell T. C. Shipley that J. W. O'Connor was anxious to retire from the firm, would leave $40,000 in it, and that you wanted to get another partner?

A. No; I stated my brother wanted to get about $5,000, and wished to get out of the business, and that the nominal assets left would be about $35,000.

Q. Did your firm receive two notes from Ryan & Farthing, of about $1,000 each; and if so, what has become of these notes?

A. The firm received the notes; I do not know what disposition was made of them.

Q. Why did you stop doing business for the house, and having anything to do with the assets?

A. I do not know that I need answer that; it was on account of a personal difficulty.

Q. Who gets the firm letters from the postoffice?

A. My brother, as a general thing; once in a way myself.

Q. How many times did you get the letters since you sold out?

A. Not over two letters for the last month.

182 Q. Did said letters contain any *remittances from country merchants to the firm?

A. I think they contained, principally, appeals or duns from the east.

Q. Have you lost money of the firm at cards, or other games, during the last six months?

A. I do not know I should be required to answer.

Q. It is merely for the reason that, if you did, your creditors would be entitled to recover it back.

A. Then, sir, my answer is, "No."

Several matters heretofore in substance introduced into the examination of the previous day, were then inquired into, and the testimony closed.

Judge Hilton remarked that he hoped James W. O'Connor would make his appearance in court, in order that the transaction might be investigated; that if O'Connor & Bro. were unfortunate in business, it might be ascertained, or, if otherwise, it should be developed. The court was determined that all investigations under this statute, relative to proceedings in aid of execution, should be carried out to the full extent and integrity of the law.

Mr. Thompson said he had no desire to trouble or distress these defendants, though he had been charged with such a disposition.

If they had encountered a misfortune, his clients would be among the first to evince a proper sympathy in such a case; and if they could make a showing that they were unable to satisfy the full claims of his clients against them, no doubt they would be met with a liberal disposition in a settlement. But these creditors were not disposed to be set at defiance, nor that the property should be placed beyond their reach.

Mr. Corwine replied that this was a very sympathizing speech from the gentleman who has commenced against two insolvent individuals two suits in the United States court, where the expenses were enough to embarass wealthy men.

John X. O'Connor being recalled to the stand, and examined by Mr. Thompson, denied that he had got personally a note of $1,500 from Merritt, Kempton & Co. He replied in the negative as to Alexander Johnson having been sold any goods of the firm, or having the same placed in his hands. If it was done, it was done without his knowledge. Answered a similar question in the same way, as to John Jackson. The evidence here closed.

Mr. Thompson addressed the court. He claimed that the manner in which the party testified, evinced a disposition to evade the law, and asked the court to make an order under the 467th section of the code, requiring John X. O'Connor to transfer to the sheriff, as receiver, the partnership effects of the firm, in order that the same might be appropriated to the payment of the judgment creditors.

Mr. Corwine asked for a postponement, the question being a novel and important one, and also in view of a professional engagement that afternoon.

Mr. Thompson opposed any further adjournment. He was afraid the party would not appear again.

Mr. Corwine: He is under bond.

Mr. Thompson: A bond of $1,000, and that even does not go to the payment of our debt, but, I believe, to the school fund. He had lost all faith in these parties, since J. W. O'Connor, after promising, in the presence of his counsel, to be in court, had violated his engagement.

Mr. Corwine: We have nothing to do with Jas. W. O'Connor, acting in good or bad faith. When I now ask—my client's liberty being at stake—that I may have until to-morrow to prepare myself for the discussion of *such grave questions, I am told that his *183
bond is a matter of straw. If it was a matter of straw, why did he not avail himself of it from day to day. I think the opposition to this motion is discourteous, unjust, and unchristian.

Judge Hilton said it was not worth while to discuss these points any longer—the examination had been going on for three days—the testimony had been taken down in writing, and had been substantially published. In reference to the legal points arising, the court remarked, that the law had been a long time on the statute book, and the counsel had ample time for preparation. If there was anything novel that could be suggested, the court was now will-

ing to hear the counsel—but could not consent to a further adjournment—for the duties and labor of the court, (which had other pressing business,) were to be respected.

Mr. Corwine, then, addressed the court at considerable length.

Mr. Thomson responded. At the close of his remarks he said—in reply to certain charges of oppression, made on the other side—that his clients tried mild measures before the present proceeding was resorted to. It might be called oppression, but was nothing but an honest effort of creditors to collect their debts, and if these defendants would only show their hands, and hand over their assets, they would get a receipt in full and receive $1,000 each to commence the world again. Personally for himself, he disclaimed any desire of oppression, and, though he believed the parties had attempted to injure him, he cared nothing for it, and would forget it all if they would even show a disposition to meet their creditors fairly.

Judge Hilton, in disposing of the case, remarked that the law-making power of the state, in its sovereign wisdom, had seen fit to enact the law under which this proceeding was instituted. It had been on the statute book since 1850, and all the court desired under its oath of office was to see that it should not be a mere pretence, or be dodged: but, if possible, be applied to the wants of society and enforced. The first proposition raised here was whether the affidavit was sufficient. There were two affidavits—one stating that the plaintiff recovered a judgment against the defendant, and that the latter had property and refused to apply it to said judgment. The other was for the arrest of the party, bringing it under the 461st section. The court had no doubt that the process issued correctly, and that the party was properly in court under the statute.

The next question arises in relation to the property—whether the court could order any property brought to light into the hands of the sheriff, that he might take and hold it as receiver. The objection had been raised that there was no property of a tangible nature that had been revealed. What was the proof? It was in evidence that John X. O'Connor was one of the firm of O'Connor & Bro; that a short time previous they had assets—up to about the 10th of May, at all events, they had assets to the amount of $180,000 or $190,000; that, (according to the testimony) this consisted of merchandise, book accounts, and notes, and about $50,000 of this consisted of notes due the firm. This is tangible enough to come within the 467th section of the code. A debt is property, a chose in action, a personalty. What has become of these assets? The partner in court appears indifferent as to what has become of them. Is that natural? In the absence of proof to the contrary, the court will presume that they are where he testified they were—in their possession.

184 It is not necessary that the court *should know in detail the whole of these assets, if it finds that there are substantial claims due to the firm. It can order the sheriff to get the details by books or otherwise, and to take possession of them. The 469th

section of the code looks to that very question. Whatever property the party may have can be subjected to the payment of these debts; and if any party sets up an adverse title to this personal property, they can replevin it. All the court has to do is to endeavor to carry out this law in good faith.

It is also held by the court that the partnership firm is an entirety, and that the person of one of the firm, as to a strictly partnership matter, controls that firm. We have control now of the person of one of the firm—he is here; the last we heard of the property it was in this county, and if he does not control the property and make it pay the debts of the firm, the court will.

The court, therefore, order all the assets of the firm of O'Connor & Bro. into the hands of the sheriff, (as receiver,) wherever they can be found, for the payment of the judgment creditors and costs of the suit; and that the defendants be restrained from any interference with their property until this order be complied with.

As to the attachment for contempt, that would be discharged on payment of costs.

The sheriff now demanded from Mr. J. X. O'Connor the property, in pursuance of said order.

Mr. O'Connor refused to comply.

Mr. Thompson proposed that he should be committed to jail until he obeyed the mandate of the court.

Mr. Corwine submitted that his client should be allowed time for reflection, in an important proceeding of this nature.

The court would not have any dodging in the matter. If the order was not complied with, the defendant should go to jail. The court advised the party strongly to hand over the property before extreme measures were resorted to.

Mr. Thompson said that if the defendant would make the assignment in court of the partnership effects, for the equal benefit of all the creditors, his clients—although under this proceeding they had a preference—would be satisfied to come in *pro rata*.

The defendant still declining to comply with the order, was committed to jail.

[Superior Court of Cincinnati, Special Term, 1858.]

BUTTERFIELD ET AL V. O'CONNOR & BROTHER.

The power of revision over the probate court, being in the common pleas, and not in the superior court, the latter cannot indirectly revise an act of the probate court within its jurisdiction, committing for contempt, by *habeas corpus*, on the ground of informality in the commitment, although the revising court be not then in session.

STORER, J.

A writ of *habeas corpus* was sued out before Judge Storer, on behalf of Mr. John X. O'Connor, who, it was alleged, was illegally detained in jail.

R. M. Corwine, in supporting the application for his discharge, said that, in addition to the general allegation as to the illegal detention of the party, they had also, by way of specification, set out, in a petition, the grounds upon which it was claimed the probate judge had exceeded his authority in committing this petitioner to jail. He had been directed by a former order of the probate court to deliver the assets of the firm of O'Connor & Bro. to Richard Mathers, sheriff of Hamilton county; and he now complains that, within five minutes after this order was issued—being allowed no time for the demand made, or an opportunity to be heard upon the alleged contempt—he was ordered to be imprisoned.

Judge Storer—I understand, by the return of the sheriff, that he refused to make the transfer.

Mr. Corwine—According to the return of the sheriff. Yet, even according to that return, it was not an unconditional refusal. The order was made directory to the party to surrender the assets, the property being in Kentucky at the time. Mr. O'C. told the judge it was physically out of his power to make the delivery then, and he offered to give bail to the court, showing that he was acting in good faith, but the offer was rejected, and he was told he must go
185 to jail if he did not make the *assignment at that moment. He (Mr. Corwine) urged that there was no warrant of law for this course, pursued so ruthlessly; but he did not wish to asperse Judge Hilton for his mistaken action, as he believed he took the entry as drawn for him by counsel, without any consideration.

The point which he desired now to present was that section 16 of the probate act prescribes, first, that no man shall be punished for contempt unless he has two days' notice of the time when he shall be tried.

Secondly, if it is supposed by the judge that the party is secreting himself, or has left the state, to get out of the reach of the process, in that case, the judge, instead of issuing summons, as in the first case, may issue an attachment; but the accused shall be entitled to have the usual trial of the question as to whether he is in contempt or not.

The counsel then animadverted upon the law which this proceeding grew out of, and said it never should have disgraced the statute book of Ohio.

Judge Storer—They have the same statute in New York.

Mr. Corwine—Yes, sir, and they feel as much ashamed of it as we do. It was calculated in the hands of bad men to be an instrument for bad purposes. He referred the court to what an intelligent writer on the subject had said.

Mr. E. A. Thompson said the law had been tried on the person of that gentleman, referred to by Mr. Corwine, and for that reason he did not like it.

Mr. Corwine said it appeared in the newspapers that Mr. Thompson had made a proposition that if John X. O'Connor would make an assignment he would dismiss all proceedings against him, and to test his sincerity on that point, he (Mr. C.,) saw Mr. T.

yesterday, when he then intimated that he would consent to dismiss the suits upon the condition of both parties joining in the assignment, and the property being actually delivered over to the sheriff.

Mr. Thompson said that was his proposition from the beginning.

Judge Storer said these statements could have no effect on the court.

Mr. Thompson said that it was not a fact that the probate judge declined to give this party time to comply with the order; but he privately entreated him, not as a judge, but as a brother and a man, to do so. The law says that each court is a judge of its own contempts, and for that reason the question was narrowed down to the papers in the case. As to the law under which the proceeding was instituted, he did not care whether Mr. Corwine thought it an infamous law or not. He knew of nobody who disliked the law except those who were affected by it. It received the care and attention of the legislature here; and though it had been a dead letter comparatively, he saw no reason why it should be so. He merely wanted the assets of these men for the creditors, and his proposition was that if they would bring them forward, and put them in the custody of a man appointed by the court, they might go scot free, and get one thousand dollars each.

Mr. Corwine said that if all these proceedings were dismissed, and the assets distributed among all the creditors, he believed the Messrs. O'Connor would consent.

Judge Storer intimated that he could not permit any arrangement to interrupt the present inquiry.

Mr. Gallagher (who is the attorney for James W. O'Connor,) took occasion to say that, to his certain knowledge, it was out of the power of John X. O'Connor to have complied with the order of the probate court.

Judge Storer said that when he gave an opinion dismissing an attachment against these parties, on a former occasion, his conclusion was strengthened at that time by an assurance of counsel, (no doubt made in good faith,) that these parties would make an assignment; and if he had known they did not intend to make the assignment, his opinion would have been different.

Mr. Gallagher said the assignment had been written, but the misfortune was that the parties could not agree upon an assignee.

Judge Storer disposing of the matter said, that, in disposing of a *habeas corpus*, a court had no right to inquire into the mode by which another court, having jurisdiction over the subject matter, had proceeded to act. If it had committed error, or had not followed the course prescribed in the statute, the remedy for the parties was a simple one. The judgments of the court of probate are subject to the revision of *the court of common pleas, and the act of the 186
probate judge is such an one as that court would be compelled to revise, provided there was error in it. If he had violated any of the provisions of the statute, had acted hastily or improvidently,

the common pleas court could remedy the difficulty, and by requiring bond release the party. He was surprised that course was not taken.

Mr. Corwine—It was not taken because there was no common pleas judge in town. We were placed *hors de combat.*

Judge Storer—Well, that does not transfer the power to this court. We have no power to revise the opinions of the probate judge; and if we have no power to revise them directly, we can not do so indirectly.

The important question in this case is, whether Judge Hilton had jurisdiction. If he had, however informal his mode of procedure, we can not interfere with the result of his determination. It is certain he was by law empowered, as is this court, and the court of common pleas, to authorize proceedings in aid of execution. It appears that, in this case, John X. O'Connor was before the court that he submitted to an examination, and that just such a state of case had arisen as authorized the judge to interfere.

It seems the judge has found—whether on proper evidence or not is not for me to say—that there is certain property over which the defendant has some control, and he required him to transfer it to the sheriff, as a receiver; and he had a right, under the law, to compel him to do so, if such a state of facts as alleged here was proved to exist. Whether the party was allowed sufficient time does not appear; but it does appear that he refused to comply with the order without any qualification. If that was the case, there was no necessity for further time; and the action of the court was proper, in vindicating its own process, and upon the refusal of the party to obey its order, to regard him in contempt.

It is said the party did not make an unqualified denial, as Mr. O'Connor had intimated, that he *might* do at another time what was required. It does appear to me that that looks like an evasion; for he does not even say he *would* at some other time, but *might* at some other time. When a court has determined what shall be done, it is not in the power of the individual required to do the thing, to take his own time; if so he might usurp the position of the judge, and dictate what the terms should be.

Without entering into the merits of the case, of which I take no cognizance, it appears to me sufficient is stated to authorize, at any rate, the sheriff to receive this party, and confine him in custody. The jurisdiction was clear; whether it was exercised rightly or not I cannot inquire, though I think it was. It is proper in this connection to say, that I do not see the ingenuous distinction counsel has affected to draw as to the mode in which contempts should be punished. Some contempts are so patent that they require no further examination. When the court adjudged that a party should make a transfer, and he refused, with what propriety could the court be required to go further and issue a new process, and call on the party to show cause why he refuses to do it. His unqualified refusal calls at once for the vindication of the law; because, if the court should issue their process, and under the mode of procedure

to which the counsel has referred, should give him further time, the question must arise when would there be an end of the controversy; and instead of the contempt being purged, the court themselves might be made contemptible in not doing that promptly which they were required to do, but rather putting the whole vindication of the law into the hands of the party who had broken it.

For another reason the court would not interfere with the order —one court had no right to interfere with the order of another, unless the acts complained of were *coram non judice*.

The party should, therefore, be remanded to the custody of the sheriff.

BEFORE THE PROBATE COURT.

HILTON, J.

The parties now proceeded to the probate court.

Mr. Corwine stated that John X. O'Connor was now present to purge himself of any contempt, and the following statement was presented to the court:

"John X. O'Connor says that, by answer which he made to the sheriff of Hamilton county, and to the honorable, *the probate court, he intended no disrespect to the court; and, further, 187
he is now ready to make all the transfer in his power of all his interest in, and control over, the property of the mercantile firm of O'Connor & Bro., as this court may direct. The assets, as far as he knows of them, are in the possession and control of his brother and partner, James W. O'Connor, in Kentucky.

JOHN H. O'CONNOR.

"Cincinnati, Saturday, August 21."

Mr. Thompson said that the order of the court was that the party should transfer to the sheriff certain property and assets of the firm of O'Connor & Bro.; and until he had done so he could not purge himself of the contempt.

Mr. Gallagher desired to say, in vindication of the integrity of Mr. O'Connor, that, if the fiat of Heaven had ruled him to do more as against perdition, he would be powerless to do more than he now proposed. He had no control over the action of his partner, and came here utterly helpless, to discharge himself according to the best of his ability. Both these partners had been all along willing to appoint an assignee, but the unfortunate circumstance was, that they could not agree as to the person. It was enough to hold John X. O'Connor responsible for his own acts, without holding him to answer for the sins of commission or omission of another party.

Judge Hilton—Is John X. O'Connor an innocent party in the transaction, or is he a *particeps criminis* with James W. O'Connor? [Here the court reviewed a portion of the evidence.] If J. W. O'Connor holds the assets, and this feud exists between the parties, why does John X. O'Connor permit his brother, in contempt of his rights, and in contempt of the rights of the creditors to keep possession of those assets and bid defiance to the law? If innocent, he is doing an injustice to himself and injustice to the creditors, or else he is acting under pretext. This view of the case cannot be

blinked, and it is the duty of the court to aim at getting a remedy for the creditors through the person of the partner now in court, and not to leave open meshes of the law, whereby the rights of creditors might be defeated. A fair proposition had been submitted on the part of the creditors.

Mr. Gallagher—What is that proposition?

The Conrt—That both parties should surrender the assets, upon which all suits against them should be discontinued.

Mr. Gallagher—I accept that propostion, sir, for James W. O'Connor, and your Honor shall appoint the assignee.

Mr. Thompson said that, if the parties should show the amount of assets their statement in New York exhibited, bring said assets in, and make it appear that they had surrendered all, he would consent to a discontinuance of the proceedings, and be satisfied that all the creditors should come in *pro rato*, provided, in the first place, that the plaintiffs, in the present proceeding, were indemnified from all expenses in the litigation.

This, after some conversation, was agreed upon.

John X. O'Connor was then discharged, on giving bond, for his appearance on Monday, in the sum of $25,000—it being understood that Jas. W. O'Connor should also make his appearance at the same time, to carry out the conditions of the arrangement.

FURTHER PROCEEDINGS IN PROBATE COURT.

The proceedings in relation to the case of Butterfield and others against O'Connor & Brother, adjourned over, with a view to an arrangement, was again before the court; the counsel on either side and John X. O'Connor, being present at the appointed time; but James W. O'Connor, for whose presence, more especially, the adjournment took place, did not make his appearance.

Mr. Gallagher said that, having promised J. W. O'Connor would attend, he had made every effort to effect that object, but was unable to see the party. Mr. G. then retired, leaving the case, so far as it related to John X. O'Connor, in the hands of R. M. Corwine.

Mr. Corwine read a statement signed by John X. O'Connor, to the effect that the latter was not able to see James W. O'Connor, after making all the efforts in his power to do so, and that he was present now himself to discharge the order of the court, made on the 18th inst., as well as he could.

Judge Hilton—A condition of the bond (for $25,000) given
188 on behalf of John X. O'Connor, was that James W. *O'Connor should appear to-day, and this being unfulfilled, the bond is obligatory on all the parties thereto to pay the amount of the judgments in said proceeding.

Mr. T. O'Connor, (associated as counsel for defendant)—John X. O'Connor is here, and you cannot forfeit his bond; but if he was was not here, the bond is not worth anything.

Mr. Thompson—We shall see.

Judge Hilton—He has got to surrender the assets.

Mr. O'Connor said that, inasmuch as John X. O'Connor had purged himself of the contempt with which he stood charged, and had been discharged from the order in that particular—for he claimed the moment he was admitted to bail there was a vindication of the process of the court, and of its personal respect—whatever charge was now made against him was a new proceeding, and he asked if the court should not be satisfied with the written explanation he had given that he should be admitted to bail.

Judge Hilton said the contempt never had been purged, and that the case was merely continued for the purpose of having the assets brought in and assigned.

Mr. Corwine said that, by the proceedings already had, the force and effect of the former order was gone. What more, however, could this respondent do than to assign all the interest which he had, so that the assignee could be subrogated to all his rights? If this court were to regard him in contempt, then he claimed the constitutional privilege to be tried, and of showing that instead of being guilty of prevarication in any shape, he has acted in the best of faith throughout.

Mr. Thompson had some hope, after all the asseverations of counsel, that the proposition for the settlement of this controversy was made in good faith, and, as a member of the bar, he felt ashamed, now that the parties had failed in their promises, to find an argument brought forward to convince the court that this was a new transaction. The whole proceeding was nothing less than a trick. He would lay in jail and rot before he would deign to take advantage of an arrangement that was supposed to have been made in good faith. The counsel then proceeded to charge one of the deputies in the sheirff 's office with acting the part of a spy for the O'Connors, and after he had a writ in his hands for service, with giving them six days' time to get out of the way. He also stated that a partner of one of the opposite counsel had pledged his honor that one of the defendants in these proceedings, then under arrest, should be present in court, and after such an asseveration of counsel, where the promise was not redeemed, he thought it would have been the duty of the counsel here present to have said: "I cannot defend you, sir, until that stain on my partner is removed."

Mr. Corwine, who seemed to have his attention suddenly recalled from some other matter, rose hastily and remarked, "If you refer to me, sir, I say 'tis a lie;" and, upon the opposite counsel reiterating the statement he had made, Mr. C. added, "My partner supposed Mr. O'Connor would be here, and I suppose his word would compare most favorably with that of the gentleman."

Judge Hilton said he had tried a great many cases under proceedings in aid of execution, but this was the first in which he had to enforce the provision for contempt. There was a solemn promise on the part of Mr. Hays that J. W. O'Connor would be forthcoming, but when the day arrived he was *non est*, and had bid defiance to the process of the court ever since.

Mr. T. A. O'Connor said that it was not in good taste, on the part of the opposite counsel, to cast reflections on the integrity of other lawyers. "People in glass houses," etc.

Judge Hilton—He has acted in very good faith in this case. The judge then proceeded to state that he should hold the statute had been strictly pursued in relation to this proceeding for contempt —that J. X. O'Connor had assets, and had taken no measures to get control of them. Had he denied he had assets?

Mr. T. A. O'Connor—Yes; all the way through.

Judge Hilton—The testimony shows that he has the property jointly with his brother; and there were only two questions here now—whether the court would not imprison him, and whether the bond would not be forfeited?

189 Mr. Corwine—Mr. O'Connor having said he cannot do as you require, the next question is whether you will give *him time to be heard to show you that he cannot.

Mr. T. A. O'Connor here urged the proposition of Mr. Corwine in a warm and eloquent manner. He said he wished to prove to the community, as well as to the court, that John X. O'Connor was a good citizen—that for years he followed the profession of a merchant in this city—that he had committed no contempt of this court, and had not fraudulently concealed assets. It was, therefore, he asked two days' time, and under a constitutional and statutory right, to have this charge specified in writing, and if, after a fair, open trial, he was found guilty, the public would know upon what evidence. It was also urged that the court was bound to accept bail.

Mr. Thompson—Suppose I should spit in the judge's face, must I get two days to walk about the streets before I purge myself of the contempt?

Mr. O'Connor—The statute says so.

Judge Hilton—The proceeding for contempt is not under the general law, but under a special section referring to it. There has been an order of court, first, that the party shall do a certain thing, or the penalty of contempt shall follow. Was not that in writing? The court, however, would hold that it was not necessary the charge should be in writing under this proceeding, where the punishment to have any efficacy at all should be summary; and, as to bail, did the counsel mean to contend that after conviction bail was admissible. The assets should be surrendered agreeably to the previous order.

Mr. T. A. O'Connor had heard the remark that where a bird could sing, and won't sing, he would be made sing—it was a gratuitous presumption here that Mr. O'Connor could sing.

Court—We think he can.

Mr. O'Connor—He says he can not sing and your honor never heard him.

Court—Then he'll Sing-Sing.

The former order was reiterated, and John X. O'Connor was taken into custody by the sheriff.

SUPERIOR COURT—BEFORE STORER, J., AT CHAMBERS.

In the cases of Butterfield, et al. v. O'Connor & Brother, "executions against the person" having been issued under section 478 of the Code, on the allowance of the probate court, the sheriff having arrested John X. O'Connor by virtue of these executions, the defendant makes application to be released from the custody of the sheriff, upon the executions aforesaid. The application was made under the 486th section of the Code, bringing up the question as to whether John X. O'Connor was able to comply with the order of the court in bringing in and transferring assets.

John X. O'Connor sworn and examined by R. M. Corwine—State whether, on the 18th of August, you had property rights in action, and evidence of debt which you fraudulently covered up with intent to prevent the collection of money due the plaintiffs on these two judgments?

Answer—I had not, sir.

Question—If there were any, where were they at the time?

A. I can not say; I had no control of them.

Q. Who had when you last heard of them?

A. James W. O'Connor.

Q. Had you any agency or participation in the control of them before the 18th of August; if so, how long before?

A. It is probably three months since I had control of the assets.

Q. Can you state why it is you have not participated in the administration of these assets?

A. Because my brother took them and would not allow me; and, in fact, wrote letters to the debtors of the house not to pay me any money.

Q. In any examination before the probate court, or in any conversation you had with Judge Hilton, did you, at any time, admit that you had assets in your hands belonging to the estate of O'Connor & Bros., or of your own, or had control of them?

A. I think I stated unequivocally that I had not.

Q. Have you any property or means at all now?

A. None at all except my furniture in Kentucky.

Q. Have you any more than the law would allow you if on this side of the river?

A. I think not as much.

To the Court—I have not, at any time, directly or indirectly, disposed of *or concealed any assets of O'Connor & Bro., or any of my own property, to defraud creditors, and I presume 190
Jas. W. O'Connor has not.

Cross-examination by E. A. Thompson—Has the firm of O'Connor & Bro. been dissolved?

A. No.

Q. Had they assets on the 18th of August?

A. I presume they had.

Q. What amount of assets on that date?

A. I do not know.

Q. What amount had they the last time you knew of them?

A. I presume the statement given in New York was correct--$180,000 or $190,000.

Q. Has the firm that amount now, except what was used to pay their debts.

A. I presume so.

Q. Did you see James W. O'Connor on Saturday or Sunday last?

A. No.

Q. Were you in company with him on Monday morning?

A. I was not.

Q. Do you know why he moved to Covington?

A. Because he did not wish to give you all the assets of the firm.

Q. Can you state the names of some of your country creditors?

The Court interposed—It would not be necessary the party should state this, if he was willing to assign everything he had. It would not be right to attempt to hold this young man in duress for the purpose of reaching the partner who was now absent.

Q. (by Mr. Thompson)—Have you a revolver or a pistol, sir, in your pocket?

A. No; they are things I never carry.

Court—It is not worth while to inquire about concealed weapons, for the court would not order the sheriff to seize them. If the gentleman was afraid, he might make himself easy, as the court would take care nobody was injured.

Cross-examination continued—Have you not been opposed to making an assignment?

A. I have been, for the reason that my brother did not wish to give me control—there were other reasons—we could not agree as to an assignee.

T. J. Gallagher examined by R. M. Corwine—What do you know of the control of these assets, and of the expulsion from that administration of John X. O'Connor?

A. At the time they closed the Pearl street store, there was a want of confidence between the brothers. John took the notes and books to his house, presuming, perhaps, that they would settle jointly; but subsequently James W. O'Connor got them, and said he would keep them until J. X. O'Connor consented to dissolve the firm. An assignment was proposed before there was any attachment at all, and the parties consulted with divers of their creditors, and some very large creditors wished that they should not assign. Witness understood from J. W. O'Connor that he was willing to make an assignment, but that he required as a condition precedent a dissolution of the firm, and that he should have the settlement of the affairs. They could not agree on any question of importance in the arrangement; and he (Mr. Gallagher) seeing his advice was not followed, was desirous to retire as the professional adviser of the firm; but as James W. O'Connor wished that he should not, and as

he had personally a high regard for both gentlemen, he suffered his connection with the firm, though, he believed, without being of any particular service to the parties.

Judge Hilton examined—Was satisfied, from the examination before him, that John O'Connor, as a partner of the firm, had assets which he concealed.

Court—Did you understand they were in his possession or under his control?

A. He denied verbally they were under his control, and said that physically they were not; but I was satisfied, from the whole proceeding, that he was cognizant of the condition of these assets, and could exercise control over them.

Mr. McCune testified that after the release of John X. O'Connor, on Saturday, he (J. X. O'C.) made efforts to see his brother, and could not do so. The witness saw J. W. O'Connor, who said he was willing to make an assignment for the benefit of all the creditors, not retaining a dollar for himself; but he was unwilling to pay the expenses of the lawyers on the other side.

191 *T. A. O'Connor was also examined. Under a request conveyed from James W. O'Connor, he came down from Yellow Springs to see if he could be of any assistance to his brother John; but, on arriving at Covington, he found J. W. O'Connor had gone—in apprehension, he supposed, of some requisition to the governor—though no offense had been committed against the criminal law of any state. John X. O'Connor had no opportunity since then of seeing J. W. O'Connor.

The testimony of Charles Giraldin corroborated the statement of Mr. McCune.

Judge Storer made the following order in the case:

And now the parties appear, agreeing to the adjournment from yesterday, and the testimony produced, the parties having been heard, it appears to the court that the said John X. O'Connor is unable to perform the requisition of the executions above described, upon which he now stands committed, under the order of the probate judge.

It is, therefore, ordered that the said John X. O'Connor be discharged from the custody of said sheriff and said executions, on the condition that the said John X. O'Connor forthwith assign to the sheriff aforesaid, by a proper instrument in writing, all the right, title, interest and claim, that he (said John X. O'Connor,) now holds, or heretofore has held in and to the notes, books of account, bills, claims, judgments, and all personal or real property in and to the partnership of O'Connor & Brother, as well as all individual property of every kind and description, and that he also forthwith give an order in writing to the said sheriff upon said James W. O'Connor, the other partner of O'Connor & Bro., for the books, papers and claims of said O'Connor & Brother. When said assignment and order are made to the satisfaction of the court, the said John X. O'Connor will be discharged from custody, as aforesaid, at costs

for this proceeding, which are also first to be paid. He shall also describe, as fully as it is in his power, the names of all the debtors of said O'Connor & Brother as well as himself individually, and all property, real or personal, held by said firm, in which they have any interest—furnishing to the sheriff a schedule thereof.

The conditions of the order were complied with, and the party was discharged from the executions.

[Hamilton Common Pleas Court, 1858.]

BUTTERFIELD ET AL. v. O'CONNOR & BROTHER.

1. An order of commitment for contempt by the probate court, for refusal to obey an order to deliver effects in proceedings in aid of execution, is a final order from which an appeal could be taken, or to which a petition in error could be filed.
2. Where a petition in error to an order of the probate court committing one for contempt has been filed in the common pleas, the probate judge having refused to take a *supersedeas* bond, it may be amended so as to be taken in the common pleas court.
3. A party held in custody for contempt of court in not obeying an order of the probate court in proceedings in aid of execution to deliver effects must be released where the writ of the probate court under which he is held does not show that an execution has been issued and returned "not found," or that any judgment has been rendered, and does not show on its face how the warrant was issued, whether by affidavit or otherwise.
4. Where a warrant to arrest for contempt in the probate court has been issued by a deputy clerk of that court, the prisoner must be released on *habeas corpus*.

OLIVER AND CARTER, JJ.

The defendant being yet in the custody of the sheriff, under the order of contempt, for which he had been committed by the probate court, an application is now made to Judge Oliver, of the court of common pleas, under section 511 of the code, which provides that a judgment rendered or final order made by a probate court, justice of the peace, etc., may be reversed, vacated or modified by the court of common pleas. Judge Oliver allows the writ on defendant's giving bond in the sum of $13,000 with sureties, to be approved by the probate judge.

Application being thereupon made to the probate court, Judge Hilton refused to take the bond for writ of error, on the ground that the order of the probate court, which is sought to be reversed, is not a final order, (Code, section 512,) but only an interlocutory order, requiring the delivery, by John X. O'Connor, of the firm assets into the hands of the sheriff. As to what constitutes a "final order," within the meaning of the section first quoted, section 512 of the code says that "an order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made

in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, etc.

Up to the time of the close of this report, no further action had been taken in the case, and the defendant remains in custody of the sheriff.

*The application that the clerk of the common pleas court should be directed to accept a bond, tendered to Judge Hilton upon the filing of a petition in error, to reverse his order in the case of Butterfield and others v. O'Connor & Brother, and rejected by Judge Hilton, for the reason that the order he had made was not a final one, was disposed of Saturday afternoon. 193

Mr. Corwine urged that the right to supersede the execution of the judgment was complete by giving an undertaking—first, the approval of the penalty or sum by the judge, and, second, the approval of the undertaking and securities by the clerk. Both acts are imperative, and directory to the judge and clerk; and the omission of one or both to do the act, cannot work a loss of the right of a plaintiff in error to have the *supersedeas*.

Mr. Thompson replied on the other side.

Judge Carter said that, without going into the matter at length, it was sufficient to say that, in the opinion of this tribunal, the order of the probate court was one of those final orders contemplated by the code, from which an appeal could be taken, or to which a petition in error could be filed. It affected a substantial right, and was, therefore, a finality so far as that right was concerned. A petition in error had been filed, and the motion now was, that, the probate judge having refused to take the bond, it should be so amended as to be taken in this court.

The court concluded that this was a proceeding which could be amended in any stage of the case, and should, therefore, permit the amendment, and grant the motion.

Judge Oliver delivered his views at some length upon the question, and remarked whether the order was final or not, the fact was not necessarily a test as to whether such order could be reviewed on error, and they, therefore, need not be governed by former decisions as to what constitutes a final order. The whole object of pursuit, so far as could be accomplished by that court, was reaped—the rights are all determined, and nothing remains but the execution of the order, or reaping the fruits of the judgments made. Whether there was error or not in the proceeding, they did not, of course, now inquire into. In relation to this application, however, made in the probate court upon the subject of the bond, they were of opinion that the judge of the court had failed to do his duty through misapprehension of it.

Judge Carter said he would remark, for the information of the sheriff, that the imprisonment of John X. O'Connor *was for a contempt, a disobedience of the order of the court, and the language of the order was, "that he should be confined in the jail until he complied with the order." The order is now superceded, 194

and there is no order, in fact, after the bond is given. The result is, the sheriff ought to look to it, though the matter was only thrown as a suggestion, that John X. O'Connor should be discharged. If not discharged on the order, the court would discharge him on *habeas corpus*.

Judge Oliver again intimated that the court were not now giving any opinion as to the legal effect of the order of Judge Hilton.

The bond was then perfected, and was handed to the clerk for record.

John X. O'Connor was then discharged from jail under the above order, but was immediately arrested on another suit, and gave bond for his appearance on the following Monday.

FINAL DISCHARGE.

John X. O'Connor, who had been under $2,000 bail for his appearance before Judge Carter, came into court at the appointed hour, when an investigation took place under the writ of *habeas corpus*, issued on the previous Saturday evening.

It was claimed, on the part of the petitioner in the *habeas corpus*, that the writ under which he was held in custody was void, as it did not appear upon its face that an execution had been issued and returned "not found," or that any judgment had been rendered in any court. It did not show that the court had jurisdiction of the subject-matter; and as jurisdiction was not to be presumed, the party was entitled to his discharge. In a proceeding like that before the probate court, it should be held to a more strict compliance with the forms of law, than if the case were one of crime committed against the general laws of the state. Such a warrant as that in question would not hold a party upon a criminal charge, and much less ought it to where the proceeding was simply one in aid of a judgment creditor.

T. A. O'Connor made the argument.

Judge Carter intimated to the opposite counsel that, though this was an *ex-parte* proceeding, they would be heard if they desired to address the court.

Mr. Thompson contended that it was not necessary to set out the whole proceedings in the writ or process which goes into the hand of the sheriff. The presumption here was in favor of the jurisdiction where the statute expressly gives to the court power to act.

Judge Carter remarked that if he was a legislator he would blot from the statute book this law in relation to proceedings in aid of execution. As a judge he would construe it most strictly. An honest man will pay his debts if he can, and why bring him up under a statute of this kind? A dishonest man, called up to answer under its provisions, will lie; so that the moral effect of the law was an inducement to commit the crime of perjury. If a man was too dishonest to pay his debts, he was not honest enough to swear to the truth. The statute, therefore, in its results, could ac-

complish no good. A judge acting under it should be careful not to come in conflict with the plain provisions of the constitution of the state. The warrant issued in this case by the probate judge was a very summary instrument; and the fact that it was a printed form was no argument that whatever defect there was in it should not be corrected, where the question involved a man's liberty. Where was this judgment obtained? It could not be obtained in the probate court, and what was the defendant (who was not informed where it was obtained), to do under a command of this kind? *Why, if he had no lawyer, he might rot in jail, for he was not put on his guard to defend himself. He should be informed on the face of the writ what he had to answer—otherwise, all the provisions of the bill of rights would be wholly void. 195

The probate court was a court of limited jurisdiction—a statutory court—not a common law court, in any sense, though it had some common law jurisdiction, which belongs to the statutory provision giving it power. But it was no more nor less than a magistrate's court; and this court could not presume anything in its favor, so far as its jurisdiction is concerned. If it acts on its jurisdiction it should be expressed in its records. It should appear on its face how this warrant was issued—whether on affidavit or otherwise; and if this "otherwise" was outside of the constitution, the party could not be held. He (Judge Carter) had come to the conclusion that no jurisdiction in the probate court was shown on the face, of this warrant, and, therefore, John X. O'Connor had a right to be discharged.

R. M. Corwine said Mr. O'Connor was now in court under another arrest, made in the case of Wood & Errick against O'Connor & Bro.; he hoped another writ of *habeas corpus* would be granted forthwith; for, if John X. O'Connor was now taken out of the court room, he was satisfied everything, lawful or unlawful, would be done to deprive him of his liberty. It must be apparent to the court and the community, that the course being pursued toward him was one of bloodhound ferocity, and this court ought to interpose its authority in offering a wholesome restaint to the action of that other tribunal of whose proceedings they complained.

Judge Carter—We have no idea of putting ourselves in the position of antagonists to another court. We decide on abstract principles. We find, in this case, that the warrant has been issued by a deputy clerk of the probate court.

The writ of *habeas corpus* was then allowed, and the court holding that they could not recognize this action on the part of the deputy clerk, ordered the discharge of John X. O'Connor.

Mr. Corwine said there was still a further process in which it was attemped to hold John X. O'Conner, an order issued by the probate judge on Saturday night.

The order was as follows:

"Probate Court, Hamilton Co., O.

Proceedings in aid of execution.

"F. Butterfield and others v O'Connor & Brother.

"John X O'Connor having been heretofore by me committed to the jail of Hamilton county, and having been since improvidently discharged from custody, and without having atoned for or purged his said contempt, the sheriff of Hamilton county is hereby ordered to take the said Jno. X. O'Connor and commit him to the jail of Hamilton county, for the aforesaid contempt, and him there safely kept until he have purged said contempt, on which he was originally committed in this case.

"In testimony whereof I have hereunto set my hand and official seal, this 21st day of August, 1858.

"GEORGE H. HILTON,
"Probate Judge."

Judge Carter remarked that the order on Saturday night was to vacate the order of the probate court in reference to the command, ordering the party to deliver up his property. On that occasion he (Judge Carter) said, for the benefit of the sheriff, that, if
196 that officer did not discharge him upon *the decision then rendered, he should be released on *habeas corpus*. The sheriff, however, did release him, and in so doing he did not act "improvidently," but conformed to the suggestion of the court The defendant might now be discharged.

The various writs and orders under which J. X. O'Connor was held in custody, being now disposed of, he was forthwith set at liberty by the sheriff,

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209 *[Superior Court of Cincinnati, Special Term, 1858.]

A. FATMAN & CO v. THE CINCINNATI, HAMILTON AND DAYTON RAILROAD CO.

For opinion in this case, see 2 Disney, 248.

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219 *JUSTICE OF THE PEACE—JURISDICTION.

[Hamilton Probate Court, 1858.]

EX PARTE MCCANN AND MICHAEL WALSH.

A justice has no power in a criminal case, under the act of March 28, 1856, to fine and imprison, unless the defendant has pleaded guilty.

HILTON, J.

A writ of *habeas corpus* was sued out by Richard McCann and Michael Walsh, who allege they were unlawfully detained in jail. It appears that the petitioners were laboring men, in the employ of Charles Rule & Co., and were engaged, on Wednesday in setting up a monument in Spring Grove cemetery, and on their return stepped over a part of the hedge, to save a walk round by the gate.

They were then arrested by watchman Moon, of the cemetery grounds, and taken before Squire Joseph, of Millcreek township, and charged with breaking the fence. The charge was preferred under the 8th section of the act, in relation to cemeteries and burial grounds. 'Squire Joseph having sentenced each of the parties to pay a fine of $5, and to be imprisoned for five days, they now claimed this adjudication to be illegal.

It appeared from the statement of the petitioner, that the fence in question was a young hedge near the railroad, and that they only stepped over it.

Judge Hilton held that the magistrate exceeded his authority in finally disposing of the case—having only the power to demand bail, or to commit in default of giving it—that, by the act of March 29, 1856, justices of the peace are empowered to fine and imprison only when the party has pleaded guilty.

The petitioners were accordingly discharged.

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*[Superior Court of Cincinnati, General Term, 1858.] 225

C. TUFFLI v. THE OHIO LIFE INSURANCE AND TRUST CO.

For opinion in this case, see 2 Disney, 121.

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*[Superior Court of Cincinnati, Special Term, 1858.] 226

ALEXANDER MCKENZIE v. THE WASHINGTON LIFE INSURANCE CO.

For opinion in this case, see 2 Disney, 223.

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*[Superior Court of Cincinnati, Special Term, 1857.] 241

HALL & LINDLEY v. THE RISING SUN INSURANCE CO.

For opinion in this case, see 1 Disney, 308.

253 *ASSAULT AND BATTERY.

[Hamilton Common Pleas Court, 1858.]

STATE OF OHIO v. DAVID LEVI.

In arriving at the amount of punishment to be given for beating an editor for printing a libelous article, the court will take into consideration the provocation, and if the alleged publication be low and vicious and a repetition of it under a pretense of retraction, the court will be justified in imposing a nominal fine.

OLIVER, J.

The case of "The State of Ohio v. David Levi," an indictment for assault and battery, upon a local editor of one of our German dailies, was tried in the common pleas court at the present term. The facts proved, exhibit a case of almost daily occurrence in this and other large cities—barring the flogging of the editor—and as some difference of opinion exists as to the best mode of obtaining redress when one is libeled, (one party claiming that all good citizens should seek redress through the courts, as pointed out by law, and another that the plan adopted by the defendant in this case, or something severer, is the only way to obtain satisfaction, and deter men from printing slanders of their fellow men,) and as a new "authority" was offered by counsel, and to some extent recognized by the court, we have thought the case of sufficient novelty and interest to warrant us in appropriating our space to a report of the case by T. Shinkwin, Esq.:

The defendant entered a plea of guilty, and Judge Oliver having required testimony as to the nature of the assault, several witnesses were examined.

The prosecuting witness, Charles Zielienski, a gentleman of short stature, not remarkable for physical ponderosity, described the assault as a very severe one, perpetrated, as he supposed, with a hard, heavy instrument, It took place on the 7th of June, on Vine street, over the canal. Three wounds were inflicted upon his head. The supposed cause was the publication of an article in the German Republican, which was, in part, a translation of an article appearing in the Gazette. The facts came to his knowledge as matters of common rumor, and he regarded them as true.

Evidence was also given as to the nature of the wound. None of the injuries were of a permanent character.

On the part of the defense, Judge Spooner read a translation of the article published on the 31st of May in the Republican, of which paper the said Zielienski was the local editor. The article was headed "Fortune in Play, and Misfortune in Marriage." It did not mention the defendant by name, but was broad enough and sufficiently significant in its details to leave no room for the defendant to doubt that the "cap" was intended for him. It spoke of him as one who had made a fortune by speculations in lotteries, said that

he had made over his property to his wife to elude any pursuit on on the part of the law officers, but that his wife afterward asserted the legal right to the property herself, and had manifested a partiality for the clerk of some banking establishment.

Counsel also referred to an article published in the same paper on the first of June, the day on which defendant called for a retraction of the first article—the second article, as he claimed, being in substance a repetition of the former. The attention of the court was called by the counsel to Franklin's satire on the press, in an article in which he represented the press as a court of judicature—and speaking of the checks necessary to be *imposed, in an article 254
entitled "An Account of the Highest Court of Judicature in Pennsylvania, viz: The Court of the Press," Franklin says:

"POWER OF THIS COURT.

"It may receive and promulgate accusations of all kinds, against all persons and characters among the citizens of the state, and against all inferior courts; and may judge, sentence and condemn to infamy, not only private individuals, but public bodies, etc., with or without inquiry or hearing, at the court's discretion.
* * * *

"OF THE CHECKS PROPER TO BE ESTABLISHED AGAINST THE ABUSES OF POWER IN THOSE COURTS.

"Hitherto there are none. But since so much has been written and published on the federal constitution; and the necessity of checks in all parts of good government, has been so clearly and learnedly explained, I find myself so far enlightened as to suspect some check may be proper in this part also; but I have been at a loss to imagine any that may not be construed an infringement of the sacred liberty of the press. At length, however, I think I have found one, that instead of diminishing general liberty, shall augment it, which is by restoring to the people a species of liberty, of which they have been deprived by our laws—I mean the liberty of the cudgel! In the rude state of society, prior to the existence of laws, if one man gave another ill language, the affronted person might return it by a box on the ear; and, if repeated, by a good drubbing: and this without offending against any law; but now the right of making such returns is denied, and they are punished as breaches of the peace, while the right of abusing seems to remain in full force; the laws made against it being rendered ineffectual by the liberty of the press.

"My proposal then is to leave the liberty of the press untouched to be exercised in its full extent, force and vigor, but to assert the liberty of the cudgel to go with it, *pari passu*.

"Thus, my fellow citizens, if an impudent writer attacks your reputation, dearer, perhaps, to you than life, and puts his name to the charge, you may go to him as openly and break his head. If he conceals himself behind the printer, and you can nevertheless

discover who he is, you may, in like manner, waylay him in the night, attack him behind, and give him a good drubbing. If your adversary hires better writers than himself to abuse you more effectually, you may hire as many porters stronger than yourself, to assist you in giving him a more effectual drubbing."

When a man of such remarkable powers of mind and sense of justice, wrote in this way, what was to be expected of an humble individual, such as his (Judge S.'s) client, after his standing and hope in the community had been stricken down by this article in the Republican? Could he resist the impulse of thrashing a man so cowardly as to publish such articles to the world, and then propose to swear to the truth of them? Was not the assault just such a one as any man would deserve who should slander the wife of another? He (Judge S.) would indorse the doctrine of Franklin, and adopt it himself if necessary.

Mr. O'Connor—I have nothing to say in reply, except that I think Franklin was about right in all he said.

David Levi, the defendant, being then asked if he had any statement to make, said that the article in question had ruined the reputation of his family; and as the paper was not worth anything, he thought the only way to right himself was by acting as he did, after they had declined to take back the most offensive part of the publication.

Levi received the character of a peaceful citizen.

255 *Judge Spooner—What did you strike him with?

Defendant—I first hit him with my fist, and then two or three licks with a cowhide.

Judge Oliver said there were some things which provoke even an ordinary good citizen to commit a breach of the peace. The provocation alleged in this case was the publication of newspaper articles, which the less they were repeated or heard by anybody, the better. The defendant, however, was not here as a test of the power of the press, or to be acted upon with reference to the restraining or enlarging of that power. The question was simply one as to a violation of the criminal code, but in determining how far the defendant was guilty, they might consider the influences under which he became a transgressor of the law. The publication was one that it could be scarcely said indicated a regard for public morals but rather evinced a delight to revel in publications of a low and vicious character.

The defendant, it appears, called on the publishers, and stated he felt himself and family aggrieved, and asked a retraction, and a supposed retraction is made, but with a repetition, in substance, of what was before stated, after a "mild and polite" request to retract the charge, as the editor himself states. In such a state of case, something might have resulted more than an assault and battery. An assault of some severity was made. In this state of facts, though the court felt called upon to act without reference to the provocation, as the state of mind of the accused was to determine the degree of his guilt, and was to be ascertained through the light

of the influences under which he acted. The sentence was that the defendant should pay a fine of $10.

Judge Carter said he concurred with Judge Oliver. The punishment was to be considered as merely nominal. The fine need not be paid.

The defendant was discharged.

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*PARTNERSHIP—LIEN FOR DEBTS. 257

[Superior Court of Cincinnati, Special Term, 1858.]

SEIBRICHT v. ROHRKASSE ET AL.

Where a party retired from a firm, leaving the entire partnership property with his partner, the latter giving a bond conditioned to pay all the partnership debts, and afterward misusing the assets, whereby the security of the retiring partner, for liability to the creditors was being destroyed or impaired: *Held*, that the retiring partner has no lien upon the property for the payment of the partnership debts, which can be enforced in equity.

STORER, J.

We have already considered this case upon demurrer. The allegations in the petition were, that the plaintiff had been a partner with Rohrkasse, and, on the dissolution of the firm, he had retired from the business, leaving the entire partnership property with Rhorkasse, who had agreed to pay all the partnership debts. Relief was sought on the ground that the partner, thus taking the assets, was mismanaging the same, whereby the security of the plaintiff, for liability to the creditors would be either destroyed or seriously impaired. These statements being admitted by the demurrer, we held that the complainant had a lien upon the partnership property, which the dissolution merely of the partnership did not discharge, it would in a proper case still be enforced in equity. On the principle decided in 1 Sumner, 181, Hoxie v. Carr; 2 Paige, 400, Deveau v. Fowler; 8 Summons, 599, Warren v. Taylor, we overruled the demurrer, and gave the defendant leave to answer. Answers have since been filed, and affidavits taken, from which it very clearly appears that the complainant disposed of his interest in the partnership property, to his copartner, for the amount, or nearly so, of the money he had invested as capital, and transferred the partnership property to him, and took his bond, in the penal sum of $7,000, conditioned to pay all the partnership debts.

The only question upon this state of fact left for decision is this: Did the transfer of the partnership property from the complainant to Rohrkasse, his partner, discharge the lien, that he would otherwise have held for the payment of the partnership debts? It is very clear that the right of the first creditor wholly depends upon the lien of the partners. Their claim upon the joint property

can only be worked out through that instrumentality. If no lien exists, or if none was reserved, no remedy to subject the joint partnership exists. In 6 Ves., 125, *Ex parte* Ruffin; 11 *ib.*, 9, *Ex parte* Williams; Story on Partnership, section 359; 21 Pa. State Reports, 82, Butcher's Appeal; 9 Cushing, 555, Howe et al. v. Lawrence; 5 Ohio St., 508, Miller v. Estill; 11 Ohio, 394, Wilcox v. Kellogg, the law, as we find it there established, in our opinion,
258 closes all further *controversy, and requires us to order the preliminary injunction heretofore granted to be dissolved.

We are thus relieved from the examination of the other questions submitted in the argument, as to the validity of judgments, the sale of notes, and the *bona fides* of transfers, subsequent to the dissolution. Having determined the case upon a principle that meets us at the threshold, and forbids us to proceed, we are not disposed to announce our judgment upon any other matter in controversy. We conceive this to be the proper function of all courts, and, although there is high authority for judicial *obiter dicta*, we are not disposed to follow it.

W. B. Probasco, for plaintiff.

W. C. McDowell, for defendant.

[Superior Court of Cincinnati, Special Term, 1856.]

R. R. McIlvaine v. M. A. Bradley et al.

For opinion in this case, see 1 Disney, 194.

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270 *[Superior Court of Cincinnati, Special Term, 1857.]

Daniel Carney v. Timothy Kirby et al.

For opinion in this case, see 1 Disney, 479.

MUNICIPAL CORPORATIONS.

[Superior Court of Cincinnati, Special Term, 1858.]

BOERES V. CITY OF CINCINNATI.

A municipal corporation like an individual, having received work done, and of which the public has ever since received the benefit, can not evade liability for payment on the ground that the work was not done according to contract, and that part was unauthorized.

Action to recover for building a stone wall, and furnishing materials, upon High street.

Answer—That the work was not done according to contract; and a part of it was not authorized to be done.

It was in evidence that all the work was received by the city authorities, and has been in public use since its completion.

STORER, J.

Municipal corporations, like individuals, are subject to all the legal implications that properly follow from their acts. If they received the benefit of a contract, not originally made with them, or unathorized by them, or use the property acquired under it, such acts create a corporate liability. (1 Pick., 304, Pro. C. Bridge v. Gordon; *Ib*, 373, Epis. So. v. Dedham; 12 Wheaton, 64, Bank v. Dandridge; 16 S. and R., 256, Ridgeway v. B'k; 14 Johns. 118, Dunn v. Church.)

Charles Hilts, for plaintiff.

Hart & Disney, for defendant.

271 *CORPORATIONS.

[Hamilton District Court, 1858.]

THE STATE EX REL, S. M. Hart v. THE CINCINNATI GAS LIGHT AND COKE CO.

Allowing a petition to be filed praying that the charter of the Cincinnati Gas Light and Coke Co., be declared void.

In the Hamilton county district court, a petition has been allowed to be filed, praying that the charter of the Cincinnati Gas Light and Coke Co. shall be declared void, etc. We give an abstract of the petition.

The state of Ohio, by T. A. O'Connor, prosecuting attorney for Hamilton county, on the relation of Samuel M. Hart, solicitor for the city of Cincinnati, states that the defendant is a corporation, etc., created by the laws of the state of Ohio, by incorporation act, passed April 3, 1837, and the acts amending the same; that, by the terms and provisions of said act, defendant was empowered to manufacture and sell gas, for lighting the city of Cincinnati, streets, buildings, etc., (setting forth particular rights, privileges of defendant, etc.,) that, by act of legislature, passed March 11, 1853, the said act of incorporation was so altered and modified, that the city council of said city was authorized and empowered to regulate by ordinance, from time to time, the price which defendants should charge for any gas furnished by said company to the citizens, public buildings, etc., and that the company should, in no event, charge more for any gas furnished to said city or to individuals, than the price specified by ordinance of said city council, that a neglect to furnish gas, as aforesaid, in conformity to such acts of the legislature and ordinance of said council, should forfeit all rights of said company, under the charter by which it has been established; that on the 31st of August, 1853, the council, in pursuance of said authority from the legislature, passed an ordinance regulating the price which defendants shall charge for gas furnished, etc., whereby it was ordained that, from and after the 1st day of September, 1853, the price which the defendants should charge consumers for gas shall be $2.25 for each thousand cubic feet, and no more; that the said company has wholly disregarded the requirements and obligations imposed upon it by said ordinance, and have failed, neglected and refused to provide gas to consumers, as aforesaid, at the rate fixed and established by said city council, and have wrongfully and persistently exacted from said citizens and other consumers, at least $2.50 for each and every thousand cubic feet of gas consumed, etc.; and said company has thereby worked a forfeiture of its corporate rights, privileges and franchises. Wherefore, the relator asks judgment that said company be excluded from all corporate rights, etc., and said corporation dissolved.

[*Superior Court of Cincinnati, Special Term, 1858.] 273

ROBERT MCGREGOR, ADMR., ETC. v. ELLIS & STURGES, ET AL.

For opinion in this case, see 2 Disney, 286.

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*NATURALIZATION. 278

[Hamilton Probate Court, 1858.]

†ANONYMOUS. (Ex parte Downs)

Probate courts in Ohio have the power to admit aliens to citizenship.

HILTON, J.

In this court Judge Hilton announced an opinion on the question as to the authority of the probate court to naturalize aliens. The opinion is, in substance, as follows:

The court observed that it has never had any doubt of its jurisdiction upon this subject. The right was exercised by our predecessor. Questions upon this subject have been mooted; and we have heard it questioned whether any state court has the power to naturalize, aiming thereby to remove all facilities upon this subject, and confine it to the courts of the United States. But this power of the state courts is well settled. (See 6 Cranch, 176, *ib.* 420; 5 Leigh, 743; 1 Hill N. Y., 141; 78 Barbour, N. Y., 444; 5 English Ark. Report 621)

What is the law of the United States upon this subject? Section 14 of the laws of the United States, in relation to the naturalization of aliens, says: "Every court of record, in every individual state, having common law jurisdiction, and a seal and clerk, or prothonotary, shall be considered as a district court within the meaning of the naturalization act; and every alien who may have been naturalized in any such court, shall enjoy the same rights and privileges as if he had been naturalized in a district or circuit court of the United States."

Has the probate court these requisites?

The constitution of Ohio, article 4, section 7, says; "There shall be established in each county a probate court, *which shall be a court of record*, open at all times, and holden by one judge, elected by the voters of the county, who shall hold his office for the term of three years," etc; and section 8 says: The probate court shall have jurisdiction of probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, and such jurisdiction in *habeas corpus*, the issuing of marriage licenses, and for the sale of

†The opinion in this case was reversed by the Hamilton district court, see opinion, *post*.

lands by executors, administrators and guardians, and such other jurisdiction in any county or counties, as may be provided by law."

Here is given to this court exclusive jurisdiction in certain matters, and it may have such other jurisdiction as may be provided by law. It is true that it is a court of limited jurisdiction, but what court is not? Even the court of common pleas is so, as section 4, *article 4, of the constitution says: "The jurisdiction of the courts of common pleas, and of the judges thereof, shall be fixed by law;" and so of the probate court.

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It is clear from the clause, as to this court, that it is a court of record. But does it exercise common law jurisdiction? Now, what is understood by common law jurisdiction, is certainly a court clothed with a jurisdiction recognized by the common law, and having its origin in the common law. This is a term that can have reference only to the ancient origin or source of the rule, or the law of the particular matter in question. All courts in this country are created and limited by the constitution, state or federal, and by the statute law, and hence derive their authority from these sources; but they are only considered as common law courts when they are clothed with a jurisdiction recognized as of common law origin. The probate court is vested by the constitution with jurisdiction in *habeas corpus*, etc. This is a common law writ, and so recognized in England, although its exercise may be regulated by statute of parliament, as in this country, it is regulated by the legislatures. In Blackstone's Com., (B. 3, 137,) where this whole matter is discussed we find this passage:

"This is the substance of that great and important statute, which extends only to the case of commitment for such criminal charge as can produce no inconvenience to public justice, by a temporary enlargement of the prisoner—all other cases of unjust punishment being left to the *habeas corpus* at common law. But even upon writs at the common law, it is now expected by the court, agreeably to the ancient precedents and the spirit of the act of parliament, that the writ should be immediately obeyed; by which admirable regulations, judicial as well as parliamentary, the remedy is now complete for removing the injury of unjust and illegal confinement;" and by the *note* to the above it will be perceived that all these cases of unjust imprisonment are now provided by statute 56, Geo. III, C. 100; and the note further adds: "It is a common mistake to suppose that the statute of Charles II enlarged in a great degree our liberties, and forms a sort of epoch in their history. But, though a beneficial enactment and eminently remedial in many cases of illegal imprisonment, it introduced no new principal, and conferred no new right upon the subject. From the earliest records of the English law no freeman could be detained in prison except upon a criminal charge or conviction, or for a civil debt. In the former case it was always in his power to demand of the court of King's Bench a writ of *habeas corpus ad subjiciendum*," etc. From all this we think it clear that the writ of *habeas corpus* is a common law writ, and confers upon the court exercising it, as is generally

understood, common law jurisdiction. Some courts may have more and some less of this jurisdiction, but the more or less does not effect the principle. The jurisdiction is there; and it being also created by statute makes no difference. It is but confirmatory, and the common law is its origin—the source of the writ and the right.

We conceive that this court has also the other two requisites of the law of the United States, to-wit: A seal and a clerk. The only real doubt that has ever been expressed upon this subject is, whether this court has a clerk? But we think that it is merely a peg to hang a doubt on. The constitution of Ohio says, (sec. 16, article IV:) "The general assembly may authorize the judge of the probate court to perform the duties of the clerk of his court, *under such regulations as may be directed by law;" and the act de- 280
fining the jurisdiction and regulating the practice of probate courts, (Swan's Statutes, p. 748, section 10,) says: "The judges of said courts shall have the care and custody of all files, papers, books and records belonging to the probate office, and are hereby authorized to perform the duties of clerks of their own courts. Every probate judge shall have power to appoint a deputy clerk or clerks, each of whom shall, previously to entering upon the duties of his appointment, take an oath or affirmation faithfully to perform all his duties as deputy clerk, and, when so qualified, said deputy may do and perform any and all the duties appertaining to the office of clerk of said court."

We apprehend that it is clear from this that the duties of the judge and clerk are mentioned as distinct functions to be performed by the same person. Each is created by separate and distinct provisions of the constitution of the state and of the law. The judge, besides being clerk of his own court, has power to create deputies "to perform any and all the duties appertaining to the *office* of clerk of said court."

If this were not so, how could this court comply with the law of the United States "prescribing the mode in which the public acts, records and judicial proceedings in each state shall be authenticated so as to take effect in every other state?" As, for instance, the record of a will, so as to be used in evidence or recorded in another state; the most important record that can be authenticated, and which this court is called upon every day to perform? The law of the United States, upon this subject, says:

"Section 1. That the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certification of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form." This is done everywhere throughout the state, first, by the certificate of attestation of the record, signed as "probate judge *ex-officio* clerk," and, second, by the certificate of the probate judge "that the above attestation is in due form," and signed as "probate judge." Here is the prac-

tical, every-day fact of different and distinct acts and offices performed by the same person, and in fulfillment of a law of the United States, which is as important a law as that on the subject of naturalization, and the validity of the act, as judge and clerk, never disputed. It is clear that distinct functions performed by the same person is a common and ordinary occurrence, and it requires no technical straining for the most unlettered to apprehend the fact, from his daily experience and observation in the affairs of life; and such is the case in the probate court—the functions of judge and clerk are real and distinct, and yet required by law to be performed by the same person. We therefore hold that this court is a court of record, having common law jurisdiction, with a seal and a clerk, and, therefore, all the requisites under the law of the United States to naturalize aliens. If this court is incorrect, or any person is aggrieved, it can easily be tested by proceedings of *quo warranto*, to be decided by the supreme court. (Swan's Stat., p. 783.)

The court will merely state, in conclusion, that the court of appeals of Kentucky has just decided "that the city court of Lexington, having common law jurisdiction, though limited, may grant naturalization."

281 *The court below, in that case, decided the contrary, but it was taken up on appeal, and the court of appeals, the highest court of that state, decided as above quoted from its decision. See the case of Morgan v. Dudley, decided by the Kentucky court of appeals. And so we may say of the probate court—"it has common law jurisdiction, though limited." This court is, therefore, clearly of the opinion that it has the right, and that it is its duty to exercise the jurisdiction given. We found the exercise of this duty inaugurated by our predecessor, after the most careful investigation and consulation with other judges experienced and learned in the law. As there had been no authoritative decision on the subject, we conceived it to be our duty, upon coming into office, to follow and confirm the judgment of our predecessor in this regard, and to afford this facility to the public, the court being always in session, and having the necessary time and leisure to exercise the strictest scrutiny in this important function.

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289 [*Superior Court of Cincinnati, Special Term, 1858.]

JOHN HIRSCH v. STEAMBOAT QUAKER CITY.

For opinion in this case, see 2 Disney, 144.

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*TRIAL. 291

[Hamilton Probate Court, 1858.]

Ex Parte Robinson.

On application of a prisoner accused of having aided and abetted another in a murder, for a discharge on *habeas corpus*, on the ground that he had desired a trial before the end of the term ensuing after his commitment, and no indictment had been found against him at that term, the application was refused on the ground that the word "term" was, in criminal cases, not different from the three months' term provided by law, although in this county (Hamilton) the grand jury meet every month.

Hilton, J.

J. W. Robinson had been committed from the police court, some weeks ago, on a charge of aiding and abetting one S. Denny in the murder of Wm. Terrill. A writ of *habeas corpus* was sued out by Robinson, and it was alleged that he was illegally detained, for the reason that a session of the grand jury having intervened, and no bill having been found against him, his continued imprisonment was an infringement of the right guaranteed to him by the Constitution of a speedy trial.

It was further urged by his counsel that there was no testimony to fasten the crime against him; and, as no indictment could, therefore, be found, he must remain in jail, without the possibility of a trial, unless the court discharged him.

Counsel referred to the 13th section of the practice act in criminal cases, which provides that where an accused party desires to be brought to trial before the end of the term next ensuing after his or her commitment, and no indictment is found against him or her at that *term*, the court should discharge such prisoner, unless it shall appear by affidavit that the witnesses against him or her cannot be produced in time, or there is strong presumption of the guilt of the prisoner.

Mr. Brown, on the part of the state, said that the accused could not be discharged on *habeas corpus*, unless there was a defect in the mittimus, and the opposite counsel did not pretend there was.

Defendant's counsel—No; but it has served its day and generation. The principle of law is, that where a grand jury has intervened, unless the court should order a new mittimus, the prisoner shall be discharged.

Mr. Brown then proceeded to remark that, though there were monthly sessions of the grand jury in this county, there were not monthly terms of the common pleas court—that there were but four terms in the year, and that the May term, which commenced on the second Monday in May, lasted until the first Monday in November, was, in the eye of the law, an entirety, and, therefore, it was urged that the objection as to this prisoner's illegal detention could not be made until that time.

Defendant's counsel said that many prisoners against whom bills had not been found by the grand jury, had already been discharged, and that the prosecuting attorney, by discharging one set of men and holding on to others, did not fulfill the ends of justice, and contended that the legislature had discriminated between business of a civil nature and that of a criminal character—the terms of the common pleas for the latter being concurrent with the sessions of the grand jury.

Judge Hilton said that, no doubt, the question was an important one. The writ of *habeas corpus* secured important rights to the individual when there was a proper occasion for it—then it was truly the writ of liberty. He would be careful, however, not to trespass on the rights or jurisdiction of another tribunal, particularly on a point where that tribunal had a judicial discretion to exercise in the matter. The question was whether J. W. Robinson was illegally detained, and the only evidence presented was the
292 mittimus. *The offense charged was a serious one, and the interest of society demanded that a party charged with it should not be discharged upon light grounds. As to the clause in the thirteenth section of the criminal practice act, it, no doubt, applied to the court to which the party had been recognized, and which had juristiction at the time of the offense. It was rather a doubtful question that the terms should be monthly—the letter of the law states they shall be January, May and October—and the section, in relation to the monthly session of the grand jury, was for the convenience of this county—differing from other counties of the state, only because of its large population. It was, therefore, for the convenience of the county, and not for the prisoner; and his rights, therefore, in relation to a speedy public trial, were to be measured by the general standard throughout the state, where parties were brought to trial (in most counties) only every three or four months.

The application in the present case should appeal itself to the sound discretion of the common pleas, where this court was disposed to let it remain and leave the responsibility with the judges of that court.

The party was then remanded.

[*Superior Court of Cincinnati, Special Term, 1858.] 305

EDWARD TAYLOR v. JOHN M. SECRIST.

For opinion in this case, see 2 Disney, 299.

[*Superior Court of Cincinnati, Special Term, 1858.] 310

SPINNING & BROWN v. THE OHIO LIFE INSURANCE CO. ET AL.

For opinion in this case, see 2 Disney, 336.

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*JUSTICE OF THE PEACE—ARREST. 314

[Hamilton Probate Court, 1858.]

EX PARTE BLANK.

1. The affidavit for arrest after judgment before a justice, (Justice's Code. section 26), must state the facts justifying the belief in the existence of the particulars enumerated in section 20.
2. Where the affidavit states that the defendant has disposed of his property with intent to defraud his creditors, and put the money in his pocket and was about to leave the city with such intent, this is not a statement of sufficient facts to justify the conclusion of fraud.

HILTON, J.

Anton Blank obtained a writ of *habeas corpus* from the probate court, and asked to be discharged from custody.

It appears that the firm of Moerlein & Windisch recovered a judgment against the prisoner, before F. H. Rowekamp, Esq., J. P., of Cincinnati township, for the sum of $62. After the judgment was obtained, the plaintiffs made affidavit under section 26 of the act regulating the jurisdiction of justices of the peace in civil cases. The affidavit is, in substance, that the account was for beer sold, and that defendant had disposed of his property, or part of it, with intent to defraud his creditors, and put the money in his pocket, having sold his coffee house, and was then about to leave the city with such intent.

It was contended by counsel for the prisoner that the affidavit was not sufficient to hold the party under the above section, there being no facts stated sufficient to justify the belief in the allegations of the affidavit as to his intention to defraud creditors.

The opposite counsel claimed the affidavit was sufficient, and that the 20th section, referred to in the 26th, had reference to cases only before arrest; and that the affidavit anyhow came 315
*within the requirements of the section—also, that the case could not be reached by *habeas corpus*.

Judge Hilton said that the cases in which it had been heretofore decided that the court could not take jurisdiction under a proceeding of this character where there was error on the record, were cases of a criminal nature, and where the party had been convicted by a court of final jurisdiction.

In all other cases of illegal imprisonment there was a remedy by *habeas corpus*, where the facts appeared on the record. The present case came under this latter clause. The 26th section made direct references to the 20th, which last required that the affidavit should contain a statement of the facts claimed to justify a belief in the existence of one or more of the particulars. Are the facts in this case sufficient to justify the conclusion of fraud?

The fact of a person disposing of a part of his property, was not evidence of a fraudulent intent without some further facts. The constitution throws a shield around the individual of which he cannot be deprived, unless in cases of fraud, and that fraud must be affirmatively established beyond a reasonable doubt by the affidavit.

Stallo, Andrews & McCook, for Moerlien & Windisch;

J. Flinn, for defendant.

[Superior Court of Cincinnati, Special Term, 1858.]

MOSES HESS v. HENRY FELDKAMP.

For opinion in this case, see 2 Disney, 332.

TAX SALES.

[Superior Court of Cincinnati, Special Term, 1858.]

WILLIAM HARRISON v. JOSEPH OWEN AND J. DAN JONES, AUDITOR.

Where plaintiff had sent an agent to pay delinquent taxes on his real estate, who obtained the auditor's receipt, but the money was applied on property in which plaintiff had no interest, which the agent, being an ignorant man, did not discover from the receipt, in consequence of which the property was sold for taxes: *Held*, that the plaintiff may maintain an action to quiet his title against the purchaser at such tax sale. The auditor is not a proper party to such action.

The plaintiff alleges that he is in possession of an estate, and seized of the legal title; that the premises *became liable to 316
the payment of taxes for the years 1854–5, and that he sent an agent who paid off the taxes in 1855, and took a receipt from the auditor of the county; that in 1856–7, upon the property becoming delinquent again, he paid the taxes and took a receipt, supposing that everything was properly settled; but that in 1858 he was called upon by Joseph Owens, who claimed to have purchased the property at delinquent sale, for non-payment of the taxes of 1854–5. The plaintiff alleges that he offered to pay Owens the amount paid by him, but that the latter refused to accept it, and threatened to turn him out of possession. The plaintiff now asks to have his title quieted.

A demurrer is filed on behalf of Owens, and also on behalf of the auditor.

SPENCER, J.

If the averments are true, the plaintiff is entitled to relief. If he had paid the taxes, and the treasurer neglected to credit the payment on the books, and allowed the property to appear on the delinquent list, its sale was contrary to law, and the party would, undoubtedly, be entitled to relief in that state of case. The petitioner avers that this agent of his was an ignorant man, and that at the time he took the receipt for the payment of the taxes, it expressed other property, and the payment was, in fact, appropriated to property in which he had no interest—so that, by mistake, the money paid on these particular premises, was for two years applied to other property. Now, this was as well the mistake of the agent of the state as of the other party, who was not bound to take any receipt at all. If his payments were appropriated to the wrong property, he would be entitled to relief beyond peradventure; so far there is a good cause of action set forth as against Owen.

We cannot see why the petition was filed against the auditor; he has no interest in the property, and was, undoubtedly, an improper party to the action; as to him it should be dismissed, and he may have a judgment for his costs.

Parker & Parker, for plaintiff.

J. G. Douglass, for defendants.

318 *NATURALIZATION—PROBATE COURT.

[Hamilton District Court, 1858].

IN RE MARTIN DOWNS.

The probate court is a court of ecclesiastical, and not common law jurisdiction, and is not, therefore, such a court as the act of congress authorizes to naturalize aliens.

We gave a week or so ago the decision of the probate court, (Judge Hilton,) as to the power of that court to issue naturalization papers; and we also gave, briefly, the substance of a decision upon the question, by the Hamilton county district court *ante*: 278. We now give a more perfect statement of the decision of the latter court, furnished by Judge Swan, who was one of the judges upon the bench, at the hearing of the application:

The question as to the right of the probate judge to issue naturalization papers was before the Hamilton county district court, on the application of Martin Downs for certificate of naturalization. His counsel, Mr. Crapsey, presented to the court his final certificate received from the probate court of Hamilton county. The question whether the application should be heard involved the inquiry whether the certificate already received from the probate court was not sufficient.

SWAN, J., said—The act of congress provides that "every court of record, in any individual state having common law jurisdiction and a seal, and clerk or prothonotary, shall be considered a district court, within the meaning of the naturalization act," and may naturalize aliens.

A court of common law jurisdiction takes cognizance of trials of fact and law on issues between suitors, or on indictments or information. The probate of wills, the issuing of letters of administration, and settlement of the estates of deceased persons, are matters not belonging to common law jurisdiction, but to ecclesiastical courts. Incidental jurisdiction, such as issuing writs of *habeas corpus*, petition for dower, and partition of estate, does not change the probate court to a court of common law jurisdiction, such as the act of congress contemplated. A court of record, which has no clerk, must itself, necessarily, *ex officio*, record its proceedings and act as its own clerk. If the probate judge appoints a deputy clerk but still remains himself, *ex officio*, the clerk of his court, it may be doubted whether, in the sense of the act of congress, the probate court is a court having a clerk. Be that as it may, the probate court is a court of ecclesiastical, and not common law jurisdiction, and is not, therefore, such a court as the act of congress authorizes to naturalize aliens.

[*Superior Court of Cincinnati, Special Term, 1858.] 332

SPINNING & BROWN v. THE OHIO LIFE INSURANCE CO., ET AL.

For opinion in this case, see 2 Disney, 336, 341.

[*Superior Court of Cincinnati, Special Term, 1858.] 334

RICHARD MATHERS v. J. B. RAMSEY & CO.

For opinion in this case, see 2 Disney, 334.

[Superior Court of Cincinnati, Special Term, 1858.] 337

SPINNING & BROWN v. THE OHIO LIFE INSURANCE CO. ET AL.

For opinion in this case, see 2 Disney, 336, 344.

[Superior Court of Cincinnati, Special Term, 1858.] 348

THOMAS DUNLAP ET AL v. EXECUTOR OF JOHN A. WISEMAM ET AL.

For opinion in this case, see 2 Disney, 398.

[Superior Court of Cincinnati, Special Term, 1858.]

SPRINGER AND FRIES v. EDWARD WISE ET AL.

For opinion in this case, see 2 Disney, 391.

[*Superior Court of Cincinnati, Special Term, 1858.] 362

SPINNING & BROWN v. THE OHIO LIFE INSURANCE CO. ET AL.

For opinion in this case, see 2 Disney, 336, 354.

[*Superior Court of Cincinnati, General Term, 1858.] 369

EUGENE GRASSELLI v. JOHN LOWDEN.

For opinion in this case, see 2 Disney, 323.

This case was affirmed by the supreme court. See opinion, 11 O. S., 349.

[*Superior Court of Cincinnati, Special Term, 1858.] 374

SPINNING & BROWN v. THE OHIO LIFE INSURANCE CO. ET AL.

For opinion in this case, see 2 Disney, 336, 355.

[*Superior Court of Cincinnati, Special Term, 1858.] 385

THOS. KELLY v. ADMINISTRATOR OF WISEMAN.

For opinion in this case, see 2 Disney, 418.

This case was cited in Robinson v. Hathaway, 2 Dec. R., 581, 583, s. c. 4 W. L. M., 105, 108.

386 *OFFICE—FEES.

[Hamilton District Court, 1858.]

WM. G. HALPIN v. THE CITY OF CINCINNATI.

1. A citizen who takes upon himself the burden of an office, can recover no fees except such as are prescribed by law or ordinance. Fees are a subject of legislative discretion entirely.
2. If no compensation is attached to the office, he can recover none, although at the request of a superior, he performs services not obligatory upon him.

IN ERROR to Common Pleas.

This case was first tried before a justice of the peace, who rendered judgment in favor of plaintiff for the sum claimed. The defendant appealed to the common pleas court, and that court gave judgment for the defendant. The case is brought here by petition in error filed by the plaintiff, Halpin.

The petitioner states that, by direction of the city civil engi-
387 neer, he *recorded and placed in the possession of said officer, for the use of the city of Cincinnati, certain field notes taken by him, while engaged in his occupation as surveyor, for part of which payment has been made, and for the other part payment has been refused.

The defendant files an answer, and says "that at the time of the performance of the work and labor for which plaintiff claims judgment, the said plaintiff was city surveyor of said city, and was bound, as such surveyor, to perform said services, work and labor, without compensation."

The counsel for plaintiff argue "that if the plaintiff was city surveyor, it would not follow that he must work for nothing, especially when the work was not any part of his duty as surveyor; that there were, "at the time the plaintiff was city surveyor, but three sections of the ordinance regulating the office of city civil engineer, which had any application to the city surveyor—the one provided for his appointment by the civil engineer. (Book of Ordinances of 1855, page 214.) Another (p. 216,) provides for his duties; and the third (page 217,) provides for the recording of all plats, field notes, etc., which may be made by the engineer, assistant or city surveyor, and that these shall be the property of the city. None of these ordinances provide any compensation for the work he may do for the city itself, nor is there any ordinance or resolution of council which provides that any services he may render to the city are to be gratuitous. We are left, therefore, to resort to the former custom of the city, in such cases, or to the general principle of the law. We can perceive no distinction between this case and the ordinary one of assumpsit for work and labor performed for an individual at his request, and without any special contract as to the compensation. In such a case the workman proceeds on the *quantum meruit*;

he receives the fair value of his labor, and the law, in every such case, presumes, nothing positively to the contrary appearing, that such was the contract between the parties. In what does the position of the city of Cincinnati change the rights of the parties, or affect the claim of the plaintiff to compensation for his labor? Is it that it is a corporation which must act through her trustees? She has done so. She authorized the civil engineer to employ the plaintiff to perform all the duties appertaining to the office or duty of city surveyor. Is it that she neglected to fix a salary or to graduate the fees to which such surveyor should be entitled? We are not to be prejudiced by her neglect. She had the authority from her charter to employ us, or another, to perform this labor; she exerted this authority without saying anything on the subject of compensation, and has thereby left herself in the position of any natural person who should make a similar contract for labor—she must pay the fair value of the work done; and that the bill is a reasonable one, if anything is to be paid at all, is tacitly admitted, since the city rests itself entirely on the naked proposition, (to this it amounts,) that the city is, in no case, bound to pay for labor done for her, and at her request, unless a *special contract* to pay, and the amount to be paid shall have been previously made and ascertained by the board of trustees."

The defendant's counsel argue that "prior to the passage of the ordinance entitled 'an ordinance to create the office of civil engineer,' the city surveyor was annually elected to office by the suffrages of the people, and received a salary fixed upon by the city council." The office was created and regulated by ordinance passed April 20, A. D., 1828.

*By the terms of the ordinance creating the office of civil engineer, passed March 19, A. D., 1848, the ordinance creating 388
the office of city surveyor, above mentioned, was repealed, and all the duties and authority that belonged to the "surveyor" were transferred to the "civil engineer," and the office of surveyor was abolished; in fact, the change was but a change in the name, as the civil engineer is *now* what the city surveyor *was*.

"At the time of this suit being instituted, the ordinance of March 19, A. D., 1848, was in full effect, and still stands.

"This ordinance requires the civil engineer to be 'a skilled surveyor,' and authorizes him to appoint an assistant civil engineer, and it is the duty of the 'civil engineer to make all the surveys,' etc., for the city. The offices of the civil engineer, and his assistant civil engineer, are salaried offices.

"Section 4 of this ordinance (page 214, ordinance 1855,) is as follows: 'Said civil engineer may appoint an assistant surveyor, to be approved by the city council, and to be called city surveyor, whose duty it shall be, under the direction of the civil engineer, to make surveys of private property for such compensation as may be agreed upon with the owners; the said city surveyor shall furnish his own instruments, and employ his own assistants, chain carriers and markers, at his own expense.'

"The ordinance nowhere contemplates that the 'city surveyor' shall act or do labor for the city; but, on the contrary, the only duty prescribed to him is 'to make surveys of private property, for such compensation as may be agreed upon with the owners.' He is not even allowed to use the instruments provided by the city for her civil engineer. His post is one of position merely; it singles him out as the surveyor for the citizens. The civil engineer and his assistant civil engineer are the surveyors for the city, and the ordinance and the custom recognize none other.

"Any individual might take upon himself a part of the duties of the civil engineer, and, with equal justice, present his claim to the city for services rendered. The city is not bound to keep on the alert, to notice whether individuals are doing the work of her officers. The city should not be compelled to pay twice for the same work; she has paid the civil engineer, and if plaintiff has any claim, it is against the engineer."

SWAN, J.

Held by the Court, (SWAN J., delivering the opinion.)—That a citizen who takes upon himself the burden of an office, can recover no fees except such as are prescribed by law or ordinance. If he does not like the burden, he may resign—he is a mere volunteer; there is no implied obligation at common law to pay. Fees are a subject of legislative discretion entirely.

Judgment of common pleas affirmed.

P. McGroarty and J. T. Crapsey, for plaintiff.

S. M. Hart and Wm. Disney, for city.

PRACTICE—DEMURRER—MOTION.

[Hamilton District Court, 1858.]

WM. HEAVER v. JAMES BEATTY.

A petition against the drawers of a bill by one who paid the same for the honor of the drawers, averring that it was presented to the drawee for payment (without stating when), which was then and there refused, and then and there protested, if the allegations of time are indefinite they should have been objected to on motion, but on demurrer the petition is sufficient.

The plaintiff below filed his petition against Wm. Heaver and A. A. Britton, the sheriff returning as to the latter "Not found"

The petition states "that the defendants were partners, under the firm name of Heaver & Britton, and being indebted to one John M. Bock, of the city of New Orleans, said defendants, on the 29th day of June, A. D., 1853, at Cincinnati, drew on E. Wood Perry, of New Orleans, their draft (a copy of *which is attached,) for the sum of $121.25, to the order of said 389
Bock to pay their indebtednees to him, and that said draft was presented by said Bock to said Perry, the drawee, for payment, and that payment of the same was then and there by him refused, and the same was then and there protested for non-payment; and plaintiff says that of the presentment of said bill, demand of payment, and refusal of said drawee to pay the same, and of the protest thereof, and payment of the same by the plaintiff for the honor of the defendants, said defendants had due notice. Plaintiff further states, that upon the refusal of said Perry to pay said draft, he paid the amount of said draft, then under protest, to said John M. Bock, on the 5th day of August, A. D., 1853, for the honor of these defendants, Heaver & Britton, they having been duly notified of the non-payment and protest of said bill as aforesaid. Plaintiff therefore demands judgment.

To this petition the defendant (Heaver,) demurred generally, and the court, on hearing, overruled the demurrer.

The petition, it will be observed, states that the bill "was presented to the drawee for payment, (without stating when,) and that payment was then and there" by him refused—"then and there protested;" that of the presentment, demand, refusal, protest and payment by the plaintiff, Beatty, for the honor of the defendant, the latter had due notice. Payment for the honor of defendant is averred.

The defendant's counsel argued that the time of presentment, notice, etc., were not specifically stated in the petition, so as to constitute a cause of action.

SWAN, J.

Held, by this court (SWAN, J., delivering the opinion,) that the allegations of the petition, if indefinite, should have been objected to on motion, under section 118 of the code; but on demurrer the petition is sufficient.

Fox & Fox, for plaintiff in error.

Strait & Hollister, for defendant in error.

FILING ACCOUNTS BY ADMINISTRATORS.

[Hamilton Probate Court, 1858.]

†THE STATE, EX REL. PAT. MCLAUGHLIN, V. ROBERT MOORE, ADMR. OF JOHN MCLAUGHLIN, DEC'D.

An administrator can be required to file his first account before the expiration of the eighteen months after the date of his bond.

HILTON, J.

Judge HILTON, in disposing of the case, said the citation issued in this case, was upon the petition aad affidavit of the relator, alleging that he is a brother of the deceased, who died intestate, without leaving widow or children, and that he and a sister, resident of this city, are the only heirs and distributees of said estate; that more than twelve months have elapsed since the appointment of said administrator; that there are no debts to be paid; that the three persons still owing the estate have been seen and that there is a desire for an amicable settlement, or that the claims may be compounded, as the statute directs. He therefore asks to have the estate closed up, and, as a preliminary to that, that the administrator may be required to file an account of his administration to this date.

The only demand now made of the administrator is that he should file an account. It is objected that an account can not be required of the administrator until the end of eighteen months from the time of his giving b ɔnd, (2d October, 1857). The bond is for $6,000.

An administrator, in law, is but a trustee, administering the estate for the benefit of the creditors or the heirs; and in the absence of any statutory provision, it is clear that it is a power inherent in the court that appointed him at any time to call him to an account, upon a fair showing, by a party interested, of the expediency or ne-
390 cessity *of the case. But our statute is not silent upon this subject. Section 158 of the act for the settlement of estates, (Swan's Stat., p. 387,) says: "Every executor or administrator shall, *within* eighteen months after having given bond for the discharge of his trust, render his first account of his administration upon oath, and he shall, in like manner render such further accounts of his administration, from time to time, and every twelve months *thereafter*, and also *at such other times as may be required by the court*, until the estate shall be wholly settled."

The construction given to this section of the statute, and always acted on in this court, is, that the administrator is required to file his account current within eighteen months from his appointment, and every twelve months thereafter, until the estate is wholly settled, without the motion of any person in the matter, it being peremptory upon him to do so at those periods, without the action of the court or any other person in the premises; and if he fails to do so, that he is in default of his duty; and this, also, has been the con-

†The order in this case was reversed by the court of common pleas. See opinion, *post*. 68.

struction by the court of common pleas when that court had jurisdiction of probate matters, under the old constitution. But the law, after making this ample provision for *future* accounts after the eighteen months, goes on to provide, "and also at such other times as may be required by the court." This is made without any limit, but, of course, subject to the sound judicial discretion of the court, and occurring after making provision for future accounts, clearly indicates that it was intended to apply to accounts previous to the eighteen months, if required by the court, upon the proper showing being made.

Section 161 then goes on to provide how the administrator may be compelled to render his account as provided in section 158, upon the application of a party interested, and on failing to do so, that he may be dealt with as for contempt. (Section 51 and 52.)

The law would be very lame and impotent if such provisions were not made, or if the power was not inherent in the court by the common law regulating trusts. What security would there be to detect unfaithful administration before the eighteen months, if the administrator was to have it all his own way, and could do as he pleased previous to that time? Who would entrust an estate to an administrator, or go on his bond, if such was the case? But the law further confirms this view. Section 13 of said act (Swan, p. 367) requires that the administrator's bond shall include this clause: "To render upon oath a true account of his administration *within* eighteen months, and at *any other time*, when required by the court *or* the law." The bond in this case includes that clause. The court, therefore, has no doubt as to the right of petitioner in this case to demand an account. As to whether this estate can be fully settled at present, that will be a matter for further investigation after the account is filed, and also as to the question of the distribution of the estate among the heirs.

The court will, however, merely state that section 97 of said act (Swan Stat., 379) provides that, after the expiration of one year from the publication of his appointment, the administrator or executor "may proceed to pay the debts due from the estate." And section 98 says, "If the executor or administrator shall have paid away in manner aforesaid, the whole of the estate and effects of the deceased, before notice of the demand of any other creditor, he shall not be required in consequence of such new demand, to represent the estate insolvent, but may plead *plene administravit;* *and upon proving such payments, he shall be discharged." 391
And so in this case, if it can be shown that the claims against the estate have all been presented to the administrator, and that there is no probability of insolvency, the court can see no reason why the estate should not be distributed to the proper persons before the expiration of the eighteen months, as by the above provision the administrator is released from liability for all payments after the twelve months have expired, and if there should any other claim arise, the heirs would be individually responsible to the creditor to the amount of the estate distributed to them.

The court will, therefore, require the administrator to file account of his administration to this date, at such reasonable time as may be convenient to him to do so, subject to the further order of the court in the premises.

W. B. Caldwell, for the relator.

P. McGroarty, for the administrator.

JUSTICES OF THE PEACE.

[Washington Common Pleas Court, 1858.]

WM. SHARP v. WM. W. LIDDLE.

1. It is error in a justice of the peace to proceed to the trial of the case of the plaintiff when he does not appear to prosecute it at the time set for trial. A neglect to appear is an abandonment of the action by the plaintiff, and the justice can only render a judgment of non-suit or dismissal.
2. If the defendant claims to try a set-off, in the absence of the plaintiff, the record must show that such set-off was filed on or before the hour fixed for trial. In no case can the plaintiff's or defendant's cause of action be tried by the adverse party when he fails to appear, or support the same by proof.

This was a petition in error to reverse the judgment of a justice of the peace. The action was brought by the said Sharp to recover an account for $7.90. Summons was issued on the 24th of July, 1858, returnable on the 24th of July. The record showed the following entries:

July 24, A. D., 1858, defendant filed a set-off, containing two items, one for $5, and one for $10.

July 24, A. D., 1858, at one o'clock, the plaintiff failed to appear, that being the time set for trial; the defendant appeared, and the plaintiff still for an hour failing to appear, the defendant demanded a trial; trial had; defendant sworn, and thereupon it is considered that the defendant recover against the plaintiff the sum of $5 and costs.

NASH, J.

This case presents a question twice decided by the court, to-wit: That it is error in a justice to proceed to the trial of the case of the plaintiff, when he does not appear to prosecute it at the time set for trial. A neglect to appear is an abandonment of the action by the plaintiff, and the justice can only render a judgment of non-suit or dismissal. Nor has the defendant any right to insist upon a trial of the action so far as the claim of the plaintiff is concerned, when the plaintiff fails to appear and prosecute the same. To hold otherwise would be to constitute the justice as the agent of the plaintiff to try his case for him in his absence.

But it is said that the act of March 5, A. D., 1856, has prescribed a different rule; it must be very emphatic language, which

will deprive a plaintiff of the right to abandon his action by failing to appear and prosecute it. It is against all our ideas of judicial proceedings to permit a defendant to try the case of a plaintiff in his absence, and when, also he fails to appear and offer proof in support of the same, such a rule would enable defendants to conclude the rights of a plaintiff, when the plaintiff did not see fit to offer any evidence in support of his claim.

Section 105, as modified by the act of March 5, A. D., 1858, 53 Ohio Statutes, 21, provides that, "if either party fail to appear at the return day of the summons, or fail to attend at the time *to 392
which a trial has been adjourned, or fail to make the necessary bill of particulars, or fail in the proofs, the case may proceed at the request of the adverse party; and in all cases where a set-off or counterclaim has been filed before the dismissal of the case by the plaintiff, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed his action."

To clear the question of any uncertainty, I may remark that the last clause provides for a contingency, where the plaintiff comes and enters a dismissal of his action. By section 104, the plaintiff may voluntarily dismiss his action before it is finally submitted; in such a case the defendant has a right to have tried any cause of action which he may have set up against the plaintiff by way of set-off or counterclaim, provided the same is filed before the entry of such dismissal.

In this case there has been no such dismissal; the plaintiff simply failed to appear, and hence the question is to be governed by the first clause in section 105. One of the contingencies there provided for is where a plaintiff fails in his proof. In such a case the cause may proceed at the request of the defendant. What cause is here left to be proceeded in? Not the cause of the plaintiff; that cause is out of court by a failure on his part to prove it; hence, no further proceeding can be had in reference to the plaintiff's course of action; and if this is the true construction of this clause, it must be the construction of the preceding ones, since the right to proceed is the same in each and all of the cases provided, for if the plaintiff's case cannot be proceeded in after he had failed in his proof, no more can it be proceeded in when he has failed to appear, or to file his bill of particulars.

If the cause of action embraced in the plaintiff's suit cannot be proceeded in, or tried at the request of the defendant, when he fails to appear, or in his proofs, as to what can the cause be proceeded in at the request of the defendant? In every action there may be two adverse causes of action; that of the plaintiff against the defendant, and that of the defendant against the plaintiff. Now, if either party fail to appear, or offer evidence in support of his cause of action, the adverse party has a right to go on and try his cause of action. In this case the plaintiff failing to appear, the defendant had a right to insist upon the trial of any set-off or

counterclaim which he had, in due time, filed in the action. This due time must be on or before the hour set for trial. The defendant cannot, after a failure by the plaintiff to appear, file a cause of action, since the failure to appear put an end to the action, so that there is, then, no action pending, to which any set-off or counterclaim can be interposed.

This whole section provides for two classes of cases—first, when the plaintiff dismisses his action; and, secondly, when he fails to appear, or appearing, fails to maintain the same by proof. In either of these contingencies, the defendant has a right to insist upon a trial of his set-off or counterclaim, provided, in the first case, it was filed before the entry of the dismissal, or in the second case, on or before the hour set for trial; but in no case can the plaintiff's or defendant's cause of action be tried by the adverse party, when he fails to appear, or fails to support the same by proof.

In this case the record shows that the plaintiff did not appear at the hour fixed for trial; and hence, so far as his right of action was concerned, it was the duty of the justice to dismiss the action; but he allowed the defendant to file a set-off, and then proceeded to
393 *try the cause, without having first nonsuited the plaintiff; nor does the record show what he did try, nor whether the set-off was filed on or before the hour set for trial. If the defendant claims to try a set-off, in the absence of the plaintiff, the record must show that such set-off was filed on or before the hour fixed for trial. This record only shows that it was filed on the 24th, without any statement of the hour of its being filed.

The record ought to show the time when this set-off was filed. The entry in this case should have been in the following form:

July 24, A. D. 1858, at one o'clock, P. M.—And now came the said defendant and filed his bill of particulars in the words and figures following, to-wit: ———; and thereupon, the said plaintiff failing to appear and prosecute his action, it is considered that the same be and is hereby dismissed; and thereupon, at the request of the said defendant, I proceeded to hear and try the cause of action set up by said defendant against the plaintiff, and, after hearing the testimony, do find that the said plaintiff does owe the said defendant, on the said cause of action, the sum of ——dollars and —— cents. It is, therefore, considered that said defendant recover against said plaintiff the sum of $——, together with his costs, taxed to $——.

Such an entry as the above will protect the rights of all. The plaintiff will not be debarred from bringing a new action, and the defendant will have a judgment for his claim.

The judgment in this case is, therefore reversed, and cause set for trial in this court.

Green & Dawes, for plaintiff.

Nye & Alban, for defendant.

*[Superior Court of Cincinnati, Special Term, 1858.] 404

ELISHA HATHAWAY v. HENRY LEWIS, ADMR., ETC.

For opinion in this case, see 2 Disney, 260.

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*PRACTICE—SERVICE ON MINORS. 404

[Hamilton District Court, 1858.]

REUBEN MORSE v. C. W. GRAMES ET AL.

A decree of foreclosure having been given, the defendant, the mortgagor, appealed to the district court, and died after the case was docketed. His heirs and others, some of whom were minors, were made parties. Summons issued and personally served on the minor defendants without stating their ages, is not sufficient. The omission to state the ages raises no presumption that they were over fourteen. The better practice is to state the age in the petition, and it should also be stated in the summons so as to advise the officer of the mode of serving it.

APPEAL from Common Pleas Court.

The plaintiff filed his petition asking judgment for $133.33, and an order for sale of premises mortgaged to secure the debt. The court of common pleas entered a decree as prayed for. The defendant, Grames, appealed to this court. After the case was docketed in this court, the defendant and mortgagor, (Grames,) died. His death was suggested, and his heirs and others made parties. Some of the heirs were minors. An amended petition was filed, in which it is stated that defendants are *minors*, without stating their ages. Writs of summons were issued on the amended petition, and service was had personally on defendants, without stating their respective ages.

Held, (SWAN, J., delivering the opinion.) That the service in this case is not sufficient. The petition should have stated the age of the defendants; at all events, the omission, both in the petition and return on the writ, does not raise any presumption that the *minors are over fourteen. The better practice is to state the age in the petition. It should be also stated in the summons, so that the officer may be advised in what mode he must serve the process. 405

John S. Nixon, for plaintiff; E. Woodruff, for defendants.

FILING ACCOUNTS BY ADMINISTRATORS.

[Hamilton Common Pleas Court, 1858.]

STATE EX REL P. MCLAUGHLIN, V. ROBERT MOORE, ADM'R OF JOHN MCLAUGHLIN, DEC'D.

An administrator cannot be required to file his first account before the expiration of the eighteen months after the date of his bond.

PETITION IN ERROR to reverse decision of probate court, ordering the administrator to file his first account previous to the expiration of eighteen months from time of his appointment.

MALLON, J.

In deciding the case, Judge MALLON said that the probate court was given, by statute, the direction and control of administrators; but this direction and control was to be exercised in accordance with the law, which was as follows: "Every administrator shall, within eighteen months after having given bond for the discharge of his trust, render his first account upon oath; and he shall, in like manner, render such *further* accounts, from time to time, and every twelve months thereafter, and also at such other times as may be required by the court, until the estate is fully settled" The usual understanding, and the court believed the practice always has been, to allow the administrator eighteen months within which to file his first account. But it is argued, in this case, that the administrator has given a bond to settle, as the court shall direct True, he has, but the court must observe the law in making its directions. Again, it is said the probate court must have some control over the administrator. The statute provides that the probate court may remove the administrator for unfaithful execution of his trust. (In this case it is claimed, only, that as one of the heirs has come here from Nova Scotia, it would be convenient for him to take home the proceeds of the estate.) The statute also provides how the administrator shall proceed, and how he shall be proceeded against. If the court remove him, the new administrator must sue on the bond. The court can make no order, nor does the law allowing the administrator to pay debts after one year, give the court authority to compel the administrator to distribute to the heirs within one year; that statute fixes the rights of creditors, but has no bearing on the question here. The law of last winter, as to guardians, evidently in view of former statutes, and the practice under them, provides that the court may enforce return of inventories and accounts from guardians at the *prescribed times*. Upon a careful reading of the foregoing statute, it will be seen that, whatever discretion is given to the probate court, it is to accounts to be filed after the filing of the first account. Eighteen months is given absolutely, and after that the court may exercise a discretion, in view of the condition of the estate, as to the further and other accounts than the first.

Upon a careful examination of all the statutes, the court had no doubt upon the proper construction of this statute. It gives the administrator eighteen months within which to file his first account; and this is in accordance with other statutes upon the duties of administrators, and in accordance with the analogies of the law. Another question was whether this order could be reversed upon petition in error?* Does the order affect a substantial right? Upon error, this court will not review and reverse the probate court upon matters which rest in the discretion of the probate court. The administrator accepted the trust with a view to the law which prescribed his duties. He assumed the trust under the provisions of the law. The court ought not to impose duties upon him, or make requirements of him beyond the law. Had the administrator given his note payable in eighteen months, payment could not be enforced in twelve months, so, if the statute gives him eighteen months within which to file his first account, the court cannot compel him to file it within twelve months, nor can the court put in jeopardy his bond, by making such an order upon him. If, then, it is his right to have eighteen months, the order of the court depriving him of this right, so secured to him by the statute, under which he took upon himself this trust, is an order affecting a substantial legal right, within the meaning of the 512th section of the code. 406

The order of the probate court will be reversed.

P. McGroarty, for administrator; W. B. Caldwell, for the heir.

ASSESSMENTS FOR IMPROVING STREETS.

[Washington Common Pleas Court, 1858.]

†BARNEY MALOY V. THE CITY OF MARIETTA.

Section 116 of "An act to provide for the organization of cities and incorporated villages," is unconstitutional and void.

The facts in this case are as follows: In 1853 the council of Marietta passed several ordinances for the improvement of certain streets therein, and provided that an assessment should be levied upon the adjoining lots to meet the expenses of such improvement. The council appointed the superintendent of streets to have such improvements made, and authorized him to collect such assessments, and pay the expenses incurred in making these improvements. He was authorized to employ hands and to pay them out of the funds, so, by said assessments, to be raised. He employed hands, collected a portion of the assessments, and paid so far as such collections would go. The plaintiff was hired by said street superintendent under such orders, and he performed the labor sued for in doing work on said improvements, and under a contract with said street superintendent. A portion of the persons owning lots refused to pay the assessments made on them, and the district court in this county held that the same could not be collected, as the law was void under which the same were made; and hence no further moneys have been collected so as to pay for a portion of the work.

NASH, J.

This case has been continued for several terms, under the expectation that questions involved in it would be found settled in certain cases to be reported. The case involves a consideration of the act under which the city council acted; for if the power assumed to be exercised was never constitutionally granted, then the defendant cannot be made liable for work performed under acts which were a nullity. The agent of the city was empowered simply to spend the amount of these assessments, not to contract a liability for labor against the city; and as all are presumed to know the law, each must be bound by that law, as it is judicially found to exist. The power here granted was an authority to expend certain sums of money, not to contract debts for labor, binding on the corporation. If, then, the city had no power to make such assessments, all that was done under these acts of the council is necessarily void, and hence cannot bind the city. Whether the persons composing the council are personally liable for the work performed under their direction and by their procurement, is a question not now before the court.

407 *The act for the organization of cities and villages, (Swan St., 985, sec., 116), grants power to the council of any city or village to assess and collect a charge on the owners of any lots or lands through or by which a street, alley or public way shall pass,

*This case was reversed by the supreme court. See opinion, 11 O. S., 636.

for defraying the expenses of constructing, improving, repairing or lighting the same in proportion to the front feet, or the taxable value thereof. To the grant of this power is attached no limitation upon the amount of an assessment so to be made. The constitution, article 13, sec., 16, declares that the general assembly shall provide general laws for the organization of cities, towns and villages, and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning credit so as to prevent the abuse of such power.

The statute for the organization of cities and villages, grants the power to make assessment, but nowhere limits or restricts the amount of this assessment. If this article of the constitution is to have any effect whatever, then the legislature, to every grant of power coming within its terms, must fix a limit—some limit beyond which a city or village cannot go in its taxation, assessment, etc. What that limit shall be is left to the discretion of the general assembly; but the constitution is imperative that this discretion must be exercised, this limit be declared. It was designed that an unlimited power of taxation or assessment should never be committed to these corporations; hence, it would seem clear that the grant of such a power would be void, unless some restriction is placed upon its exercise. The question came before this court and the district court in this county, in the case of Slocomb v. City of Marietta; and both courts held this grant void, for the want of this restriction upon its exercise. This case went to the supreme court, and is reported in 6 O. S., 471. The court decide the case upon another ground, and conclude their opinion by saying that "leaving untouched the constitutional question presented in the case, we hold that the defendant in error was not entitled to recover." This case clearly leaves *undecided* as an open question, the constitutionality of this grant of power.

But in the case of Hill v. Higdon, 6 O. S., 243, the supreme court had this section under consideration, and held that it was *constitutional*. It is true that the objection now presented was not presented in that case, and is not alluded to in the opinion of the court. The right to grant to cities such a power would hardly seem a debatable question; while the absence of all restriction upon its exercise appears to have been wholly overlooked in that case. How, then, does the law stand in view of these two decisions?

In the last case, the court do not refer to this case of Hill v. Higdon, *supra*, nowhere intimate a suggestion or hint that the court had directly passed upon the validity of this sec. 116; and in the conclusion of the opinion in Marietta v. Slocomb, *supra*, the court say that they leave *untouched* the constitutional question presented in that case. Now, if the court had intended to reaffirm the decision in Hill v. Higdon, *supra*, there was no constitutional question leave *untouched*; since, by that decision, this very assessment power to as granted in sec. 116 was declared valid, nor would there have been any necessity in deciding the case of Marietta v. Slocomb, *supra*, on a ground hunted up by the court, and not presented by counsel,

as I am informed, if the court had designed to abide by the decision in Hill v. Higdon, *supra*. That case, if followed, controlled the case of Marietta v. Slocomb, *supra*, but the court do not even allude to it, but decide *this case on other grounds, leaving the question here presented untouched. The decision in the last case is then a virtual overruling of the conclusion arrived at in the first; but the court seems to have shrunk from the manliness of admitting that in the first case they had overlooked the only real objection against the constitutionality of sec. 116. From this course of the court we are left to draw our own conclusions as to what the court means by these two decisions left as they have been; and I can have no hesitation in saying that the second decision impliedly overrules the conclusion of the first, and is a negative pregnant strongly implying the unconstitutionality of such a grant of power, unaccompanied with any restrictions upon its exercise. I am, therefore, left free to follow my own opinion as well as that of the district court in this county, in holding this sec. 116 void, and all acts done under it equally void; and hence that the plaintiff in this action cannot recover against the city of Marietta.

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Ewart & Loomis, for plaintiff.

M. Clarke, for defendant.

[Superior Court of Cincinnati, Special Term, 1858.]

EX PARTE BESSIE, EVERTS.

For opinion in this case, see 2 Disney, 33.

[*Superior Court of Cincinnati, Special Term, 1858.] 33

SPINNING & BROWN v. OHIO LIFE INSURANCE AND TRUST CO.

For opinion in this case, see 2 Disney, 336, 364. Cited in Longworth and Anderson, Exrs. v. McGrew, 2 Cincinnati Superior Court Reports, 479.

[* Superior Court of Cincinnati, Special Term, 1859.] 49

ROBERT C. HAZELWOOD v. ADMR. OF ANGELINE PARKER.

For opinion in this case, see 2 Disney, 429. Cited in Tanner v. Brown, 2 Am. Law Record, 614, 617, 5 Dec. R., 112, 115.

*SALES—WARRANTY. 65

[Superior Court of Cincinnati, General Term, 1859.]

H. & F. WITTE v. SHAFFER & LEONARD.

On the sale of 176 barrels of mess beef, the jury may infer from brands or marks on the barrels whether the brand was the vendor's own or another's, an intention to affirm its truth, and relied on by the vendee, constituting a warranty. Nor is this inference sufficiently negatived by showing that there was an inspection by the vendee by opening some of the barrels, for the inspection may have been only partial, on account of the vendee's reliance upon the brand, or it may have been for another purpose, as to ascertain the size of the pieces or strength of the brine. It is for the jury to draw the conclusion.

GHOLSON, J.

This case comes before the court upon the question whether the judge who presided at the trial erred in refusing a new trial. We think it may be fairly inferred. from the pleadings and evidence, that the questions really submitted to the jury and decided by them, were, first, whether there was a warranty of the quality of 176 barrels of mess beef, as shown mainly by the fact of a brand or a mark on the barrels. *Second*,—Whether, if such a warranty might, ordinarily, be inferred, from making and exhibiting a brand or mark on the barrels, it was negatived, in this case, by showing that there had been an inspection of the beef, by opening some of the barrels. The jury must have found affirmatively as to the first, and negatively as to the second question. We are to determine whether such finding is so manifestly contrary to the evidence as to require us to interfere, not only with their decision, but with that of the judge, who heard the evidence, and, therefore, had a better opportunity of determining as to its sufficiency than we can possibly have.

It is sometimes a little difficult to distinguish between what is termed a rule of law and a conclusion from facts. When the same effect is uniformly given to certain acts or declarations, as showing a particular intention, the finding such an intention is, really, perhaps, a conclusion of fact, though the uniformity with which it is done, may lead to considering it a rule of law. Now, it is not necessary to decide in this case whether, generally, as a question or presumption of law, the selling an article with a particular brand or mark, is an affirmation of the truth of what is stated, or is usually understood by that brand or mark. It may or may not be so under the circumstances. It is, however, a fact or circumstance, which may be regarded in connection with others. So, whether the brand or mark was the vendor's own, or that of another, may or may not be a sufficient consideration to induce the conclusion that there was an intention to affirm its truth or correctness, so understood by the vendee, and on which he relied, thus constituting the affirmation a warranty. But, surely, from such circumstances, a jury may justly

infer, as a conclusion of fact in a particular case, that there was such an intention. This we do not understand as seriously contested, in the absence of negative circumstances.

66 The circumstance relied on to negative *the inference of an intention to affirm the quality of the article, which might otherwise be drawn, is that there was an inspection or examination. Here, too, we think, such an inspection or examination may or may not, under the circumstances, be sufficient to negative the inference. Indeed, we suppose that, in this case, the controversy must have hinged upon the acts and declarations of the parties, at the time of the inspection alleged to have been made, and subsequently; and, particularly upon the circumstance that the treaty for a sale was, at that time, broken off upon an objection apparent upon the mere view of the article, and which objection may have prevented a more thorough examination into its quality. The jury may have considered that the sale subsequently made was really without any inspection, and that the vendee confided in the brand of the manufacturer, without renewing and completing an inspection, which would otherwise have been more thorough. So it may be from the acts and declarations of the parties, that the object of the inspection was only to ascertain the size and description of the pieces of beef put into the barrels, and not the quantity of salt, or strength of the pickle.

We are not satisfied that, in reference to their conclusion upon these matters, there has been any gross and manifest error on the part of the jury, showing a degree of wrong and injustice which requires us to interfere. The judgment will, therefore, be affirmed.

W. B. Caldwell, for plaintiffs.

Fox & Fox, for defendants.

[Superior Court of Cincinnati, Special Term, 1858.]

DENNISTOUN, WOOD & CO. v. MERCHANTS' BANK OF CLEVELAND.

For opinion in this case see 2 Dec. R. 24, (1 Western Law Monthly 102), or 2 Disney, 52.

Cited in Petit v. Hudson, 4 W. L. M. 434,438, (2 Dec. R. 660, 663).

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*DEVISE. 67

[Superior Court of Cincinnati, Special Term, 1859.]

EXECUTORS OF WM. NEFF v. DEVISEES OF WM. NEFF.

1. Under a will charging upon the realty the sums required to maintain and educate minor children, and to determine the amount of the sums: *Held*, that it is proper to consider the amount of the estate, the expectation of the devisees, the extent and the manner in which the surviving parent wishes to educate them. The sums may be determ ned by the court or referred to a master to ascertain and report.
2. Where a provision in a will states that it is the testator's wish and direction that at the earliest period deemed proper by his executors, any real estate whatever, or such portions as they judge least profitable, might be sold, and the proceeds divided, except such portion as was required for certain sons, is not a naked authority, but a trust.
3. In such case the executors are bound to sell the whole estate if they judge it to be proper, or such part as they find least profitable, especially where the rest of the will expresses an intention to divide, not the realty, but its proceeds. If the executors do not exercise this discretion in a reasonable time, the devisees would be entitled to relief in equity.

STORER, J.

A petition is filed by the plaintiffs to obtain a judicial construction of the will of the testator.

The will in substance is as follows: First.—After the payment of all his lawful debts, all the remainder of his estate, real and personal, in Ohio or elsewhere, he gives and bequeathes first to his wife, E. C. Neff, his household furniture and goods, and one-seventh of the whole residue of the estate, as her complete and separate portion, to be owned, enjoyed and controlled by her in lieu of dower.

Second.—The remaining six-sevenths of the whole residue of his estate to be divided equally among the six osns, each one-seventh, to-wit: Peter, Wm. C., Richard W., Edward W. Sehon, Montague Phelps and James M. W. Neff, subject to the following conditions and limitations, *i. e.*, he had already given to Peter and William $10,000 each, which were charged against them, and are to be counted in the *general fund, and calculated as so much of their portion paid over; to Richard Wayne Neff, the testator had 68
also made advances from time to time, and which were charged to him on the testator's books, which sums were also to be calculated against him, as in the case of his brothers, Peter and William Neff, and adjusted in the same manner; and as his son Richard was young and inexperienced, and had just arrived at his majority, the executors were directed to retain and hold in trust for him such sum as his share shall amount to, and invest the same according to their best discretion, and pay over to him, during his natural life, such annual sum as they may deem right and proper under all the circumstances; said sum to be paid quarter-yearly, provided that the executors, at any time after three years from the decease of the tes-

tator, might, if they all consented and thought it expedient, pay over to the *cestui que* trust the entire seventh part of the estate. In case of Richard's death, his portion was to be equally divided among the remaining heirs.

Third.--It was the wish of the testator that his interest in the Cincinnati Sugar Refinery, might be continued under the then mode in which it was conducted, subject always to the decision of a majority of his executors.

Fourth.—It was the testator's wish and direction that, at the earliest period deemed proper by his executors, any real estate wherever situated, or such portions of it as they should judge to be the least profitable to hold, might be sold and the proceeds divided, except such portion as was required for Richard and his three minor brothers.

Fifth.—It was the testator's wish and direction that his executors should have full authority to elect and determine upon any one of his minor children arriving at his majority, whether the portion due to him should be paid over to him or held in trust, in the same manner, and subject to the same conditions as specified in the case of Richard Wayne Neff; the said executors, if they assume the trust, to have the right of terminating it. The guardian of the minors to hold the portions due to them, subject to the decision of the executors, who were constituted trustees, provided a trust should be created under this provision of the will.

Sixth.—The testator appointed N. W. Thomas, J. P. Kilbreath and E. C. Neff, his widow, the executors, dispensing with any bonds for the execution of any trust created by the will.

Seventh.—Mrs. E. C. Neff is appointed the guardian of the minor children by a codicil.

It is first declared, that in order to avoid all ambiguity in the original will, "as to actual or conditional trusts therein created, in respect to Richard W. Neff, and his minor brothers, the executors are appointed trustees, to execute the same without security being required from them."

In the second place, the minor heirs shall have all reasonable expenses of maintenance and education defrayed during their minority by the executors out of the general estate, and not exclusively out of their separate portions.

In the third place, in case any of the sons shall die before the estate was divided, and a distribution thereof had, leaving issue, the share belonging to him shall descend to such issue. If there be no issue, then to the surviving heirs.

The plaintiffs allege that they are in doubt as to the legal meaning of some of the provisions in the will, and ask that their duties be defined, and the course to be pursued pointed out by our decree.

69 *The minor defendants answer by their guardians, and seek the protections of the court; the other defendants, except Peter Neff are in default; he has answered.

Several questions have been presented by the parties for us to determine.

First.—What estate, if any, is vested in the executors by these devises?

The only devise, conferring a general power to sell, is the fourth. This does not vest any estate in the executors, but gives an authority only to sell the real property, coupled with the reservation, that this power need not be executed unless it is deemed to be expedient.

There has been much diversity of opinion, on the question, how far testamentary words, which import a mere power to sell, confer a trust on the executors, or invest them with title. Mr. Hargrave in his note (Co. Lit, 113, a.) inclines to construe such a devise as investing a fee, and not a bare authority to sell, while Sir Edw. Sugden has concluded, from an examination of all the cases, that a devise of land, to be sold by executors, without giving to them an estate, will confer a power only, and not an interest. (1 Sugd. on Pow. 133, 6 ed.)

It is said by Jarman, (vol. 2, p. 149,) "When the duty imposed on the devisee is to sell or convey the fee simple, he is held to take the inheritance, to enable him to comply with the directions;" but it would seem, when no estate was devised, but an authority given merely to sell, the rule would be different. (Ib. 251; Powell on Devises, vol. 1, 243.)

The doctrine held by Sugden and Powell is followed in Bergen v. Bennett, (1 Caines' Cases in Error, 16,) Jackson v. Schauber, (7 Cowan, 187,) and affirmed by Chancellor Kent, (4 Com. 320, in notes.)

Our own court decided, in Taylor, et al., v. Galloway, 1 O., 232, that "if land is devised to be sold by executors, it is a naked authority only, not coupled with an interest." So, also, in Wiles v. Cowper et al., 20 O., 124.

But when a trust is created, and a power given to the trustee, which it is his duty to execute, he is considered a trustee of the power, and not as having discretion to execute it or not. (Ib. 150.)

These decisions affirm the general rule, and very clearly indicate the true distinction between a devise of the estate, to be sold and conveyed, and a simple authority conferred on the executors to dispose of the property.

In Dabney v. Manning et al., 3 O., 325, where the testator directed his executors whenever, in their opinion, sale could be made to good advantage, to sell the real estate, and devised the proceeds to be distributed to his children as they became of age, it was held the devise was a power connected with a trust, and the executor was entitled to the possession of the land.

So in Brewster v. Benedict et al., 14 O., 368, by the directions of a will, real estate was to be disposed of and converted into money, and the court held that, in equity, it should be considered as money.

If we apply the rule thus stated to the claim before us, it would seem to be obvious what construction should be given to this devise. The testator declares his wish and direction to be, that, at

the earliest period at which his executors might deem it proper, his real estate, wherever situated, or such portions of it as they may judge to be the least profitable to be held, might be sold, and the proceeds divided, except such portions as are required by the second clause to be retained by the executors for Richard W. Neff, and, by the fifth clause, for *his sons, Montague, Edwin and James.
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A trust, we hold, is created by this devise, and the executors are bound thereby to sell the whole estate if they judge it to be proper, or such part of it as they find to be the least profitable, at the earliest period. A duty is thus imposed, which they alone must determine, when and how it shall be performed, subject, nevertheless, to the ultimate control of the proper court, to restrain imprudent action, or hasten the tardy execution of their trust. This opinion is strengthened by an examination of the several clauses of the will, which very clearly indicate, we think, the testator's intention, that the proceeds of his estate should be divided, not the realty itself. The executors are directed to pay over to the devisees their several portions, and hold those which belong to the minors, in trust, to be appropriated in such sums, and at such periods as they may deem proper, under the peculiar circumstances of each case, retaining the principal sum in trust, best investing the same according to their discretion.

This direction is incompatible with the partitions of the estate in specie, as such a step would defeat the testator's object, and take from the trustees the power to hold for the *cestui que* trusts, the shares belonging to them in severalty.

But the discretion vested in the executors must be exercised in a reasonable time, and a failure on their part to act, will authorize the devisees entitled to the absolute division of their several portions, to ask relief in equity. A proper application for that purpose would result in an order requiring a sale to be made, and the terms of payment would be determined by decree.

Upon the facts submitted to us, we are satisfied the executors should at once proceed to sell the real estate, and close up the trusts confided to them, so far as the devisees, whose shares are not subject to any condition or reservation, are concerned. We think the whole property should be sold, as a practical division, equivalent to a partition, will thereby be effected. It is probable the interests of all the devisees might be promoted, if some particular portions of the realty should be reserved from immediate sale; but when the charges upon real property are considered, the yearly taxes, improvements, repairs, loss of rents, and other expenditures, it appears to us, that a sale of the entire realty should now be made.

This opinion is strengthened by the fact that the property can be appraised, and the devisees may be allowed to take such parts of it at the valuation as will equal their distributive shares, or may, at their option, compete with each other in bidding at a public sale.

The devisees who are of age, including the widow, should not be postponed to a longer period. They are in a situation to require, and can better enjoy the use of their several shares now than

hereafter, and the executors should not be required or permitted to continue to execute the general trust any longer than is legally necessary. They will have enough on their hands after the devisees are paid, in the fulfillment of their duties, as to the investment and expenditure of the portions due to Richard and the minor children. We cannot, we think, require them to do more, and shall, accordingly, relieve them of a part, at least, of their responsibility.

It is asked whether the devisees may not, by consent, waive the provisions of the will, and have partition of the land? We suppose such a course might be adopted if all the children were of age, and had the power to assent. *But it is difficult to understand how the trusts, specific in their nature, to which are annexed important 71
conditions, imposed by a father's solicitude for his children's welfare, can be destroyed by the *cestui que* trusts. It is obvious the testator's requests, directing how their portions should be expended and controlled, would be totally disregarded by setting apart the realty to each devisee.

The purpose of the testator seems to us so clear, that we cannot come to any other conclusion than that, to give effect to his intentions, we must require the property to be sold.

If, however, there was no special trust created, but a mere power to sell, at the discretion of the executors, there could not be a change of the personalty to the realty, and a consequent partition of the property, as the parties interested have not the capacity to make the election. Some of them are minors, and we have no power to decree an election, nor can their guardians be permitted to assent for them. There could, then, be no conversion upon legal principles.

Thirdly—The executors ask us to advise them if they can distribute the personal property while a suit against the estate is pending in which a large sum is claimed to be due?

If there is any doubt about the solvency of the estate, there could not, with safety to the executors, be such distribution; but if the assets are sufficient to discharge the debts, and the amount demanded in the action alluded to, it is not probable will be recovered, or if any recovery is had, it must be for a much smaller sum, the executors may protect themselves by retaining a reasonable sum to provide for all contingencies.

The residue of the personalty may then be distributed among the several devisees, as provided for by the will, and, if necessary, a guaranty may be required to refund, if the sums then paid should be afterward found necessary to liquidate the testator's debts. But as the executors will always have sufficient security in their hands, in the proceeds of the real estate, no such special guaranty will probable be necessary. It is proper here to remark that, because the testator requires the advancements he had made to his sons Peter, William and Richard, to be charged to them, as a part of their distributive shares, under his will, the executors are not thereby permitted to postpone a division of the personalty until the other devisees have received, severally, an amount equal to their

advancements. This would be inequitable and unjust. The object of the testator can be very readily reached, if these advances are charged to each devisee as a part of his several share.

Fourthly—A question has been made as to the sums required for the maintenance and education of the minor children. The will provides that the amount necessary for these purposes should be charged upon the whole estate; and this is but right between the children, as those who have arrived at their majority had been, up to that time, supported and educated at the expense of their father.

One of the defendants objects to the sums already expended as extravagant, and claims that a much less amount would be sufficient for the purpose.

To decide this point satisfactorily, we must consider all the circumstances of the case; the amount of the estate, the expectation of the devisees, and the manner in which the surviving parent may think it proper to educate them, whether at home or abroad, whether it is to be confined to the ordinary branches of learning, or to embrace the most liberal course.

72 *These considerations we must not disregard.

It has been suggested to refer the matter to a master, to ascertain and report what would be a fair amount to allow for these purposes; but we do not think it necessary to do so, as the question is neither complicated nor difficult of solution.

The executors will set apart a sum to be made up of the annual expenses, of educating and maintaining the minor children, at the rate of $850 each per annum, until they reach the age of eighteen years, after which it will be increased to $1,000 each, for the succeeding years, before the minority ceases. This amount they will invest, expending so much only as will be sufficient for the purposes required by the will.

It will be proper that the sum thus invested should be very safely secured, as any unexpended portion remaining in the hands of the executors will pass to the body of the estate.

With these instructions, we think the executors may proceed at once to distribute among the devisees their several portions of the personalty, providing, in the first place, for the contingencies of debts not yet ascertained to be due, and that may possible be required to be paid, as well as the education and maintenance of the minor children of the testator.

A doubt has been suggested as to the propriety of permitting the widow of the testator to take certain portions of the personal estate, at the appraisement, without security. We think this question should be left to the discretion of the executors.

As the amount will, necessarily, be deducted from her distributive share, and as it is very clear the executors will always have sufficient indemnity in their hands from the proceeds of the sale of the realty, if not of the personalty, they may well decline to compel Mrs. Neff to give any additional security.

It may not be out of place to suggest here, more especially as our opinion is invoked upon the various devises of the will, that

the executors cannot be to careful in the discharge of the very delicate duties devolved upon them, as trustees of one of the devisees, who has already arrived at his majority, as well as the minor children.

The preservation and just distribution of the several portions of their father's estate, are not the only responsibilities imposed by the testator upon his representatives; he has vested a large discretion as to the amount to be paid, and the time, also, when the expenditure should be made involving moral questions, reaching far beyond the ordinary requirements of the law.

It would seem a parent's anxiety had anticipated that much of that restraint which he could properly and rightfully exercise, might be necessary for his executors to impose. Hence he has devolved upon them the duty of limiting, if proper, the expenditures, and even of withholding the entire sums to be distributed should it be necessary.

A request coming, as it were, from the tomb with its daily utterance, demands more than the technical performance of the trust. It demands that no encouragement should be given to the indulgence of youthful passions by an unnecessary or excessive allowance of money. The expenditure should be confined within such limits as a parent, looking to the real welfare of his child, however great his expectations, would guard his outlay.

While it is very true the standing of the family, the social relations, and the circumstances attending them, ought to be considered, the best interests of the devisees should, above all be consulted so far as they relate to their prosperity and happiness. 73

Of these the trustees, under the will, are, especially, the guardians. In a very important and, perhaps, absolute sense, they are the instrumentalities through which the children of a devoted parent may, by their conduct in after life, vindicate his memory.

A decree will, therefore, be made, carrying out, in detail, the principles of this decision.

Tilden, Rairden & Tilden, for executors.

Worthington & Matthews, for devisees.

81 [*Superior Court of Cincinnati, General Term, 1859.]

JOHN WEBB v. JAMES P. WILLIAMS ET AL.

For opinion in this case, see 2 Disney, 430.

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82 [*Superior Court of Cincinnati, Special Term, 1855.]

HALL v. HALL.

For opinion in this case, see 1 Disney, 36.

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90 *RAILROADS.

[Superior Court of Cincinnati, Special Term, 1859.]

WM. M. CORRY v. THE CINCINNATI, HAMILTON AND DAYTON RAILROAD CO.

1. As a general rule the only evidence of a passenger's right to be conveyed is the possession of a ticket; and the conductor is not bound to take a passenger's word that he has a contract with the company, by which he has a right to be transported, and he may remove the passenger who relies on the contract, but the company will be responsible for the act if the contract really exists.
2. When it becomes necessary for the conductor of a railroad to remove a passenger for non-payment of fare, no greater force is to be used than is necessary for the purpose, and no unnecessary violence on the passenger, his person or his feelings.

Before Justice Storer and a Jury.

The action in this case was brought to recover $10,000 damages for an assault and battery committed on the plaintiff by a conductor of the railroad company.

The plaintiff states that in pursuance of an invitation to be present at "A Grand Buchanan Rally of Democrats," at Bellefontaine, he left Cincinnati on the first of August, 1856, having previously purchased a ticket at the full price; that learning from a statement on a large printed poster, as well as from other sources, that these defendants had entered into a contract with the Democratic Club of Bellefontaine that persons attending the meeting should be carried at half fare, he made application to the ticket seller at West Liberty for a half ticket to return; but the latter, having none, told him it would be all right if he spoke to the conductor; he thereon went into the cars without a return ticket, and Wm. H. Martin, having come on the cars at Dayton, as conductor, demanded his ticket or the fare; witness explained to him the cir-

cumstance, but Martin was dissatisfied, and insisted on plaintiff paying or leaving the cars. Plaintiff offered to go to the ticket office in Cincinnati with the conductor, and if the arrangement was not as he stated, he would be willing to pay; Martin still refused, but offered as a compromise that, if plaintiff would pay his fare, they would then go to the ticket office, and the money should be returned if he (M.) was not right. Plaintiff, claiming to stand on his rights, declined. After various conversations along the road, Martin forcibly ejected him from the cars at the Carlisle station, and, as the plaintiff claims, with much violence, and to the injury of his person.

Judge Johnston, who appeared with Mr. Corry in the case, made the opening statement.

J. T. Worthington, on the part of the defense, said that what was done on the occasion referred to, was wholly justified. He expected to prove, not only that there was no such contract as that referred to, but that Mr. Corry had no reasonable right to understand any such arrangement existed; that he was notified, before leaving the city, that no such contract was made; but, notwithstanding, he entered the cars without procuring a ticket, and that, losing control of himself, he became insulting to the conductor—his manner and language, to say the least, being highly menacing.

After the testimony had been given, and the argument of Mr. Corry heard, (counsel for the defendant declining to argue the case,) the court charged the jury.

STORER, J.

A railroad company had the right to prescribe all necessary and proper regulations for the government of their trains, the transportation of passengers, and the protection of their own rights, as well as those of the passengers, when such regulations were not inconsistent with the law of the land, unreasonable, or opposed to the rights of the citizen. If a passenger refused to pay his fare, or show his ticket when the same was demanded, the regulation which authorized the conductor to remove him, was not inconsistent with law, or opposed to private rights. But whenever *it became necessary in such case, for the conductor to remove him, he was not permitted to use greater force than was necessary to effect the purpose, and should inflict no unnecessary violence on the passenger, his person or his feelings. 91

As a general rule, the only evidence of the passenger's right to be conveyed to the place of his destination, is the possession of a ticket, or the payment of the fare, and the conductor is not bound to take the word of a passenger, that he has paid his fare at the ticket office, or has lost his ticket, or has a contract with the company, by which he has a right to be transported. In such a case he may remove the passenger who relies only on the contract; but the company will be responsible for the act, if the contract really exists.

A passenger who is once permitted to commence his journey with a knowledge on the part of the conductor that he has not paid

his fare or purchased a ticket, cannot, as a general rule, be removed from the cars; but at the end of the journey he may be made to pay. If, however, he refuses to pay, and has no evidence of payment, and insists, moreover, on his right to remain, when called on for his ticket, he may be removed at any time subsequent to such refusal, under the restrictions already defined, as to the degree and force to be used.

The jury returned a verdict for the defendant.

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92 [*Superior Court of Cincinnati, Special Term, 1858.]

SPINNING & BROWN v. OHIO LIFE INSURANCE & TRUST CO.

For opinion in this case, see 2 Disney, 336, 388.

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97 [*Superior Court of Cincinnati, General Term, 1858.]

HUGH GIBSON AND MARY ANN GIBSON v. C. MOULTON ET AL.

For opinion in this case, see 2 Disney, 158.

This case was affirmed by the Supreme Court in Gibson v. McNeely, 11 O. S., 131. The latter case was cited in Hawkins v. Jones, 19 O. S., 22, 23.

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105 [*Superior Court of Cincinnati, Special Term, 1858.]

WARNER v. CHAS. F. PORTER.

For opinion in this case, see 2 Dec. R., 26, (1 Western Law Monthly, 104) or 2 Disney, 124.

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113 [*Superior Court of Cincinnati, Special Term, 1858.]

A. NUGENT v. C., H. AND I. S. L. R. R. CO.

For opinion in this case, see 2 Disney, 302.
This case was cited in Aetna Insurance Co. v. Reed, 33 O. S., 283, 294.

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117 [*Superior Court of Cincinnati, General Term, 1858.]

JESSE JENKINS v. LITTLE MIAMI RAILROAD CO.

For opinion in this case, see 2 Disney, 49.

*PROSECUTION FOR FORTUNE TELLING. 121

[Gallia Common Pleas Court, May Term, 1823.]

STATE OF OHIO v. ABIGAIL CHURCH.

The defendant was indicted under the tenth section of the act for the punishment of certain offenses therein specified; for that she, under the false pretense of foreknowing future events, and of telling the fortune of George Badgley, did obtain from said George twenty-five cents, with intent him, the said George Badgley, to cheat and defraud.

Plea, "Not guilty."

Vinton, for the prosecution.

Douglas, for the defendant.

George Badgley stated that he had heard of the reputation of Mrs. Church in the neighborhood, for telling fortunes, and had understood her common charge to be twenty-five cents; that with a view of getting his fortune told, he went to her house; that she sat beside him, and after shuffling some cards, uttering some mystical words, and examining closely the palm of his hand, commenced the thread of his *fortune, and ran through the whole tale of his 122
life; that he paid her twenty-five cents willingly, came away well pleased, and was perfectly satisfied; that much of what she told him was true, but sufficient time had not elapsed to determine as to all. The defendant's counsel wished the witness to relate *all that she did tell him*, but this, from delicate motives, he declined, and the court and counsel forbore to press it; but it was plain, from the manner of the witness, "a bonnie brau laddie," that it was concerning an affair of a very tender nature. Witness believed, from report, that much of what the defendant was in the habit of telling actually came to pass; and that her reputation stood high in the neighborhood as a correct fortune teller.

Jesse Dutton stated he used the employment of a boatman up and down the Ohio river; that he had lost his pocket-book, containing all his bills and most valuable papers; that, after a long and useless search, he was advised to apply to the defendant; that, after going through the ceremonies of dark sayings, anxious looks and shuffling of cards, she told him that he might rest perfectly assured that neither his pocket-book, nor any of its contents would be eventually lost to him, although some time must necessarily elapse before he could possibly obtain it; but that within certain dates *a very dark complexioned man, or negro*, would bring him the pocket-book with its contents; that he willingly paid the usual fee of twenty-five cents and retired. Witness stated that, within the period mentioned, a NEGRO MAN came to him with the pocket-book, containing all he had lost. As to whether any disturbances had been created by reason of her doings, he stated he had once heard that she foretold a dark complexioned man on Chickamagua would cheat and defraud his neighbors; and that a person who suspected that himself was intended, had manifested some ill blood upon the occasion.

General Holcomb was called as to the character of the defendant, and her setting "folks together by the ears" in the neighborhood. The general stated that he lived a near neighbor to Mrs. Church; that she was an industrious woman; that her husband was an old revolutionary soldier, and that what she obtained, together with his pension, afforded a subsistence for themselves and family; that he had heard much of her telling fortunes, and believed her house was the full resort of both nymphs and swains of the country round, to get their fortunes told; that he had seen and conversed with many of them; that all were pleased, and many highly delighted with the tender tales of love she had told them; that he knew of no disturbances in the neighborhood by reason of what she had told; he once, however, met a company of young men returning from defendant's house, and one was swearing that his money was as good as anyone's else; that he had been waiting a long time, but now had to return home many miles, and wait three or four days longer before it would come to his turn. Witness had conversed with the defendant upon the subject of her practice; she always told him that whether or not she could tell fortunes, she did not know; but if people would have it that she could, and would flock to her house for the purpose, she could not afford to lose her time for nothing, and thought twenty-five cents but a reasonable compensation; she had, however, adopted one invariable rule: never to take money from either children or old fools.

The defendant offered no testimony.

Mr. Vinton for the prosecution, addressed the jury:

He urged that the present was an offense clearly within the letter of the statute, and intention of the legislature. All wise governments (said he), in every age of the world, have made provision against offenses of this nature. God, in his providence, for his own wise purposes, and the peace of society, has so ordained that the page of futurity should be totally hid from our view; indeed, the knowledge of it would not only tend to make a deadly breach upon the harmony of society, but hasten the work of our destruction. The days of inspiration have gone by. To teach man his true nature and estate, to bring about the great purposes of heaven, and to publish the glad tidings of a happy restoration to lost man, the Almighty saw fit to communicate a portion of his will to the prophets and seers of old; but those ends are now accomplished, and we live under a more practical dispensation, which addresses itself to the heart
123 *and the life. The golden rule is left for our comfort and monition; and our laws are all in furtherance of that Divine precept. Can it be pretended, gentlemen, that this woman was divinely inspired? Is not even the supposition itself horribly impious? Is she not, then, basely usurping an attribute that belongs to God alone? And that (let it not be named) through the false and sorry devices of the shuffling cards, and inspecting the palm of the hand? Are you prepared, gentlemen, to say these devices are true? that these pretenses are not false? What, then, is the

simple scope of your consideration? Has she not obtained money from the witness, Badgley, by these means and pretenses, and are they not false? If the defendant knew at the time that she was not endowed with the power of foretelling future events, was it not a fraud practiced upon the witness to obtain his money? Was it not with intent to cheat and defraud him in the very words of the statute? Again, gentlemen, the wisdom of applying the statute to such cases, is apparent from the one before you. Have not the doings of this woman tended to stir up strife in this country, and to set peaceful neighbors at odds and quarrels with each other? Mr. Vinton concluded by observing he had no doubt but the jury, from the evidence before them, would have no hesitation in finding the defendant guilty.

Mr. Douglas, for the defendant, could not forbear complimenting his young friend for the clear and correct views he had taken of the dispensation of Providence, as applied to the general state and condition of man; they afforded an ample testimonial not only of the ardor of his thought and sound structure of his mind, but also of the purity of his principles. But, gentlemen (said Mr. Douglas), I can not agree with him, either in the expediency of his appeal, or the fitness of its application. Those sublime truths are too awful for the present occasion, and were designed for a more glorious purpose than the aid of a prosecution so contemptible and unsupported as the present. There is something grand in our appeals to Heaven, when the subject calls for them; and that orator is rarely happy who has his sublime illusions present for the furtherance of a sublime design. The spear of Achilles, or the bow of Ulysses, were never wielded or drawn to make war upon dwarfs; and if Jove himself should thunder at the murmuring of every pelting mortal, we should have "nothing but thunder." Hence the precept of the Roman critic:

"Never presume to make a god appear,
But for a subject worthy of a god."

"Fit the action to the word, and the word to the action," is a precept of the most immortal of bards, who, among his other inimitable qualities, possessed that of a rare special pleader, and from which my friend, from his known attachment to that science, cannot withhold the meed of his approbation and applause; concerning which precept I have heard a learned judge, who lately adorned our supreme bench and gubernatorial chair, more than once suggest as peculiarly applicable to *actions of slander*, and so designed both by Shakespeare and Hamlet.

Nor can I agree that a case like the present is either within the meaning of the statute, or intention of the legislature. Miserable, indeed, must be the occupation of the legislative body, who, in the boasted days of light and truth, could sit out their live-long time in making laws having for their object the punishment, with five hundred dollars fine and six months imprisonment of a poor, old, frail and simple woman, who should be guilty of the enormous crime of taking twenty-five cents from some love-lorn Strephon, for

telling him whether or not his Phillada would have a high chin, blue eyes, or pug nose; or to beware of a mole on the left breast, for it was the unerring badge of a shrew or a profligate. The times of such legislation are long since out of mind. Even in that country where they have made more use of witchcraft and necromancy than ever we republicans did, the statutes of the wizard monarch have long since been repealed, and his book of Demonology is only found in the libraries of the curious, and would not there be found, but from the circumstance of its being written by a king. It is only scarce because it is not valuable; and remains a memento of the extraordinary paradox, that a *wise king* may be a *learned fool.*

Even in the age that succeeded, when "quite athwart went all decorum;" *when divination was on tiptoe, and pervaded every-
124 thing; when profound statesmen were moon-struck enough to believe they were divine witnesses; when as the satirist observes,

"They'd search a planet's house to know
Who broke or robb'd a house below;
And ask of Venus, or the moon,
Who stold a thimble or a spoon;"

When Praise-god Bare-bone's parliament was asserted to be the temple of the Highest; and even then and there I say the more wise and temperate did not hesitate to declare that such laws were a disgrace to the statute book.

But to come nearer our own times and bosoms, let me ask you, gentlemen, whether you ever hear the blue-laws (so called) of Connecticut and Massachussetts mentioned but to be satirized? Those laws, which our pious forefathers (for I believe you are mostly all my countrymen—Yankees) very gravely adopted as a substitute for the laws of God. Their wilder sons loved their buxom wives too well to forego a kiss, even upon the Sabbath; and the scale-beam would kick in favor of the ponderosity of some old runnion of a witch, even against the bible, aided by the pious discourses of a Mather or a Mahugh. They found that a barrel sawed asunder would make two tubs in despite of blue-laws; and the "confounded big piece of timber" which, on Saturday night,

"Fell down, slam-bang,
And killed poor John Lamb,"

ceased to be regarded as an instrument of Divine vengeance, or a judgment from Heaven, for his profanation of that holy time. Darby persisted in the love and elopement of his darling Joan, in spite of the penance of the cart-tail, or the quick scourges of the cat-o-nine. The truth is, the old bedlam nature is the same in all ages and under all laws. You may tread her down, but cannot tread her out; when in a frolicksome mood, she will frolic. All laws ought to be proportioned to the wants of that society for which they are made; and although some may, on a slight view, be considered as encroaching too far upon individual rights, yet are

still to be tolerated in relation to the object they have in view. Thus the law of England, making it penal to bury the dead in any other commodity but woolen cloth, may at first seem a trifle in the dignity of legislation, but is, nevertheless, said to be a wise law, inasmuch as it encourages the staple of the kingdom. But laws depriving men of the liberty of kissing their wives, or restraining all under the degree of a Knight from wearing steel points upon the toes of their shoes, over a given length, are foolish, contemptible, and ridiculous. In fine; the more witch laws, the more witches; and all the acts of grave legislation upon the matter, will serve but as additional fuel for the charmed cauldron. The greatest legislative secret may be summed up in the advice of the old Quaker lady; "Let them alone, and they'll fall of themselves."

Where, gentlemen, are the evils brought upon society by the doings of this old fortune teller? Where the call for a prosecution? Is it because she sets her sage prognostications at the enormous fee of 25 cents? I tell you nay! it is gotten up by some canting, monkish zealot, who affects the alarm that his craft is in danger. His motives may be good, but his notions and habiliments are better suited to a disciple of James Naylor or Jemima Wilkinson, than an American grand-jury man. The prosecuting witness protests before you that he is not the voluntary complainant in the business. He sought her skill, heard the tale of his fortune, paid the pittance, and is satisfied. Is he defrauded? Has she cheated him? If he be deceived, he has sought the deception himself. It is true he *will not, he can not* tell us the one-half that was told him; but sufficient is understood from the "*villainous trick of his eye, and foolish language of his nether lip,*" for good guessing of the whole matter; he is content, nay, delighted with his *quid pro quo*—a good Rowland for his Oliver. His future dulcina, is, no doubt, to be fairer skinned and sweeter disposed than he even anticipated before he visited Mrs. Church. Some other interloping Panza is to be routed from the windmill; the lip upon which he is fated to sigh is never to be sighed on by another; and she who is to "share his pleasures and his heart" is to be all his own. Dare I further trow, gentlemen, I would jump at the guess, from Badgley's phiz, that she is to possess, withal, a competent share of the smoother of furrowed cheeks and sweetner of boisterous tempers, and rare commodity *which, according to the mood of the time,

"Like Aaron's serpent, swallows up the rest." 125

The warning voice of this defendant appears the astonishment and delight of the country round. Even the virtues ascribed to *love-in-idleness* fade away before the mystic wave of the wand of dame Church. Satyrs are changed into lovers; and the transformation of a Bottom is no longer without a parallel. By its unyielding magic, lost pocket-books are restored, and the *feræ naturæ* reclaimed. The people of Raccoon township may now lift up their voices and rejoice at the coming of that blessed prediction;

"When wolves and bears will learn to browse,
And go to pasture with their cows."

Her house is not the "commodity, nay, it is the very staple" of spring love and good fellowship.

Thither repair

"Tom, Dick, and Benny,
And Sal, and Kate, and Jenny,
All, all in merry glee."

There, "like elves and fairies in a ring," they dance around the modern Titania, who carelessly casts her enchantments about her, and dispenses happy fortunes with the ease of a widow Wunks, and the facility of a Robin Goodfellow. Where is the "boon laddie of Galla Water," "the bonnie lassie of Gretna Green," or the "Roy's wife of Aldevalloch," who could forbear to join this festive throng! Even my young friend ought not to withhold his meed upon the joyful occasion. Let him gladden his heart that he has fallen on these days, and "rather pursue the triumph and partake the gale," than attempt its opposition by a criminal prosecution. Who knows the good that she may have in store for him? who knows but the fortune of Lucrece, with the beauty of Hellen, now sighs in secret for its destined approach? Ah! says he, who will show me this good? I answer, Abigail Church. "Shall I now realize this unknown object of all my cares?" I reply—go to Mrs. Church; she will tell you.

But we are told that some dark complexioned person about Chickamagua is in the habit of cheating his neighbors; and disturbances are reported to ensue. Ah! and gentlemen, in these "coster-monger times," it needs no "ghost come from the grave" to tell us that Chickamagua is like unto the places of the plains—the one dark-complexioned countryman may be hailed by many kindred light-blown spirits from the "towered cities" of the East. Haply for us if the rarity of occurrences like these called for the aid of fortune tellers to point them out.

"Beware the ides of March," said the Roman augur to Cæsar. "Beware the month of May," said the spectator to his fair countrywoman. Which of these prognostics partook of the greatest share of divination; the one being the faith as the other was the levity of his country. We ought not too rashly to tax Roman credulity or religion because we will not believe that the wrong flight of birds at Pharsalia and Cannæ predicted the fate of those great battles. We doubt not the virtue or learning of a Plutarch, because *he* believed them; but rather rejoice that he has recorded and sent them down the vista of time for our instruction and reproof. Will the Epicurian cit, "with eager eye and smacking lip," forbear the delicious morsel, because a Montauk Indian tells him that south-west moon makes bad oysters at Blue Point? Even old Sir John in the moanful days of villainy, boasted his better ability to take a purse when under the governance of his chaste mistress, that patroness of rogues, the moon. Will you indict our whole hord of almanac makers, for fortelling the numerous goods or ills of life that await us, because our birth is under the tail of "Charles' wain," or our crimes attributed to the influence of a star? Are they criminals

because they tell us that when the moon is in her appogee, or Mars in his perihelion, we must expect more wars or falling weather about that time?

I was reading in a newspaper the other day that Isaiah Thomas' apprentice, while composing the almanac, came to his master to know what he should put opposite the 14th of June. The master, being engaged, told him "anything." The boy put, "rain, hail, snow and sleet." It so happened that it both hailed and snowed on that day. A large dose of Emprick's pills, noted for their efficacy in recovering strayed cattle, drove the countryman aside from the road, where, to be sure, he found the ox. I doubt much if even in these days and goings down of the sun, either the quack or Mr. Thomas *would have been adjudged within the letter or spirit of this statute—the one for the price of his pills, or the other for the recipes of his almanacs. 126

But I have detained you too long in telling what, in my judgment, the statute does not intend. I will detain you but a few moments longer in stating what I believe it does. It was intended to detect high-handed swindling in such instances as the following: If a man should make his appearance in your town, in the guise of a merchant, and should relate that he had a large quantity of merchandise at Pittsburgh or Wheeling, just ready to descend the river; should show false invoices or bills of lading, and thereon induce one of your citizens to loan him a sum of money for his exigencies, until he could pass on as far as Louisville, on urgent business, and thus make off with the booty—or if he should feign the name of heirship of a large non-resident landholder in your state, and exhibit false deeds and vouchers, whereby he imposed on the unwary, and obtained money or property by means of such false and fraudulent pretenses—and, indeed numerous other cases which could be mentioned. But to extend it to the contemptible case of this woman, would be giving a scope to implied powers hitherto unprecedented. If our legislature really think it is time to take the alarm; that our liberties are endangered, or our peace invaded by the inroads of witches, fortune-tellers and conjurors—let them so express it. Let laws be enacted with a punishment consequent to each. Then, at least, will the first object of a criminal code for a free state be obtained—that of having crimes specific, and punishments certain: for of all things within the circle of our jurisprudence, we ought to be the most cautious in extending criminal laws by application.

Mr. Douglas concluded, by observing that he was equally clear on his part, as the prosecuting attorney was on his; and that the jury must acquit the defendent.

The court left it to the jury to say whether they believed the case within the statute, and if the defendant obtained the money with intent to cheat and defraud. The jury, after retiring a few minutes, returned a verdict of "*Not Guilty.*"

140 [*Superior Court of Cincinnati, Special Term, 1858.]

MARTHA E. PIATT v. J. H. PIATT ET AL.

For opinion in this case, see 2 Disney, 408.

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145 [*Superior Court of Cincinnati, General Term, 1859.]

DANIEL BRANNIN v. ABRAHAM O. SMITH, PARTNERS, ETC.

For opinion in this case, see 2 Disney, 436.

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149 [*Superior Court of Cincinnati, Special Term, 1858.]

WILLIAMSON v. WILLIAM H MOORES ET AL.

For opinion in this case, see 2 Disney, 30.

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151 [*Superior Court of Cincinnati, General Term, 1857]

JOHN F. H. GRONE v. GERTRUDE FRONDHOF.

For opinion in this case, see 1 Disney, 504.

*ASSIGNMENT FOR CREDITORS. 154

[Superior Court of Cincinnati, Special Term, 1859.]

STETSON ET AL., ASSIGNEE V. JAMES DURRELL.

While a man cannot convey to himself, yet the fact that persons to whom a corporation makes an assignment for the benefit of creditors, were, at the time of the assignment, officers or trustees of the corporation, constitutes no legal objection to the validity of the assignment.

[This case was tried some time ago, and at the time of trial we did not deem the matter of sufficient legal interest for publication in this journal. Circumstances have since transpired, which warrant us in giving place to the court's charge to the jury. We give the substance of the charge, as revised by Judge GHOLSON.]

The question was as to the right of property in the office furniture of the Ohio Life Insurance and Trust Company, claimed by the plaintiffs under the assignment. On the other side this assignment was alleged to be void—a "mere sham" or cloak, etc.

Judge GHOLSON charged the jury as follows:

This is an action for replevin. The plaintiffs have obtained possession of the property, and no real damages on account of its detention having been shown, they are entitled, if the owners of the property, to a verdict and nominal damages.

The defendant, by the institution of this action, has been deprived of the possession of the property, and, if wrongfully, then he is entitled to damages to the extent of his interest, which* in 155
this case is to the value of the executions in his hands. He is to be considered as having not a mere possession, but a special property.

The real issue between the parties, is whether this property, when taken by the defendant, was the property of the plaintiffs, or of the Ohio Life Insurance and Trust Company; and this depends on the effect of a transfer made to the plaintiffs in trust for the creditors of that company. The effect of that transfer depends on two considerations: First.—Whether what in fact, took place, transferred the legal title to the property from the Ohio Life Insurance and Trust Company to the plaintiffs. The mode adopted for the purpose was, by a conveyance, under the corporate seal of the company. This seal appearing to have been affixed by the officer having it in custody the burden of showing that it was not affixed by the authority of the corporation, is thrown upon those who dispute it; and in this case there is no evidence tending to show a want of authority to affix the seal.

All the evidence offered has a contrary tendency. It is a rule of law that a man cannot convey to himself; but this rule does not apply in this case. The plaintiffs were not and are not the corporation of the Ohio Life Insurance and Trust Company. The fact that they were, at the time of the assignment, officers or trustees of the corporation did not constitute any legal objection to the validity of that assignment. If there were anything irregular in this, the ob

jection must be made in a different shape from that adopted in the present case by those directing the levy of the officer on the property in dispute.

The next consideration is whether there was fraud in the transaction, making the assignment fraudulent and void? The statute expressly provides, that a conveyance intended to cheat and defraud creditors, is, as to them, fraudulent and void. If the assignment in this case be of that character, it cannot have the effect to convey a title to the plaintiffs, as against the present defendant, who is a creditor, or represents creditors. But the imputation of fraud is a serious one, and requires proof. This proof may be direct or by circumstances. I do not say that there are, in this case, no circumstances tending to show fraud, or such as according to the usual and ordinary course of things, are sometimes found in fraudulent transactions, and have been considered marks or badges of fraud. Such a circumstance is being pressed with suits, or being in insolvent circumstances, or conveying to persons closely connected. But such circumstances are liable to be explained, and it is for you to determine, but not improper for me to suggest that they are explained by the object of the assignment, an equal distribution of all the property of the assignor among its creditors. By such an assignment, the very persons, whom there must be an intent to defraud, acquire an interest in the property, which interest the law furnishes means to secure and protect. The law favors such an assignment by an insolvent debtor, and while it allows it, does not favor a preference to a particular creditor. Preferences in this case, may have been given by the assignor, but not by the deed now under consideration. And it is this deed which is now under consideration, and the question is whether this deed, when made, was fair and free from the imputation of fraud. The defendant, in this case, by an allegation of fraud, seeks to avoid this deed and obtain payment in full and without regard to the claims of other unpaid creditors: there are cases in which this may be done, but both justice to these creditors and the principles of law require that it should be by clear and full proof.

156 *As to the character and position of the parties who appear before you, independent of the direct issue, you have nothing to do, and a very little consideration will suffice to show you the manifest impropriety of letting any such consideration affect your verdict in this case. You might probably think you were doing what you suppose just and right, as between the immediate parties, and yet do great injustice and wrong to others, who are in law represented, but personally have no right to appear.

The jury returned a verdict for the plaintiffs.

[*Superior Court of Cincinnati, Special Term, 1858.] 170

GRAHAM & BUCKINGHAM v. FIREMAN'S INSURANCE CO.

For opinion in this case, see 2 Disney, 255

[*Superior Court of Cincinnati, Special Term, 1859.] 173

COSBEY ET AL v. EXECUTORS OF DANIEL LEE.

For opinion in this case, see 2 Disney, 460.

This case is cited in Reddish v. Carter, 1 Cincinnati Superior Court Report 283, 288.

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*DIVORCE AND ALIMONY--PRACTICE 186

[Hamilton Common Pleas Court, 1859]

DUHME v. DUHME.

1. The divorce statute should not be construed in a spirit of improper liberality, nor with a view to defeat its ends; but the object should be to ascertain the intention of the legislature, as expressed in the statute, and to carry this intention into execution.
2. The living together unhappily; or simple cruelty; or neglect of duty, is not sufficient to constitute a ground for divorce: the "cruelty," the "neglect of duty," must be extreme, gross, superlative.
3. "Extreme cruelty," is defined to be either personal violence; or the reasonable apprehension of the same; or a systematic course of ill-treatment affecting the health and endangering the life of the party against whom it is directed. What constitutes "gross *neglect of duty, "is left to the 187 sound discretion of the court.
4. Alimony may be allowed for a less cause than is required for divorce. It may be allowed for simple ill-treatment, where separation is consequent. It is not necessary that the treatment should amount to "extreme cruelty." Ill-treatment, on the part of the husband, may consist in entire estrangement; in cursing the wife; in imputing a want of chastity; and in communicating suspicions of it to others, so as to lay the foundation for calumny and scandal.
5. On a petition for divorce and alimony, the court may refuse the divorce and grant the alimony. It is not necessary that a separate petition be filed for alimony alone.

DICKSON, J.

This is an application for divorce and alimony. The grounds alleged by the complainant are "extreme cruelty" and "gross neglect of duty." The defense, a general denial. The parties were married in this city, Feburary 10, 1847. They lived together until January, 1856, when Mrs. Duhme separated from her husband. They were reconciled about four months thereafter; came together and continued until May 21, 1857, when she left him finally, and some months after brought this suit.

At or after the marriage each party was possessed of an ample fortune. She brought to him $7,216 in money and real estate, in which she had a life interest (remainder to her children), yielding a net income of $2,000 per annum. Mr. Duhme possessed a much larger fortune.

The parties were of different nationalities, of equal respectability and social condition. The concurrent opinion of all the witnesses, was to the effect that Mr. Duhme was of correct business deportment, of a peaceable and quiet disposition, and of a reserved and taciturn habit of mind. The same concurrent opinion was to the effect that Mrs. Duhme, prior to marriage, was a happy, joyous and amiable girl; after marriage, still amiable, but her amiability tinged with a dark shade of melancholy and sadness.

The character and disposition thus, by the witnesses ttributed to each, would seem to forbid that they should be actors in such a suit as this.

The grounds relied upon to sustain the application may, for convenience, be considered under a threefold division.

First—It is alleged that Mr. Duhme practiced toward her an undue economy. The evidence referred to to support this charge was, principally, that he had sold his dwelling house on Fourth street, and removed to rooms in the third story of a business house, known as Duhme's building, on the south side of Third street, between Main and Walnut. The testimony showed that the basement of this house was occupied for a restaurant—the principal and second stories for offices, the third story in part by Dumhe's family, the rear rooms were for the accomodation of political and social parties. The entrance to Dumhe's apartments was through the common entrance to the building. It did not appear in evidence that Mrs. Duhme had complained of this residence, and there was testimony that she had expressed herself as satisfied with it. Were I sitting here as an umpire on a question of taste, I might be inclined to speculate upon the incongruity of persons of so much wealth living in such apartments; but if she were satisfied with them, she is precluded from alleging this as a ground of divorce.

Second—It is alleged that Mr. Duhme in his general deportment towards his wife was cold, harsh and unfeeling. The testimony shows estrangement and alienation between them at an early period of their married life: that Mr. Duhme not only abstained from all manifestation of affection towards his wife, but treated her as if she were a stranger. In the suggestive language of one of the wit-
188 nesses, they acted as if they ought to be introduced to each other. The testimony gives a very full description of their mode of life for the last six months preceding the final separation--which may be taken as an example of their manner of living for many years of their married life. These six months were spent in the Third street apartments. Mr. Duhme was with his wife more or less every day, yet was never seen in conversation with her; he sat at the table with her in silence; read his paper by her side in the evening, with his back turned upon her; gamboled with his children, but spoke

not of their mother; slept in bed with her and knew her not. For two months preceding the separation, he abstained from eating at the table—she and her children ate alone. This period seems a long, dark night giving promise of no day.

It was, however, sometimes, on his part, relieved by positive acts of violence.

On one occasion, coming in, his child met him, joyously exclaiming, "Father, Dr. Fowler says I have a fine head, and will make a great man, that my head is just like my mother's;" the response was sarcastically, "Your mother is a dear creature." and, turning to her, said, "You are a hell of a woman," then gruffly left the house. Another instance shall be related in the witnesses' own language. "One morning, before breakfast, Mr. Duhme was lying on the sofa in the front parlor, when I came down stairs Mr. Duhme asked me why Hermenia (referring to the nurse girl) had slept in the front parlor (the room next to Mr. and Mrs. Duhme's bedroom) last night, (Hermenia had previously slept up stairs in the room with me.) I told him I did not know. Mrs. Duhme then came into the room and said to me, that Duhme had told her it looked suspicious—there is no knowing what these women would do if they were grandmothers. Duhme flew into a violent passion and said, 'You are a G—d d——d liar.' He clenched his fists and shook them at her and gritted his teeth. He abused her with other violent language, but I cannot recollect the words now. He was probably ten or fifteen minutes occupied in his abusive talk toward her."

On another occasion, when they were in the country for the summer, Mr. Duhme asked his wife to ride with him in his buggy to this city. She assented. In due time he had the buggy ready. She then declined going, alleging, as the witness thinks, as a reason that the day promised rain. This threw him into a paroxysm of passion, in which he gesticulated violently, and poured upon her a volley of the most profane imprecations. These instances may be taken as fair examples of others not given, and the foregoing is a faithful presentation of their mode of life for many years; as unhappy an one as was perhaps presented to a court. There is no justification or excuse for his conduct. There is this palliation: the testimony clearly shows that there was, on her part, coldness and indifference. Whether this aversion—this indifference succeeded and was consequent upon his ill treatment, or whether it preceded and caused it, the testimony does not make clear. But this indifference on her part was expressed only in quiet and silent demeanor. When she spoke to him, she spoke pleasantly; and in no instance does the testimony show that she replied harshly to his harsh language. There is no well-attested instance of impropriety of conduct, on her part to him, during the ten years of their married life, excepting this coldness and indifference.

There is evidence in the case that she, during the time that they boarded with a family in their house, was *absent much 189
of the day from her home. But this was not the cause of his ill-treatment for it occurred long after he had ill-treated her, and while they

were living most unhappily together—she sought kindness in her relative's houses.

There is also evidence of unkindness toward her children. But the overwhelming weight of evidence is that she was a kind and affectionate mother. The conclusion to which I come, then, is, that he was harsh and unfeeling in his deportment to his wife, for many years of his married life.

Third.—It is alleged that Mr. Duhme was jealous, without foundation, of his wife, and that this jealousy manifested itself in indignities toward her, and in the communication of his suspicions to others, which might naturally be the foundation of calumny and scandal. The testimony shows that prior to any separation he addressed to his wife remarks reflecting on her chastity. On several occasions, when her sister and her sister's husband were boarding with them, he reproached her with improper conduct toward her brother-in-law. On another occasion, about the same time, he made a serious charge against her chastity, with reference to the attending physician.

During the time of their first separation, he frequently, and to different persons, made remarks reflecting upon her chastity. To one he expressed his apprehension that she would become attached to other men. To a servant of his wife, he addressed vague inquiries, as to whether a certain man slept up stairs, where his wife slept. But the most marked instance in which he charged her with impropriety of conduct, occurred about the time she finally abandoned him, and was doubtless the immediate cause of that abandonment. When they occupied the apartments on Third street, they had a servant girl and a sewing woman living with them. These usually slept up stairs, together. On one occasion, Mrs. Duhme desired the servant girl to sleep down stairs, in the room adjoining to the one where Mr. Duhme and she slept. When Mr. Duhme saw the girl there in the morning, he said it was an arrangement so that the sewing woman could receive her visitors up stairs. Mrs. Duhme left him. This statement was attested by the servant girl, whose whole deportment on the witness-stand impressed the court with the truthfulness of her narration. It is not denied that this jealousy was wholly without foundation in fact, but certain palliating circumstances are pleaded. It is said that she attended a spiritual circle and lecture. This allegation, and the inference intended to be drawn from it, are most unjust to her. Mrs. Duhme is now about middle life, and from the testimony, only on one occasion in her life, did she attend a spiritual lecture, and once a spiritual circle; and on this occasion she could not well absent herself, because it occurred at her own boarding house, in the company of her own relatives. Besides, the public mind was at that time excited on the subject of Spiritualism, and it was a matter of amusement to some; of curiosity to others, and to still others, of philosophical speculation.

There was nothing in her conduct, in this respect, to detract, in the slightest degree, from her character as a lady. There were,

however, palliations for his manifestations of jealousy. Those that occurred before any separation, were generally expressions of passion, and intended as personal indignities, and did not indicate a settled feeling of jealousy. Those that occurred after her separation, were due, in a great measure, to his condition of mind, and same allowance is to be *made. But making every due allowance, the testimony establishes that at different times during 190
their married life, he was jealous of her, and that this jealousy manifested itself in personal indignities toward her, and in the communication of suspicions to others, calculated to cause scandal against her.

I find, then, that there has been, in Mr. Duhme's conduct, harsh treatment to and jealousy of his wife, under the circumstances stated. Does this conduct, on his part, constitute what the law calls "extreme cruelty," or "gross neglect of duty?" It is proper here to advert to the argument made to the court, as to the spirit with which this statute should be interpreted. Complainant's counsel say it should be interpreted liberally, and what is meant by that phraseology is, that if it would conduce to the happiness of the parties to separate them, I should, if possible, so construe the evidence as to make out a case under the statute. It is said there are three parties to a divorce suit—the complainant, the defendant, and the state. I admit the proposition as to the parties, but the state has taken care to protect itself. It provides various grounds of divorce, yet among them I do not find that the living together unhappily is one. But as to the spirit in which the statute should be interpreted, let Sir William Scott speak. (2, Haggard's Ecclesiastical Report, page 35, Evans v. Evans:)

"The humanity of the court has been loudly and repeated invoked. Humanity is the second virtue of courts, but undoubtedly the first is justice. If it were a question of humanity, simply, and of humanity which confined its views merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Every body must feel a wish to sever those who wish to live separate from each other—who cannot live together with any degree of harmony, and consequently with any degree of happiness; but my situation does not allow me to indulge the feelings, much less the *first* feelings of an individual. The law has said that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons, which the law approves, and it is my duty to see whether those reasons exist in the present case.

"To vindicate the policy of the law, is no necessary part of the office of a judge; but if it was, it would not be difficult to show that the law, in this respect, has acted with its usual wisdom and humanity; with that true wisdom, and that real humanity that regards the general interests of mankind. For, though in particular cases, the repugnance of the law to dissolve the obligations of matrimonial cohabitation, may operate with great severity upon individuals; yet it must be carefully remembered, that the general happiness of the

married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off. They become good husbands, and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes."

This statute should not be construed in a spirit of improper liberality, nor with a view to defeat its ends; but in this case, as with every other statute, the object should be to ascertain the intention of the legislature as expressed in the statute, and when this is discovered, to carry it faithfully into execution. With this rule in view, is this case one of "extreme cruelty?" This
191 *general term the law has defined. It says there must be either personal violence, or the reasonable apprehension of personal violence; or a systematic course of ill treatment, affecting the health and endangering the life of the party against whom it is directed. I do not think that the testimony establishes either of these cases. Has there, then been "gross neglect of duty?" This general term has received no definition—perhaps it is incapable of any: certainly not, without limiting its generality. The statute, in each case, appeals, for its interpretation and application, to the sound discretion of the court. The phrases "extreme cruelty" and "gross neglect of duty," are relative terms—they are expressed in the superlative degree. Simple cruelty or neglect of duty is not sufficient to constitute a ground of divorce. It must be "extreme," "gross," superlative.

Now, while I find, as a conclusion of fact, that there has been, in this case ill treatment, of a very grave character, on the part of Mr. Duhme toward his wife; yet I do not think that it is of that extreme character necessary to constitute "gross neglect of duty." Finding, therefore, that the facts of this case do not constitute "extreme cruelty," or "gross neglect of duty," I refuse the application for divorce.

But this petition contains also a prayer for alimony, and the next inquiry is, do the facts under consideration constitute a case for the allowance of alimony? The law assigns as grounds for the allowance of alimony alone, "gross neglect of duty," and "when there is a separation in consequence of ill treatment on the part of the husband, whether the wife be maintained by the husband or not." We have seen, as grounds of divorce, "gross neglect of duty" and "extreme cruelty," but when the law making power came to consider what should be grounds for the allowance of alimony alone, it says "gross neglect of duty," and drops the words "extreme cruelty," (the superlative degree) and substitutes therefor simply "ill treatment," (positive degree); and as if to indicate beyond all doubt that the legislative intent was to allow alimony for a less cause than divorce, it adds, in substance, that where ill treatment exists, and consequent separation by the wife, even though the husband maintain the wife, there is a ground for the allowance of

alimony. "Extreme cruelty" existed originally as a cause for divorce. The statute allowing alimony alone was enacted subsequently. The legislature, for the allowance of alimony alone, adopted, very generally, the grounds that had been previously on the statute book, for the allowance of a divorce, until they came to the ground "extreme cruelty," when that was dropped and in its place were substituted the words—"when there is a separation, in consequence of ill treatment on the part of the husband." (2 Curwen's Revised Statutes, p. 1662.) In 1857 the legislature repealed this law, and enacted, in its place, the one under which this case is brought, adding to the repealed law the words following: "Whether the wife be maintained by the husband or not." (54 vol. Ohio Laws, page 130.) The conclusion is clear, the legislature intended that a less degree of ill treatment should be a sufficient ground for alimony alone than was required as a ground for divorce. The inquiry, then, is, has there been ill treatment by Mr. Duhme and consequent desertion by Mrs. Duhme?

I think there has been. Making all proper allowance for the conduct of Mr. Duhme, it was ill treatment in him to live with his wife for years as if she were a stranger to him; it was ill treatment in him to curse his wife; it was *ill treatment in him to impute to her a want of chastity; it was ill treatment in him to 192
communicate his suspicions to others, and thus lay the basis for calumny and scandal against her.

In consequence of this ill treatment Mrs. Duhme separated from her husband. The requirements of the statute are, thus met in this case, and it is my duty to allow Mrs. Duhme alimony. But a technical objection is here raised. It is said that this is an application for divorce, and *alimony* as incidental thereto; that for a party to avail herself of the statute for the allowance of alimony alone, the prayer should be for alimony alone. It is not alleged that the facts set forth in the petition would not be a sufficient predicate in law for the allowance of alimony, but because there are two prayers at the close of the petition, one for alimony and one for divorce, it is said the petitioner must abandon this suit, and begin a new suit by filing this same petition, omitting the prayer for divorce. I do not think the law requires so vain a thing. The general principles of pleading do not require it—petitions, bills in equity, conclude with several prayers and with alternative prayers. The facts stated in the petition constitute the case. The prayer of the petition, is drawn according to the pleader's opinion of the relief he is entitled to upon his petitions; the court grants that prayer, that relief which the petition, as proven, requires. But every part of a law is to be construed with reference to the whole. Section 4 of the "Divorce Act" (54 O. L., 132) providing in what cases an appeal may be allowed, says, "An appeal to the district court may be allowed in cases in which the court shall give judgment in favor of the wife for alimony alone, *without granting a divorce*," thus recognizing the fact that alimony may be allowed on a petition for divorce and alimony, even though a divorce is not allowed and thus

the law has heretofore been, Laughery v. Laughery et al, 15 O. 404.

In the allowance of alimony it is not a case to be harsh to Mr. Duhme. He has now in his possession real estate belonging to his wife; he has had the income of this real estate for twelve years. This is said by her counsel to have amounted in that time to about $20,000, clear of all expenses. Mr. Duhme received from his wife $7,216 in cash which the testimony shows, he has expended in the improvement of her property. I will allow to her, her real estate; $1,000 only in money, and the costs will be charged to the defendant. The allowance of $1,000 is to cover the expenses of the trial to her.

They have two children, (boys,) aged respectively five and eight years. The younger child will be given to his mother—the elder to his father, with mutual access. In the disposition of the children, I have had in view the desire to draw these parties together. In the separation of the children there is a lasting bond of union. There is no sufficient reason why they should not come together; there is much reason why they should. These little ones have a right to demand of their father paternal care and affection; they have a right to demand of their mother maternal care and affection. All this they can only have when there is union between the father and the mother. Let them be united.

Tilden, Rairden & Tilden, and Wm. Johnston, for petitioner.

Lincoln, Smith & Warnock, for defendant.

[*Hamilton Common Pleas Court.] 193

STATE V. COOK AND SEITER.

For opinion in this case, see 2 Dec. R. 36, (1 Western Law Monthly, 201.)

This case was reversed by the Hamilton circuit court. See *post.*

[*Superior Court of Cincinnati, General Term, 1858.] 209

WHITNEY ET AL. V. ROGERS ET AL.

For opinion in this case, see 2 Disney, 421.

[*Superior Court of Cincinnati, General Term, 1858.] 211

WILLIAM WOOD V. J. PEARCE.

For opinion in this case, see 2 Disney, 411.

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*RAILROAD MORTGAGES. 218

[Licking Common Pleas Court, March Term, 1859.]

JOHN MCCORMACK V. CENTRAL OHIO R. R. CO., GEO. S. COE ET AL.

The necessary expenses for keeping up and operating a railroad are, in equity, the first charge upon its earnings. Therefore, when it becomes necessary to purchase machinery for the successful operation of the road, the same should be paid for out of the current earnings of the company, (in the absence of an agreement to the contrary,) notwithstanding a mortgage has been previously made upon the road, its franchises, incomes, etc., present and future..

In this case the railroad company had, during the construction of its road, mortgaged the road, its franchises, and all its property, present and future, together with its "tolls and income," to Geo. S. Coe, in trust, to secure bonds upon which to raise money to finish and put in operation the road. The court held:

FINCH, J.

First.—That the mortgage did not operate to create a charge on the future earnings or income of the company in the *ordinary 219
sense of a mortgage lien: but that by force of its character and other enabling statutes of Ohio, on that subject, that instrument ought to be sustained as a quasi deed of trust, or agreement under seal between the so-called mortgagor and mortgagee, by which the railroad company was to remain in possession of the road, and manage its affairs for the benefit of the mortgagee and all other parties interested, till default made, etc.

Second.—That, as this income could only be produced by operating their road, and this, of necessity, involved the constant outlay of large sums of money, for which no other provision was made by the parties, the necessary expenses of keeping up and operating the road, is, in equity, the first charge upon its earnings.

Third.—If at any time, while the road remains in the hands of the company, it becomes necessary to purchase locomotive engines or other machinery, in order to continue the successful operation of their road, the directors of the company have the right, and it is their duty, as well to the mortagee as to the stockholders and creditors, to purchase and pay for the same out of the current earnings of the company, and if, under such circumstances, they contract a debt for such necessary machinery, the creditor has a right (in the absence of any understanding to the contrary) to be paid out of the current income of said company, and in that respect is to be classed with laborers and others who minister to the daily necessities of the company.

Fourth.—That the mortgagee (after default) is to be next paid out of this fund; and lastly, the general creditors. Judgment accordingly.

[It will be observed that the foregoing decision differs from the tenor of several decisions we have already published. We have published all the decisions on this subject that have been made public.—ED. W. L. G.]

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225 [*Superior Court of Cincinnati, Special Term, 1858.]

THORNTON CHECK v. THE LITTLE MIAMI RAILROAD CO.

For opinion in this case, see 2 Disney, 237.

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231 [*Superior Court of Cincinnati, Special Term, 1859.]

NEFF'S EXECUTORS v. NEFF'S HEIRS.

For opinion in this case, see 2 Disney, 468.

*HABEAS CORPUS. 234

[Hamilton Common Pleas Court.]

EX PARTE LEWIS EARLY.

1. The writ of *habeas corpus* is a writ of right; yet, at common law, it does not issue as a matter of course—it does not issue when, upon the petitioner's own showing, the court, upon the return, would be compelled to remand to custody.
2. The law of Ohio requires the writ to issue, in all cases, in behalf of a party confined in a jail of the state, except in behalf of a person committed on final conviction, or committed for treason or a capital offense, plainly and specially expressed in the warrant of commitment.
3. Where courts have concurrent jurisdiction, the court which first acquires jurisdiction of a given case, retains it, to the exclusion of the other courts.
4. When a state court issues a writ of habeas corpus, directed to a marshal of the United States, for the release of a person alleged to be unlawfully held by him, the marshal's return, uncontradicted, that he holds the party by a warrant from a United States Commissioner, under the fugative slave law of 1850, is conclusive upon the state court, and the writ must be dismissed.

This was an inquiry before Judge DICKSON, upon a return made by United States marshal Sifford to a writ of *habeas corpus*, directing him to produce in court, the body of Lewis Early, a negro, alleged to be in his custody without authority of law.

The marshal set forth in his return, that he held this party under a warrant from Charles Brown, United States commissioner, and in obedience to his order, and that at this hour, he was present at an investigation, pending before that officer, and could not, therefore, be produced before this court.

J. W. Caldwell represented Lewis Early; and the marshal was represented by the Hon. Geo. E. Pugh.

Mr. Caldwell applied for a continuance of the case, until after the termination of the proceeding before the commissioner, and asked that the marshal should have leave to amend his return.

Mr. Pugh—He has not asked leave.

Mr. Caldwell—Well, that he be directed to amend it. The counsel then went into a statement which he claimed to be the facts of the case, and alleged that if Early left the state of Virginia and came into Ohio alone or in company with George Schetzer by the consent of George Kilgour, his master, he was a free man.

Court—The question is as to the sufficiency of the return; the facts back of it are not before the court.

Mr. Caldwell then proceeded to contend that the framers of the constitution did not contemplate that a judge of the U. S. court should have power to appoint any creature (he did not use the word offensively), upon whose action the liberty of the citizen should depend: this commissioner had no more power to hold this man than a notary public or a justice of the peace would have. The

doctrine would not be tolerated a quarter of a century ago, in the bosom of the Democracy. Nothing but the most ultra-sectional political views could have led to such an enlargement of the boundaries of the jurisdiction of an office so created, as had been claimed for this office of commissioner. He (Mr. C.) now submitted
235 *that the return of the marshal was an insufficient return, and that he should be directed to amend it, and, at the termination of the examination before the commissioner, produce in court the body of Lewis Early, that the court might decide whether he came to Ohio by the wish of Mr. Kilgour, or had been brought here by Schetzer, the latter having the title conveyed to him. Was Mr. Pugh afraid of state sovereignty—of the integrity of a state court?—afraid that a citizen of Virginia would not get his rights in a state court of Ohio?

Mr. Pugh—Suppose I am afraid, how will that affect the question? Mr. P. would now merely suggest that if the court were to make an order that the marshal produce this negro, after the decision of the commissioner adversely to Mr. Caldwell's claim, it would be impossible for the officer to obey such a writ, as the negro would be in the custody of his master.

Upon an intimation from the court that it did not desire to hear argument on that side of the case, Mr. Pugh closed his remarks.

DICKSON, J.

This is an application made by Messrs. Jolliffe and Caldwell for the discharge of Lewis Early from the custody of the United States marshal. The petition sets forth that the custody is held under a warrant from Charles Brown, a commissioner of the United States; and that this commissioner had no legal authority to issue the same. The return of the marshal is, in substance, that he holds Early in obedience to this warrant, and the order of said United States commissioner, and that he has Early now before the commissioner pending an investigation, and, therefore, he cannot produce him in this court. The truth of this return is not denied.

Two questions are presented for determination—

1. Ought this court to have issued the writ of *habeas corpus*? At common law, while this writ was always considered a writ of right, it did not issue as a mattter of case. When the petitioner, by his own showing, presented such a case, that on the return of the writ, the court would be compelled to remand the party the writ did not issue. (3 Barnwell and Alderson, 420). The same rule obtains in the states of Massachusetts and Pennsylvania (Sims case, 7 Cushing 285, 26 Penn. St. R., 9). The reason for it is obvious.

Our state pursues a somewhat different policy, and determines, in certain cases, upon the return, that which at common law is determined upon the application for the writ. The legislature prescribes that the writ shall issue in all cases, where the party is confined in a jail of this state, except in behalf of a party, convicted of some crime or offense for which he stands committed, or who has been

committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment; and that it shall issue in all cases in behalf of persons unlawfully deprived of their liberty. (Swan's Statutes—new ed.—p. 450).

The supreme court in the case *ex parte* Collier, 6 O. S., 55—a case precisely analgous to this—held in substance, that the writ should issue, and the rights of the parties be determined upon its return.

2. The second question is as to the sufficiency of the return of the marshal—does it excuse him from the production of the body?

It does, unless the commissioner had no jurisdiction to issue the process under which the marshal holds the party. The rule applicable to the case is this: *where courts have concurrent 236
jurisdiction, the court which first acquires jurisdiction of a given case retains it to the exclusion of the other courts. This is a rule of peace, of harmony, to prevent collision and conflict between the courts, it rests in comity. It is important wherever there are courts of concurrent jurisdiction; it is especially important in our complex government, with state and federal judiciaries, operating upon the same people and within the same territorial limits. The court that oversteps or disregards this rule is guilty of a grave offense against the administration of justice. The rule, however, is subject to proper limitations. If a court without any jurisdiction therefor, issue a process that process is void, and a court of competent jurisdiction may so declare it. If, for example, a court of exclusively civil jurisdiction, should assume criminal jurisdiction, and issue the process incident to criminal procedure, such process would be void and a competent court might disregard it.

The only inquiry then in this case is, had the commissioner jurisdiction to issue the process under which the marshal holds the party? He had, if the fugitive slave law of 1850 is a constitutional law. This latter is a grave question. There is much learning upon it. The most eminent statesmen and jurists of our country have brought their whole strength to its investigation. The books furnish the results of their labors. I do not, however, propose now to examine this question upon principle. It would be supererogation. The question is *res adjudicata*. The fugitive slave law of 1793 has been held constitutional by the supreme court of the United States in the Prigg case, 16 Peters, 539.

This decision was affirmed by the same court in the Vanzandt case, 5 Howard, 215, and reaffirmed by the same court in 14 Howard, 13. The fugitive slave law of 1850, so far as constitutional questions are concerned, differs in but one respect from the preceding law. The power of remanding by the latter law is given to commissioners, by the former it was given to the justices of the peace. The law of 1850 has been held constitutional by Judge McLean, *ex parte* Robinson, 6 McLean, 355, by Judge Nelson (of the New York circuit), in a charge to the grand jury, 1 Blatchford's Reports; by the unanimous opinion of the supreme court of Massachusetts, 7 Cush.,

285, and on the 7th of March last by the unanimous opinion of the supreme court of the United States.

The question is *res adjudicata*, and the genius of the common law is adherence to settled precedent. In the face of this weight of authority, it would savor of factious opposition to federal rights, for an inferior court of a state to interpose and declare the law unconstitutional. Such a proceeding would be productive of no good and of much harm; it would tend, in the minds of many, to associate the idea of freedom with lawlessness, to produce alienation and distrust between the state and federal judiciaries, where mutual regard and confidence should obtain. If the law is oppressive and unjust there is a constitutional remedy, by application to the legislative department of the government, or it may be to the supreme court of the United States for reconsideration and reversal.

With this view of the law, for me, as a judge, to interfere by *habeas corpus*, and free this man from the custody of the marshal, would be an act of the same character as for me as a man to interfere by personal violence to accomplish the same purpose. Either would be an act of physical force unwarranted by law. I cannot do it. Let the writ be dismissed.

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241 [*Superior Court of Cincinnati, General Term, 1858.]

BROWN v. ALEXANDER.

For opinion in this case, see 2 Disney, 395.

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243 [*Superior Court of Cincinnati, Special Term, 1858.

JOHN HUFF v. HATCH & LANGDON.

For opinion in this case, see 2 Disney, 63.

*JUDICIAL SALES. 245

[Hamilton District Court, 1859.]

HARTSHORNE v. REEDER ET AL.

An appraisement and sale of the whole property by the sheriff will not be set aside on the opinion of witnesses that the property would bring more if parceled into lots, the objection is too late, the application should have been made to the sheriff.

An appraisement and sale was made of the whole property, and objection is raised that it should have been appraised and sold in parcels.

The Court, (SWAN, J., presiding.)

Held, That the judgment debtor *should have made appli- 246 cation to the sheriff to have the appraisement and sale in parcels. The objection comes too late, when simply grounded on the opinion of witnesses, that the property would, in their opinion, bring more by being parceled into lots.

Motion overruled.

PLEADINGS.

[Hamilton District Court, 1859.]

JOHN ROSE v. JACOB CREUTZ.

A petition to collect money-rent under a written lease may be verified by the plaintiff's attorney, if the instrument is in his possession, it being a written instrument for the payment of money only, within section 113 of the Code.

The petition is verified by the attorney of plaintiff, because the instrument is in his possession. On petition being filed motion was made to strike from files, because the instrument being a lease is not for the payment of money only.

Motion overruled.

ON ERROR *Held*: That such instrument when sued on for money-rent only is a written instrument for the payment of money only, within the terms of the code, section 113.

Judgment below affirmed.

[*Superior Court of Cincinnati, General Term, 1858.] 251

THE DIRECTORS OF THE WESLEYAN CEMETERY v. WILLIAM WOODRUFF.

For opinion in this case, see 2 Disney, 216.

252 [*Superior Court of Cincinnati, Special Term, 1859.]

LEMUEL H. SARGENT v. EDMUND B. TOWNSEND.

For opinion in this case, see 2 Disney, 472.

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253 *SURETY—PARTNERSHIP.

[Superior Court of Cincinnati, February Term, 1859.]

THE BAKERS' UNION OF CINCINNATI v. H. W. STREUVE.

A surety cannot be charged unless the claim is brought within the very terms of his contract. The substitution of a new agreement, instead of that to which he was originally a party, will exonerate him from his liability. But whenever it is evident, from the agreement or the circumstances attending it, that a security given to a partnership was intended to continue in force, notwithstanding there might be a change in its constitution, the court will extend it to embrace all subsequent liability.

STORER, J.

The plaintiffs composed a voluntary association, in the nature of a joint stock company, transacting business under the name of the Bakers' Union of Cincinnati, whose object, it appears, was to purchase flour, and resell it for the benefit of the parties interested: especially, that the members who were practical bakers might, at all times, have the privilege of procuring flour at the lowest price.

In the month of June, 1856, the defendant's son, H. H. Streuve, a minor, was appointed the clerk and agent of the plaintiffs, having the entire control of the property then on hand, with power to conduct the business, make sales and purchases, and collect debts. On the 6th of the same month, the defendant executed the following bond:

"Know all men that I, H. W. Streuve, of the county of Hamilton, and state of Ohio, am held, and firmly bound unto the Bakers' Union of Cincinnati in the sum of $5,000, for the payment of which I hereby bind myself, my heirs, executors, administrators, and assigns.

"The condition of the above obligation is such, that: Whereas said Bakers' Union have this day, employed Henry H. Streuve, as clerk in their business, so long as they can agree: Now, if said H. H. Streuve shall faithfully pay over all moneys by him received, and shall not, in any wise, cheat or defraud said association, then this obligation shall be void, otherwise, to be, and remain in full force."

It is admitted that H. H Streuve was in the employ of the plaintiffs, from the date of his engagement, till the early part of the December following.

When the petition was filed, the parties named as plaintiffs were the members of the association; but, by leave of court, the pleadings have been amended by making the Bakers' Union of Cin-

cinnati, party plaintiff, instead of the individuals composing it, as permitted by section 1 of the law of February 27, 1846. (Swan, 706.)

The plaintiffs claim, the defendant's son received or collected large sums of money while in their employ, which, of right, belonged to the association, and which have not been paid over, or *accounted for, as he was bound to do. On the other hand, 254
the defendant denies the alleged indebtedness of his son, and asserts that he has fully paid to the proper officers of the plaintiffs, all sums he has received.

The parties have been fully heard at bar, as well as on their written testimony. A reference has been made to a master, who has reported, and since his report, the case has been reheard, witnesses again examined, and counsel have argued for both parties.

On the trial, it was proved that one of the members of the association, who owned stock, at the time the bond was executed by the defendant, had since sold his interest to a third person, and is not now a party to the association. And it is claimed the bond cannot, therefore, be enforced, as it wasnot intended, it is said, to cover any liability, other than that which was originally imposed by the terms of the contract. That the introduction of a new member into this association must, therefore, result in the discharge of the obligation, *per se*, so far as any subsequent liability can be imposed, and make it necessary, whenever a stockholder disposes of his share in the company, that a new bond should be given, though the same association still exists, the same business transacted, the same capital employed.

It is very clear, that a surety cannot be charged, except the claim against him is brought within the terms of his contract. The substitution of a new agreement, instead of that for the performance of which he was responsible, will, therefore, exonerate him from liability; and in that large class of cases, where officers of corporations, or other companies, public or private have given bonds to perform perform their duties during their term of office, and their employments are annual, or at other stated periods, their obligation is confined to the time for which they were appointed: at the expiration of that term their liability terminates. When reappointed the employees must enter into a new guaranty.

But whenever it is evident, either by express argument, or implied from the conduct of the parties, the nature of the business to be transacted, as well as the circumstances of the case, that a security given to a firm, was intended to continue in force, notwithstanding there might be a change in its constitution, the courts will extend it to embrace all subsequent liability. (Smith M. Law, 99.) So in Metcalf v. Brown, 12 East, 400, it was held that the trustees of a joint stock company might sue on a bond, made to them as such notwithstanding a change in the company, for the obligor, knowing the fluctuating state of the company, must have so intended.

So a promissory note, given to secure orders made by a firm, will be available for the benefit of future as well as present mem-

bers, if it clearly appears to have been the intention of the makers. Pease v. Hirst, 10 B. & Cres., 122.

When we consider the circumstances attending the execution of the defendant's bond, we must conclude it was intended to cover the delinquencies of his son, during the whole term of his employment, however much the ownership of the stock may have changed. The substitution of one individual for another, in the membership of the company, imposed no greater liability than already existed upon the bond; nor could it create any new duty, or change the mode of conducting the business, It is very fully proved that no objection was taken by the defendant to the introduction of new members, but his principal remained, notwithstanding, in the employ of those who represented the same body, which he originally engaged to serve, performing, meanwhile, the same duties, without
255 *modification in the same manner of the performance.
We must, therefore, hold the bond was a subsisting security when this suit was brought, and will furnish grant for the plaintiff to recover whatever sum the principal may have been in arrear.

Stallo & McCook, for plaintiff.

W. T. Forrest, and Tilden, Rariden & Tilden, for defendant.

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257 [*Superior Court of Cincinnati, Special Term, 1858.]

ABRAHAM O. BRANNON, ASSIGNEE, ETC. v. DANIEL BRANNON ET AL.

For opinion in this case, see 2 Disney, 224.
This case was denied in Roberts v. McWilliams, 4 Gaz. 97, *post.*

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265 [*Superior Court of Cincinnati, Special Term, 1859.]

EDWARD J. LEWIS, v. ADOLPHUS H. SMITH AND HENRY O. GILBERT.

For opinion in case, see 2 Disney, 434.

*JOINDER OF ACTIONS. 266

[Superior Court of Cincinnati, Special Term, 1859.]

HOWLETT v. MARTIN.

A suit to obtain judgment on a note and a suit to foreclose a mortgage securing the note, between the same parties, are proper to be consolidated on motion, although there are lienholders made parties in the latter action not interested in the former.

STORER, J.

These actions are brought, the one to obtain judgment on a promissory note secured by mortgage, the other to foreclose, as it is alleged, the mortgage itself.

The defendant Howlett moves that the actions be consolidated under section 143 of the Code; this section provides, where two or more actions are pending in the same court, which might have been joined, the defendant may, on motion, and notice to the adverse party, require him to show cause why the same should not be consolidated, and if no such cause be shown, the said several actions shall be consolidated.

The question now presented, directly involves the power to give judgment upon the note or bond, which is the evidence of the debt, in the same action where the plaintiff seeks to foreclose the mortgage which secures it.

I see no reason why the several remedies the plaintiff might have, before the Code was adopted, should not be combined in an action under our present practice.

The change so thorough (so unwise in the old practice), very clearly indicates it to have been intended by the legislature to unite in one suit all conceivable causes of action of the same class, and all the various remedies necessary to give them effect. Unless the joinder will produce manifest incongruity and the parties be deprived of the benefit of a full and fair trial, there would seem to be no good ground to *forbid the pursuit of all the usual remedies, 267
at the same time, and in the same procedure. The rendition of a judgment for the debt, may be necessary to bind the estate of the debtor, not included in his mortgage; the foreclosure may be desired to exhaust the value of the security; and finally the possession of the property mortgaged, may be necessary to subject the rents and profits; a step that is pursued in every proper cause, under another form, when the court will authorize a receiver to collect and appropriate them.

The great object of the consolidation, is to save cost, and prevent multiplicity of suits; it is regarded always with favor, and never denied, when it is clear the parties are the same, and the cause of action is identical. It is true there may be more parties required, when the petition is filed to foreclose, than when the remedy is upon the note or bond, but the cause of action is the same in

both cases, for if the debt is not due, or its consideration has failed, the security is not available, nor does the joinder of prior, or subsequent lienholders make the parties really interested, any less the same.

We think the two actions now before us may well be tried together, and all the remedies a plaintiff has a right to pursue fully imparted when they are sought by petitions in one action only.

Consolidation ordered.

Dodd Huston, attorney for plaintiff.

[Superior Court of Cincinnati, Special Term, 1859.]

THOMAS W. FARRIN v. JONATHAN CREAGER ET AL.

For opinion in this case, see 2 Disney, 464.

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273 [*Superior Court of Cincinnati, Special Term, 1859.]

DARST & HERCHELRODE v. SLEVINS & CALVERT.

For opinion in this case, see 2 Disney, 473.

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275 [*Superior Court of Cincinnati, Special Term, 1855.]

DAVIS & MAJOR v. CINCINNATI, HAMILTON & DAYTON. RAILROAD CO.

For opinion in this case, see 1 Disney, 23.

*MUNICIPAL CORPORATIONS—STREETS. 277

[Superior Court of Cincinnati.]

†O. B. FARRELLY & CO. v. THE CITY OF CINCINNATI.

1. The keeping the streets in good repair, is a public duty, imposed on the city as a corporation by statute. An action will lie where an individual is specially injured in consequence of the non-observance or non-discharge of such duty, or through misfeasance or malfeasance in its discharge.
2. Individuals cannot enforce a public right or redress a public injury by suits in their own names. It is only when an individual suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him.

GHOLSON, J.

The petition of the plaintiff states that they are and have been since the 17th day of March, 1852, the owners and conductors of a line of omnibuses, which have plied regularly between the corner of Main and Fourth streets in Cincinnati and Corryville, near said city, by way of Vine street, making trips every half hour in the day; that such line of omnibuses had been of benefit to the public and profitable to the proprietors; that as owners of said line of omnibuses, in and over said route, they are and have been duly licensed by the said city, and have fully paid the taxes assessed for the same. The petition further states that Vine street is a public highway or street; under the exclusive care and supervision of said city, which it is the duty of said city to keep in good order and repair; but that the said city neglecting its duty, has not kept in repair and fit for ordinary use and travel that part of said street between Mulberry street and the north line of the city, which on or about the first of January, 1856, became wholly broken up and ruinous, full of deep holes and big stones, and so badly cut up in the middle or roadway, that it could be traveled only by driving in and over the gutters.

The petition alleges that in consequence of this condition of the street, although their omnibuses and horses, as well as the harness and equipments, were good and sufficient, and they employed good and skillful drivers, while traveling along said street, the omnibuses were racked and broken, the horses strained, crippled, and in some instances killed. The petition further alleged that at various times the plaintiffs were compelled in bad weather, by the condition of the street, to abandon a part of their usual route for their line of omnibuses, and thus lose a great deal of the good will and custom of those who had previously and regularly used the said line of omnibuses.

The petition states that all this injury and loss occurred through the neglect of the defendant, notwithstanding the frequent petitions of the plaintiffs and others, addressed to the city authorities at different times since the 1st day of January, 1856, requesting them

†The judgment in this case was affirmed. See opinion 4 Gaz. 33, s. c. 2 Disney, 516.

to cause said street to be repaired. The plaintiffs, therefore, claim damages to the amount of three thousand dollars.

To this petition a demurrer has been filed. First—On the ground that the facts set forth do not constitute a cause of action; and second—On the ground of an improper joinder of causes of action.

The duty of the city of Cincinnati in reference to public streets, has been frequently the subject of adjudication. The keeping the streets in good order is a *public duty* imposed on the city as a corporation, by the statute. Wherever such a duty has to be observed
278 toward *the public, and an individual is *specially* injured in consequence of the non-observance or non-discharge of such duty, or through misfeasance or malfeasance in its discharge, an action will lie. 3 Black. Com. 165. Broome on Com. Law, 661, 2 Cl. & Fin. 331.) The breach of a public duty causing damage to an individual, combines two tortuous ingredients—the wrong done to the public, and the wrong done to the individual. Individuals cannot enforce a public right, or redress a public injury by suits in their own names. The law gives no private remedy for anything but a private wrong. It is not enough that an individual suffers in common with the rest of the community—his damage must be over and beyond, and only in respect of such special and peculiar damage, can he maintain an action. (5 Bingh. N. C. 281, 29 E. C. L.) This distinction, it has been said, is intelligible enough, but there may be difficulty in its application, and cases may arise in which it is not easy to draw the line between a strictly private injury, and a public nuisance. (Broome on Common Law, 98.)

When a common highway is suffered to become in a foundrous condition for want of proper repair, the injury to the citizens in general is, that they cannot ride or walk in the same track as before, but for that cause alone, it is very clear no action will lie (1 Inst. 56 A. 2 Bingh. N. C. 281—29 Eng. Com. Law.) The business of one man may require him to pass over the highway daily, of another, only occasionally; yet it has never been supposed that this difference in degree of the injury was sufficient to make it special and peculiar. On the contrary, it has been said: "Even where one person sustains an injury in common with the public and, from the circumstances in which he may happen to be placed, suffers more frequently, or more severely than others, he will not, on that account, have, as of course, a separate right of action. It is only when he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him." (Broome on Com. Law., 661, 7 Cushing 510–511.)

There are only two classes of cases, so far as my researches have extended, in which injuries have been deemed to be special and peculiar. One proceeding from the local position of the plaintiff, as where he had a shop or place of business located on or near the highway which became obstructed. Such was the case of Wilkes v. The Hungerford Market Company (2 Bingh. N. C. 281), in which it was said, "all who passed had the right of way, but all had not

shops." Another class arises from the particular nature of the injury, as where one traveling on the highway, and using due and proper caution, suffers from an obstruction or defect attributable to the negligence of the party bound to keep the highway in repair. The injury of which the plaintiffs complain as the foundation of their action does not fall within either of these classes. Their business required that they should use the highway very frequently, not only daily but hourly, they may thus have suffered more severely than the rest of the public, but not in a different way.

It is true the petition alleges what might be, at first view, regarded a particular injury, the breaking of vehicles and crippling of the horses by which they were drawn, on account of the dangerous condition of the highway. But it is apparent from the generality of the statements, and it was admitted by counsel, that this allegation constitutes not the ground of the action, but a specification of the damage resulting from the interruption of the alleged *right 279
of the plaintiffs to travel over the highway. After the highway became in the ruinous condition described in the petition, it could no longer be prudently and safely used. If such its condition, and the interruption in its use, gave to the plaintiffs no ground of action they surely would not create a claim for damages by continuing to travel with their vehicles and horses.

Under these views the demurrer must be sustained.

King & Thompson, for plaintiff.

R. B. Hayes & Wm. Disney, for city.

[*Superior Court of Cincinnati, Special Term, 1857.] 281

SMEAD, COLLARD & HUGHES v. FAY ET AL.

For opinion in this case, see 1 Disney, 531.

ATTACHMENT.

[Superior Court of Cincinnati, Special Term, 1859.]

CHAMBERLAIN & CO. v. E. K. STRONG.

To sustain an attachment, proof of a fradulent intent to dispose of property is necessary. Constructive fraud is not sufficient. A sale to one creditor, without actual fraud, and to prevent one creditor from gaining any advantage over others, does not show a fraudulent intent which will support an attachment.

STORER, J.

In this class of cases, we require proof of a fraudulent intent on the part of the defendant to dispose of his property, before we can sustain an attachment. What is termed in legal parlance, constructive fraud is not sufficient: such conduct is very properly within the more approriate supervision of the chancellor before whom an issue
282 can be made up, and the principles *governing the statute of frauds effectually applied. We find in the case before us, no actual fraud to have existed in the sale charged to have been made to defeat creditors.

If any inference can be drawn from the conduct and language of the defendant, his object was to prevent one creditor from gaining an advantage over the others.

The mode restored to was certainly not as unexceptionable as would have been an assignment for the benefit of all the creditors, as it is subject to more abuse, and leaves the proceeds of the property sold too much under the control of the debtor, but there is no such case made out as will authorize us to continue the attachment. It must, therefore, be dismissed.

PLEADING—PARTIES.

[Superior Court of Cincinnati, Special Term, 1859.]

FRICKE V. EBERHART.

To a petition against one only of two joint makers of a note, the defendant may demur for non joinder of the other joint contractor. A demurrer under the Code being equivalent to a plea in abatement, and as between such joint contractors, there may be a right of subrogation, or one may be a mere surety, and it is against the policy of the law that he alone should be selected.

STORER, J.

Petition on a note signed by another jointly. Defendant demurs and claims there is a defect of parties, in that all the makers are not sued.

The defendant had the right, before the Code, in a case like this, to require that all the joint contractors should be joined. Under the Code, the demurrer is equivalent to a plea of abatement. It practically produces the same result: The plaintiff must join all the persons liable upon the contract wherever it appears any such exist.

Each party has the right to compel contributions, and when the judgment is against all the parties, there can be a subrogation to him who pays the debt: Besides one may be a surety, and it would be against the policy of the law to permit him alone to be selected for suit, and the principal debtor remain unmolested.

Demurrer sustained.

[*Superior Court of Cincinnati, General Term, 1859.] 289

YOUNG & POMEROY V. EXECUTORS OF NOBLE.

For opinion in this case, see 2 Disney, 485.

296 *PLEADING.

[Superior Court of Cincinnati, Special Term, 1859.]

†GEORGE SHILLITO v. THE MERCHANTS' AND MANUFACTURERS' INSURANCE CO.

1. There can be no propriety in a demurrer to an answer containing a mere general denial of the allegations of the petition. But a statement intended as a specific denial may be tested by a demurrer to ascertain its sufficiency.
2. A division of an answer by numbers is only contemplated by the Code as to the part containing the defenses, and is not required when there is only a denial, and when a demurrer is directed to a single clause of the answer, it should appear that the clause has no connection with what precedes or follows, especially where the grounds of demurrer are not pointed out, otherwise the division by figures will not be regarded, and the court will consider that clause as part of other defenses alleged.

GHOLSON, J.

In this case a demurrer has been filed to the answer of the defendant, or rather to the two clauses of the answer, which are marked 2 and 4.

The Code provides that an answer shall contain, first, a general or specific denial of each material allegation of the petition controverted by the defendant. Second, a statement of any new matter constituting a defense, counterclaim or set-off, in ordinary and concise language, and without repetition. When the Code was first adopted, no demurrer to the answer was allowed; afterwards by an act passed February 20, 1856, the law was changed, and a demurrer allowed for the insufficiency of the answer, or to one or more of the defenses set up in the answer.

There can be no propriety in a demurrer to an answer containing a mere general denial of the allegations in the answer. To authorize a demurrer there must be a specific denial, or a statement of new matter in a form to constitute a defense. The general or specific denial must be limited to the denial of the plaintiff's cause of action, the effect being to throw on the plaintiff the burden of proof, and of course giving him the right to begin; the new matters constituting a defense, include what are called matters in confession and avoidance.

I can see no reason why a statement intended as a specific denial, may not be subjected to the test of a demurrer to ascertain its sufficiency, and in this case at least, the statute requires that the grounds of demurrer must be pointed out in, or with the demurrer.

One of the clauses in the answer to which the demurrer is directed, clearly appears to be a mere denial of an allegation in the petition. There is no statement of facts which would make it specific. The petition sets up a custom and avers that it is consistent with the terms of the policy. The clause in the answer states that

†The judgment in this case was affirmed by the supreme court. See opinion 15 O. S., 559.

the custom is inconsistent with the terms of policy "and is also contrary to the settled principles of law applicable to the agreement between the parties." The addition, really, neither weakens nor strengthens the denial. No fact is alleged, and at most, it is a general denial with an epithet appended.

The other clause to which the demurrer is directed, admits the shipment of the property as alleged in the petition, "and avers that a clear bill of lading was given by the agent of said vessel for said property on board of said ship, in general terms, and no provision made or leave given for carrying said property on deck."

This statement cannot be understood as new matter constituting a defense. The averment in the petition admitted in the first part of the clause is not the one intended to be avoided by the last. If it had been intended to admit a custom to carry on deck as alleged in the petition, the averment of a clear bill of lading having been given, containing no provision for carrying on deck, could not be regarded as avoiding such a custom. It is rather a denial that such a custom existed.

I am inclined to think that such was the intention of the pleader, but for a reason I shall proceed to assign it is not proper, in my opinion, now to decide the sufficiency of that averment considered as a specific denial, upon the present demurrer. In the first place, it is proper that the grounds should be pointed out as the statute requires in such a case. In the next place, I do not think, as to the present answer, *though there is a division by figures, 297 they are to be regarded.

By examination of the Code, it will be seen that a division by numbers, is only contemplated as to the part of the answer containing the defenses. No such numbering is required when there is only a denial, either general or specific, and in such a case, where a demurrer is directed to a single clause of the answer, it should appear that the clause has no connection with what precedes or follows; and particularly when the grounds of demurrer are not pointed out.

From the best idea I can form of the averment that a clear bill of lading was given, it is intended to meet and rebut the averment of a custom. If the pleader had been content to rely upon the denial to be implied from this averment, it might, perhaps, be proper to consider upon demurrer, how far the fact of time would in law operate as a denial. In other words, whether the two facts are entirely inconsistent, so that the averment of the one necessarily negatives the other. But the pleader is not content with a denial in that form—the answer proceeds with a general denial. I do not, therefore, think the sufficiency of the averment as standing alone can properly be examined upon a demurrer.

The plaintiff may, if he thinks proper, withdraw his demurrer, and require the defendant, by a motion, to render his intention in the answer more clear; but if this be declined, I shall overrule the demurrer upon the ground as before stated.

R. M. Corwine and R. B. Hayes, for plaintiffs.

Coffin and Mitchel, for defendants.

305 [*Superior Court of Cincinnati, General Term, 1859.]

HENRY RAUGHT V. JOHN BLACK ET AL.

For opinion in this case, see 2 Disney, 477.

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307 [*Superior Court of Cincinnati, General Term, 1859.]

FATMAN & CO. V. THOMPSON & TAFFE.

For opinion in this case, see 2 Disney, 482.

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323 *CRIMINAL LAW.

[Hamilton District Court, 1859.]

†JAMES BURNS V. THE STATE OF OHIO.

1. It is error to charge that deliberation and premeditation, as an element in murder, may be accomplished in a very short time—in a moment—so swift as thought is present, if one considers and thinks of killing, and then commits the crime.
2. The act of April 12, 1858, section 7 (4 Curwen, 3087), prohibiting the judge before whom a case is tried in the common pleas court, to sit in review of his own decision in the district court, if there is a quorum, etc., applies to criminal, as well as civil cases.

IN ERROR from the Common Pleas Court of Hamilton county.

[In this case the argument was made about two weeks ago, and the decision of the court was rendered a few days afterward. We had not intended publishing any part of the report of the case, because the opinion of the court was not in writing, our plan being in general to publish court opinions only from the manuscript of the judges; thus avoiding errors. But, in this instance, we have been requested by some of the members of the bar to give Mr. T. Shinkwin's report of Judgs Brinkerhoff's opinion, and follow this by the manuscript report of Judge Carter's dissenting opinion, with which we have been furnished.]

BRINKERHOFF, J.

The plaintiff in error, James Burns, was indicted, tried, convicted, and sentenced to suffer death, for the crime of murder in the first degree—the killing of Michael Burke. Upon the application to the supreme court for a writ of error, the testimony was carefully read by all the judges, who were unanimously of opinion that error had intervened, both of fact and of law, and that the writ ought to be allowed; but inasmuch as that court was on the eve of an adjournment until November, and apprehending that a

†This case overrules Cook v. State, 2 Dec. R., 36, s. c. 1 W. L. M. 201, or 3 W. L. G. 193.

failure of justice might ensue if the return of the writ was delayed until that time, thought it best to allow the writ, and make it returnable to this court at its present term.

The reversal of the court below was claimed on two grounds. *First*—Because the verdict of the jury was not warranted by the testimony. *Secondly*—That the court erred as to a matter of law in its charge to the jury.

In examining the question as to whether the testimony was sufficient to warrant the finding of murder in the first degree, the court examined the statutes referring to the various degrees of homicide, and adverted to the element of premeditation and deliberation *as the difference between murder in the first and second 324
degrees.

The group of persons (then proceeded the court,) brought into view by this record presents about as melancholy a picture of human nature in its most degraded aspect as can well be imagined. The prisoner was the keeper of a low drinking house, and of a lodging and boarding house for drunken strumpets. The deceased was a visitor at 2 o'clock of a Sunday morning, and the principal witness, or the only one competent to testify as to the fact of killing was a boarder, and it seems impossible for any rational mind to place that full and satisfactory reliance on the evidence of this witness (Bridget Duffy), which such a mind would naturally desire as the basis of a verdict or sentence of death. According to her own statement one quarter of her whole time was usually spent in the jail for drunkenness; and it was impossible for the court to shut their eyes to the fact that she was a strumpet; that she had been drinking more or less on the very day the occurrence took place to which she testifies, and that her perception, memory and conscience must have been obscured and beclouded by late hours and debauchery, and by hard drink—doubtless not of the best quality. Making the due and necessary allowances on the account of the state of her mind, her habits, her character, and the extent to which at least the accuracy of her memory is impeached, does her testimony make out a case on which a jury or a court could conscientiously and before God award the punishment of death? A majority of this court is clearly of opinion it does not; and that a new trial for this reason ought to be granted.

What is evidence? It is that which tends to induce conviction on the mind. But, looking at this evidence as it stands, it is unsatisfactory to induce in his (Judge B.'s) mind any other conviction than this; That these two degraded men had a quarrel, arising on a question as to whether a certain treat had been paid for, and, during the continuance of it, a knife, not prepared for the purpose, but accidentally within reach, is seized, and a mortal wound inflicted, not on a part of the body which an ignorant man would suppose to be a fatal one, and death ensues. Death, it would appear, resulted here from the use of a deadly weapon, upon a sudden quarrel, in which there was no premeditation in the design of taking life, even if that design existed. The court would remark, how-

ever, that if Burns had been convicted of murder in the second degree, they would not have felt at liberty to interfere on the ground that the testimony did not warrant the verdict.

It is important to notice that, in Ohio the crime of murder is *sui generis*—differing from murder as it exists in almost every state in this Union, and at common law. At common law, and by the statutes of nearly every state in the Union, that which in Ohio is merely murder in the second degree, is murder absolutely, and in the highest degree—so that the adjudications in other states on the crime of homicide, at common law or on the statutes, in whole or in part, varying so far from our own, can constitute no guide whatever, and in deciding this question, therefore, they had to look to the plain provisions of our own statutes and the adjudications of our own courts.

In the first place counsel complain of the definition given by the court below of the term "malice," and urge that it comprises a large number of different definitions, some of which are erroneous. The court did not view it in that light; it was to be taken as a whole; and while it must be admitted that the charge was somewhat redundant, and by its redundancy somewhat *obscure, yet it
325 could not be said, viewing as a whole, it was erroneous or likely to mislead the jury as to the import of this term "malice."

In the next place it is claimed the court erred in this—that the judge told the jury to deliberate was to weigh and to consider—premeditate was to think of before. In their original and true meaning this was correct. The charge then proceeds: "As to the question of time in reference to deliberation and premeditation we can of course lay down no rule."

That is just as it should be; but it then proceeds—"Deliberation and premeditation may be accomplished in a very short time—in a moment—so swift is thought." Now in this last clause it is claimed the judge erred, and this court is unanimously of opinion it did. The case of Shoemaker v. The State, 12 O., 43, goes the farthest in this direction; but it goes only to the extent of holding, that if the fact of premeditation and deliberation is made out to the satisfaction of a jury, the law fixes no time during which that deliberation shall continue. This, in the opinion of this court, and of the supreme bench, is going to the extreme verge of what the statutes of Ohio will permit, and they are unwilling to go a hair's breadth beyond it. For this reason they believed the court erred, and that on this ground, also, the judgment and sentence should be reversed, and a new trial granted.

It was said the same charge was given in the Loefner case, and that the judgment was affirmed by a majority of the supreme court. His (Judge B.'s) recollection was, that that branch of the charge was not assigned for error. Certainly it was not called to the attention of the court.

The court here felt compelled to make a remark, without being certain as to the propriety of uttering it—that there is (as was said) in this community a clamor for capital conviction and execu-

tion, arising from the supposed acquittal of parties tried for capital offenses, or a reduction of the highest crime to a lesser grade of offense by the verdict of a jury. But, granting it to be, that the administration of the law in the past had been too lax, it was a poor way to remedy it by making it too rigid in the future; and it was a poor consolation to a man, sentenced to the gallows contrary to law, that it was necessary to restore the balance arising from past delinquency. Courts of justice, whatever for the time being are the demands of public opinion, are made for the protection of innocence, and none of us know how soon we may be under the necessity of invoking them for our own protection against public clamor.

[Judge CARTER furnishes the following as a general synopsis of what was said by him in the district court, in expressing his dissent to the opinion of the majority of the court.]

CARTER, J.

In a matter of such grave importance, and more especially on account of the strong and singular language in which the opinion of a majority of the court has just been announced, it is necessary and proper for me to say a few words as an individual judge, and a member of this court.

In the first place I will say, by the opinion of the majority of this court, I have had no part or lot, in any way, in the consultation about this case, the discussion of its facts or principles, or in its decision, although the opinion is announced, by the mouth of the court, on the point of deliberation and premeditation, to be the *unanimous* opinion of this court. Although I wished to take part in the consultation and decision of the case, as a member of the *court, and holding it to be my right so to do, yet I was pre- 326
cluded by the majority of this court, and, of course, was obliged to succumb. My colleagues held that I was excluded from sitting in the case on error, by the law passed by the legislature, April 12, 1858.

In this opinion of a majority of this court I do not agree, and therefore express my dissent. The law of April 12, 1858, being "An act to relieve the district courts, and to give greater efficiency to the judicial system of the state," has nothing at all to do with criminal procedure. It treats altogether of civil cases and actions, and cases in the criminal jurisdiction of the courts were not at all in contemplation of the legislature. Part of the 7th section of this act reads as follows:

"And a judge of the court of common pleas, who has decided a cause in the common pleas, shall not sit on the review of his own decision, in the district court, on error or otherwise, when there is a quorum in the district court without him."

This is the language of the law, which a majority of this court decide, excludes me from sitting in this case. This is the language of a law enacted in reference wholly to civil procedure, and does not, in any way, touch criminal practice, and, among others, for this especially good reason; whatever the decision of the district

court, in a civil case, either party, plaintiff or defendant, has again the right of reviewing the decision in error, in the supreme court; but in a criminal case, if the decision here is against the plaintiff, the state, that is the end of it, and there is no more review. The state, then, stands not on equality with the defendant, and it never was in contemplation by the legislature to prohibit a judge of the court of common pleas to sit in review of his own decision, in a case like the present, with the other members of the court, in the district court. Holding this view, and because of the novel and strong language used in the decision of the majority of this court, and the singular allusions of the judge in the concluding remarks of his decision, I shall proceed to express, in my right, my entire dissent to the opinion of a majority of this court. The judge pronouncing the opinion says, and this is indeed strange enough to me, that the facts of this case showed such a state of case, that "no conscientious or rational-minded jury or judge, before God, should award or pronounce the punishment or sentence of death." I do not know how the majority of this court have viewed the facts of this case presented in *writing* in the bill of exceptions, but I will here most distinctly say, that my conscientiousness and my rationality, as well as that of the excellent jury of twelve minds, in the court of common pleas, and that, too, "before their God, did award and pronounce the sentence of death" upon James Burns, from the most solemn convictions of justice and of duty. (Here Judge Carter was interrupted by Judge Brinkerhoff, who denied having used the language attributed to him by Judge Carter, but said that the language was used in reference to the testimony of Bridget Duffy), and then Judge Carter continued: If this was so, it still furnished the same reason for him, (Judge Carter), speaking as he did; and I will go on giving my view of the facts, and the correct and honest view, too, which a jury of twelve minds took of them, when under the sanctity of a solemn oath—men of rationality and intelligence as they were—after a careful and deliberate investigation, they brought in a verdict of "guilty of murder in the first degree."

What are the facts of the case without the testimony of Bridget
327 Duffy, so much talked about in this decision of the *majority? —for these facts made out a case of murder in the first degree. Her testimony comes in to confirm the conclusion which the "rational and conscientious mind" adopts before testimony begins. Her testimony explains the particulars of the general conclusion before formed, on the facts before detailed. This, then, is the case, without the testimony of Bridget Duffy.

About two o'clock in the night season, on the bank of the river, on a street called "Robber's Row"—a most low and degraded place on the pavement, immediately before the door of a low doggery, kept by the defendant James Burns, the cry of "Murder, murder, murder, oh, Burns, you have murdered me," arouses the inmates of the sleeping rooms above, in the neighborhood. Men and women arise from their beds, and look from the windows above, and see a man, apparently lifeless, lying upon the pavement before Burns'

door, and Burns over him, with a large butcher knife in his right hand. They see Burns go to a pile of wood lying on the river quay, some fifty feet distant, and hide the knife in the wood-pile. Again he returns to the body, and taking a barrel of water standing close by, he throws it over him; again he approaches the wood-pile and changes the hiding-place of the knife—putting it still further in the wood-pile—takes the body by the shoulders, removes it into his house, and then flees the scene, announcing to a witness that there was a bit of a fuss, and he was going for a doctor. He goes to a doctor's office, some two squares and a half off, and no more is heard or seen of him, until some twelve days after, he is arrested in Evansville, in the state of Indiana, and brought to this city. Would not this state of facts justify a verdict of murder in the first degree? Would a "conscientious and rational-minded court," after the verdict of a jury of twelve minds, upon such a case, overrule the jury, and grant a new trial? These facts make out a case certainly as strong as that in which many prisoners have been sentenced and executed.

And now we have the testimony of Bridget Duffy, showing the particulars, and confirming the conclusion which the mind has already arrived at. She had been a lodger at Burns' hole the night previous; she had slept all day until six o'clock of the evening. She was addicted to habits of intemperance, but this was the only sin against her. She had not drank much that day, or that evening or night. Two men came in, the deceased and "his partner." They talk together. This was sometime in the night. The partner goes away, saying that he will go down for the steward of the boat, and return and have some fun, leaving on his departure Burns, Michael Burke, the deceased, and herself in the doggery. Burns calls upon Burke to treat. He does so, each one drinking, and Biddy, the witness, taking egg nogg. Drink over; Burke takes from a good deal of silver change which the witness saw open in his hand, a quarter of a dollar, and gives it to Burns, and Burns puts it in his vest pocket. The witness and deceased then sit down in conversation, and after a while Burns comes from behind the counter and sits down. Some time elapses, when Burns goes behind the counter, and says to Burke "I want you to pay for that last treat you had" Burke made answer, "that he had treated once, and paid for the treat, and would not be forced by any man to treat." Burns then said to Burke, "God damm you, I will soon show you whether you will or not." Burke got up and started toward the door leading to the street, to go out. Burns rushed toward him, caught him, and choked him till he was black in the face. There was a *table 328
which stood a few paces from the street door as you come in. Burke told Burnes to let loose of him. Burns pulled Burke from the door up to the table, where the butcher-knife was, reached over and got the knife. Burke trying all the while to get loose from Burns and get out of doors. Burns forced the deceased from this table to outside of the door, having hold of Burke by one hand, and the knife in the other; and when outside of the door gave him the

fatal stab, with the expression at the same time, "Now God damn you!" "Burns then came in, went round the bar, and took a drink of liquor. Went out again and locked the door so that the inmates, the witness and another women, could not get out. Burns pushed the door open suddenly, when we were screaming and trying to get out, and pushed us clear back against the door, and then fastened the door again. He then went to the door again, and after some time we got it open, and when we got out, Burns was lifting Burke up and shaking him up and down, but I did not know what he was going to do. When Burns saw us come out, he let loose of Burke, and Burke dropped. He then went to the wood-pile; coming back I got him to help us in the house with Burke." She, the witness, then went for the officers to arrest Burns.

This is but an imperfect narrative of the testimony of Bridget Duffy; but does it not explain the particulars of the case, and confirm the conclusion of the "rational and conscientious mind," that this was a murder in the first degree? But is is said by the majority of the court that the testimony of the witness, Bridget Duffy, was unreliable; that she was a drunken strumpet, and she was impeached by other witnesses, called on the part of the defense.—Whatever impressions have been conveyed to the minds of the majority of this court, by looking at the testimony of these witnesses, imperfectly taken in writing in this bill of exception, I will take it upon myself to say, that a more sincere, truthful and reliable witness I never, as a judge, saw upon the witness stand, than this Bridget Duffy. Indeed she was a most remarkable witness, and completely impressed the jury and myself, by her simple manner and truthful expression, that she was telling the truth the whole truth and nothing but the truth. I have no doubt that every one who heard her, of the bar or of the auditory, were similarly impressed. As to her impeachment, there was nothing in it. The witnesses called to impeach her impressed everybody that they themselves were suborned, for they apparently came from the lowest dregs of society, and their matter and their manner were both unequivocally against them. No sin had this Bridget Duffy but what she herself condemned herself for, upon the stand—that of intemperance. And here it is but just to say, that the conclusion to which the mind of the court was brought in the trial of the case below, from all the evidence, was that this act of homicide of James Burns was that of a man of malice, who had been accustomed to kill men and women, and, no doubt the jury came to the same conclusion. The act was done with such facility, with such ease, that it bore the marks of deliberate and premediated malice, as contemplated by the law.

These things, from this bill of exceptions, perhaps could not appear to the minds of a majority of this court; but they are mentioned to show with what exceeding care and prudence the solemn verdict of twelve honest minds upon the facts, under the obligations and sancity of their oaths, and the judgment of a court thereupon, made
329 *from a fair and impartial trial of a cause, should be reviewed by a court of error, upon a mere bill of exceptions, where noth-

ing appears but words on paper. Indeed, of so much importance was this consideration, in the minds of the learned judges of our supreme court, that, under the Code, before the recent law, they unamiously decided that, upon writ of error, they would not examine the facts as set forth in a bill of exceptions, either in civil or criminal cases, to determine whether the verdict of the jury, or the judgment of the court below, was error or not. No trial of an inferior court can, by any possibility, appear upon bill of exceptions to a superior court, as it really was. As a general and proper principle of law, too, no judge of a court will grant a new trial against the verdict of a jury upon the facts alone, unless the error of a jury was so gross as to manifest something else than the exercise of an honest judgment—such as passion, corruption, fraud, etc. How, then should a court of error, upon mere bills of exceptions, act in reviewing the verdict of a jury, and the confirmation of that verdict by a judgment of the court?

But the majority of the court again say that there was error in the law in the charge of the court of common pleas. So far as the point made by the counsel for the prisoner, in reference to malice, is concerned, they, in *some terms*, conclude thus: "Viewing it as a whole, it could not be said it was erroneous, or likely to mislead the jury as to the import of this term "malice."

But here, they say, occurs the error of law in the charge of the court—in that the court told the jury that "deliberation and premeditation may be accomplished in a very short time—in a moment—so swift is thought." In their comments upon this language of my charge—taking this sentence out of the context, alone by itself—the majority of the court are disposed to put a restricted and constrained meaning upon my charge, which, I have not the least doubt, never struck the jury as it does the majority of this court. It was not my design to lay down any rule to the jury, (I could not, as a matter of law and commen sense), as to time, in the element of deliberation and premeditation of murder in the first degree; and this was the idea I wished particularly to convey to their minds, and I have not the least hesitation in saying that they perfectly understood me. Take my language together, as I charged. After instructing the jury that, before they could find a verdict of murder in the first degree, they must find the fact of killing—purpose and malice—I then proceed to say, "If you come to the conclusion that malice was present in the act charged against the defendant, you will inquire if it was deliberate and premeditated. To deliberate is to weigh and consider; premeditate is to think of before, in their original and true meaning. The killing may be a fact—the will or purpose to kill may be present; malice may be in the act, and yet deliberation and premeditation may be absent. As to the question of time in reference to deliberation and premeditation, we, of course, can lay down no rule. Deliberation and premeditation may be accomplished in a very short time, nay, a moment, so swift is thought, or there may be the deliberation and premeditation of hours, of days, of weeks, of years. A malicious man—his malice

directed toward a homicide—may be capable of deliberation and premeditation in almost an instant of time. He may know the act to be a crime—see the consequences of it and consider of it in a very short time. Indeed, we might say, a malicious man, whose
330 thoughts are directed toward mischief and wrong, *might be very apt to consider and think rapidly and swiftly of his gloomy and dreadful intent."

Who cannot understand all this and achieve therefrom the precise idea that the court desired to convey? Do I pretend to lay down any rule as to this matter of deliberation and premeditation? Do I not speak the truths of human mentality; mental philosophy and of the law? Does not every man know that premeditation and deliberation may be the creatures of a very short time—of a moment? Do I tell the jury they are in the case before them? Do I not say they MAY? Do I not leave them to their own judgments entirely—and in what I say, do I not say the truth and the law? It seems to be the consideration of a majority of this court that I limited and bound the jury. But it is not so, and they did not understand it so. They took the text and context together, and they knew as "rational and conscientious minds," well enough what was meant by the court. I have been upon the bench now a period of nearly eight years, and during all that time I have been in the custom, in cases of homicide, of giving the sentiments of this charge upon the subject of deliberation and premeditation. Many of these cases have gone up to the supreme court on error, and never have I heard the law as I delivered it upon this subject, questioned by the courts until now.

But a short time since, in the celebrated case of the State of Ohio against Joseph Loefner, the very language of my charge on this subject, was the language of this. That case went up to the supreme court on error, and my law and judgment was affirmed, and the sentence had been executed if the executive clemency had not intervened. But, says a majority of the court, the point was not raised, according to their memory, in the case of Loefner, before the supreme court. I would respectfully ask them, if Joseph Loefner had suffered upon the gallows, would it not have been judicial murder? Much authority, using language, similar to, if not stronger, than my own, might be adduced to support my opinion of the law, both in our own state, from our own supreme court, and out of it, but I think it unnecessary, for the truth of the charge, as a matter of law and of common sense, will strike every one.

As to what is said by the judge in his concluding remarks, as novel as it is from the bench, I have nothing to reply. It speaks for itself.

I think, then, in this my dissenting opinion, that the majority of this district court have committed great error in overruling in the the case of Burns v. State of Ohio, the verdict and judgment of the court of common pleas.

W. Johnston & G. P. O'Donnell, for Burns.

T. Gaines and W. H. Kerr, for the state.

*ARREST. 337

[Superior Court of Cincinnati, Special Term, 1859.]

STATE EX REL. REUBEN JOHNSON v. THOS. MCLAIN.

A United States commissioner has authority to issue a warrant within his district for the arrest of a person charged with obstructing a marshal acting under the fugitive slave law.

Opinion of the court delivered by

STORER, J.

A writ granted by one of my colleagues, has been made returnable before me, requiring the jailor of Hamilton county to have the relator in court, and show the cause of his detention, it being alleged, he is illegally restrained of his liberty.

The officer's return exhibits the following facts: On the 10th instant, James Cochran, who is admitted to have been a United States commissioner, for the southern district of Ohio, appointed by the circuit court, and residing in Zanesville, Muskingum county, directed his warrant to the jailor of Hamilton county, commanding that officer to receive and retain in his custody until he should be discharged by due course of law, the relator, Reuben Johnson, who it is alleged had been found guilty of an attempt to rescue a fugitive slave from the custody of a deputy of the United States marshal for said district, the fugitive then being under arrest upon a legal proceeding, at the instance of his master and owner.

Bail, it is charged, was required to be given for the relator's appearance, at the next term of the district court, for the southern district of Ohio; and upon failure to give it, the accused is ordered to be imprisoned. Upon this process, the marshal has committed the relator to the jail of this county, where he is now detained.

The relator's counsel claim his discharge from prison, on several grounds.

1. That it does not appear the warrant of commitment is under the seal of the commissioner.

2. That it does not describe any offense with sufficient certainty.

3. The commissioner had no power to hear and examine the charge against the relator, and, of course, no authority to commit him to prison.

The first objection is purely technical. We find the seal of the commissioner is properly affixed, though in his certificate, he describes it as the seal of the "United States." However ambitious may have been that officer to assert the dignity of his position, his seal is his own, and authenticates his personal act alone. Though he uses language less simple than should be employed, his seal verifies itself, without any additional formality.

The second objection cannot be sustained. It is charged in the warrant, the relator has been found guilty of opposing a deputy-

marshal, while in the performance of his duty, under legal process, thus obstructing the operation of the fugitive slave law. Other
338 *facts are stated, connected with the arrest of the slave, and the relator's interference. If it is an offense at all, to pursue the course charged upon the relator, we think it is sufficiently set forth in the warrant before us, and so far as certainty is required, the law is, in that respect fulfilled.

Our attention has been called to the fact that the arrest and examination took place in another county, and there was no propriety, therefore, in committing the accused to prison, one hundred and seventy miles from the place where the offense was committed.

This, we suppose, is a question of convenience merely, to be determined by the commissioner or the marshal, though its abuse ought to be restrained, whenever any unnecessary hardship is imposed upon a prisoner, or any obstacle interposed to the fullest liberty on his part, of employing counsel, procuring bail, and preparing for his defense. There is now no prohibition to the use of the jails of the state, by the United States. The marshal may commit the prisoner to any jail within his district, and his warrant will protect the jailor; and when as in the case before us, the district court holds its session in Cincinnati, there is no legal impropriety in placing the relator in the prison of Hamilton county.

The last point, made by the relator's counsel, involves the right of the commissioner to examine and determine upon the offense, and afterward to commit the accused to prison.

It is asserted, in the argument, the commissioner has exercised judicial functions; that, as his appointment is not within section 1, article 3, of the constitution of the United States, his acts are, therefore, void. How far we may be permitted, in this summary proceeding, to hear and decide grave constitutional questions, we need not now inquire; nor would it be proper to pronounce, "ex-cathedra," what are the true limitations of the constitution upon its delegated powers. The principle, however, upon which we must determine the personal right of protection is alone to be vindicated by adhering strictly to the landmarks of the law as we find them established in the past history of our legislation, and which those courts, whose duty it is to construe the constitution, have, in past time, so ably and fearlessly maintained. We ought not to permit the remedies, given by the states to their local tribunals, for the protection of the individual citizen, to be absorbed or rendered powerless by the action of the federal courts.

To uphold the sovereignty of the states, we must vindicate, for all practical purposes, the sovereignty of the individual who makes up the aggregate of the commonwealth. When his rights are regarded, those of the states are properly appreciated.

We have no delicacy, therefore, in a proper case, to determine whether a law is constitutional or not; but, we cannot permit ourselves to revise the decision of an appellate court, while they remain the received rule of construction, however clear may be our conviction that the law has been erroneously expounded; nay, more,

should we be satisfied that the public sentiment demanded a re-examination as well as a revisal of the judgment. Any other course would not produce reform, but revolution. The genius of our government is better understood in its ideal than in the actual performance of our political duties. Abstract propositions are not practical results, but rather the elements out of which we may resolve the problem of self government; yet whatever of its postulates we may assume we can work out safely and happily, the correlative obligation of the ruler and the ruled. Hence it is our duty to endure, to obey even, rather than to agi-
*tate when the effort will reach only the surface of the evil. 339
We must leave its ultimate correction to the power of a well regulated public opinion which, at last, despite all erroneous constructions or oppressive enactments, will be omnipotent for good. It is as true now, as when the maxim was first announced:

"Better to bear the ills we have,
Than fly to others that we know not of."

Nor does this view conflict with the suggestion made by the relators' counsel, that our official oath places us in a position where we are bound to decide according to our own convictions of duty, irrespective of what are the conventional limitations on private right.

These limitations apply to the judge, as well as to the individual; they pervade our whole social system, and no one can deny their existence or dispute their necessity. We are impressed with as conscientious regard for the higher law as any one; but while we acknowledge its demands, we cannot disregard the restraints of human enactment, and thus abrogate the authority of the whole municipal Code.

If we did, we should upheave the foundations upon which our government rests, and become, in reality, a law unto ourselves, our own expositors of every statute; thus construing, as was once said by high authority, "the constitution as we alone understand it."

We have been led to make these suggestions, by the peculiarities of the case before us, as well as the position it is intimated we sustain to the public.

The authority of the commissioner has not been exercised by virtue of any power conferred by the fugitive slave law; no person has been subject to his supervision, who has escaped from labor or service in another state. An offense growing out of the execution of that law, has alone been investigated and determined. We are not compelled, therefore, to look to section 4, of the law of 1850, to find the warrant for the commissioner to employ the power he has exercised. That section does, in terms, confer upon the commissioner the same jurisdiction as the judges of the circuit and district courts possess, and it would seem imposed judicial powers; indeed, the duties connected with the power necessarily involved the determination of most important rights, without reserving to the parties either appeal or supervision by another tribunal.

It is, therefore, unnecessary to decide any question, connected with the fugitive slave law, so far as the authority therein, conferred upon the commissioner is concerned. Whenever such a question may arise we should feel at liberty to hear it discussed, and express our opinion, how far it is binding upon the state courts. Until then, we have no other intimations to give, no concessions to make.

Commissioners were first appointed by the law of 1812, and were restricted to the taking of acknowledgments of bail and affidavits. In 1817, they were employed to take depositions in civil cases; and in 1842, they were authorized to exercise all the functions of a justice of the peace, or magistrate of any of the states, relative to crimes or offenses against the United States, by arresting, imprisoning, or receiving bail under the authority of sec. 33, of the act of September 24, 1789.

The commissioners are appointed by virtue of the power given to the circuit court, by the statute which provides for its organization; and that power is commensurate with any offense against the laws of the United States, whether affecting its commerce, finance, or police. Hence it is, that all preliminary examinations, since 1842, of charges against persons for homicide on the high seas, piracy, destruction of ships, counterfeiting the current coin, or de-
340 *frauding the revenue, have been conducted by the commissioner of the district, where the arrest was made. His jurisdiction has been doubted only so far as we can ascertain, when it has been exercised under the law of 1850. The acquiescence of the legal authorities of every state, in the exercise of the power, thus to adjudicate, furnishes very satisfactory evidence that it is not regarded as an assumption of authority, or even an interference with the tribunals of the states.

It is true, in some of the states, the statute of 1819, which declares the slave trade with Africa to be piracy, has not been sustained by the commissioner, or even the juries summoned to present the offender, or to try him, after indictment found. Whether this refusal arises from any constitutional doubt as to the power conferred, or a fixed determination to ignore the statute, we are not judicially informed; but it requires no very clear prescience of the future, to conclude, if the power is once successfully resisted by those for whose especial benefit it is now so often enforced, the integrity of the whole system will be affected, and the law becomes, for all practical purposes obsolete.

While the statute of 1850 is in force, with the limitations we have already suggested, we feel it to be our duty to defer to its sanctions, and the more so in the case before us, since the guilt or innocence of the relator is yet to be determined. He is still entitled to the right of trial by jury as well as the assistance of counsel, and the decision of an examining officer merely, is not a final ecree.

While we are satisfied, we may decide the question made by the relator's counsel, in favor of the validity of the warrant under

which he is now imprisoned, we do not intend to be understood as going a step further in adjudicating upon the grave point submitted in argument which involves individual right, as well as state sovereignty. Whenever it becomes necessary to hear and determine any question which affects the integrity of the local tribunals or the privileges of the citizen, we hope to be able to do our whole duty. But until that time arrives, we have no further opinion to give, as it would be indelicate, as well as extra-judicial, to announce one when the direct question is not presented.

We suppose, the point urged by the relator's counsel, was necessarily involved in the case, lately decided by the supreme court, where the writ of *habeas corpus* was refused on the application of a party charged with the rescue of a fugitive slave, then on his trial at Cleveland. The court there held they would not interfere, while the prosecution was going on, as no practical result could follow from taking jurisdiction, when the party, if discharged, could be at once rearrested. After conviction, a new state of things might probably exist, and every appropriate remedy, in a proper case, not only be granted, but enforced.

The relator is, therefore, remanded to the officer, who holds him in custody.

J. Jolliffe, for relator.

Stanley Mathews, for government.

344 *SELF DEFENSE.

[Hamilton District Court, 185).]

†CHAS. COOK AND WM. SEITER V. STATE.

The plea of self defense in a prosecution for murder, is available in some instances where there is no actual necessity for taking life, provided the party who resorts to it actually and honestly believes he is in danger of his life, or of great bodily harm, and the jury find the circumstances were such as to justify such a belief, though no actual danger existed.

IN ERROR to Common Pleas.

The opinion of the court was delivered by

BRINKERHOFF, J.

The cases were before the court on writs of error, allowed by the supreme court, and made returnable here, the object being to reverse the judgment of the common pleas, and the sentence of imprisonment for life passed on these petitioners, on their being found guilty of murder in the second degree. The indiciment was for murder in the first degree, and it charged the homicide as the joint act of Seiter and Cook. The cases were necessarily somewhat blended; and although the trials below were separate, the findings separate, and the writs of error separately prosecuted, the court said so far as it was convenient, the cases would be considered together.

The duty of reviewing proceedings of this character was not a pleasant one. Where crime of some degree of enormity was committed, it was always a matter of regret that error should intervene to release parties from punishment, or to delay it, and he, (Judge B.), felt himself compelled to say, for the benefit of any young men who might be present, the court felt no special sympathy for those, for these petitioners; and the evidence of their character and conduct, as embodied in the bill of exceptions—their habits of idleness, of drinking, and above all their evident familiarity with the den of
345 the strange woman whose house, as it was *wisely said, was the way to hell, leading down to the chambers of death—all rendered it very apparent, that if it should happen these young men should be restored to their liberty, neither they nor society would be any special gainers by their restoration, unless they materially altered their course of life.

Notwithstanding the rules of criminal procedure, established as they have been by the wisdom of ages for the protection of innocence, must be maintained in their integrity; and without reference to the circumstances of the particular case before them, they should look to the questions of law involved, without bias or favor. In that spirit they had endeavored to enter upon the consideration of the questions which this record presents. A number of ques-

†For charge to the jury in this case see 2 Dec. R. 36, (1 W. L. M. 201). For common pleas decision see *post* 142.

tions had been raised, and discussed by counsel which the court did not deem it necessary to notice. They should notice such only as they deemed to be of a serious character.

First—As to the case of Seiter—it was alleged the court erred in its charge to the jury, or rather in its refusal to charge as requested, on a particular point by counsel for plaintiff in error. The court here rehearsed in brief manner the history of the case, remarking that in order to a proper understanding of the questions, it might be necessary to make a succinct statement of the facts as they transpired (according to the testimony) on the evening when the homicide occurred. It would be seen from this statement of facts, which was but general, and by no means intended to give the details, that the testimony by which the facts were to be developed, depended of necessity on the statements of the inmates of this house, and of Swift, who accompanied the parties that were involved in the transaction. The degree of credit, therefore, which was to be attached to the testimony of Swift, was a matter of vital importance to the defendants respectively.

It is alleged for error that the court charged the jury thus:

"It is contended by counsel for the state, that the position of one of the witnesses, Swift, is that of an accomplice in this crime. It is for you to say, gentlemen of the jury, looking at all the circumstances, whether this is so or not. The principle of law is, that the testimony of an accomplice in crime must be corroborated to make it entirely worthy of belief. It certainly would not do to convict on the testimony of an accomplice, unless corroborated. The principal as well applies to the defense. The witness is before you, and his testimony. It is for you to judge of his credibility. In reference to accomplices, our supreme court uses the following language; 'The evidence of accomplices in crime should be cautiously received, and in all cases suspiciously scrutinized by a jury.'"

In this part of the charge, it is alleged the court below erred: and this court is unanimously of opinion it did err. It is frequently remarked, and perhaps it may be called a rule of evidence, that a conviction ought not to be on the unsupported testimony of an accomplice. Nevertheless, it would not be error if the jury, under all the circumstances, should take it on themselves to convict on the testimony of an accomplice alone. But be this as it may, the court did not believe the rule applies in this case of a defendant. It is a rule for the protection of parties accused of crime; but it was a new principle to the court, and they did not think it a correct one, that the fact of complicity in a crime, on the part of a witness, was to be determined by a jury, when the party was not on trial for any such crime; and then in this collateral way, if the jury shall first find him to be an accomplice, they shall disregard *his testimony, unless it is corroborated. We think, therefore, in this charge, the court below erred. 346

Again, in the case of Seiter, the court was requested by defendant's counsel to charge the jury in these words: "Unless you

are satisfied from the evidence that when defendant, Cook, inflicted the stab of which Kate Bureau died, Seiter, in pursuance of an agreement with Cook, was either actually present, or near enough to render aid and assistance, and with the intent to render such aid in the act of homicide, you cannot in the present issue convict him of any grade of homicide;" all of which instruction the judge refused to give. It will be seen from the statement of facts that this blow from the knife from which death ensued, was inflicted after Seiter and Swift had passed out of the gates, which were locked after them; and the instruction here requested by the counsel, and refused by the court, raises the question, whether under our statute a party can be convicted as a principal in a homicide or other criminal act, when he is neither actually nor constructively present participating in that act. Though a party does not actually engage in the criminal act, if he is present aiding and abetting; or so near to the scene of the crime as to be able to render assistance, and with the view and intent to render such assistance, should it become necessary; or where he is on the watch to give alarm in cases of impending interruption of the criminal act, in all such cases a party may be convicted under our statute as a principal in the crime. But where neither of these states of fact exists, although he may have procured the act to be done, he cannot be indicted as a principal, but should be indicted under the 36th section of the Crimes Act, for procuring the act to be done, that being a substantive and distinct offense from the act itself.

It is testified by some of the witnesses in this case that Seiter said to Cook, "kill her, Charley"—accompanying the instruction with an opprobrious epithet. If it be taken for granted that he used these words and in pursuance of that direction and on account of it, Cook did kill her, Seiter could not be convicted under the issue made up under this indictment, but should be indicted and tried for procuring the murder to be done.

For these reasons the judgment and sentence of the court of common pleas in the case of Seiter must be reversed; the judgment set aside, and a new trial awarded.

In Cook's case, the charge of the court in respect to the credibility of accomplices, and leaving the question of fact as to whether Swift was an accomplice, to the jury, was the same as in the case of Seiter, and the same error intervenes. But there was an additional assignment of error in close connection with this point, in Cook's case.

When Swift was on the stand, the question was put to him by counsel for defendants, whether there was any previous understanding or concert between himself and Seiter and Cook, as to going to the house of Mrs. Davis, for the purpose of having a difficulty—to which the prosecuting attorney objected and the court sustained the objection.

Now take this in connection with the charge of the court in reference to the subject of accomplices. It will be seen that the testimony of Swift (who was a competent witness), as to whether

he was an accomplice or not, or whether there was any agreement between him and his associates, was rejected and ruled out. He was not permitted to testify on that point, and yet in the charge of the court, the jury are told that if Swift was an accomplice, they could not rely on his uncorroborated *and unsupported testi- 347
mony. It seems to this court that this combination of facts were clearly error, and must have operated greatly to the prejudice of defendant; because, by this charge of the court, suspicion and even more than suspicion, was thrown upon the credibility of Swift, and yet, when on the stand, he was not permitted to testify as to the fact on which his want of credibility was to be based.

The remaining allegations of error in Cook's case are based on the charge of the court on the subject of self-defense. [The words of the charge were here quoted.]

It is claimed by counsel for plaintiff in error that by the proper construction of this portion of the charge, the doctrine is laid down that in no case can the justification or excuse of self defense be made available in a case of homicide, unless actual necessity for taking life exists, and that in all cases the jury shall be the sole judges of the actual necessity.

This court was not quite certain that this was a fair construction of the charge. It was susceptible of such a construction, and yet, perhaps, it was not a necessary one; and on full reflection, he (Judge B.) was not disposed, as it was not necessary, to predicate error upon it. The entire court, however, was of opinion that a somewhat modified statement of the law, on that point, would be necessary to its full and correct understanding; and that the excuse or justification of self-defense, in cases of homicide, might be made available in some instances, where there was no actual necessity for taking life, provided the party who resorts to it actually and honestly believes that he is in danger of his life, or of great bodily harm—and the jury find that the circumstances of the case were such as to justify and render rational such a belief, although no actual danger existed.

Again, it was assigned for error that the court on the subject of self-defense, charge that a party, claiming the benefit of that right must not bring an attack, but must himself be in the right, etc. In the balance of the charge, there did not appear any modification of the charge thus broadly stated; and by this statement the court thought the jury were liable to be misled, left, as it was, without an exception; because, if a party being in the wrong in the commencement of a fight, afterwards endeavors honestly and vigorously to get out of the combat, and retreat to the wall, while his adversary there pursues him with deadly intent and with deadly weapons, he may, in that case, make available to himself the right of self-defense, even though he were originally in the wrong.

For these reasons the judgment would be reversed, the verdict set aside, and a new trial be awarded.

Judge Carter, in a few remarks, expressed his dissent on the subject of self defense. He thought a constrained and restricted meaning was put on the language of the charge. His object was to convey to the jury that an individual who claimed the right of self-defense, must be himself in the right. He did not go into particular instances as he deemed them inapplicable. As to the exclusion of the testimony of Swift on the subject of any agreement between the parties before they went to the house, it was excluded on the general principle that the defendant has no right to make testimony for himself on his own declarations.

In reference to the subject of accomplices, the court did not use the term in its technical sense, in the first instance, and they left
348 the credibility at last to the jury, but made a suggestion* that where a party was complicated in the crime, his testimony, either for or against the prisoner, was to be viewed with care, and ought to be corroborated; and they did not say that the testimony of Swift or Seiter should be absolutely corroborated to render it worthy of belief. He had seriously considered the charge; and sincerely believed every particle of it to be law. It struck the mind of the judge on the trial, and he believed the minds of the jury, that the knife had been in the hands of Seiter before it was used by Cook—that it was prepared by him—and if so, he was a principal, and not an aider and abettor.

Judge Johnson here rose and protested against any remark being made in the presence of so large an audience, that Seiter had anything to do with this knife, when there was not the slightest evidence of anything of the kind. It was sheer imagination.

Counsel for plaintiffs in error—Judge Matthews, Judge Johnson and T. A. Logan.

T. Gaines and Wm. H. Kerr, for the state.

[Superior Court of Cincinnati, Special Term, 1859.]

MERRITT & KEMPTON v. SAMUEL BORDEN ET AL.

For opinion in this case, see 2 Disney, 503.

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349 [*Superior Court of Cincinnati, Special Term, 1859.]

OWENS v. HICKMAN.

For opinion in this case, see 2 Disney, 471.

HUSBAND AND WIFE.

[Superior Court of Cincinnati, Special Term, 1859.]

YOUNG V. ROSS ET AL.

Under the statutes of Ohio in force in 1859, as to the wife's tenure of her separate property, she could appoint her husband her trustee or agent to collect rents, reinvest her property, etc., and in the absence of fraud between them, his management of the fund is but the act of an authorized agent; therefore, if a husband, in the absence of fraud or indebtedness, purchase an estate for his wife, to become her separate property, and subsequently this estate is sold by them, and the proceeds invested in other property in her name, the latter estate cannot be subjected to intervening judgments against the husband.

STORER, J.

The question presented, is resolved into the inquiry, was Ezekiel Ross, the defendant, at the time he caused the conveyance to be made to his wife of the property first purchased, solvent? In other words, had he sufficient property, unincumbered, to pay his debts and liabilities, not only those accrued but accruing?

This point once settled, the subsequent transfers, and exchanges may be readily explained.

*If the conveyance to Mrs. Ross, was valid as against cred- 350
itors when it was executed, the property it embraced passed to her as her own estate, protected against the subsequent alienation by the husband of his interest therein for her life, as well as the sale thereof by subsequent judgment creditors.

The statute of———gives to the wife the perfect control of her separate property; unless by her consent it is given to the husband he has no right to interfere with it, for his individual benefit. Hence, the wife may appoint him her trustee, or agent to collect the rents, to sue, or reinvest property belonging to her, and if there is no fraud between them, his management of the fund, is but the act of an authorized agent, liable to be restrained by a court of equity, on the application of his wife, and subject to the same limitations as apply to every person who has assumed a fiduciary relation.

If then the case before us, as it is alleged, was the mere sale or exchange of one estate legally belonging to the wife, for another, and afterward, the property thus taken, should be disposed of, and the proceeds vested in the premises now sought to be subjected, there can be, we think, no doubt, in the absence of fraud or indebtedness at the time the first purchase was made, on the part of the husband, but the right of the wife to possess the property as her own estate, is unaffected by the plaintiff's judgment.

Coffin & Mitchell, for plaintiff.

Taft & Perry, for defendant.

385 [*Superior Court of Cincinnati, Special Term, 1859.]

E. S. BATES, TREASURER, ETC. v. GEORGE FRIES, TREASURER, ETC.

For opinion in this case, see 2 Disney, 511.

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401 [*Superior Court of Cincinnati, Special Term, 1859.]

NICHOLAS PATTERSON v. THE STEAMBOAT "GULNARE."

For opinion in this case, see 2 Disney, 505.

This case was cited in Barry v. Hovey, 30 O. S., 344, 349.

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407 ***SELF DEFENSE.**

[Hamilton Common Pleas Court.]

†STATE OF OHIO v. CHARLES COOK.

If the character of the deceased was known to the slayer to be that of a dangerous fighting person, it is a proper element to be considered in estimating the reasonableness of the slayer's apprehensions of danger, but for no purpose whatever can the deceased's character for chastity be considered.

Indictment for murder in the first degree. Second trial.

DICKSON, J.

GENTLEMEN OF THE JURY:—You have heard the testimony as it has been detailed from the witness stand; you have heard the able arguments of counsel; you will now hear the charge of the court. After that you will retire to your room to deliberate upon and prepare your verdict.

The case has consumed much time, not more however perhaps, than its importance required. Your patient attention heretofore is an earnest that you will well and truly discharge your duty hereafter. In the distribution of duties in the trial of causes it is the province of the court to declare the law, and of the jury to consider and determine the facts. When each—court and jury—pursues its own line of duty, without interference with the other, the policy of our constitution and laws in this respect is attained. With the facts of the case I do not intend to interfere, nor do I intend to indicate an opinion as to the guilt or innocence of the defendant, I shall confine myself to the statement of the law that may be applicable to the circumstances of the case.

While the indictment contains but one count, it embraces three
408 charges *against the defendant; murder in the first degree, murder in the second degree, and manslaughter. The plea is not guilty, and this presents the issues for your determination.

Homicide, the taking of human life, may be either criminal or

†This case was reversed by the district court. See opinion *ante*.

or not criminal. It is not criminal when the law commands it; as when a soldier in lawful war takes life, or the sheriff in the execution of the sentence of the law executes capitally. Homicide, also, is not criminal when the law *permits* it. This may occur when life is taken in self-defense. The law of self-defense requires a particular explanation.

When a person is assailed, he may oppose force to force, and employ sufficient force to repel the assailant, and if it be necessary to protect his life or himself from great bodily harm, he may take the life of the assailant. This necessity, which in the law permits the taking of life may be either real or apparent. It is real, when there is actual danger to life, or of great bodily harm; it is apparent when the circumstances at the time of taking life—to a reasonable mind—indicate the presence of actual danger, though in fact there is none. For example: If the deliberate purpose of A with taking B's life, assaults him with a *presented* and *loaded* pistol, but before A draws the trigger, B aware of A's purpose, anticipates him and shoots him down. This the law would permit B to do, because of actual danger to his life. But suppose that A had by mistake seized an *unloaded* pistol, this being unknown to B, still B might act upon the appearances at the time, and take A's life. This the law would permit because of apparent danger to B's life.

But this danger that excuses homicide, must not be a mere fanciful danger, the creation of the imagination, the offspring of a desire to shield from punishment; there must be a necessity real or apparent as explained. Life cannot be taken with impunity, from motives of revenge, from frenzy of passion, or from cowardice. Nor can it be said that such real or apparent necessity exists, when the danger apprehended may be obviously averted or removed by the use of less violence than that of taking life. Life cannot be taken when it is manifest at the time that less force would be sufficient for protection.

The phrase self-defense indicates that the party is acting at the time in the defensive, and if he is not, this plea cannot avail him. A person, however, who was originally in the wrong, or who commenced the contest, may yet avail himself of this defense on a charge of homicide, provided he, before taking life, had himself in good faith quit, or endeavored to quit the combat, and indicated to his antagonist in a clear and unmistakable manner that he desired peace. A person who by his own wrong brings the danger upon himself; must suffer the consequences of his wrongful act, unless he fairly and in good faith quits or endeavors to quit the combat; if he has so done, however, and is then pressed by his antagonist to that point that it is necessary for the protection of his own life or himself from great bodily harm (as these terms have been explained), then he may take life—his antagonist in that case having himself in turn become the aggressor.

Criminal homicide, by our statute, has three degrees—murder in the first degree, murder in the second degree, and manslaughter. These are defined by our statute as follows:

SECTION 1. *Be it enacted by the general assembly of the state of Ohio*, That if any person shall purposely and of deliberate and premediate malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery or burglary, *or by administering poison, or causing the same to be done, kill another, every such person shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death.

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Section 2. That if any person shall purposely and maliciously, but without deliberation and premeditation, kil another, every such person shall be deemed guilty of murder in the second degree, and upon conviction thereof, shall be imprisoned in the penitentiary, and kept at hard labor during life.

Section 3. 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.

You will observe, gentlemen, that the statutory definition of manslaughter, embraces two distinct kinds of homicide; the one where the killing is unlawful, without malice and upon a sudden quarrel; the other where the killing is unintentional while the slayer is in the commission of some unlawful act.

This latter kind of manslaughter may be illustrated by the case of a person shooting at the horse of another, and unintentionally killing the owner, or by the case of a person with a motive of mischief, throwing a stone down the chimney of his neighbor and accidentally killing him. This branch of manslaughter requires no further remark.

The unlawful killing, without malice, upon a sudden quarrel, constitutes the other kind of manslaughter. The killing is unlawful when the law does not command or permit it. These terms have already been explained sufficiently for the purposes of this case. There must be no malice; that is an element of the higher crime of murder, it will be hereafter explained. The quarrel is not a sudden one, if it is sought as an occassion or opportunity for taking life.

The killing may be intentional or unintentional. Manslaughter is the lowest grade of criminal homicide; the killing in it is not supposed to proceed from a bad or corrupt heart, rather from the infirmity of passion to which even good men are subject.

When a person purposely and maliciously, but without deliberation and premeditation, kills another, he commits the crime of murder in the second degree. The purpose to kill and the malice particularly distinguish this degree of homicide from the lower degree of manslaughter.

The word "*purposely*," as here employed, has no peculiar meaning different from its meaning in common usage. It conveys a similar idea to the word intentionally, but indicates a more fixed determination of the mind. No accidental, casual, or unintentional homicide can amount to the crime of murder. The purpose of the heart

or mind is evidenced by confessions, statements, or external acts. It is only in these ways that we can ascertain what passes within the mind or heart. From the deliberate use of a deadly weapon, in a deadly manner, the existence of a purpose to kill may be inferred.

The term malice, in the law is not confined o personal ill-will or hatred—its meaning in common usage—but has a broader signification. It may be briefly defined as the "emotion of a heart devoid of social duty and fatally bent on mischief." When this mischief is the taking of human life, it is the malice of murder.

"Malice in law," says judge Thurman, "is a wilfully formed design to do another an unlawful injury. Whether *such de- 410
sign be prompted by deliberate hatred, or revenge, or by the hope of gain, or springs from the wantonness and depravity of a heart regardless of social duty and fatally bent on mischief."

"Malice" said our late supreme court "is the dictate of a wicked, depraved and malignant heart. It is not necessary that the malignity should be confined to a particular ill will toward the person injured. It is evidenced by any act which springs from a wicked and corrupt motive, attended by circumstances indicating a heart regardless of social duty and bent on mischief." It may be evidenced by a sudden killing, under circumstances of little or no provocation, springing from a depraved heart, reckless of the rights of others.

When a person purposely, and of deliberate and premeditated malice, kills another, he commits the crime of murder in the first degree. Murder in the first degree and murder in the second degree do not differ as to the purp se to kill and the act of killing, they differ only in the degree of the malice—simple malice being an element of murder in the second degree; deliberate and premeditated malice being an element of murder in the first degree. To deliberate, is to weigh as in a balance, to consider the reasons on both sides, to reflect; to premeditate is to think of beforehand. In murder in the first degree, the purpose to kill is generated in the heart by malice; the mind deliberates and premeditates upon it, then determines; the hand executes. These operations of the mind and the act of killing necessarily precede and succeed each other, in some order. They are not simultaneous and therefore cannot be instantaneous. There must be *some* time for the formation of the purpose, for the deliberation and premeditation. *What* length of time the law does not prescribe, it varies, necessarily, with the varying circumstances of each case.

I have thus endeavored to state the law of homicide, applicable to this case. I will repeat in part: When a person, upon a sudden quarrel, unlawfully, but without malice, intentionally or unintentionally kills another, he commits the crime of manslaughter. When a person purposely and maliciously kills another, he commits the crime of murder in the second degree. When a person purposely and of deliberate and premeditated malice kills another, he commits the crime of murder in the first degree.

It is claimed, in behalf of the defendant, that this is a case of self-defense. This is denied by the state. The grounds of the claim and denial you have heard and remember; I shall not repeat them. I will indicate to you a few inquiries, the consideration of which may aid you in the determination of this question. You may, then, inquire, whether the defendant, Charles Cook, or the deceased, Kate Bureau, commenced the conflict that resulted in her death. If you find that he commenced it, either originally or by adopting and prosecuting the quarrel of another, you will then inquire, did he quit or endeavor to quit the combat, in good faith, before striking the fatal blow? If he did not, if he commenced and continued the combat up to the moment of striking the fatal blow, this is not a case of self-defense. If, however, you find that he did, in good faith, quit or endeavor to quit the combat before that time, or if you find that the deceased commenced the conflict with defendant, either originally, or by assaulting him when he interfered for the purpose of peace between deceased and Seiter,—if he did interfere for that purpose—then it does not necessarily follow that the killing was in self-
411 *defense. But you will further inquire, what was the purpose of defendant in striking her? Was it to avenge himself for an injury she had done him, or an insult she had given him? Was it to punish her for striking him with the spittoon or other cause? Or was it for the purpose of protecting himself from a supposed danger to his life or of great bodily harm? If you find that the purpose of defendant was to avenge himself, or to punish her for striking him with a spittoon, or other cause, then this is not a case of self-defense. If, however, you find that his purpose was in good faith to protect himself, you will then inquire whether there was at the time actual or apparent danger to his life, or of great bodily harm, as these terms have been explained; if you find there was no reasonable ground for apprehending such danger, the killing was not in self-defense. If you find that there was at the time reasonable ground of apprehending such danger, you will then inquire could he obviously have averted or removed the danger by less violence than the taking of life? If you find he could have so done, then the killing was not in self defense; if he could not have so done, and the necessity under the circumstances, as defined, existed, then the killing was in self-defense. These inquiries are to be determined by an attentive consideration of all the testimony.

If you come to the conclusion that this is not a case of self-defense, but a case of criminal homicide, you will then inquire, what is the degree? Murder in the first degree? Murder in the second degree? or manslaughter?

These crimes have been sufficiently defined, but I will call your attention to certain distinctions between them:

If the killing was simply unlawful, that is, for the purposes of this case, not in self-defense, without malice, upon a sudden quarrel, even if it was intentionally done, the crime is manslaughter. If the killing were purposely and maliciously done, the crime is murder in the second degree. You will thus observe that a leading

distinction between murder in the second degree and manslaughter is the presence or absence of malice, its presence in murder, its absence in manslaughter.

An important inquiry then, is, whether the killing in this case was malicious or not? The best rule that I can give you to guide your inquiries upon this point is this—consider attentively all the circumstances in the case, particularly at the time the fatal blow was given, then if you find that the act of killing at the time and under the circumstances was such an act that no good man would have been provoked to have done it; and further, that it was such an act as could only have been dictated by a heart at the time devoid of social duty, that is, reckless of the rights and lives of others, and fatally bent on taking life, then it was a malicious act and so far as this element is concerned, the crime is murder. But if the act was not such an one as I have thus described, then the act was not malicious and the crime is not murder.

Whether the act of killing bears the one or the other character, is a question of fact for your determination. Consider the purpose for which defendant entered the contest, the kind of weapon he used, the manner in which it was carried and used, his statements and declarations, if any made, the sexes of the parties in the conflict, their relative strength, the conduct of the deceased, the weapons she used, whether deadly or the contrary, the manner she got them, the necessity or not on her part of using them for her own protection, and all the attendant circumstances, with a view to the determination of the question suggested.

We have already seen that the difference *between the two 412
degrees of murder is as to the degree of malice; the malice of murder in the first degree being deliberate and premeditated. The meaning of these terms has been stated, and I will only add, that deliberation and premeditation are not to be presumed without proof, but must be proven as any other material facts in the case.

GENTLEMEN:—You are the judges of the credibility of the witnesses—that is of the faith or reliance to be placed in their statements. This is as much a part of your duty as to consider the bearing and tendency of the testimony. You are to look to the position of the witnesses, their relation and connection with the case, the interest they may have in its result, or the bias, for any cause, which they may have, their manner upon the witness stand, their apparent intelligence, memory, honesty, the coherence of their statements, or the contrary, the correspondence or otherwise of their statements, with the statements of other witnesses on the same matters; and from these and other considerations, determine the reliance that you may place in their evidence. Memory may sometimes be at fault with entire honesty of purpose. A witness who has testified before in the same case, may omit statements then made, or make statements not before made, yet without any intention to falsify; for the memory may be different at different times, and the questions put by the examiner may also be different and suggest different replies. These discrepencies may exist

without impairing materially the confidence to be placed in a witness, and yet they may seriously impair this confidence, if the discrepencies relate to important and material facts, known to the witness to be such.

Some of the witnesses in this case, it is admitted, lead unchaste lives. This circumstance it is proper to remember, in the consideration of their testimony. But it does not thence follow that they are not to be believed, or that they cannot speak the truth.

They are competent witnesses in the law; and persons who voluntarily make such characters their companions and the witnesses of their deeds, cannot complain of the rule of law that permits them to testify.

William Seiter who is jointly indicted with the defendant, but not now on trial, has given testimony. In some of the states a person standing in this relation would not be permitted to testify at all. This exclusion proceeds upon the idea that it would not be safe to rely upon the testimony of a person occupying such a position. This is not, however, our law; yet it is proper, in the consideration of such testimony to remember the position of the witness, and give to his statements that credence to which, under the circumstances, you think them fairly entitled.

You are to determine the value and reliability of all the testimony. When a witness, appears upon the stand, of impaired character, or in a position or connection with the case calculated to bias his mind, each of these circumstances, in the consideration of his testimony, is to be remembered, not alone, but in connection with all the other circumstances, favorable and unfavorable in the case, bearing upon his testimony, that you may thence determine its reliability and true value. Your great duty is to seek the truth, and this, when found, fearlessly to declare. Reconcile the testimony, if it can be properly done. If there are irreconcilable contradictions, then, as I have said, seek the truth.

Allusion has been make to the character of the deceased, and
413 it is proper that I should say to you that it is as *much a crime to kill the lowest and most degraded person, as the highest and most respectable. They are all alike under the protection of the law. Yet in cases of death in mutual combat, if the character of the deceased was known to the slayer to be that of a dangerous, fighting person, it is a proper element to be considered in estimating the reasonableness of the slayer's apprehensions of danger. But for no purpose whatever, can you consider the character of the deceased for chastity. The character of the defendant has been placed before you, and it is a proper circumstance to be remembered in the consideration of the evidence. The purpose and value of testimony to character are well stated by Chief Justice Shaw, of Massachusetts, and I will read you what he says:

"There is" he says, "one other point remaining to which it is necessary to ask your attention; and that is the evidence of character. There are cases of circumstantial evidence, where the testimony adduced for and against the prisoner is nearly balanced,

in which a good character may be very important to a man's defense. A stranger, for instance, may be placed under circumstances tending to render him suspected of larceny or other lesser crime. He may show, that notwithstanding these suspicious circumstances, he is esteemed to be of perfectly good character for honesty in the community where he is known, and that may be sufficient to exonerate him. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience; it is so manifest that the offense if perpetrated, must have been influenced by motives not frequently operating upon the human mind; that evidence of character, and of a man's habitual conduct under common circumstances must be considered far inferior to what it is in the instance of accusation of a lower grade. Against facts strongly proved good character cannot avail. It is therefore in smaller offenses, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such cases where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime like this of murder, to prove a high character, and by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution."

Something has been said by counsel as to the action of a former jury in this case; with this you have nothing to do. You must lay all such matters wholly aside. They are not in the case and you are not to be influenced in the least degree by them. You are the triers of the issues in this case, and you are to decide them by the light of your judgments and not by the opinion of a jury that has preceded you, or of the judges that set the verdict of that jury aside—a circumstance that has been alluded to. You are to decide this case upon the evidence, and not upon outside considerations.

The affirmative of the issue, presented by the pleadings, is with the state. The burden of proof rests upon it. You must be satisfied, beyond a reasonable doubt, of the existence of every essential element constituting either murder in the first degree, or murder in the second degree, or manslaughter, *or you cannot 414
convict. You must be satisfied beyond reasonable doubt that the defendant is guilty of murder in the first degree, or murder in the second degree, or manslaughter, or you must acquit. This renders it proper for me to explain the meaning of the phrase reasonable doubt. I do this in the language of Judge Thurman, then of the supreme court of this state:

"We have frequently" says he "used the expression, convinced beyond a 'reasonable doubt.' It is necessary that you should understand what we mean by the expression, a reasonable doubt.

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 a single eye to the ascertainment of the truth, irrespective of the consequences of their finding. It is not a mere speculative doubt voluntarily excited in the mind in order to furnish a pretext for avoiding the rendition of a disagreeable verdict. Such a doubt is considered by the law as merely captious."

I will also read from the charge of Chief Justice Shaw, of Massachusetts, on this subject, in the Webster case.

"Then," says he, "what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecution. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent, until he is proved guilty. If upon such proof there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though as a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."

A few words as to the form of your verdict and I have done. If you find the defendant not guilty, you will say: We, the jury, find the defendant not guilty, as charged in the indictment. But if you find him guilty, the statute requires you to specify, in your verdict, of what crime you find him guilty. If you find the defendant guilty of murder in the first degree, you will say: We, the jury, find the defendant guilty of murder in the first degree, as charged in the indictment. If you find the defendant guilty of murder in the second degree, you will say: We, the jury, find the defendant guilty of murder in the second degree, as charged in the indictment. If you find the defendant guilty of manslaughter, you will say: We, the jury, find the defendant guilty of manslaughter, as charged in the indictment. GENTLEMEN:—You have solemnly sworn well and truly to try the issues between the state and this defendant, and a true *verdict to give according to the law and the evidence. It is your duty to try these issues *well*; that is, patiently, attentively, deliberately. It is your duty to try them truly; that is, with a single eye to the ascer- 415

tainment of the truth, uninfluenced by fear, favor or affection. Yours is a solemn duty, a great responsibility. That you will discharge it faithfully there is no reason to doubt. Take the case, examine it carefully and impartially, and render such a verdict as the law and the evidence require.

[*Logan Common Pleas Court, June Term, 1859. 20

WM. STOKES v. THE COUNTY COMMISSIONERS OF LOGAN COUNTY.

For opinion in this case, see 2 Dec. R. 688; s. c. 4 W. L. M. 590; s. c. 1 W L. M. 448, or 2 Dec. R. 122.

[*Superior Court of Cincinnati, General Term, 1859.] 33

O. B. FARRELLY & CO. v. THE CITY OF CINCINNATI.

For opinion in this case, see 2 Disney, 516.

[*Superior Court of Cincinnati, General Term, 1857.] 65

ISABELLA MOORE v. JACOB STEIDEL ET AL.

For opinion in this case, see 1 Disney, 281.

[*Superior Court of Cincinnati, Special Term, 1859.] 81

GIBSON & CO. v. OHIO FARINA COMPANY.

For opinion in this case, see 2 Disney, 499.

97 *ASSIGNMENT TO PREFER CREDITORS.

[Marion Common Pleas Court, May Term, 1859.]

GEORGE ROBERTS v. GORDON MCWILLIAMS ET AL.

1. Sureties, as well as creditors, may, in good faith receive reasonable indemnity from a failing debtor, in contemplation of insolvency, without thereby becoming trustees for the equal benefit of all creditors.
2. The fact that there are cosureties, joint and several, not uniting in receiving the indemnity, does not change the result.
3. The interest of a mortgage is "property," because it is the subject of valuable ownership, and sale. It is, by the common law, a chose in action, or chattel interest, or, as denominated in civil law, "incorporeal property." It may be held in severalty, joint-tenancy, or in common.
4. A mortgage, joint in form, to two creditors, to secure equally the several debts of each, is, in legal effect, several, and not joint, because the interest secured is several. Its construction being a question of intent, the ordinary legal effect of a joint grant, is modified by the several interest of the grantees. Each mortgagee holds a several entirety, in the incorporeal chattel interest, neither one in trust for the other. Upon this point, Brannon v. Brannon, 3 Weekly Law Gaz., 257, considered.
5. Such mortgage, made in contemplation of insolvency, with the design to prefer the secured creditors, is not within the statute relative to assignments to trustees. (Swan, 468; 3 Curwen, 2239.)
6. A conveyance, by one instrument, of one specific chattel to one creditor, another to a second, and still another to a third, though giving more valuable security, and thus a preference to one, over either of the other secured creditors, is not within the statute relative to assignments.
7. An absolute sale to a creditor, in payment of his debt, made in contemplation of insolvency, with a design to prefer him, if also fraudulent, within the second section of the statute of frauds, is, in Ohio, under the statute relative to assignments, an assignment in trust for the equal benefit of all creditors.

The pleadings and proof show these facts. On the 3d of February, 1859, Gordon McWilliams, in contemplation of insolvency and with the design to prefer and indemnify his sureties, Ebenezer Peters and Thomas Search, executed to them a mortgage then duly recorded, by which he did "bargain, sell, and convey unto said Peters and Search, their heirs and assigns, forever the following real estate in Marion county Ohio (described). To have and to hold said real estate to them the said Peters and Search, their heirs and assigns forever." The condition of defeasance (its language a little condensed) reads thus: "Provided, nevertheless, and these presents are upon this condition, that whereas said Gordon McWilliams, as principal debtor, and Thomas Search and one John McWilliams as sureties, on the 10th January, 1859, executed to the Marion Deposit Bank their bill of exchange, on Irving Bank, New York, payable in sixty days for $1000; and on the 4th of December, 1858, said Gordon McWilliams as principal debtor, and John McWilliams and Ebenezer Peters executed to said Marion Deposit Bank their bill of exchange at sixty days on Irving Bank New York for $2000,

which bill was indorsed before due to the Exchange Bank of Columbus. And on *the 29th of December, 1858, said Gordon McWilliams, as principal debtor, and Thomas Search and R. Wilson his sureties, executed to said Marion Deposit Bank their bill of exchange at sixty days on Irving Bank New York for $1800. And heretofore at a date now forgotten, said Gordon McWilliams as principal debtor and Ebenezer Peters surety executed to Willard Russell their promissory note for $500, at one year, being the only note held by said Russell, against said McWilliams and Peters. And said Gordon McWilliams has executed to said Search his promissory note, payable thirty days after date, at the Bank of Marion, for $324. Now therefore, if said Gordon McWilliams shall pay said several claims with the interest thereon, and shall save said Peters and Search, and each of them harmless from all payments, interest, cost, damages and expenses, by reason of said notes, bills, etc., then these presents to become void, otherwise remain in force. In testimony," etc. 98

At the same time, and as a part of the same transaction, Gordon McWilliams executed to Search and Peters a chattel mortgage on various articles of personal property, including sixty acres of wheat in the ground, to secure the same liabilities. This mortgage is a substantial copy of the real estate mortgage, but contains the following addition: "And it is hereby expressly understood by the parties hereto, that the proceeds of said sixty acres of wheat shall be applied to the satisfaction of said claim held by said Russell."

This mortgage was filed February 4, 1859, with the recorder of the county whose office was in the township where the parties resided. (44 Stat. 61; Swan 315, sec. 8.)

The mortgage debts remain unpaid. Neither Peters nor Search have taken possession of any of the property.

At the same time Gordon McWilliams sold the residue of his visible personal property to James McWilliams, for $920, in consideration of which, said James, in writing, assumed to pay one debt of said Gordon, for $425, on which said James was surety, an *unascertained* balance due from said Gordon McWilliams to said James, and "if the money held out," a note of said Gordon to Rebecca Williams of $220, on which James was not surety, and "to deliver the balance, if any, to Peters & Search," for their indemnity as sureties. The balance, *afterwards* ascertained to be due James McWilliams, was so much, that nothing was left for Peters & Search.

The mortgages are no more than sufficient indemnity to Peters & Search.

The plaintiff, who is a general creditor of Gordon McWilliams, seeks to charge Peters & Search and James McWilliams as trustees for the equal benefit of all the creditors. No objection is made as to joinder of defendants.

J. H. & H. C. Godman, for Peters & Search, cited 8 O., 390; 1 O. S., 45, 237; 20 O., 540; 7 O. S., 359; 5 O. S., 222, Bouv. Law Dic.; 4 Kent 292; 3 Blackst. 328; 2 Story Eq. sec., 960; 4 Kent,

159; Rex v. St Michael, Doug. 640; R. V. Edgington, 1 East, R. 288; 4 John's R., 41; 11 Ib., 524; 4 Conn. R., 235; 7 Mass., 138; 9 S. and R., 302; 5 Harr. and Johns, 312; 2 Cow., 195, 3 Pick., 484; 2 Greenl. R., 132; 6 Conn., 142; 20 Maine R., 111; 2 Green, N. J. R., 14; Dickson v. Rawson, 5 O. S., 222; 2 Hilly'd on Mortg., 157; 4 O. S., 602; 7 O. S., 359; 1 O. S., 45, 237; 4 Ib., 45; 20 O. 540; 1 O. S., 243.

The mortgages are not mutually trustees for each other. The whole mortgage is to be considered in construing it and the subject matter. Chit. Cont., 83, 4; Wilson v. Troup, 2 Cow., 195; Sumner v. Williams, 8 Mass., * 214; 10 Mass. 379; 11 Mass., 302; 11 Pick. 154; 4 Dallas, 345; 2 Shepley, 233; Doe v. Burt, 1 T. R., 703; 2 Bing., 522; Robertson v. French, 4 East, 135; 4 Taunt., 844; 1 Stark R., 53; Donnel v. Edmonds, 2 Pick., 617; Burnett v. Pratt, 22 Pick., 556; Thayer v. Campbell, 9 Missouri, 280.

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If two persons advance money, and take a joint mortgage without words to be equally divided, they shall each take a proportion. 2 Ves., 258; Petty v. Stynard, 1 Ch. R., 31; 1 Eq. Cas. Abr., 290; 3 Ves., 631; 1 Atk., 467; 3 P. Wms., 158; Edwards v. Fashion, Pre. Chy., 332; 1 Eq. Cas. Abr., 292. If a grant or covenant be in terms *joint only*, yet if the considerations be *several*, the interest of the grantees is several and not joint. This must be so in Ohio where joint tenancy never existed. 22 Pick., 556; 9 Mo., 280; Shirkley v. Hannah, 3 Blackford, 403; 2 Pick., 617; Randale v. Phillips, 3 Mason, 378; Delong v. Hutcheson, 2 Randolph, 183; 1 Hill'rd on Mortg., 246, section 61; 1 Chit. Pl., 10; 3 Bos. and P. 235; Gould v. Gould, 8 Cow., 168; 6 Wend., 203; Sharp v. Conkling, 16 Vt., 355; 6 J. R., 49; 1 Wend., 228; 3 Fairf., 65; Thomas v. Pike, 4 Bibb, 418.

Payment to one would extinguish *his* title. 8 O., 222; 10 Ib., 433; 4 Kent, 194; 1 Cow., 122; 2 Mass., 493; 4 W. & S., 426; 2 Harr & McHen., 17; 3 Ib., 399; 18 J. R., 7; 5 Cow., 202; 5 Hill, 272.

It is equitable to prefer creditors. 8 O., 390; 7 O. S., 359.

If there could be a trust between joint mortgagees, it is a mere incident of the mortgage, and does not come within the statute: 1 O. S., 237; 4 O. S., 602. No trust arises because no *estate* passed to mortgagees, but only indemnity, and no right of possession accrues until they are damnified Each holds for himself, and if the property is sold, can only receive its proceeds so far as he has paid debts.

Ozias Bowen, for plaintiff. These mortgages are assignments in trust, under the act of 1853, for the equal benefit of all the creditors, because Peters holds in trust for Search, and Search for Peters, and Search and Peters hold in trust for their cosureties and for creditors. Wilson, Russell, Exchange Bank of Columbus, and Marion Deposit Bank, can all enforce the trust against both Search and Peters: Hall v. Jeffrey, 8 O., 390; Mitchell v. Gazzam, 12 O., 315; Bancroft v. Blizzard, 13 O., 30; Fassett v. Trabor, 20 O., 540, 390; Doremus v. O'Harra, 1 O. S., 45; Atkinson v. Tomlimson, 1 O. S.,

237; Dickson v. Rawson, 5 O. S., 218; Bagaley v. Waters, 7 O. S., 359; Gaylord v. Cramer, 1 Handy, 369; Bloom v. Noggle, 4 O. S., 45; Harkrader v. Leiby, ib., 602; Brannon, Assignee of Smith, v. Brannon et al. 3 Weekly Law Gaz., 260 (March 26, 1859). This case and the language of the court in 4 O. S., 513, and 5 O. S., 222, are in point.

John J. Williams, John C. Johnston, P. Bunker, for James McWilliams, cited 7 O. S., 363; Wilcox v. Kellogg, 11 O., 394; Swift v. Hallridge, 10 O., 280, and other cases above cited.

LAWRENCE, J.

By the common law debtors might prefer favored creditors, either by assignment in trust in good faith, or otherwise. This rule is modified by statute of March 4, 1853 (3 Curwen, 2239; Swan, 468), which provides "that all assignments of property in trust, which shall be made by debtors to trustees in contemplation of insolvency, with the design to prefer one or more creditors, to the exclusion of others, shall be held to inure to the benefit of all the creditors, in proportion to their respective demands, and such trusts shall be subject to the control of the courts."

*If the mortgages to Peters and Search are an assignment within the statute, such result must follow, either because (giving the mortgages the effect of *several* and separate grants to each mortgagee) the grantees are trustees for creditors of Gordon McWilliams, or for cosureties of the grantees; or because (as the liabilities secured are *all several* liabilities of the mortgagees respectively, and not in any case the just liability of both), the mortgages convey a joint estate in pledge 4 O. S., 611 or, perhaps, more technically *a joint* interest, pledge, or right, and so both grantees hold in trust for each, and thus, in legal effect for creditors and cosureties of each; or because a preference is secured by trust in favor of Willard Russell. 100

I. *Sureties trustees for their creditors.*

In the case of Harkrader v. Leiby, 4 O. S., 613, the court say: "When any valuable interest of the insolvent debtor is transferred by any species of conveyance binding the recipient, either expressly or by necessary implication, to account in chancery to any creditor of the assignor, the statute enlarges the trust and makes it enure to the benefit of all the creditors, and distributes the fund to all in proportion to their respective demands." And see Dickinson v. Rawson, 5 O. S., 222. The *literal* effect of this language would be to bring the mortgages in this case within the statute. Indeed, under that language a surety could not take an indemnity from a failing debtor, because he could be required as a trustee "to account in chancery to" the creditor of the assignor. 2 Bouv. Inst., 75, section 1422; Ohio Life Ins. Co. v. Ledyard, 8 Ala. 866; Roberts v. Colvin, 3 Gratt., 358; U. S. Bank v. Stewart, 4 Dana, 27: Green v. Dodge, 6 O., 80; 5 O. S., 219-223.

But this language could not have been intended in that unlimited sense, for it has been held that sureties may take indemnities without being trustees for all creditors under the statute. At-

kinson v. Tomlinson, 1 O. S., 237; Bagaley v. Waters, 7 O. S., 359; 4 O. S., 602.

The true construction is, perhaps, more accurately stated in Dickson v. Rawson, 5 O. S., 222, which holds that the statute controls "every transfer or conveyance of property, whether by mortgage or otherwise, made by an insolvent debtor in view of his insolvency, to be held by the person taking it for the benefit of some one or more of the creditors of the debtor, *other than himself.* To bring the case within the operation of the statute, the conveyance must be in *trust*, and the person receiving the property thereby constituted a *trustee*, for some one or more of the *creditors* of the debtor, to the exclusion of others. Whether it is so in trust, and the assignee or grantee such trustee, depends upon the question whether by the terms of the instrument, or by necessary implication, he is liable to account to the preferred creditor for the property in his hands, and for the manner in which he disposes of it."

But all this is subject to the qualification, that the *trustee* is one who is acting in whole or in part for creditors without a *personal interest for his own indemnity* in the *whole trust.* For a *surety* who receives indemnity "is liable to account to the preferred creditor for the property in his hands and for the manner in which he disposes of it." Yet *he* as well as the *creditor*, may secure a preference, by judgment lien, by purchase absolute in payment of the debt, by mortgage, by assignment of *reasonable* amount of property to *himself* in trust to sell and account to the debtor for surplus 1 O. S., 240-243; but see 7 O. S., 369; 5 O. S., 224; 2 O., 390; and by purchase in consideration of payment of his own
101 *claim and that he assume other debts. 1 O. S., 240, 243, 249; 5 O. S., 222; 7 O. S., 361; 4 O. S., 602. In all such cases, the party secured must act *solely for the purpose of securing himself*, without interposing any unnecessary barrier to the rights of others, or the statute of frauds may apply. 20 O., 545, 389; 1 O. S., 243; 6 O. S, 620; 4 O. S., 610; Burrill on Assignments, chap. 32, page 398. Hence, if a creditor or surety takes security to himself, by a mortgage in form, yet annexes conditions for the benefit of the debtor, as a power of sale in the mortgagor. 5 O. S., 1-134; 20 O., 389; or perhaps, if he takes an assignment, 1 O. S., 243; or mortgage, 4 O. S., 608; 20 O., 389-545, of *more chattels* than are reasonably necessary. Burrill on Assignments, 226-247, thereby interposing barriers to the rights of others, or interposes trusts for the benefit of others, 5 O. S., 218; 1 Handy, 369; 4 O. S., 602, in all such cases the security loses its character as such, and being indivisible 4 O. S., 613; 6 O. S., 615; it is deemed an assignment in trust for all creditors within the statute. 4 O. S., 608; Burrill on Assignments, 31-5. In all such cases of transfer to the creditor, he occupies the position of preferred creditor and trustee for others. If the transfer is to the surety, he becomes trustee and his creditor becomes the preferred creditor of the statute. The result would seem to be that a surety may do whatever is reasonably necessary to obtain indemnity in any form, to himself, if that is his *primary*

and sole design, though the unavoidable legal effect may be to create in him a trust which the creditor to whom he is surety may inforce, and as to which, the assignor and creditor can require him to account. While he may take indemnities to himself, he cannot take them through a trustee, for though the statute only applies to assignments "with the design to prefer one or more creditors," yet a trust in a third person designed to indemnify a surety, has the legal effect to create a trust for the creditor, 5 O. S., 223. Such resulting trust may exist in the surety, if made solely for his indemnity, but may not exist in a third person.

These mortgages, therefore, are not within the statute, *simply because* the creditors to whom the assignees are sureties, may require them to "account for the property in their hands, and for the manner in which they dispose of it."

II. *One of two joint and several co-sureties receiving indemnity.*

Nor does an assignment come within the statute, *simply because*, a debtor, in contemplation of insolvency, with the design to prefer his surety, grants property by way of indemnity, to *one* of several co-sureties. The statute could only apply to such case either because the surety receiving the indemnity is a *trustee* for his *co-surety*, or for the *creditor*, or both, as he undoubtedly is.

1. *Trust by one surety for co-surety.* Neither the *language* of the statute, nor its *reason* and spirit, nor the adjudicated *cases*, make it apply to such trusts, where the trustee is *personally interested* for his own indemnity in the *whole* trust.

I have already shown above, that the language of this statute also shows, that the term "*trustees*" in it means *those*, who, as to all or *some part* of the trust, sustain *no other beneficial relation* than that of trustees, and not those, who, by taking reasonable indemnity to save themselves, are *unavoidably* made trustees by *operation of law*, for the secured creditor. A surety, in taking indemnity, acts for himself, primarily, and so is not a trustee. A trustee, within the statute, is one who holds property for the sole benefit of another, and not one who is personally benefited or indemnified to *the extent of the whole value of the trust. A trustee is one 102
having a *cestui que* trust, or beneficiary other than himself: 2 Bouv. Inst., 321; Bouv. Dic.

Thus in 7 O. S., 369, it is said of the cases adjudged, in which assignments come within the statute, "in each of them it will be found that the assignee held the property as mortgagee or otherwise, in part at least, merely to secure other creditors besides himself." A surety, therefore, who takes reasonable indemnity to himself, is not a trustee within the statute, and so it cannot apply. The statute requires (1) an assignment in trust, (2) to trustee, (3) in contemplation of insolvency, (4) and design to prefer one or more creditors. These must all unite, and if anyone is wanting, the statute does not apply.

It follows therefore, that the surety receiving the indemnity, is not a *trustee* within the statute merely because the *co-surety* can require him to account. The co-surety is not a *creditor* before pay-

ment, and the statutes only applies, in cases where *creditors* can require an assignee, holding for no purpose of indemnity to himself, to account. The *co-surety* is not such a creditor, nor is the surety having indemnity such assignee. The terms *surety* and *creditor* are not convertible. Assignments under the statute "enure to the benefit of *all* the creditors." Sureties cannot receive money of the assignee and hence are not creditors. The expression "all the creditors," in the statute includes every class embraced in the previous expression "one or more creditors." The evil aimed at by the statute, was a preference to creditors by assignment to trustees which the moral sense of the commercial world condemned, and not preference to sureties, which commercial ethics enjoins generally as a duty. The statute applies to assignments to *trustees* for the benefit of *sureties*, not because the design to prefer them, is the "design" to prefer *creditors* mentioned in the statute but because the law will not separate the design in behalf of the surety, from the legal effect which makes the design in favor of the surety, a design in favor of the secured creditor. 5 O. S., 223. But when such design by legal effect does exist to prefer a creditor, the surety may nevertheless receive indemnity to himself, for then he is not a trustee within the statute.

If one surety could not take indemnity to himself without uniting a co-surety in the transfer, the result must often be to deny indemnity at all. The co-surety may be absent, unable or unwilling to assume the duties required by the indemnity. He may be unfit for its management, or unsafe because irresponsible, or reckless, or adversely interested, and thus desire to prevent indemnity to surety. The statute was not designed, as all the cases show, to prevent indemnity to any surety; 4 O. S., 609, 610; 5 O. S., 222; 7 O. S., 364; 1 O. S., 242. In Bagaley v. Waters, 7 O. S., 360, indemnity was received by one of two co-sureties without objection.

2. *Trust by surety for creditor.* I have already shown above that reasonable indemnity to a surety himself, although he is thereby liable to account to the creditor, is not within the statute. The existence of a co-surety adds nothing to the rights of the creditor, does not change the nature of the trust, and so cannot make the statute apply.

3. *Conveyance by one instrument joint in form, to two creditors to secure several claims of each, but not joint claim of both.*

The mortgages in this case have the same legal effect as if made to all the secured creditors, 5 O. S., 223, they are joint in form, and if so in legal effect, they are within the statute, for the grantees jointly, would then
103 *hold in trust for each, with survivorship, and the test, is, has the mortgagee or can he by possibility have, any interest in trust not for himself, but another creditor? Whether a mortgage creates an estate, a pledge, a security a chattle interest—whether there be seizin or not, is not material, since it creates a valuable right that may be a trust within the statute. The statutes relate to "assignments of property." The interest of a mortgage is "pro-

perty," within the statute. It is incorporeal and intangible—in the expectancy, but like any chattel interest, it may be held in severalty, jointly: or in common. When I say a mortgagee holds in severalty, etc., it is not to be understood that he holds such an estate in the mortgaged property, but that the interest created in him by the mortgage is thus held.

A mortgage trust can be expressed in such terms as to chattels and realty, that the tenants in common would hold each an undivided half for himself and for the concurrent or subsequent security of the co-tenant, and such trust would be within the statute, while a joint tenancy for the security of the several claims of two creditors, would necessarily create reciprocal trustees; because joint tenants hold *per my et per tout*, while tenants in common are seized at law *per my* but not *per tout*, though trusts may be attached to such seizin; 2 Kent, 351; 4 ib., 366; 8 Walker Am. L., 305.

In Ohio there can be no joint tenancy of realty—at least it is not created by terms which would create it at common law. 22 Pick., 557; 7 Mass., 131. But it may be conceded that the interest of a mortgagee is a chattel, and susceptible of joint tenancy, and then the questions to be decided are—Do these mortgages create joint-tenancies? Do they create tenancies in severalty or in common, in which either grantee holds any interest for the other, or only each an interest (whole undivided half, proportionate to debts secured) for or himself? Gould, Pl., ch. 4, sec. 53, 60; 2 Blackst., ch. 12. If a joint tenancy is created, both hold all in trust for each, because "a joint tenant, in respect of his companion, is seized of the whole," 4 Kent. 359, Gould Pl., ch. 4, sec. 56, and survivorship would vest an exclusive title in the survivor who would then, of necessity, hold in trust for the secured debts of the deceased.

1. *Joint tenancy, and so within the statute.* Do the mortgages, in this case, by reason of the joint form of the grant, create a joint tenancy? The general rule of the old common law was, that a joint grant with unity of time, title, interest, and possession, created a joint tenancy; but the modern doctrine is, that a joint grant generally creates an equal tenancy in common. This may be changed by other controlling terms of the instrument. 4 Kent, 359, 368; 2 ib., 351, Greenl., Cruise Title, 18. The object of all construction is to ascertain the intention of the parties. Chit. Cont., 75, and notes; Broom, L. M., 249; 2 Blackst., ——; 1 Bouv. Inst., 255. The intention apparent upon the mortgages is to create a several, and not a joint interest, in the grantees, because the liabilities secured are all several, not joint. The mortgages being mere incidents of the secured debts, follow their several character. This view is sound upon principle and authority. The mortgages are joint in form; but if so construed, their object is defeated, and the maxim may well be applied, "Beigne faccendæ sunt, interpretationes propter simplicitatem laicorem, ut res majis valeat quam pereat; et verba intentioni, non e contra, debent inservire." Broom L. M., 238.

"And as observed by Lord Hale the judges ought to be curious and
104 subtle, to invent reasons and means to *make acts effectual according to the just intent of the parties. To cavil about the propriety of words, when the intent of the parties appears, is not commendable; the judges will rather apply the words to fulfil the intent, than destroy the intent by reason of the insufficiency of the words." "If, 2 Parsons Cont., 17, the parties to the mortgages did not intend to make an assignment within the statute, but did intend a security, and as that would be defeated if the mortgages are construed to be joint, they should not be so construed, if their language will admit of any other construction." Co. Lit., 42–183. "Where one covenants with, or otherwise binds himself to, two or more persons jointly and severally, if it appears from their contract, that their interest is joint, they must all join in the action. For when the interest of the covenantees is joint, the right of recovery is so. But upon such a covenant (or as it seems even on one that it is joint only), if it appears from the deed that the interest of the covenantees is several, they may sue in separate actions." Gould, Pl. ch., 4, sec. 58-9.

These citations with those quoted in argument fully support the view, that where there is a several grant to two, with a convenant to both, joint in form as to the subject matter of the grant, the covenant is in legal effect several, because being an incident of the grant, it follows its condition. And so the condition of a bond (or mortgage) may control the mere form of the grant. Chit. Cont., 78, note q. r. This principle is applicable by way of analogy to the present case. In Burnett v. Pratt, 22 Pick., 556, the precise question now under consideration is decided. The court say, "Where the interests of the covenantees are several, the covenant, though in form joint shall be construed to be several. It is very clear and well settled that a mortgage given to two or more persons to secure their several debts, is several and not joint; that each mortgagee has a right to inforce his claim under the mortgage in a form adapted to the case, and, of course, that the doctrine of survivorship does not apply. If the debts secured are equal in amount, the mortgagees will have an equal interest in the mortgaged estate and in case of foreclosure will hold it in equal proportions. But if the debts are unequal, the purparties of the tenants will be in exact proportion to the amounts of their respective debts." And see Donnels v. Edwards, 2 Peck, 618; 2 Story Eq., sec. 1206; 2 Parsons on Cont., ch. 1; 1 Hilliard on Mort., ch. 11, sec. 60; Ib., ch. 33, sec. 24, 25; Thayer v. Campbell, 9 Mo., 280; Welford Eq. Pl., 412; Randall v. Phillips, 3 Mason, 378; Sherley v. Hannah, 3 Blackf., 403; Delong v. Hutcheson, 2 Randolph, 183. Such joint mortgage is several in legal effect, and has the same legal consequences as two separate mortgages, executed and recorded at the same time. The object being security to the creditor, and the mortgage being construed most strongly against the grantor, it will be held that each grantee takes a several entirety as that best effects the object. This view is strengthened by the consideration that joint tenancies of chattels, aside from partnerships, are not favored.

The case of Atkinson v. Tomlinson, 1 O. S., 237, was a *joint* assignment to two sureties, and Hardrader v. Leiby, 4 O. S., 602, was a joint mortgage to three sureties in both cases probably to indemnify against *several liabilities*, and certainly in Dickson v. Rawson, 5 O. S., 220, that question was made, and deemed immaterial. It will be readily conceded that Peters and Search, by taking a separate mortgage to each, could have taken indemnity, and the objection that it was taken by one mortgage rather than two, is more tech-
*nical than substantial. In a joint mortgage to two, to secure 105
the several debts of each, each holds severally for his own indemnity, and his interest terminates when his liability ceases. If his liability be paid he could not be required to execute any further trust. 1 Curwen Stat., 236, ch. 109. The common law doctrine that a gift or grant of a chattel interest to two or more, creates a joint tenancy, 2 Kent, 350, is controlled and changed by the principle, that where the interest is *several* the covenant, though in form joint, shall be construed several.

2. *Interest in severalty or in common.*

If Peters and Search had each taken a separate mortgage, executed and recorded at the same time, each would have taken an *entirety*—would have held in severalty—so that, if the liabilities of Peters were paid, Search could resort to the whole mortgaged property for his indemnity. A mortgage to the two could be drawn so as to accomplish the same result—an interest in severalty—an entirety to each or it could be drawn so as to vest equal undivided moieties in common in each, or interests in common proportioned to the liability of each. So by separate or the same instrument, any undivided interest could have been granted, the same to both grantees, leaving in the grantor unincumbered interest. It would seem to follow from the principles stated, that each grantee of a mortgage to two joint in form, to secure their several claims takes in severalty an entirety and that after foreclosure they would hold as tenants in common, in proportion to their respective mortgage claims, the liens of which were co-equal. The case of Burnett v. Pratt leaves it doubtful if the mortgagees take each an entirety or as tenant in common. The language of that case is contradictory on this point, since it declares such mortgage "several and not joint," and also declares that a tenancy in common is created. An estate in severalty is quite different from a tenancy in common. If the mortgagees hold in severalty, neither one would hold in trust for the other, and such mortgage would not come within the statute relative to assignments. Each would hold not merely one entirety in severalty, for the creditors he represents in proportion to their respective claims, but one entirety for each creditor, so that the one mortgage would have the legal effect of separate mortgages for each secured claim. But if the mortgage to Peters and Search, could create in them a tenancy in common, each holding equal, or unequal, though definite interests, each would hold for his own indemnity, upon the principles above stated, and not in trust for the

other. The pledge is an incident of the debt and attaches to it. The pledge to each would attach to the claims secured for each, if the extent of the security should be ascertained and definite. The "several interest" principle of Burnett v. Pratt, would in such case control a tenancy in common, as well as a tenancy in form joint, and so each tenant in common would hold for himself alone.

IV. The mortgages under consideration secure one note payable to Search himself. But as to this, Peters is not a trustee of any interest for Search. It falls within the principle already stated that a mortgage joint in form to two, to secure their several debts, is in legal effect several. In Root v. Bancroft, 10 Metc., 47, it was held that a mortgage to two, to secure a debt of one, made the grantees tenants in common, the party not interested holding his moiety, as trustee for the other. But that cannot affect the case of a mortgage to secure the several debts of both.

The view I have taken of the effect of mortgages joint in form to secure several debts, seems to me well sustained *by
106 authority, though apparently in conflict with a point suggested, rather than decided, in Brannon v. Brannon, 3 Weekly Law Gaz., 260, March 26, 1859. That was on a mortgage joint and several in its terms. Spencer, J., says, "The conveyance is made to four individuals to hold 'to them and each of them' (i. e., jointly and severally) to secure said persons individually, and as firms in their liabilities, etc. Now there is no indebtedness specified in this instrument in which all the parties are jointly liable, nor in which they are severally liable; and if there was, or such indebtedness might subsequently have arisen, yet the paper specified was neither joint nor several, but such as some of the parties were liable upon as individuals, some as individuals and firms jointly and some as firms jointly, in no case embracing all."

"It follows that so far as the conveyance is joint, they held in trust for each; and so far as it was several, each held in trust for all—not each separately until his single debt was paid, or each in proportion only to his single debt, but all jointly, as well as severally until the debts of each and all were paid; so that should the debt of any one be paid in full, his interest in the property did not thereby cease, but he still continued to hold as trustee for the others; and as such trustee, he would be held to an account by the others, or by the mortgagor himself. This brings the conveyance within the statute. But I have said this point need not be decided."

If that case was in point and the question suggested had been decided directly upon principle or an examination of the books, I would have yielded my own convictions to the authority so justly conceded to the learning and ability of Judge Spencer. But he did not, as is apparent, intend to determine the point suggested.

V. *Preference amongst secured creditors.*

The mortgages under consideration do not secure an equal *pro rata* distribution to the secured creditors. By the chattel mortgage, it is provided that one of the creditors (Russell) shall have the proceeds of 60 acres of wheat. An assignment is not within

the statute, merely because it makes a preference among the secured creditors. It is competent, either by the same or separate instruments, to assign absolutely a horse to one creditor, a lot of goods to another, and notes to a third, either by way of mortgage, or in payment absolute. All the adjudged cases show, that the statute was not designed to prohibit preferences by mortgage, or by payment. If this may be done by separate instruments, the same legal effect can be accomplished by one. In such case, nothing is, or can be held by one person, in trust for another, which is the test by which the trust of the statute is decided.

VI. *Preference to one of the secured creditors with surplus, if any, to others within statute.*

In this case the realty mortgage covers 140 acres of land, worth, as proved by parol, $7,000, subject to prior mortgage of $3,000, leaving

The realty mortgage interest worth—say	$4,000
The chattel mortgage covers wheat in ground worth, say more or less	600
Other chattels	900
Value of mortgage security estimated	$5,500

The debts secured are—

FOR SEARCH'S INDEMNITY.

Bill to deposit bank	$1,000	
" " "	1,800	
Search himself	124	
Estimate contingency	40	
Total	$2,964	

FOR PETERS' INDEMNITY.

Bill indorsed to Exchange bank	$2,000	
Debt to Russell	500	
Estimate contingency	36	
Total	$2,536	
Total liabilities secured		$5,500

Both mortgages being executed at the same time as part of the same transaction, have the legal effect of one mortgage 4 O. S. 514.

*VII. *Absolute sale in consideration of payment to third persons.* 107

1. Gordon McWilliams sold chattels to James McWilliams in consideration that he would pay enumerated debts of said Gordon, release his claim on said Gordon, amount then unsettled, pay another debt of said Gordon "if the money held out," and residue if any to Peters and Search for their indemnity as sureties of said Gordon. This is not an assignment within the statute if done *bona fide.* A sale of chattels in contemplation of insolvency in consideration that the purchaser pay debts of the vendor to third persons is not within the statute. 7 O. S., 359. In such case there is no trust to be enforced in equity for creditors, because the legal title in or right of action on the promise is in the creditor. Ib., 366; 1 Swan Pr., n. 20. This is not changed by the fact that the right of action depends on

a contingency. 5 O., 56. Nor is it material that the amount to be paid the creditor is uncertain and to be ascertained. Weston v. Baker, 12 J. R., 277, nor that it is to apply on a larger claim due from the vendor to the creditor. Ib. It is true there is no trust in the vendee which the vendor can enforce in equity but that existed without objection in Bagaley v. Waters. 7 O. S., 360. It is not a trust to the creditor as the statute requires. 4 O. S., 613; 5 O. S., 222.

If the sale to James McWilliams was *bona fide*, and not within the statute of frauds, it is not within the statute relative to assignments.

2. Some confusion perhaps exists in the authorities as to whether an absolute sale, mortgage or assignment to a creditor in contemplation of insolvency with a design to prefer him, if also within the second section of the statute of frauds (vendor and vendee both participating in the fraud) is void absolutely as to general creditors, or is by the statute relative to assignments, Swan 466, 3 Curwen 2239, converted into an assignment for the equal benefit of all creditors. 20 O., 389, 400, 545; 5 O. S., 224; 6 O. S., 616, 620, etc.; 1 O. S., 240-3; 4 O. S., 610.

The general rule is that a creditor who levies on property fraudulently sold within the statute of frauds, 2 Gilliman Ills. 78, Burrill on Associated Ch. 52, p. 542, or who impeaches it in chancery for fraud obtains an exclusive preference. 6 O. S., 615. Prior to the statute relative to assignments, fraudulent assignments were absolutely void as to creditors.

But it would seem that the doctrine in Ohio is, that where a sale, mortgage, or assignment to a creditor is within the second section of the statute of frauds, and is also made in contemplation of insolvency with the design to prefer such creditor, it is not absolutely void as to general creditors, but it is within the statute relative to assignments, and so is an assignment in trust for the equal benefit of all creditors. The sale being void as to general creditors by the statute of frauds, the vendee cannot occupy the position of a purchaser, and as by the same statute the title as between the parties passes to the vendee, he becomes by operation of the statute relative to assignments, a trustee for the equal benefit of all creditors.

Thus in Brown v. Webb, 20 O., 389, it is held that "where a debtor in contemplation of insolvency executes a chattel mortgage to one creditor for the purpose of securing such creditor in preference to others, with an understanding that the mortgagee shall satisfy his claim out of the goods, and then surrender the residue [a large residue] to the mortgagor, [which would be within the second section of the statute of frauds, Burrill 298,] the *mortgage will
108 be deemed an assignment of property in trust, and the mortgagee will be deemed a trustee, holding the mortgaged property for the benefit of all the creditors in proportion to their respective demands." And in Dickson v. Rawson, 5 O. S., 224, the court in considering fraudulent assignments say: The statute [relative to assignments] it is true does not avoid the conveyance, but it nullifies the attempt

of the debtor to confine its benefits to a part only of his creditors and makes it more to the benefit of all. The declaration of trust is illegal, and the statute avoids it and compels the assignees to become trustees for all the creditors of the assignor.

If therefore the sale to James McWilliams being in contemplation of insolvency, with a design to prefer him and other creditors of Gordon McWilliams, is within the second section of the statute of frauds, he holds in trust for the equal benefit of creditors. The evidence upon that subject or the conclusion thereon need not here be stated.

*HUSBAND AND WIFE—EXECUTIONS. 109

[Hamilton Probate Court, 1859.]

J. S. NEWTON v. J. P. CLARKE.

1. The act of February 28, 1846, section 1, relating to the interest of husbands in the wife's estates, merely exempted from execution for the husband's debts, but does not contravene the other sections giving the husband a life estate as tenant by the curtesy, and if the husband in this way possess a homestead he cannot exempt other personal property in lieu thereof.

2. Sections 2, 3 and 4, of the above mentioned act, relating to the interests of husbands in the wife's estate, do not exempt horses, wagons, and crops taken from the wife's real estate. They became the husband's on marriage, and not being choses in action did not require to be reduced into possession, and were subject to the payment of his debts.

PROCEEDINGS in aid of execution.

It appeared in testimony that with certain money which had belonged to his wife the defendant, had purchased farming stock and utensils, horses and carriage, etc., and a motion was made to subject a portion of this property to the payment of the execution.

It was claimed on the part of the defense that the property was exempted from execution by virtue of an act in relation to the interests of husbands in the estates of their wifes, passed 28 February, 1846; or if not, at least by other acts, including the Homestead Law.

HILTON, J.

The common law doctrine of the interests of the husband in the estate of his wife, remains in tact except so far as it is altered by our statutes, and that these statutes must be construed strictly. The first section of the act referred to, exempts from execution for the husband's debts the real estate of the wife. But this does not contravene the other sections of the law, giving the husband a life estate as tenant, by *the courtesy in the wife's property, 110
but merely exempts it from execution. If, therefore, he is possessed in this way of a homestead, he cannot plead other sections of the law which exempts certain personal property in the absence of the homestead.

After referring to the effect of the second, third and fourth sections of the law, the court proceeded to remark that it appeared in this case the horses, carriage, wagon, and the crop taken from the real estate, were not strictly exempted by this law; but that on the marriage this personal property, vested in the husband and was subject to the payment of his debts; and that personal property, other than choses-in-action, was not required to be reduced to possession according to the law governing choses-in-action but vests in the husband at once by virtue of the marriage.

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113 *AMERCEMENT OF SHERIFF.

[Superior Court of Cincinnati, Special Term, May, 1859.]

PETER DOUGLASS v. RICHARD MATHER, LATE SHERIFF OF HAMILTON COUNTY.

1. As a general rule, no officer of this court can be considered in default for neglect of duty, until he has technically refused to perform what he may be required to do in the relation he sustains.
2. It is proper for a party to demand in the first instance, payment of moneys due him, and which may have been collected on execution, or other process, before the officer can be amerced, or interest be claimed for withholding it. Nor is the spirit of the rule changed where a fund already in his hands is directed by the court to be distributed. Nevertheless, an action may be brought before an actual demand is made, and interest will be allowed from the commencement of the action.
3. But there may be cases, where it would be obligatory upon the fiduciary to seek out the party entitled to receive a fund, and thus relieve himself of the trust. He cannot retain money for an indefinite time, use it as his own, and consider himself as entitled to hold it, without interest, after his term of office has expired, merely on the ground that no demand has been made.

STORER, J.

The question presented upon the motion before us in this, shall the defendant be required to pay interest upon a sum of money now in his hands, and which has been heretofore appropriated, by a decree of this court, to the plaintiff's use?

It appears by the testimony in the cause plaintiff held certain certificates for property purchased by him at tax sale, the amount of which, with penalties and interest, on the 30th of October, 1857, was $192.83. The tax had been assessed upon land, owned by the heirs of Moore, which had been subjected to sale by decree, and in order to give the buyer an unincumbered title, the sheriff was ordered to retain from the purchase money and pay to the plaintiff the sum already stated to be his due. The date of the decree is October, 1857.

Shortly afterwards the plaintiff called upon the defendant, presented his certificates and demanded his money, when he was informed the defendant had in his hands an execution, sent from Cuyahoga county, Ohio, against the plaintiff, and his duty required

him to retain so much of the fund as should be necessary to discharge it. The plaintiff denied that he was the person named in the process, and it seems, by mutual consent, the writ was returned, and inquiry made as to the identity of the party against whom it issued, the money for the time being remaining with the defendant. In a few weeks another writ was sent to the defendant, which was placed in the hands of his deputy, who called upon the plaintiff to discharge it, when, by consent of the officer, the plaintiff gave an order upon the sheriff to deduct the damages and costs from the amount in his hands.

For some cause, not clearly explained, no appropriation was made, and the execution was sent back the second time. Early in March, 1858, another *writ came into the sheriff's hands, upon 114
which one of his deputies, notwithstanding the order already given to the defendant, levied upon the plaintiff's property, who was compelled to pay the amount claimed to be due, still denying, as he asserts, his liability to pay it.

The plaintiff now demands his money with interest, from the time it was received by the defendant; his claim is resisted on the ground that there has never been a refusal to pay it, but on the contrary repeated requests made of plaintiff to call at the sheriff's office, and receive the amount.

Upon the question whether any such requests were made, the parties themselves are directly at issue. Both have testified; the one affirms, the other denies. Two of the sheriff's deputies have been examined, who state, in general terms, that the plaintiff was notified several times the money was ready for him, and assured it would be paid on demand.

Upon these conflicting statements, we must determine the rights of the parties.

As a general rule, no officer of this court can be considered in default for a neglect of duty until he has technically refused to perform what he may be required to do in the relation he sustains. Whether it is the sheriff, the clerk, or the attorney, neither is delinquent, unless some one of the obligations he has assumed in virtue of the office he holds, is unfulfilled. Thus it is proper for a plaintiff to demand in the first instance, payment of monies due to him, and which may have been collected on execution, or other process before the officer can be amerced, or interest be claimed for withholding it. Nor is the spirit of the rule changed where a fund already in his hands is directed by the court to be distributed. There must even here be evidence of positive misconduct, or omission of duty, before we could justly hold the officer shall be charged with anything more than the amount decreed to be appropriated. But there may be cases where it would not only be prudent, but obligatory even upon the fiduciary to seek out the creditor, and thus relieve himself of the trust. He certainly ought not to retain it for an indefinite time, use the fund as his own, and consider himself as entitled to hold it, without interest, after his term of office has expired, merely on the ground that no demand has been made. It is our duty to protect the officer

as well as the suitor, both are entitled to our aid, but each must place themselves before us without legal blame, when they ask us to interfere on their behalf.

It is evident when the plaintiff first demanded his money, the sheriff could not have retained it, to satisfy the execution then in his hands against the plaintiff. We suppose he would not be permitted to apply it on any such principles, that the proceeds of one writ when one party is plaintiff, may be held to discharge another, where he was defendant, if both were in the officer's hands at the same time.

Until it was ascertained whether the plaintiff was the real debtor, there seems to have been no objection raised to the further retention of the money. When the order was finally given to apply it, and that was refused; this coupled with the fact of the levy and subsequent discharge of the execution, by the plaintiff, establish, in our opinion such a state of things as we may well regard to be equivalent to a request to pay, and a consequent refusal to do so.

We think then, that interest should be allowed from the 15th day of March 1858, until the present time.

The last execution, it is proved, was received by the sheriff, on
115 the 8th of *March, 1858, and the levy and satisfaction were during the same month. It is also admitted the refusal to apply the fund in controversy was made about the same time.

If the sheriff had paid the money he held into court, we might have ordered it to be deposited for the benefit of the plaintiff, and any accruing interest would have been added to the principal as a matter of course. This step would have saved all trouble, and avoided every responsibility.

Further, if it had been shown, the sum now claimed had been deposited by the officer, to the credit of the plaintiff, or specially held for his use, so that it could be distinguished from the private funds of the recipient, and did not, therefore, become a part of his estate, in case of his death, we might hold that interest could not be claimed. But such is not the fact. We find the sheriff relies only upon his uniform willingness to pay, and requires a special demand to be made before he is chargeable with any default, without proving the fund in controversy was specially set apart for the plaintiff, or not mingled up with his general account.

We do not think he has furnished a sufficient excuse to forbid the allowance of interest for the period we have indicated. We have stated the general rule to be that interest cannot be disputed until a demand has been made; but it is nevertheless true, an action may be brought before an actual demand is made, and interest will be allowed from the commencement of the action.

This was settled in Delo v. Birch, 3 Campbell, 347; Brewster v. Vanness, 18 Johns 121, and Dygert v. Crane, 1 Wendell, 534; and the principle thus governing the collection of money on execution, "*a fortiori*," should be the rule when the money has been already collected, and by order of the court appropriated. The character of the officer in the last case, partakes not only of that of sheriff,

but of receiver, also, and it may be doubted, whether he can protect himself from the liability to pay interest, when he has not directly notified the party entitled to receive the fund, of his willingness to pay it.

The motion will therefore be sustained, and the sheriff ordered to settle the account upon the principle we have indicated.

W. Van Hamm, for plaintiff.

W. B. Caldwell, for defendant.

[Superior Court of Cincinnati, Special Term, 1855.]

BRONSON v. METCALF.

For opinion in this case see 1 Disney, 21.

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*STREET ASSESSMENTS. 129

[Superior Court of Cincinnati, Special Term, 1859.]

REYNOLDS v. CLEARWATER, ET AL.

1. The action of municipal agents is not conclusive in cases where they are empowered to levy an assessment.
2. A court has power to supervise the acts of the city authorities, after they have been performed, even when it is clear the court might have enjoined them from the commission of their acts, if the equitable power of the court, had been invoked before they were complete, or while they were threatened to be done.
3. It does not follow that the omission to seek a restraining order is a waiver of any right on the part of the defend nt to dispute the regularity of the course pursued by the agents of the city.

STORER, J.

The plaintiff is a contractor, under an agreement, with the city of Cincinnati, to repair the Harrison road, from the Brighton House west to Riddle street. He claims to have performed the work, and now demands from the defendant, as one of the owners of the land, bounding on the road, $268.41, which he alleges have been assessed by ordinance, as is required by the city charter.

An ordinance was passed on the 3d of July, 1857, declaring that the Harrison road within the boundary specified "should be repaired with boulder stone." Afterwards proposals were solicited by the board of city commissioners for the performance of the work and the plaintiff filed his bid, which was accepted—the city council confirming it. A contract was accordingly entered into between the plaintiff and the city, by which it was stipulated he was to receive "*forty-five cents for each square yard of the road repaired.*" This sum including materials and workmanship.

When the work was completed, as is usual in such cases, it was accepted by one of the city commissioners, and an ordinance passed by the council, ordering an assessment to be made upon the adjoining lots for the whole amount alleged to be due, each foot front of the property, on both sides of the road, to bear its share of the expense *pro rata*.

The estimate and assessment was afterwards fixed at $1.04 and 44-100 per foot, which, when charged upon the defendant's land, amounted to the sum now sought to be recovered.

As we understand the case, no mode of repair, other than the designation of boulder stone, was named in the ordinance or the contract. To what extent the road was to be improved, or whether there should be any change of grade, either by elevating the existing surface, or depressing it, does not appear to have been determined. A simple authority is given to repair, without any check upon the expenditure of money, or any limitation prescribed as to the extent of the improvement contemplated to be made.

130 *The right of the plaintiff to recover, is resisted, on the ground that under the authority granted by the ordinance no other sum could be made a charge upon the property owners, than such as good faith and the conveyance of the public required to be expended for the improvement of the thoroughfare.

It appears the assessment exceeded $1,000 for the whole work.

A number of witnesses were examined, and testified the whole expense necessary to be incurred, ought not to have exceeded fifty or sixty dollars, at the farthest; among these were a member of the council, who voted for the repairs, and the largest property owners in the vicinity of the road; their testimony going even to the fact, that the road since the repairs, is in no better condition than it was before.

After the passage of the ordinance, and after the contract was entered into with the plaintiff, the city engineer and one of the commissioners concluded it was necessary to incur the outlay for what they believed to be a permanent repair of the road, and by their advice, the mode pursued was adopted by the contractor.

The opinion of these officers is not sustained by the testimony; in fact so great is the preponderance on the other side, that the counsel for the city frankly admit, if we have the right to inquire at all, into the propriety of the mode pursued in making the repairs, there cannot be a recovery, except for such ratable portion of the expense justly incurred, for what was really necessary to be done, under the ordinance.

It is said we ought not to interfere, because the city council have adjudicated, by ordering the improvement to be made, and accepting it after the work was done, thereby ratifying the acts of the city officials, as well as those of the plaintiff. These proceedings, it is supposed, conclude all parties, except in the case of actual fraud, or where fatal defects are found to exist, in the ordinance, or the mode in which the contract is claimed to have been performed.

The question, then is simply this: Can we supervise the acts of the city authorities after they have been performed, when it is very clear we might have enjoined them for the commission of those acts, if our equitable power had been invoked before they were complete, or while they were threatened to be done?

It seems to us the preventive process of the court could not have been denied, if an application had been made, upon the evidence now adduced, for an interference at any time during the progress of the work, as it is clear we should but have thereby awarded a clear legal right, to avoid an unjust assessment, and saved the landholder from a burden that ought not to have been borne.

Nor, does it follow, because a restraining order was not obtained, that the omission to seek that remedy is a waiver of any right, on the part of the defendant, to dispute the regularity of the course pursued by the agents of the city.

If the city was plaintiff, and sought to recover for the repairs alleged to have been made, the reasonableness of the charge might well be the subject of examination and decision by the court. The defendants could not, then, be held responsible for more than the actual cost incurred. Nor do we perceive how the plaintiff can stand upon better ground than the city. He derives his right from the contract he has entered into with a municipal body, and is bound by all the limitations incident to it. If, then, the corporation cannot enforce an unjust or unlawful claim the *assignee or 131
contractor, is alike concluded.

We must hold the city council to represent the property owners, in these peculiar contracts. They are practically the agents of those who are to be affected by the agreement made with the contractor and it is their duty to originate no improvement, to levy no assessment, nor enter into any stipulation that is manifestly inequitable.

No agent could ordinarily thus create such a liability against his principal, as it would evidently be an excess of authority, if not a direct abuse of confidence. There must in such a case be a significant ratification of the act done before a liability could be inferred.

We find no such admission here, in the power assumed by the city and her officers. On the contrary, there is no intimation from the time the work commenced, until it was finished, that the defendant assented to the reparation of the road, in the mode alleged, though it is in proof he opposed it, regarding it as unnecessary, and so far as it would charge him with a tax to pay it, as unjust.

We cannot then permit the idea to be entertained, that there is no supervision over the official acts of municipal agents, or that their action is conclusive in any case, where they are empowered to levy an assessment. Such a doctrine, would leave a party, injured by gross official delinquency, without remedy. In every ordinary case, where the final action of a judicial tribunal is had, there may be a supervision, by appeal, or writ of error, but in the case before us there is no such remedy; nor would the ordinary process of *certiorari* reach the point, as the complaint is not for the act of the

council, but of the agents of the city, in exceeding the power alleged to have been conferred by the ordinance.

In a case like the present, therefore, there must be some mode by which relief can be administered, and we have no doubt it may well be given by our decree.

We decide the defendant is liable to pay his ratable portion of $75, to be assessed upon each front foot of his land, and the city must be charged with the payment of the residue.

W. T. Forrest for plaintiff.

R. B. Hayes for city.

Ferguson & Long for Clearwater.

CORPORATIONS.

[Superior Court of Cincinnati, Special Term, 1859.]

HORTSMAN v. RIX ET AL.

A plaintiff having obtained a judgment against a church corporation on notes given for money borrowed to erect the edifice, cannot maintain an action against the trustees of the church as individually liable on the notes, which would give two judgments on the same contract. The plaintiff's remedy is by bill in equity, averring the inability of the corporations to pay the debt, and asking to hold liable the members of it when the debt was created. An amendment to the petition to meet the case, may be allowed.

The plaintiff charges the defendants, who are trustees of St. Jacobus church, as being individually liable to pay certain promissory notes given by that corporation, for moneys borrowed to build their church edifice.

It is admitted a judgment has already been rendered upon the notes against the corporation, and it is contended this action cannot therefore be maintained against the defendants. If the defendants can be held liable as individuals, we are satisfied the petition must assume another form. The plaintiff cannot have two judgments upon the same contract, the one against the corporation, and the other against the persons composing it. The notes have been already merged in the judgment, and if the plaintiff seeks to pursue the defendant, under the statutory clause, he must set forth the former proceedings, as by bill in equity, aver the inability of the corporation to discharge the debt, and ask that the members who belonged to it, when the debt was created, shall be held liable.

The plaintiff may amend his petition to meet the case.

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*ATTACHMENT. 132

[Superior Court of Cincinnati, at Chambers, 1859.]

J. R. MORTON & CO. v. R. STERRETT.

When the allegations upon which an attachment is issued, as that defendant is about to dispose of his property with intent, etc., are positively denied by the defendant's answer, the denial is as good as the affirmation, and, unless further testimony is given by plaintiff, the attachment will be dismissed.

STORER, J.

Judge STORER, in this case, disposed of an application on the part of the defendant to dissolve an attachment.

The allegation in the petition of the plaintiff (that defendant was about to dispose of his property, with intent to place it beyond the reach of his creditors) was positively denied in the answer; and in this class of cases the court always considered the denial equivalent to the affirmation, and held that the party, unless he introduced further evidence to substantiate his statement, was not entitled to its process. The testimony here did not prove any positive wrong, or anything like a fraud, but a desire on the part of defendant to retain his property in his possession. None of the witnesses state that there was anything in his conversation or conduct that could lay the foundation for a belief that any course was intended by him by which the creditors would be deprived of the benefit of the property that Mr. S. had at the time. Some stress had been laid on the fact that he had paid off his brother, but if this was done in good faith he had a legal right to pay off any of his creditors, and might have supposed his brother sustained more confidential relations than others. Another point urged was that he did not make an assignment. The court had no power to compel him to do so—no right unless something like a trust was created to take possession of the property and then a clear case must be made out. They would, however, advise an assignment to be made.

Mr. Collins, for the defendant—That has been done.

Court—We can see no reason for sustaining this attachment. Creditors are not always the coolest men when their rights are at stake, but indulge views and suspicions that are afterward found to be incorrect. They feel sensibly their loss, and draw, perhaps, stronger inferences than courts afterward would, who are impartial between the parties. The attachment is dissolved.

J. G. Gibbons, for plaintiffs.

Collins & Herron, for defendant.

145 [*Superior Court of Cincinnati, Special Term, 1858.]

MUELLAR & GROGAN v. ISAAC BATES ET AL.

For opinion in this case, see 2 Disney, 318.

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148 [*Superior Court of Cincinnati, Special Term, 1857.]

PARVIN v. MCBRIDE, SNOW ET AL.

For opinion in this case, see 1 Disney, 566.

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153 [*Superior Court of Cincinnati, Special Term, 1859.]

THE FARMERS' COLLEGE v. THE EXECUTORS OF CHAS. MCMICKEN, DEC'D.

For opinion in this case, see 2 Disney, 495.

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155 [*Superior Court of Cincinnati, Special Term, 1857.]

MCCULLOUGH v. LEWIS.

For opinion in this case, see 1 Disney, 564.

This case was cited in Stoutenberg v. Frees, 2 Dec. R., 463, s. c. 3. W. L. M., 151, 152.

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161 [*Superior Court of Cincinnati, Special Term, 1858.]

EGAN v. LUMSDEN.

For opinion in this case, see 2 Disney, 168.

This case was cited in Whitehead v. Post, 3 W. L. M. 195, 199, s. c. 2 Dec. R., 468, 471.

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165 [*Superior Court of Cincinnati, Special Term, 1859.]

WALLACE v. EXECUTORS OF MCMICKEN ET AL.

For opinion in this case, see 2 Disney, 564.

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169 [*Monroe District Court, June Term, 1859.]

EX PARTE PHILIP WINGARD.

For opinion in this case see, 1 W. L. M. 453, s. c. 2 Dec. R., 126.

This case is cited in Knapp v. Thomas, 39 O. S., 377, 387.

[*Superior Court of Cincinnati, Special Term, October, 1859.] 191

HEZEKIAH STITES v. WM. HOBBS.

For opinion in this case, see 2 Disney, 571

[*Meigs District Court, April Term, 1859.] 200

H. MCCARTY v. LUCIA BLAKE.

For opinion in this case, see 2 Dec. R., 155, s. c., 1 W. L. M., 589.

[*Superior Court of Cincinnati, Special Term, June, 1859.] 202

WM. H. LAPE v. DAVID A. PARVIN ET AL.

For opinion in this case, see 2 Disney, 560.

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*CONTEMPT OF COURT—HABEAS CORPUS. 209

[Hamilton District Court, 1859.]

EX PARTE FRENCH.

Payment of money collected by a trustee cannot be enforced by the probate judge, or any judge, by the process of contempt of court, which is intended as a punishment, and not as a remedy, the money not being the identical fund collected; as a specific property is a debt for which arrest is, except in cases of fraud, forbidden by the constitution.

GHOLSON, J.

In this case, the petitioner, L. French, alleged that in a proceeding in the probate court at the suit of Stadler & Co., he (French) being the respondent in said suit, was committed as for a contempt of court, in not complying with an order of said court, to pay over (to W. S. Brown) a sum of money received by him as assignee and claiming that said committal was illegal, he now asks to be discharged.

Judge GHOLSON announced the opinion of the court. The court find in the papers handed up that a sum of money ($620) was collected by the trustee (Mr. French), and remained in his hands; and the question arising is whether the payment of that amount by the trustee can be enforced by the process of contempt. We are unanimously of the opinion that it cannot—that it is not competent for any court in the state to enforce payment in that way.

In the first place, because of the constitutional provision that protects the person from arrest for debt, unless in cases of fraud, and in the next place it is not claimed that this money was the identical fund collected. This order of the probate court is in the nature of

a demand which arises from a past transaction, and is not in the nature of a requisition to deliver specific property, while the statute contemplates only the delivery of specific property. We have assumed the power to exist in the probate judge to inquire into this matter of the assignment, but he had no right to use the particular process that had been used in this case. This proceeding by contempt was not only an extraordinary power, but was in the nature of a punishment, and was never intended as a remedy to accomplish the purposes of the suit. The court cited the case of 3rd Hill, 662.

The petitioner was accordingly discharged.

Oliver Brown & P. T. Williams for petitioner.

T. J. Gallagher on the other side.

[*Superior Court of Cincinnati, General Term, November, 1859.] 257

ISRAEL MARIENTHAL ET AL. v. H. J. AMBURGH ET AL.

For opinion in this case, see 2 Disney, 586.

[*Superior Court of Cincinnati, General Term, November, 1859.] 258

JOHN SHILLITO v. JAMES PULLAN ET AL.

For opinion in this case, see 2 Disney, 588.

[*Superior Court of Cincinnati, General Term, December, 1859.] 273

GERARD R. CHESELDINE v. RICHARD MATHERS.

For opinion in this case, see 2 Disney, 592.

[*Superior Court of Cincinnati, Special Term, 1859.] 289

MCCAMMON AND BARKER v. PRUDENCE SUMMONS ET AL.

For opinion in this case, see 2 Disney, 596.

[*Superior Court of Cincinnati, General Term, December, 1859.] 293

JOHN A. WILLIAMS v. DANIEL H. MEAD.

For opinion in this case, see 2 Disney, 604.

[*Superior Court of Cincinnati, Special Term, December, 1859.] 321

HARRIET E. CAMPBELL v. EZEKIEL MCELEVEY ET AL.

For opinion in this case, see 2 Disney, 574.

*STATUTES—QUO WARRANTO. 337

[Hamilton District Court, 1859.]

Scott, Carter, Mallon and Dickson, JJ.

STATE OF OHIO EX REL. B. ROBINSON v. JOHN S. GANO.

1. In a proceeding in *quo warranto*, commenced in proper form, under the supplementary act, passed March 18, 1839, (Swan's Statutes, 787), the court may give judgment as to the right of defendant to the office in controversy, without passing upon the right of the relator.
2. The clause, "No law shall be revived or amended unless the new act contain the entire act revived or the section or sections amended; and the section or sections amended shall be repealed," of section 16 of article II of the constitution, is directory alone, to the legislature.
3. The object of this clause is to enable the members of the legislature to act advisedly in the revival and amendment of laws; and it does not prohibit independent legislation, which on its face develops its whole purpose, even though such legislation changes or modifies the effect and operation of preceding statutes.
4. The fifth section of the act commonly called the police act (56 vol. Stat. 48) is constitutional.

DICKSON, J.

This is a proceeding upon an information in the nature of a *quo warranto*, at the relation of Benjamin Robinson against the defendant, John S. Gano. The information, in substance, sets forth that the relator, Benjamin Robinson, has been duly appointed and qualified chief of police of the city of Cincinnati; that by virtue of that office he is the ministerial officer of the police court of said city, and that, defendant, John S. Gano, has intruded himself into this latter position, and thereby virtually into the office of chief police, and claims to hold the same on the ground that he is the city marshal. The relator further sets forth that there is no such office as city marshal, and concludes, in substance, with the prayer that defendant answer by what authority he claims to hold the said office of marshal or to be the ministerial officer of the police court.

To this information the defendant files two pleas. The first is a denial that the relator is chief of police as he claims, and concludes to the country. The second plea alleges, in substance, that defendant has been duly elected and qualified city marshal, of said city, and is by virtue of said office the ministerial officer of the police court.

To this second plea, the plaintiff at the relation of said Robinson files a demurrer.

This is the state of the pleadings, and they present, on the demurrer, the question, is the defendant, John S. Gano, legally in the exercise of the powers and duties of city marshal? The other question is admitted, to-wit: that if defendant is the city marshal, he is by virtue thereof the ministerial officer of the police court. Is, then, the defendant, John S. Gano, legally city marshal? But,

here the objection is raised on behalf of the defendant, that under this proceeding an inquiry cannot be instituted as to the right of defendant until the right of the relator is determined. It is admit-
338 ted that at *common law, issues of law are to be determined before issues of fact, but it is claimed that this is a case of double pleading, involving two independent issues, the one as to the right of the relator as raised in the first plea; the other as to the right of the defendant as raised in the second plea and put in issue by the demurrer; and that the issue as to the right of the relator must first be determined. In support of this claim it is said that this proceeding is brought under the supplementary act to the general *quo warranto* act; Swan's Revised Statute, 787 that it is, at the instance of a private individual, without leave of court or the co-operation of the attorney general or the prosecuting attorney; that this is therefore in the nature of a private proceeding for personal ends, and that true policy would require us to construe the statute in such a manner as to prohibit any private individual disturbing a person in the exercise of a public office, until he had *first* established his own right to the same. This is ingenious and plausible, but is it correct? If it be correct, then a *quo warranto* proceeding commenced under this supplementary act is not a proceeding for the purpose of determining by what authority, *quo warranto*, the defendant holds the office he possesses, but it is primarily and mainly a proceeding to determine by what authority the relator claims the office held by the defendant. I say intentionally, *mainly* perhaps, I might say *exclusively*, because it is claimed that if on the inquiry concerning the right of the relator, it is found that he has no right to the office held by the defendant, then that the proceeding must be dismissed without further inquiry. Suppose, however, it is found that the relator is entitled to the office held by the defendant and judgment is given for him, of course that necessarily decides that the defendant is not entitled to the same office, and necessarily precludes further inquiry as to the defendant's right. So that in whatever way the issue as to the relator's right is determined, it precludes further inquiry as to the defendant's right, and thus as I have said, makes a *quo warranto* proceeding under this supplementary act, merely an inquiry concerning the relator's right.

Can that then be a correct interpretation of this supplementary act, which converts an information in the nature of a *quo warranto* into an inquiry into the relator's right.

Let us examine the statute. It provides, in substance, that a person who *claims* to be rightfully entitled to a public office, usurped and held by another, may file an information in the nature of *quo warranto* against that other, and then that like proceedings shall be held and a like remedy given as is or may be provided by law for cases of usurpation of office under the general *quo warranto* act. It further requires that the relator shall give security for costs. Section 3 of the general *quo warranto* act provides that in a proceeding in *quo warranto* the prosecuting attorney *may* set forth therein the name of the person claiming the office in question, and that judg-

ment shall be rendered on the right of the defendant, and on the right of the relator, or only upon the right of the defendant, as justice shall require.

From these statutes, it would seem that the supplementary act, only introduced an additional *mode* of instituting a *quo warranto* proceeding, but when commenced, the proceedings under it were to be precisely the same as if commenced in any of the other modes pointed out by statute. Jurisdiction was given over the proceeding when a party *claiming* the office filed the information and his bond for costs; and section 3 shows that by the statute as *at common law, the inquiry that must be made is into the right of defendant; the other inquiry, by statute, as to the 339 right of the relator, may be made at the discretion of the court.

Our conclusion, then, is not only that we may, but that the proper course for us, is to inquire, in the first place, into the right of the defendant. This construction is in harmony with the common law, whence, without definition, this writ was introduced into our constitution and laws, and of course with its common law meaning.

We return, then, to the inquiry raised by the demurrer, is John S. Gano city marshal? It is admitted that he is not, if section 5 of the act commonly called the Police Bill (56 O. L., 51) is constitutional.

The first sentence of that section declares that, "in all such cities of the first class, with a population exceeding eighty thousand inhabitants, there shall be no such office as that of city marshal, but the duties thereof, as now imposed by the acts to which this is supplementary on the city marshal, shall be performed by the chief of police."

Our inquiry, then, is simply as to the constitutionality of this section.

The grounds upon which it is alleged that this law is unconstitutional, we will consider.

First—It is said that this section, without setting forth and repealing the same, amends section 72, of the act for the organization of cities, etc., Swan's Statutes, 972 in this, that said section 72 declares that "The qualified voters shall elect a city marshal, a city civil engineer," etc., and that this section virtually amends that, in striking therefrom the words "city marshal." It is further said that this section in the same way amends all sections of preceding laws which prescribe duties for the city marshal, as this section in effect, to the extent of its operation, strikes from them the word marshal, and inserts therein the words chief of police.

This section is, therefore, claimed to be unconstitutional, as contravening the 3d clause of the 16th section of the second article of the constitution, which declares: "And no law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended; and the section or sections so amended shall be repealed."

Admitting for the present, that the section of the statute under consideration does in fact amend sections of preceding laws, and is,

therefore, in contravention of the clause of the constitution set forth, does it thence follow that this section is unconstitutional? It does; unless the clause in question is to be treated as directory. The question then arises, is that clause directory to the legislature, and its enforcement under their supervision, or is it imperative upon the legislature and to be enforced by the courts, by declaring laws not made in accordance with it unconstitutional and void?

Without pretending to lay down any general rule to determine when a provision of a constitution or law is to be considered directory only, and without entering into an examination of the decisions of other states on this question, (and they are very contradictory), we think that we may, from our own decisions, educe a rule sufficient to guide us to the true construction of this clause.

The two clauses of the section of the constitution preceding the one under consideration, are in these words: "Every bill shall be fully and distinctly read on three different days, unless in case of urgency, three-fourths of the house in which it shall be pending
340 shall dispense with this rule. No bill shall *contain more than one subject, which shall be clearly expressed in its title."

These claims have been the subject of consideration in our supreme court. In the case of Miller & Gibson v. The State, 3 O. S., 475, the supreme court held that the first clause was merely directory, and that its observance by the assembly was secured by their sense of duty and official oaths, and not by any supervisory power of the courts. The ground for holding this, was that the clause was intended as a permanent rule, that it prescribed a mode of procedure in the passage of laws through the general assembly. In the case of Pim v. Nicholson, 6 O. S., 176, the supreme court held that the second clause above stated was directory only, for the reason that it was intended as a permanent rule of the houses in the passage of laws. They held it to be a permanent rule, assigning therefor these reasons: "The subject of the bill is required to be clearly expressed in the title, for the purpose of advising members of its subject, when voting, in cases in which the reading has been dispensed with by a two-thirds vote."

"The provision that the bill shall contain but one subject, was to prevent combinations, by which various and distinct matters of legislation should gain a support which they could not if presented separately. As a rule of proceeding in the general assembly, it is manifestly an important one."

The above are the principal reasons given by the court for holding this second clause directory only. I know the judge in deciding this case puts some stress on the fact that the word *bill* is used, and says, "If (the clause) relates to bills and not to acts." But I apprehend this makes no difference. If the clause, "No *bill* shall contain more than one subject, which shall be clearly expressed in its title" be directory only, because in its nature it is a permanent rule of the house, how is it less or more a permanent rule if the language had been, "No *act* shall contain more than one subject, which shall be clearly expressed in its title?" The substance and

meaning of the clause is to determine its character rather than its accidental phraseology.

From these cases this rule may be educed: When the object of a provision of the constitution is manifestly to furnish a permanent rule for the government of the houses in the passage of laws, the provision is to be treated by the courts as directory only, the observance of which is under the supervision of the houses themselves. And further, when a provision of the constitution prescribes a mode for the passage of laws, and is mainly directed to the guidance and government of the houses in the passage of laws, it is to be considered a permanent rule for the houses.

Let us apply these tests to the clause under consideration. "And no law shall be revived or amended unless the new act contain the entire act revived or the section or sections amended; and the section or sections so amended shall be repealed."

Is not this a plain direction as to the *mode* which the legislature shall pursue in the revival or amendment of laws? It would seem so. And is not the object of the provision manifestly to guide and protect the legislature in the passage of laws amendatory of or reviving other laws?

It would also seem so. In reference to the object of a provision similar to this in the constitution of Maryland, their supreme court say: 7 Md., 159. "The particular cause to which we refer was evidently inserted in the constitution for the purpose of preventing incautious and fraudulent legislation, and to enable members to act knowingly *upon all subjects, and to guard them from the contingency of voting for the repeal or revival of laws through mistake or accident, under the deceptive language often employed in the title of acts." So in our own state it is well known that it was a practice to revive or amend a law simply by reference to its title, without setting forth the act revived or amended. In this way, in the hurry of business, in the absence of books containing the laws, or from other causes, imposition was practiced upon the legislature by designing members. The object of this clause was to prevent this evil, by enabling members to vote advisedly. It is true it has another purpose, to-wit: To furnish a convenient mode of reference in the examination of the statutes. But this is a secondary consideration, besides the same remark might be made with reference to the clause prescribing that a bill should not contain more than one subject, etc. Yet our supreme court did not, on that account, hesitate to treat that clause as directory. If we are right, then, in our view of the object of this clause, according to the tests we have been furnished by our supreme court, this clause is in the nature of a permanent rule for the houses, and therefore to be treated by the court as directory only. 341

This construction is in harmony with that placed by the supreme court upon other clauses of this brief section, and treats the entire section as in the nature of permanent rules for the government of the general assembly in the passage of laws.

Besides, if this clause is compulsory to the extent that the very form of amendment prescribed by it must be strictly observed, it renders every amendatory act passed under the new constitution inoperative and void, for the clause requires that the section amended—not *as* amended—shall be set forth. A form that meets the exact words of the constitution, would be this: Be it enacted, that section (setting it forth) be amended so as to read as follows: (setting it forth *as* amended) and that said original section be repealed. Yet this form has never been pursued, even in substance, the usual course having been to simply set forth the section *as* amended.

The supreme court of Indiana has held a similar provision of their constitution to be compulsory, and there the question was directly raised whether an amendatory act that only set forth the section *as* amended was constitutional, and it was held not. 5 Ind. Rep. 330. Such a construction of the clause in our constitution, would sweep from the statute book every amendatory act under our new constitution—producing the wildest confusion in our laws. And yet if the clause be compulsory this construction cannot be escaped, because if it is compulsory it cannot be disregarded in any respect, and particularly not as to the very form of amendment prescribed.

But after all, is it necessary, for the determination of the constitutionality of the 5th section of the police act, to decide whether this clause be directory or not?

Can it be said that in any proper sense of the word, section 5 is an amendment of any preceding law? It does not on its face purport to be. It is a plain declaration of the legislative will, abolishing the office of city marshal, and devolving its duties on another officer. It is an independent law, introducing a new policy in the government of cities of the first class, containing more than eighty-thousand inhabitants. By a well known rule of construction this repeals all preceding laws or parts of laws, inconsistent with it.

342 Now, does the clause of the constitution *under consideration intend to prohibit independent legislation, introducing a new policy, or reversing a previous policy of the state? Does it intend to prohibit the passage of any law that in its effect and operation varies, changes or modifies the operation of some section of a preceding law, unless such section is formerly set forth and expressly repealed. Does it intend to abolish the rule of repeal by implication? To this extent, however, must the clause go, if the section of the police act under consideration is an amendatory section within the operation of this provision of the constitution.

If this be the case then, indeed is our statute, law involved in uncertainty and confusion. There is scarcely a law upon our statute book, of any length, that does not in some of its provisions effect or modify some section of a preceding law, without setting it forth and repealing it. For example: jurisdiction is conferred upon our common pleas and district courts, in a great measure, by a single section; which declares that all laws, with certain named

exceptions, upon the statute book conferring jurisdiction upon the old common pleas and supreme courts shall have application to the new common pleas court and the district court. The same is true of other laws. Again: If this clause of the constitution is to receive the construction claimed, it prohibits a very proper and judicious mode of legislation. For example: If the legislature should desire to abolish the office of police judge and transfer its duties to the mayor, a very proper method of doing this would be to declare the office of police judge abolished, and to devolve its duties upon the mayor, without setting forth every section of law prescribing the duties of the police judge.

Again: If this construction be correct, it would place an almost insuperable obstacle in the way of proper legislation. For this reason: In the drafting of long and complex laws, the greatest diligence of research and the most ample learning will not be equal to the discovery of every possible law that may be affected by the new law; and yet, if this be not done, the new law to a greater or less extent, will be unconstitutional and void. To the same effect are the remarks of the supreme court of Maryland, upon a similar construction claimed for a similar provision of their constitution, 7. Md. 159. "It could never surely have been the intention," they say, "of the framers of the constitution, that a positive enactment by the legislature upon a subject within their legitimate powers was to be defeated because a previous law, not in terms repealed, was inconsistent with it. If this strict test were required, many wholesome laws would be rendered wholly inoperative, because of the inability or neglect of members to search thoroughly the statute books for laws which might be inconsistent or repugnant; a work, in many cases, of so great difficulty as to amount almost to impossibility." Can this broad construction of this clause of the constitution be the correct one? If not, within what limits shall this clause operate? This is a difficult question, and perhaps no construction can be given that will not be more or less arbitrary and unsatisfactory. We have seen that the main object of the clause is to enable the members of the legislature, in the revival of laws, or in the amendment of sections of preceding laws, to act advisedly; that the evil to be remedied by this clause was the habit, under the old constitution, of amending preceding laws by reference to their title only, or by other reference in such vague terms that the change proposed was not to be ascertained *by an examination of the new law alone. If this be 343
the correct view of the object and character of this clause, then the proper mode of construction would be to give this clause such operation as to effect its object, and no more, unless the language imperatively required it. Now, is it at all within the scope and object of this clause to prohibit independent legislation which upon its face fully develops its whole purpose, so that the members of the legislature can understand and vote advisedly upon it? Surely not. Nor does the language necessarily go to this extent. If this legislation contravenes by previous legislation it repeals it, so that

it would seem to be unnecessary to set forth that previous legislation and repeal it, thus cumbering the statute book.

If this view be correct, then a legislator proposing to draft a new law upon a matter, the subject of previous legislation, has before him two modes for his adoption. He may draft an entirely new law in his own words, without reference to preceding laws, and if it is adopted, it will repeal by implication all inconsistent laws; or he may take up the old laws on the same subject, section by section, change them to meet his views, and then present them in a bill in their changed form, and repeal expressly the original sections.

In either case full opportunity is given the legislature to act advisedly, in the one case the repeal of previous laws is by implication, in other, by express provision—in both the same object is accomplished. But in addition to all this, the only effect of section 5 upon preceding laws is to withdraw from their operation certain territorial limits. It extends only to cities of the first class that have a population exceeding eighty thousand inhabitants, leaving the old laws in full force as to all other cities of the first class. It amends no sections, and strikes nothing therefrom, but creates a new grade of cities, and makes new laws therefor, with no purpose or design of repealing existing laws within the scope of their operation.

We are all of opinion that section 5, as an *independent* section, is a constitutional enactment.

2. It is claimed, however, that the other sections of this police act, which prescribe a new mode for the appointment of a chief of police, are unconstitutional, that section 5 devolves the duties of city marshal upon the chief of police; and that, therefore, if the office of chief of police fails, by reason of unconstitutional enactment, the provision of the law abolishing the office of city marshal falls with it, because the evident intent of the legislature was to abolish the office of marshal *only* in the event of the chief of police assuming its duties, and if this be impossible the office of marshal remains.

Assuming, for the argument, that the sections of the police act prescribing a new mode for the appointment of a chief of police, are unconstitutional, the above argument would have great force, if the words chief of police in the 5th section referred only to that office when appointed in the mode prescribed in the police act. For in the event of the law prescribing the mode of appointing a chief of police being unconstitutional, there would be no one to discharge the duties previously performed by the city marshal, a condition of things that the legislature could hardly have intended. This is the whole force of the argument.

But have the words, as used in the 5th section, this exclusive reference? Is there in the section, or its context, anything requiring this limited construction? The office of chief of police was known to the statute book at the time of the enactment of the
344 police *act. This act pointed out a new method of selecting that officer, and imposed new duties upon him. But if section 5 were an independent act, it would have a definite subject matter

for its operation. Indeed, if the only object of the legislature were to abolish the office of marshal, and devolve its duties upon the chief of police, they could scarcely adopt more fitting language than that contained in this very section. The word, chief of police, as used in section 5, may refer to the chief of police appointed under the police act, or to the chief of police appointed under preceding laws, or to both. There is nothing in the section to limit its meaning to the one or the other. Section 7 of the same act provides that until the board of police commissioners shall have appointed a chief of police, lieutenants, watchmen and station house keepers, the appointment of such officers shall be made as now provided for by said acts, to which this act is supplementary—but no longer."

To what chief of police, lieutenants, etc., does this section refer? Undoubtedly to the same that the preceding sections have referred to, and upon whom they have imposed duties and conferred powers. These officers, says the section, shall continue to be appointed as heretofore, until the commissioners make their appointment.—Of course, then, they are to perform all the duties of such officers, whether imposed by former laws or by this police act, and among the rest, the duties of city marshal.

For it will be observed that section 9 declares that the act shall take effect from its passage. Immediately then on its passage, which was the 14th of March. 1859, the office of marshal ceased to exist; and by section 7th, its duties devolved upon the then chief of police appointed under the existing law until the appointment of one by the commissioners, which, by the law, was not to take place until the first Wednesday in April, 1859.

This is the obvious meaning of the act. It plainly contemplates the immediate abolition of the office of marshal, and the devolution of its duties upon the then existing chief of police. If, therefore, from any reason, the unconstitutionality of the act, for example, the commissioners should never appoint a chief of police; that office would continue to be filled under previous law, and the incumbent would continue to perform the duties of marshal.

If it be said that the intention was that the office of marshal should not cease until a chief of police had been appointed by the commissioners, then had the entire act been constitutional, but had the commissioners for any reason failed to act, would the office of marshal have continued to exist? If so its extinction or continuance would have been dependent upon the will and action of the commissioners—an absurdity.

If on the other hand, the office of marshal had ceased, in the absence of the appointment by the commissioners, who would have discharged its duties, if not the existing chief of police?

By the very terms of the act as we have seen, this office of marshal was to cease on the 14th of March, and the chief of police was not to be appointed under the act until the first Wednesday in April following; in the meantime the existing chief of police was to officiate. Now what a strange construction it would be to re-

vive the office of marshal, because for any reason whatever the commissioners did not on the first Wednesday of April or afterwards appoint a chief of police.

We are satisfied that section 5 abolished the office of marshal and devolved its duties upon the chief of police, who was to continue to perform them *until the com-
345 missioners made an appointment. If they never legally from any cause made such appointment that would not revive the office of marshal, but its duties would devolve upon the chief of police appointed in the mode provided by previous law. We are therefore of the opinion that the connection of section 5 with the other sections of this act is not of such a character as to involve its unconstitutionality; that we are not therefore called upon, in the inquiry now before us to pass upon the constitutionality of the other provisions of the police act.

It is no part of the duty of a court to be astute in the discovery of grounds for holding laws unconstitutional. The presumption is in favor of the constitutionality of every act of the general assembly; if there is a doubt about the constitutionality of a law, that, says our supreme court, is sufficient reason for the court declining to declare the law unconstitutional. If this be the general rule, how important it is that it should be applied when it is sought to annul a law, not because it is in itself unconstitutional, but because some other law with which it is in some way connected is unconstitutional.

So our supreme court holds.

In reference to the act abolishing the criminal court of Hamilton county, and transferring its business to the court of common pleas, our supreme court (Judge Ranney delivering the opinion) say, "This act was intended to accomplish two distinct purposes: first, the abolition of the criminal court, and the transfer of its unfinished business to the court of common pleas; and, second, to confer upon the last named court, the requisite jurisdiction, not only to try and determine such unfinished business, but, in the future, to exercise the same powers in criminal cases, as were exercised by the same court in other counties of the state. Now supposing the first of these objects to have failed, what possible effect could that have upon the last? No constitutional impediment existed, effecting the last by an ordinary act of legislation, and if it had stood alone, no one would have doubted that it had been effectually accomplished. But no principle is better settled or supported by stronger reason than that which gives effect to the valid parts of an enactment, when capable of separation, although other parts of the same law may be invalid, by reason of their repugnancy to a constitutional provision. This principal has been several times recognized by this court, and is one of familiar application in the courts of our sister states and of the Union. It may be admitted that the motive for restoring this jurisdiction to the common pleas, had its origin in the supposition that the criminal court was, at the same time, and by the same act, abolished. *But it is now entirely immaterial what*

might have been the inducements that led to the enactment, or how grossly mistaken the General Assembly may have been. So far as it is not in conflict with the constitution, it is a law of the land; and as a law of the land we have no discretion to refuse its enforcement." 3 O. S., 355. We are, therefore, of the opinion that the 5th section of the police act is constitutional, and that, therefore, the office of city marshal is abolished.

With the policy of this police act, we as a court, have nothing whatever to do. It is no part of the duty of a judge to commend or condemn the law he administers. Like a soldier his only duty is obedience, implicit obedience to his great master—the law.

The demurrer to defendant's plea must be sustained.

W. S. Groesbeck and S. Matthews, for relator.

Coffin & Mitchell, for defendant.

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*RESCISSION OF CONTRACT—VENDOR AND PURCHASER. 352

[Logan Common Pleas Court, December Term, 1859.]

JOHN CORNELL v. THE WIDOW, HEIRS AND ADMINISTRATOR OF JOHN MCCLAIN.

1. The administrator and heirs of a deceased vendor in an executory contract for the sale of realty are necessary parties defendant to a petition in equity, by vendee, to rescind and recover back purchase money.
2. In equity time is not generally of the essence of such contract, but it may become so by the terms of the agreement, from the nature of the property, the avowed object of the parties, from gross laches without justification or excuse, not acquiesced in or waived, from change of circumstances, or by the proper action of a party not in default and ready to perform.
3. Knowledge by vendee of defects in the title of the vendor in an executory contract for the sale of realty, is not *per se* a waiver of the right to demand a good title. It only becomes so when the terms of the contract, or circumstances, are such as to show that the vendee knows of the defects and *intended to accept such title as could be made.*
4. Such knowledge with possession taken and continued, and repairs made by the vendee up to the time when a deed of conveyance is due is not in *equity* a waiver of the right to rescind and recover back the purchase money paid, if the right is asserted promptly on the vendor's default. The parties can be put in *statu quo*, and for that purpose an account of rents, interest, taxes and necessary repairs will be taken.
5. To entitle a vendee not in default to rescind in case of the death of the vendor, and for his default the general rule is that possession must be tendered to him upon whom the descent is cast, with demand for title But if the vendor died intestate, with heirs all minors without guardian, no such tender is necessary. It is the duty of the vendee promptly by petition to ask the aid, direction and relief of a court of equity, and meantime to keep the possession so as to protect the estate from decay, a failure to do which, resulting in waste, would defeat his right to rescind. He should, however, demand title of the administrator, who is by statute authorized to complete real contracts, and may in his discretion apply the assets of the estate to cure defects of title. Demand must also be made of the guardian if there be one.

6. A vendee who buys with knowledge of defect, in vendor's title, with the expectation that the vendor will not survive to complete the contract, and where time is not of the essence of the contract, cannot rescind until the administrator, guardian and heirs are *beyond a reasonable time* in default in not completing title. They will be entitled to a reasonable time to perfect the title by judicial proceedings.
7. In such case, if the heirs of the intestate vendor are all minors without guardian, an unreasonable delay by the administrator to perfect title, or his refusal, at once authorizes the vendee to rescind and recover the purchase money. The administrator having the statutory and common law power to arbitrate the vendor's claim for refunding of purchase money, or to pay it without, and thus necessarily rescind the contract, and having the statutory power to complete real contracts, as well as the common law right to use assets to cure defects, and having the statutory power to sell realty to pay debts, the heir must generally take the consequences of his acts and neglects. Equity will require of him the utmost good faith, and the exercise of reasonable discretion before a rescission will be decreed.
8. In such case where the administrator and guardian of minor heirs both refuse or neglect unreasonably to perfect the title, the vendee not in default may rescind. They are, however, entitled to a *reasonable time* to perfect title if necessary by judicial proceedings.

On 9th November, 1855, John McClain and wife agreed in writing duly acknowledged "well and sufficiently to convey and assure to John Cornell, his heirs and assigns, lots 13 and 14 in East Liberty, on or before January 1, 1858, by such deeds of conveyance as Cornell or his attorney shall advise," in consideration whereof Cornell agreed to pay "said McClain and wife $800, as follows: $200, on or before Dec. 1, 1855; $200 Jan. 1, 1856; residue 1st
353 January, 1857; last *payment to bear interest at 8 per cent., and for the parties binds himself, heirs, executors and administrators in penal sum of $3,000.

The parties then expected the speedy decease of John McClain, who died intestate next day, leaving a widow and three minor children, Martha, age 15, Oliver, age 17, Clinton, age 14. The parties then knew that the lots had been owned by Ewing, who died intestate, leaving a widow and nine heirs; that the lots were assigned to the widow now living, for dower; that seven of the heirs released title to her, when she conveyed to McClain; that two undivided ninths were outstanding in two of Ewing's heirs, one, Mary Dumble, a minor, and married, the other, Sherman Ewing, *non compos mentis* in fact, though his capacity was a subject of doubt and fair controversy. On Dec. 10, 1855, Cornell paid McAden, as administrator of McClain, $800 in full, and took a receipt specifying that Cornell requested "McAden to attend to the completion of said contract."

Cornell took possession under the contract, occupied to March, 1858, paid taxes, made improvements and repairs. The value of the lots depreciated from $800, in 1855, to $500, in 1856, and are worth no more now. The rents exceed taxes and repairs.

On 1st January, 1858, Cornell demanded title of administrator, and was informed he could not make it. On 16th February, 1858, Cornell presented to the administrator an account for purchase money, $800, interest $104.66, taxes $5.33, duly verified, claiming

payment "because of the inability and failure of McClain, his administrator and heirs to convey, whereby Cornell has rescinded the contract." The administrator indorsed his rejection of the claim but verbally agreed with Corneil, that he should file his petition in equity in the common pleas against the administrator to rescind the contract, and recover back the money, that the title could not be made good to Cornell—that Cornell should continue to occupy and pay rents, that no objection to the plaintiff's recovery should be made because of Cornell's continued occupancy, or for want of surrender of possession to heirs, that the administrator would interpose no objection to judgment because he supposed and was advised by counsel that Cornell was entitled to recover, that he would not formally consent to judgment but submit the case to the court for its decision.

On the same day Cornell filed his petition in equity against the administrator to rescind, recover purchase money and for amount of taxes, rents, improvements, etc.

Soon after, the widow notified Cornell that she would insist on performance of contract and resist rescission. In March, 1858, John McCauley was appointed guardian of the heirs. Cornell then tendered him possession, but the guardian refused to accept and insisted on performance.

At May term, 1859, the court ordered the heirs to be made parties. Morgan v. Morgan, 2 Wheat. 290; Duncan v. Wickliffe, 4 Scam, 452; 2 U. S. Eq. Dig. 444; Muldrow v. Muldrow, 2 Dana, 386-465; Lewis v. Madisons, 1 Munf., 303.

Supplemental petition filed July, 1859, avers tender to guardian, and avers incapacity of Sherman Ewing.

The widow and two heirs reside in Champaign county—the guardian and one heir and Ewing's heirs in Logan

Pending this suit, deeds were made and tendered to Cornell as follows:

Martha McClain, widow, release June 15, 1858. Oliver McClain, warranty, for one-third. March, 1859, Martha McClain, one of the heirs, warranty deed for one-third, June 15, 1858. The two latter made as soon as grantors attained majority.

*Mary Dumble and husband warranty for one-ninth, March 31, 1858; Sherman Ewing warranty deed one-ninth April, 1858. This perfects title, except as to Clinton McLain, as to whom defendants ask judgment for specific performance, and except as to Sherman Ewing, whom defendants insist, is of sufficient capacity to make valid deed. 354

Stanton & Allison, for plaintiffs.

Walker & West and James Kernan, for defendants.

It is not averred that plaintiff "advised" as to title, as contract requires. A purchaser buying with knowledge of defects of title cannot rescind, his remedy is to sue *at law* for damages; 2 Lead, C. Eq., Pt. 2—15; 1 Hilliard on Vend. 223, section 36, 2 Story Eq., 776. Plaintiff did not before *original* suit brought tender posses-

sion to *heirs;* 1 Hilliard 224, section 36—424 section 15; 2 ib., App'x. 301; 1 Sugd. 313.

After possession and payment, vendee cannot rescind; 2 Hilliard 301; 14 An. U. S. Dig. 581, section 40; 2 Parsons on Cont. 192; 3 note O; 10 O. 143; 4 U. S. Dig. 24, section 148; 1 Hilliard 299, section 18; 5 U. S. Dig. 19, section 19; 1 Sugd. 306–8; 1 An. U. S. Dig. 25, section 114; 3 U. S. Dig., 24 section 121; 8 Blackford 215.

Time not of the essence of this contract Brashur v. Gratz, 6 Wheat; 2 Parsons on Cont., 541, 4 n; 1 Hilliard, 180 n. 433, section 11; Nesbitt v. Moore, 9 B. Mon. 508; Sugden, 299 n. 313; 11 An. U. S. Dig. 167, section 85; 2 Story Eq. 776; 1 Wheat. 179; 5 Cranch. 262.

LAWRENCE, J.

By the court, WM. LAWRENCE, Judge. I will first state some general principles, applicable to rescission and specific performance, and then apply them and others to the facts of this case.

A purchaser from a vendor who cannot make a title has his choice of remedies. He may sue at *law* to recover *damages* for the non-performance of the contract, or he may seek in chancery, a specific performance as near as the vendor is capable of performing [with compensation for deficiency, if any] or he may rescind by an action at law for the purchase money, or in a bill in equity. Brown v. Witter, 10 O., 144; 1 Hilliard on Vendors' Ch. 22, p. 301, section 24; 2 Story Eq., 779; 6 J. J. Marsh., 320; 5 J. J. M., 109; 7 O. Pt., 2, p. 73. At law, in all cases, time is of the essence of the contract, and a party in any default has no remedy. White & Tudor, Lead. Cases in Eq., (Hare & Wallace Notes,) Vol. 2, Pt. 2, p. 13; 1 Swan Pr., 326, n.; 2 Parsons on Cont., 190, n. *h;* ib., 36–41, note *c*. But see Chit. Con., 727, n.; 3 Wash. C. C. R., 140; 7 Conn., 110.

But in equity, time is not of the essence of the contract, unless so made by the stipulations of the parties; or it becomes so from the nature of the property; or the avowed objects of the parties; or from gross laches without justification or excuse not acquiesced in or waived; or from a material change of circumstances affecting the rights, interests or obligations of the parties; or by the proper action of a party not in default and ready to perform if the other party is in default without justification. 2 Lead. C. in Eq., Pt. 2, 13, 33, 20; Scott v. Fields, 7 O., Pt. 2, p. 92; Butler v. Baker, 2 O. S., 326; 2 U. S. Eq. Dig., 585. Chit. Cont. 310; 1 Eq. R., 184; Marsh. 583. 2 Story, section 776; Highby v. Whittaker, 8 O., 201; Longworth v. Taylor, 1 McLean, 375; 14 Pet. 372; 8 Cranch 470, 9 Cranch 456, 493; 6 Wheat. 528; 7 Vesey 265; 13 Ves. 73, 225, 289; Hepwill v. Knight, 1 Younge & Coll. 415; 3 O., 336; 2 Hill Ch. 121; 3 McLean, 148; 3 Green Ch. 157; 5 Cranch 262; 4 Pet. 311; 2 Dess. 378; 3 J. J. M., 54; 4 Maine 350; 9 Johns 350; —— 3 Leigh 161.

The rescission and specific performance of contracts rest in the
355 discretion of the court, governed by general rules *and principles, but no rule is of absolute obligation in all cases; 2 Story Eq., section 742, 751, 769, 772; 6 J. C. R., 111, 222.

If there be *no excuse* for delay time may be made of the essence of the contract by demand of title. Chit. Cont. 310; note 16 Am. ed. and authorities above.

Where time is of the essence of the contract a party not in default and ready to perform, may generally rescind against the party in default; where time is not of the essence of the contract, it may be made so by the proper action of the party not in default. This the vendee may notify the vendor to perform, and his failure *within a reasonable time* will justify a rescission. A party is not in default so long as his delay is acquiesced in Kirby v. Harrison, 2 O. S., 327. 2 Story Eq., sections 776, 777, 771, 766; 2 Lead. cases in Eq. Pt. 2, p. 15; [393] ib. 20 [398] 8 O., 198.

Thus Story says "equity will relieve the vendor by decreeing specific performance where he has been unable to comply with his contract according to the terms of it *from the state of his title* at the time, if he comes *within a reasonable time* and the defect is cured" and "sometimes although he is unable to make title when the bill is brought if he can do so at the time of the decree." Dunlap v. Hepburn, 1 Wheat. 179; 5 Cranch 262; 6 O., 172; 5 Paige Ch. 235; 6 Paige 407; Seymour v. Delancy, 3 Cow. 445; Chit. Cont. 310; Eq. R. 184; 1 Marsh. 583. Generally when a new suit is necessary to enable the vendor to perfect title the vendee will not be required to wait. Frazer v. Wood, 8 Beav. 339; Blacklow v. Laws, 2 Hare 40; Maginnis v. Fallon, 2 Moll. 566, 580; Coster v. Turner, 1 Russ. & My. 311, 296, Dalby v. Pullen, 3 Sim. 29; Lechmere v. Brasier, 2 J. & W. 289; 2 L. C. Eq. Pt. 2, p. 30; [404].

But a purchaser with knowledge of defects, or where vendor dies, cannot generally complain of such delay as may be necessary to make title, even if a new suit is requisite for that purpose. 2 L. C. Eq., Pt. 2, p. 15, [393].

But after notice, the vendor—or his representative in case of his death—must be prompt in perfecting title, or the vendee may rescind.

Guest v. Hornfrey, 5 Ves., 818; Heaphy v. Hill, 2 S. & S., 29; Watson v. Read, 1 Russ. & My., 236; Walker v. Jeffreys, 1 Hare, 341; 2 L. C. Eq., 16 [394]; 2 Story Eq., section 776; 12 O., 1; 8 O., 198.

Where a vendee is notified of defects of title, and they are waived as by agreeing to receive a warranty deed, or by accepting it, he cannot object for that reason to a specific performance. Gale v. Long, 3 J. J. Marsh., 540; 2 Story Eq., section 778, note; Long v. Moler, 5 O. S., 274; Hill v. Butler, 6 O. S., 207; 1 Hilliard, ch. 12, p. 224, section 36; Craddock v. Shirley, 3 Marsh., 1139; 4 Desaus., 126; 12 Ves. 27. But if, notwithstanding such notice, the contract requires a *good title*, the vendee cannot be required to accept a defective one, or an undivided interest, especially if it might affect the possession or enjoyment of the estate. There must be at least a substantial compliance. 2 Kent, 475; Dabby v. Pullen, 3 Sim. R., 29; 1 Ves., 218; 4 Madd., 227; 2 My. & K., 726; 2 L. C. Eq., Pt. 2, p. 22 [401]. A contract for title requires a *good* title. Tremain v.

Liming, Wright 644; Brown v. Witter, 10 O. R., 142; Bodley & McChord, 4 J. J. Marsh., 475; 16 Mass., 161; 14 Mass., 425; Slaward v. Willack, 5 East., 198; Sugd. (8 ed.) 233; Chit. Cont., 310; 11 Ves, 337; 18 Ves., 505; 3 Campb., 451; 2 Mer., 424; 3 *ed.*, 53; 9 Price, 488; Sugd., 305; Pugh v. Chesseldine, 11 O., 109; Smith v. Haines, 9 Greenl., 128; Brown v. Gammon, 14 Maine, 276; 4 Comst., 396; Lawrence v. Dole, 11 Vt., 549; 16 Maine, 164; 15 Pick., 546; 2
356 Parsons Cont., 169; 2 Johns, *595, 11 Johns, 525; 7 Verm., 27; 5 Mass., 494; 16 Johns., 268; 20 Johns., 130; 22 Pick., 166; 15 Pick., 546.

When a vendor elects to rescind, "he must be able to restore the vendor all he received and place him back in his original situation." 10 O., 144; Chit, Cont., 743 and notes 458, 622. The intention to rescind must be evinced by some positive act. 8 O., 198.

An application of these and other principles to the facts of this case, will show that the plaintiff is entitled to a judgment rescinding the contract and restoring the purchase money, subject to an account for rents, necessary *repairs*, and taxes.

He has in all respects complied with the contract on his part. His right to rescind has not been waived or defeated in any way.

I. The plaintiff's knowledge of defects in title at the time of his purchase does not defeat his right to rescind, for two reasons. First, the contract itself requires the vendor "well and sufficiently to convey and assure" the premises to the plaintiff. This requires a perfect title with warranty. Wright R., 644; 10 O., 142; 4 J. J. Marsh., 475; Tison v Smith, 8 Texas, 149; 14 An., U. S. Dig. 581; 1 Hilliard on Vendors, ch. 17, p. 223, section 36. Perhaps if the vendor had a *good title*, a judgment for title as against his minor heir Clinton, with warranty from his widow and other heirs, might be sufficient, though it has been doubted whether a vendee is bound to accept a judicial title which heirs may open upon arriving at majority. Jones v Taylor, 7 Texas, 240; Code, section 386; 8 An. (14) U. S. Dig., 581 section 36. As to widow, see Miller v. Woodman, 14 O., 518.

But in this case the parties anticipating the vendor's death, of course expected a judicial title, and that in proper form and time, is all the vendee could require.

Second—"Knowledge of defects by vendee," is not a waiver of the right to demand a good title, unless the terms of the contract require, or circumstances exist, "such as to show that the vendee knew of its defects *and intended to accept such title* as could be made, relying upon the covenants of warranty." 7 Texas, 240; Bales v. Delevan, 5 Paige, ch. 299; 6 Paige, 407; 1 J. C. R., 387; Jackson v. Ligon, 3 Leigh., 161; 2 U. S. Eq. Dig., 577, section 316-336; Rector v. Price, 1 Mis., 373; 2 Kent, 472.

II. Possession and enjoyment of rents by vendee in an executory contract, and payment of purchase money, do not defeat his right to rescind, even if the agreement was made with knowledge of defective title, except of course where the vendee is bound to accept a defective title. Thus in Jackson v. Ligon 3 Leigh., 161, the court

held that "Where a vendee of land knows that at the time of making the contract the vendor's title is defective, but the vendor agrees to make a good title by a given day, and the vendee goes into possession, and the vendor fails to make a good title at the time appointed, whereupon the vendee quits the possession of the land, the fact that the vendee knew at the time of the sale of the defect in the vendor's title, is no ground for compelling him to receive such title as the vendor can make." Caldwell v. White, 5 J. J. M., 208; Mann v. Dun, 2 O. S., 198, Bank of Columbia v. Hayden, 1 Pet., 455; 7 Curtis, 661-7; 1 Parsons on Cont., 417; 2 Story Eq., section 778; State v. Worthington, 7 O., Pt. 1, 171; 4 T. B. Monroe, 561; Barnett v. Hayden, 5 J. J. M., 109; Young v. Singleton, 6 J. J. M., 320; Owings v. Brown, 5 T. B. Mon., 462; Williams v. Wilson, 4 Dana, 506; 2 Dana, 375; 1 Hillard on Vend., 302-47, App x 292; 4 J. J. M., 475; 3 J. J. M., 540; Brown v. Haines, 12 O., 1; 8. O., 198–201; 4 O., 231; 1 A. K Marsh, 434. But see Fuller v. Hubbard, 6 Cow., 13.

*It may be that *at law* a party having received a partial benefit by possession cannot rescind; but it is not necessarily so in equity, as the authorities above show. Chit. Cont., 458, 622, 743, notes; Hunt v. Silk, 5 East,, 449; Beed v. Blackford, 2 Y. & I., 278; Franklin v. Miller, 4 Ad. & E., 599; 1 Metc., 547; 2 Watts, 433; 4 Mass., 502; 15 Mass., 319; Reed v. McGrew, 5 O., 386; 2 Hill, 606. 357

III. To enable the vendee in possession of land under an executory contract to rescind it, the general rule is, that he must show a surrender of the property, or an offer to surrender it, and that the vendor can be put *in statu quo*. The vendor must allow for necessary *repairs* and taxes, and the vendee is liable for rents and profits. If the vendor is dead the possession must be surrendered to him on whom the descent is cast, and not to the administrator. He cannot abandon the premises to waste and dilapidation without notice: 2 Hilliard on Vend. App. 301; 1 S. & M., 146; Davis v. Tartwater, 15 Ark., 286; McDonald v. Fithian, 2 Gilman 269.651; Griffith v Defew, 8 A. K. M. 189; Ark., 182; Pothar on Sales part 5, Ch. 2 section 374, 381, 382; Reynolds v. Nelson, 6 Mass 19 Hunter v. Goudy, 1 O., 449; Murphy v. Officer, 8 Yerg, 502; Fitzpatrick v. Featherstone, 3 Ala. 40; Caldwell v. White, 5 J. J. Marsh 208.

But to this general rule there must be exceptions, especially in Equity where rescission is in the sound *discretion* of the court. The law does not require a vain, absurd or unreasonable thing; Parley v. Balch, 23 Pick 283; Donelson v. Young, 1 Meigs 155; 2 Parsons Cont. 163; Co. Litt. 210; 25 Wend. 405; 2 Hill 351; Chit. Con. 464; note 1; 3 N. H. 455; 15 Mass., 319; 10 Mass., 31; 1 Wend. 58; 2 N. & M. C. 65; 4 Mass 45; 9 Wheat 598; 6 Mass. 449; 17 O., 78; 3 O., 307; Chit Bills 49; 20 Maine 325. If the vendor is dead, and the descent is cast upon minors without guardian, or if their residence be unknown so that notice by mail is impossible it is but the dictate of reason and common sense to say that the vendee

should be *required* to retain possession, and protect the estate until he can apply to a court of Equity and upon showing the facts have a receiver appointed to take charge of it. He should at once apply to Equity as in this case he has done, and the court will protect the rights of infants. 1 Story Eq. section 240, 544. A tender of possession to minors would be absurd. Their occupancy might work its destruction. It should not in any event be abandoned or put in hazard; 4 Wend. 525; 5 Johns, 406; 13 Wend. 95; 2 Parsons on Cont. 165, note 3.

In this case the plaintiff did all this and more. He made an equitable arrangement with the administrator, by which he was to remain in possession and pay rents. So soon as a guardian was appointed, pending suit he tendered possession to him and demanded title; 7 Cow. 53; He gave notice to the widow. He did all that was possible to do.

The plaintiff therefore has not lost his right to rescind, but is in a position to do so, if the defendants *cannot* make title, or have unreasonably *neglected* or *refused* to do so.

IV. It only remains to inquire whether the condition of the title, the position of the administrator, the heirs, or their guardian, or any of them, is such as to defeat their right to ask specific performance.

1. The administrator *alone*, if there be no guardian, may, by his *refusal* or *neglect* to perfect title, defeat the right of the heirs to a specific performance, even if they are without fault. This necessarily results from the position, duties and power of an administrator.

It has been held that when an administrator rescinds an executory
358 *contract of sale in a way beneficial to the estate, equity will not disturb his act. Howard v. Babcock, 7 O. Pt. 2, p. 73; Ludlow v. Cooper, 4 O. S. 17. And in Gray v. Hawkins, 9 O. S. (not yet published) the right of an administrator to rescind, subject to the approval or control of equity, has been directly affirmed. This right is but an incident of his powers. He has the right to collect the purchase money and thus affirm the contract. This imposes on him the duty of completing the contract. He has a *statutory* and a *common law* ower to perfect title as against the vendor's heirs. Thus in Muldron v. Muldron, 2 Dana, 386, it was held that "if one sells land—the title to be made on payment of the purchase money —and dies, the right of the money passes to his personal representative, *who may compel the heir to make title* to enable him to recover it."

He may, in his discretion, subject to the control or approval of equity, appropriate assets to cure defects and buy in outstanding interests, just as he may complete any executory contract of the intestate. Swan's Manud, ch. 10, p. 145; 2 Kent, 230; 3 I. C. R. 312; 6 I. C. R., 398; 1 Story Eq., sections 544, 240.

He has a *statutory* and a *common law* power to arbitrate the right of the vendee to recover purchase money paid, or he may repay it without suit or arbitration, and thus in either event rescind.

The right thus to rescind in any of these ways by some *positive act* implies the right to rescind by a *refusal* or *unreasonable delay* in completing the contract. 6 I. C. R. 360. The whole legal theory of delay as affecting specific performance proceeds upon the ground of implied consent to abandon the contract.

The right of the court to visit a rescission upon his neglect is no more dangerous to heirs than the right to allow it by the direct act or assent of the Administrator. The statute of limitations runs, at law, against him, even if his neglect is not in good faith, and even to the predjudice of heirs; and why will not *delay* have the same effect in equity where he neglects the duty to act or in good faith deems it the interest of the estate not to do so? 14, O. 547.

The contract is a mere chattel, subject to his control; the heirs, upon the death of the vendor, being naked trustees of the title, for the vendee, and the vendee being trustee of the purchase money for the administrator. 2 Dana, 387. Sugden 130. 2 Story Eq., section 790 *et seq*. 2 Kent 476 note *a*, 230 note *c*, 1 Hoffman Ch. R. 218.

Having the statutory power to sell realty to pay debts, he may well be entrusted with the discretion of determining whether it is best to buy in outstanding interests to perfect title, to litigate with the vendee for damages on failure to make title or for refunding of purchase money, or to rescind and avoid all these difficulties, and if necessary, sell by his petition, under the statute, the lands in controversy, rather than others more valuable, to pay costs of litigation. This discretion must rest somewhere. Equity will control it, and as well in an administrator as in a guardian. 1 Story Eq. section 544. The utmost good faith and reasonable discretion will be required, but when, as in this case, the discretion has not been abused, and the delay was with a view to rescind because of the difficulty or impossibility of perfecting the title, equity will rescind, both for delay in perfecting the title as against the heirs of McClain and the heirs of Ewing.

The administrator could not waive a tender of possession to McClain's heirs, if necessary, nor their defense for want of it; but being minors no tender was *requisite. 2 Dana 387. Fuller v. Williams, 7 Con. 53. 359

2. Added to all this it is now impracticable within any reasonable time if not impossible to make title. Sherman Ewing it is true made a warranty deed to the plaintiff, by procurement of McClain's heirs, March 23, 1858, but he is *non compos mentis*. If it be said the question of his capacity was a subject of fair controversy until now decided by the court, it may be replied that Cornell is not bound to accept a *doubtful* title. Watts v. Waddle, 1 McLean 200; Longworth v. Taylor, 1 McLean 395; Barr 34; Garnet v. Macon, 2 Brock 185; Seymour v. Delancy Hopk. 43; 5 Cow. 714; 6 Call 308; 4 J. J. Marsh, 426; 4 Monr. 115; 5 J. J. M. 135, 542; Boymun v. Gatch, 7 Bing. 379; 5 M. and P. 222.

It was the duty of the guardian and administrator each to perfect the title promptly if desirable or practicable, and the exercise

of ordinary vigilance would have informed them of Sherman Ewing's incapacity. 2 Kent 230; *n*, S. O. 198. Demand has been made for title as was plaintiff's duty, and a reasonable time has now elapsed without *any effort* on their part to make a title free from doubt. 6 Cow. 13. Fuller v. Williams, 7 Cow. 53.

If by proceeding in partition or through a guardian for Ewing the title could have been perfected, the guardian of McLean's heirs in doing nothing as yet to accomplish that object has been guilty of such delay as in Equity amounts to an abandoment of the contract, and so can not ask specific performance.

No one of the parties in this case has been "ready, desirous, prompt and eager," except the plaintiff. Meantime the property has depreciated. McKay v. Carrington, 1 McLean, 50; Garnet v. Mason, 2 Brock., 185; 2 U. S. Eq. Dig., 585; 2 L. C. Eq., 8 O. 198; 12 O. 1; Colcock v. Butler, 1 Desau., 307. The delay has been unreasonable in point of time. Lawrence v. Dale, 3 J. C. R., 23; 3 Pa., 445; 2 Sheply, 57; Rice, 84; Chit. Cont., 743, note 22; Pick., 546; 2 Shepley, 57; Colcock v. Butler, 1 Desau., 307; 1 J. C. R., 370; Chit. Cont. 310 note 1, (6 Am. ed.); 17 Main, 316; 1 Clarke, 133; 1 Dev. & Bat; 277; 16 Main 92; 2 B. Monr., 441; 4 Post Eq., 297, 374; 1 How., 358; 1 McLean, 395; 4 Bro. C. C. (1st Am. ed.) 393 n. 329; Scott v. Fields, 7 O. Pt. 2, p. 92.

It is urged that the plaintiff did not advise as to the kind of title he required. He did demand of the administrator "to attend to the completion of the contract." This was a demand for a valid title. If no kind of title was specified, it was the business of the administrator or guardian to make a valid one.

Decree that contract be rescinded—that Cornell be charged with rents to time of his notice to guardian, March, 1858,—that he be allowed for reasonable repairs and taxes, purchase money to be refunded with interest from the time it was by the contract payable.

STREET RAILROADS—ASSAULT AND BATTERY.

[Hamilton Common Pleas Court, 1859.]

STATE v. HENRY KIMBER.

A conductor of a city passenger railroad, in forcibly ejecting from the car a mulatto, claiming a right to ride, and who had not refused payment, is guilty of assault and battery, though no more force than necessary was used in the removal.

LOWE, J.

The defendant stands charged by the information with committing an assault and battery upon Sarah Fawcett. It appears by the testimony that the defendant is a conductor upon one of the street railroad cars of the City Passenger R. R. Co. in this city; that on Monday the 16th inst., the witness, Mary Fawcett, stepped upon the platform of the car under ordinary circumstances for the purpose of taking her seat in the car as a passenger. Immediately upon her getting on the platform, the defendant ordered her to *leave the car, which she refused to do, claiming a right to ride in the car.—Thereupon the defendant forcibly ejected her 360 from the car. I am not satisfied from the testimony that any more force was used than was necessary in removing her from the car, if such removal was lawful; if it was not lawful the defendant is guilty of an assault and battery. It is claimed in defense that the witness Sarah Fawcett being a person of color was rightfully expelled from the car, and that the company were not bound to transport her on its public conveyance. That the company and the defendant in its employment are common carriers of passengers for hire is not controverted.

I understand the duty of common carriers of passengers for hire to be to receive and convey all persons who apply for a passage, and who are ready and willing to pay their fare and who are not unfit persons by reason of their disorderly conduct, misbehavior, drunkenness, or disease, or who take passage for the purpose of interfering with the business of the carrier. Such is substantially the rule as decided by Chief Justice Story, Sumner Rep., 221 and by the supreme court of New Hampshire, 10 N. H. Rep. 381. See also Angell & Ames on carriers. See 524 A. seq.

In Pierce on American Railroad law, the duty of common carriers of passengers is thus defined: "The company is under a public duty as a common carrier of passengers to receive all who offer themselves as such and are ready to pay the usual fare. * * * It may decline to carry persons after its means of conveyance are exhausted, and refuse such as persist in not complying with its reasonable regulations, or whose improper behavior—as by their drunkenness, obscene language or vulgar conduct—renders them an annoyance to other passengers. But it cannot make unreasonable discriminations between persons soliciting its means of conveyance

as by refusing them on account of personal dislike, their occupation, condition in life, complexion, race, nativity, political or ecclesiastical relations, Pierce on Am. R. R. Law p. 489.

I am not aware of any decision in a court of last resort, that maintains a different doctrine from these authorities, and if there were any such decision I am satisfied the diligence of the counsel for defendant would have enabled them to produce it. I must take them therefore as the law applicable to this case. It is not pretended that the passenger was in any way disorderly, that she refused to pay her fare, that there was any lack of room for her accommodation, that any of the passengers objected to her being received, or that there was any objection to her whatever but her complexion. As she appears upon the stand she seems to be about as much of the white as African race—in fact a mulatto, and apparantly one of the better portion of her class.

I am satisfied that it was the duty of the defendant to receive the witness as a passenger, and that in forcibly ejecting her from the car he was guilty of an assault and battery. It does not appear however that he acted wantonly or maliciously but in the supposed exercise of a right; I shall, therefore, dispose of the case without imprisonment.

The defendant was fined $10.00 and the costs.

E. M. Johnson, prosecuting attorney for the state.
Headington & Pugh, for defense.

*RAILWAY MORTGAGES. 377

[Hardin Common Pleas Court, December Term, 1859.]

H. P. DARST v. THE PITTSBURGH, FT. WAYNE & CHICAGO RAILROAD CO., JOHN FERGUSON AND JOHN PEARCE.

1. Where a *charge* upon a particular fund or property is created, in express terms or by necessary implication, in favor of a creditor, with or without his privity, he may by petition in equity enforce payment of his claim without first obtaining judgment at law.
2. Under the laws of Ohio, when a railroad company has executed a mortgage upon its property and income, all claims arising thereafter for services, money or materials necessarily employed in constructing, repairing or operating its road, and all liabilities arising therefrom, are a *charge* upon such income prior to the mortgage debt.
3. This priority has been recognized in all the recent cases where receivers have been appointed; it exists when the mortgagee takes possession of a railway; it has existed by the usage of all companies, and the common understanding of the public; it is indispensable to enable railroad companies to carry out their objects; it results from a fair construction of the statute authorizing the execution of mortgages, since the *income* pledged therein is *net* income, and not *gross earnings*; it is alike just to creditors and beneficial to mortgagees, because otherwise no company could earn money to discharge its liabilities; *it is necessary for the protection of the officers of railroad companies, because otherwise their usage of paying current expenses from income would be a misapplication thereof. 378
4. Where all the preferred claims can be paid from the income or property of a company, not necessary for operating its road, each creditor may proceed for himself without making other creditors or bondholders under the mortgage parties.
5. The judgment can require the company, or any officer who is a party, to apply money then on hand or thereafter to be received, in satisfaction to such preferred claim, and this may be enforced by attachment.

Civil Action. Petition filed September 12, 1859, avers that the railroad company is indebted to plaintiff in $355.36, for money advanced and services, all of which was for the necessary expenses of said company in operating its road. That said company had issued bonds to sundry persons, in all amounting to ten millions of dollars, for money loaned, which bonds are payable in 1872, with seven per centum interest, half-yearly. That to secure said bonds the company on January 1, 1857, by deeds of trust, conveyed to John Ferguson, as trustee, the road and all real and personal property, income and profits then owned or thereafter to be acquired, to hold for the following purposes, to-wit: In case said company should fail to pay the interest and principal on said bonds, that the trustee should take possession of the road, cause it to be operated, and apply the *net* income to payment of said interest and principal, but until default, that the company "shall continue in possession and management" of the road, etc. The deed of trust recites that the following provision has been adopted by the board of directors: A sinking fund for the payment of the bonds shall be formed as follows: From the *net* earnings of the road *after the payment of*

the expenses of maintaining and operating the same, taxes and assessments, and the interest of the company's debt, there shall be set apart on January 1st and July each year, three-fourths of one per cent. on the amount of bonds issued, etc

The petition avers that the R. R. Co. has no unincumbered property liable to execution, nor can any be sold on execution by reason of the deed of trust, etc. The petition, after reciting the provisions of the deed, etc., avers that it was the duty by the terms of the deed and by law to pay the necessary expenses of operating the road, before paying the interest or principal of the bonds, etc. That John M. Pearce has money in his hands as ticket and freight agent of the company, and is daily in the receipt of money as such agent. Prayer for judgment, and that Pearce be required to pay the same out of money he now has or may receive.

Demurrer by defendants, for want of sufficient facts, misjoinder of causes, parties, etc.

E. & J. Stillings, for plaintiff.

T. E. Grissell, for defendant.

By the court—William Lawrence Judge.

The petition in this case seeks to recover judgment which is *legal* relief, and to have satisfaction thereof in a mode which is *equitable* relief.

For the defendant it is insisted:

First—That a petition in the nature of a "creditor's bill" cannot be maintained until after judgment.

Second—That the money sought to be appropriated is covered by the mortgage or deed of trust, and could not be reached by plaintiff, even after judgment.

These questions are of the utmost importance, as they involve large interests, and determine the rights and duties of the officers of railroad companies' mortgage's, etc.

It is certainly true as a general proposition, that a creditor at large or before judgment, cannot proceed by * "creditor's bill" 379 to reach assets even if there be nothing liable to attachment or execution at law. But to this rule there are exceptions. If a creditor is entitled to payment out of a specific or trust fund, a petition in the nature of a "creditor's bill" may be maintained without judgment. See authorities in Marion Bank v. McWilliams, 1 West. Law Monthly 573; Kellogg v. Brennan, 14 O., 72; 1 West. Law Monthly 568, 569, 570–1; 2 Story Eq., section 1244, 9(0. 1252; Burrell on assignments Chap. 51, page 536 and notes. Story Eq. P. L., section 148–9; 2 Story Eq., sections 1215, 1245.

Such petition is in fact more properly in the nature of a bill to administer a trust or enforce specific performance of a trust duty, or a charge or lien upon a fund, all of which belong to the equity jurisdiction of courts.

Bonvier says a trust "is an equitable right, title or interest in property, distinct from its legal ownership; or it is a personal obligation for paying, delivering or performing anything where the person intrusting has no real right or security, for by that act he confides

altogether to the faithfulness of those intrusted. * * * It is an obligation upon a person arising out of a confidence reposed in him [or a duty injoined by law] to apply property faithfully. and according to such confidence" [or legal duty] Bouv. Dic. 2 Story Eq., section 960; 4 Kent, 292; 2 Blackst., 328.

As a part of the equity jurisdiction over trusts. or of a jurisdiction analogous thereto *liens* and *charges* upon property are within the control of chancery. Thus it is said in 2 Story Eq., section 1244, "if a devise is made of real estate *charged with the payment of debts generally*. it may be enforced by *any one* or more creditors against the devisee, although there is no privity of contract between him and them. King v. Dennison, 1 Ves. & B., 272. And in sec. 1246 Judge Story says such charges "are often created by the express and positive declarations of deeds and wills; but they not unfrequently also arise *by implication from general forms of expression* used in such instruments. Thus a testator often devises his estate "after payment of his debts." The settled doctrine now is, that the debts in all such cases constitute by implication a charge on the real estate "for which he cites authorities to this and section 1247 and 1247 *d*.

In Russell v. Clark, 7 Cranch 69, it is said: "It is settled in this court that the person for whose benefit a trust is created, who is to be the ultimate recoverer of money, may sustain a suit in equity to have it paid directly to himself." 2 Story Eq., section 1250, 1251, 1252; Bouv. Dic. title Lien. 1 U. S. Eq. Dig. 251; Smith v. Shephard, 2 Hay., 163; Darrington v. Borland, 3 Porter 9; O'Brien v. Coulter, 2 Blackford. 485, 3 Blackford, 39; Grosvenor v. Austen, 6 O., 103, 227; Rawsdell v. Craighill, 9 O., 197; Wright R., 261, 2 U. S. Eq. Dig. 609 trust.

These authorities sufficiently show that the plaintiff is entitled to the remedy he seeks, without first having obtained judgment, if his claim is a *lien*, or *charge* upon the *income* of the railroad company, or if the corporation is a *trustee* of that fund for his benefit. The authorities are also clear that he may equally enforce the lien, charge or trust, if it was created or exists without his privity as with it. 2 Story, Eq. 1244, 1 Ves. & B., 272; Burrell on assignments, Ch. 51, p. 536 and notes. Richardson v. Rust, 9 Paige Ch. 243.

When there is a sufficient fund to pay this case of claims, neither the bondholders under the deed of trust, nor other creditors are necessary parties. 1 U. S. Eq. Dig. 255; 3 Paige Ch., 517; Buck v. Penrybacker, 4 Leigh *5; Johnson v. Candage, 31 Main R., 28 (1 Red.); Burnill, 537, Story Eq. Pl., sections 203, 212, 2 U. S. Eq. Dig. 434; Calvert on Parties, 212, 15; Redfield on R. R. 583 n., 1 Story Eq. 548, 548 *d*; Woodgate v. Field, 2 Hare R. 211; Owens v. Dickinson, 1 Craig. & Phill. 48. 380

It becomes material therefore to inquire whether any *charge* has been created upon the *income* of this company in favor of the plaintiff, or whether the railroad company holds it in trust.

By the general railroad act of February 11, 1848, every company has power to "do all needful acts to carry into effect the object

for which it was created." They also have "power to borrow money on the credit of the corporations—and may execute bonds—therefor, and to secure the payment thereof may pledge the property and *income* of such company." Companies organized under that law have power to construct and operate their railways. The available means of every company consists of its capital stock invested or uninvested, and its income.

The deed of trust or mortgage on this road, and indeed all the incumbered roads of this state, has been made under the statutory provision above quoted, or others similar thereto.

It is scarcely necessary to cite authorities, to prove that the mortgage in this case created a *charge*, or *lien* upon the property or income of the company. A lien "in its most extensive signification, includes every case in which real or personal property is charged with the payment of any debt or duty." Bonv. Dic.

The *charge* in favor of the mortgagee, is on which equity will enforce if legally created at the instance of any interested party.

But to what extent does the lien exist? Upon all the *gross earnings* of the company, or only its *net income* after paying taxes and expenses of operating the road. and liabilities incident thereto? There are many considerations to show that the mortgage lien only attaches to the *net earning* or rather that the *primary* charge upon the entire property and income of the company consists of taxes, wages of laborers, salaries of officers, claims for wood, coal, oil, machinery, repairs, advertising, and everything necessary to operate the road, or growing out of its management as a liability of the corporation. When all these are paid the rights of mortgagees follow next in order. The term "property and income of such company in the provision of the statute authorizing a mortgage must be construed in the light of existing facts, reason, equity and common sense. It has always been a fact that no single company in the state could operate its road for any considerable time without using its income or property to pay the expenses thereof. From the necessity of the case all parties to the mortgage expected the income thus to be used.—That necessity entered into and formed a part of the contract. The terms of the mortgage itself recognize this right. The objects of the organization of the corporation would be defeated without it, and the statute must not be so construed as to confer a power upon the company that would defeat the objects of the law of its creation. This, Susquehana Canal Co. v. Borham, 9 W. & S., 27, it was expressly decided that "the means vested in corporations which are necessary to the existence and maintenance of the object for which they were created, *are incapable of being granted away* and transferred by any act of the company itself, or by any adverse process against it." And in an able article on railroad mortgages, in 10th American Jurist and Law Magazine, (Boston, October 1842) it is said: "Perhaps a court

of chancery would decree that the profits resulting from the *franchise, should be paid to the mortgagee but it would embrace only such as should remain after the duties of the corporation were fulfilled, and *after all its paramount obligations had been sustained and secured.* 381

With this constant practice known to all the world, the mortgages in this state have come into existence so that *contemporaneous construction* has settled so far the rights of parties under them. (Sedgvick on Stat. 251, 255, Usage, Contemporaneous Exposition.) Nor is the equity of this construction to be overlooked.

If a laborer, officer or agent has devoted his time to manage a road and swell its *income*, or if a creditor has for the same purpose supplied cord wood or added to the value of the road by materials furnished, no court of equity can say in the light of justice, that all this should pass unpaid for, to mortgagees, nor is there any analogy between this and ordinary mortgages in this respect. The use of the road indispensably *requires* all these things, while it is not so with credits given to individual mortgagors. The public necessity for passenger and freight transportation, the legal duty of a railway company to operate its road with the penalty of forfeiture for non user, and liability for damages for refusal to discharge the duties of a common carrier, the duty to create income to meet mortgage liabilities, the benefits to accrue to bondholders, all require as a matter of public policy, that the law should protect and pay those who aid in operating our railroads. Without this every bond will become valueless, every road will cease operating.

If the mortgage covers all the earnings of the company, the men who repair the track, and run the engines, the officers who conduct its business, the lawyers who argue the causes, the printers whose indispensable advertisements are necessary to success, merchants whose goods are lost or damaged by negligence, men whose cattle are negligently destroyed, must all go unrequited. But this cannot be.

The mortgage expressly provides that on default of payment of interest, the trustee may take possession of and operate the road, and apply the *net* earnings on interest and principal of the mortgage debt. It is unreasonable to suppose that the mortgagor in possession is required to apply more income to the mortgage than would the trustee himself in like condition. The pledge of income carries with it by implication the duty of income, and this duty carries with it as an incident the right to use the means necessary to accomplish the end.

This created a *lien*, a *trust*, a *charge*, in favor of creditors within the definitions of Story and Bonvier above cited.

It certainly never was expected by mortgagees that the officers of a railroad company would, even if necessary to pay interest on the mortgage debt, apply all the gross earnings of the company to that object, and pay running expenses out of their own pockets.

It seems to me, therefore, very evident that the mortgagees are deprived of no right, but are greatly benefitted, by holding that

railroad mortgages create a lien or charge only upon that income and property of a railroad which remains after paying taxes, expenses of repairing and operating the road, and liabilities incidental thereto.

But as the income thus encumbered by the mortgage cannot be set apart or properly applied in payment of the interest or principal of the mortgage debt, while the *primary* charge upon the fund is unprovided for, it is a duty of the company to separate the fund by distributing it according to the rights of parties entitled thereto. This duty to the preferred creditors results from the duty to the mortgagee.

The equitable effect of the mortgage is precisely as though it said in express terms, "the railroad company grants and pledges to the mortgagee the income of said corporation after first paying the expenses of maintaining and operating said road;" and this brings it precisely within the principle stated by Judge Story in his Equity Jurisprudence, vol. 2, section 1246, above quoted.

There is, as said by Judge Story, not only "general forms of expression" from which the trust or charge "arises by implication," but there are clauses which quite specifically create such charge. But it arises from the nature of the business of the company from a necessity well understood by the parties to the mortgage, from general usage, and a reasonable construction of the statute authorizing the mortgage.

382 In all the recent cases involving the *question of priority of "running expenses" over mortgages, such priority has been sustained.

Williamson v. N. A. & S. R., 9 Am. Railway Times, No. 37; Redfield on R., 2d ed. 591, note 23; Coe v. Central Ohio R. R. Co., before McLean, Judge, Sept. 1859; the case of Pittsburgh, Columbus, or Cincinnati R. R. Co., in district court Harrison county, Ohio, reported in Railroad Record, Sept. 15, 1859.

In these cases, receivers were appointed and directed to pay the net proceeds to the payment of debts due for labor, materials and supplies, money, borrowed to pay interest on mortgage debt, etc. all before the interest or principal of the mortgage debt.

These are substantially the views taken in the case of Cary v. P. Ft. W. & C. R. R. Co., 1 West. Law Monthly, 338, though not upon the main question therein. The principal question in that case was decided in accordance with what seems to be the current of recent authoritative decisions in other states, which of course should be followed by the common pleas, until the law shall be settled by the supreme court of Ohio; but not, perhaps, in accordance with ordinary legal principles applicable to other cases.

It seems to me that the same rule should generally apply to corporations and individuals—that the true doctrine is stated in a learned note, to which my attention has since been called, in 2 Kent Com. 284, (new ed.) note *b*; Md. v. Bk. Md., 6 Gill & I., 219; Slee v. Bloom, 5 I. C. R., 366; 19 J. R., 456; Pierce v. Partridge, 3

Metc., 44, Perry v. Adams, 3 Metc., 51; Queen v. Victoria Park Co., 1 A. & E. N. S., 288; American Law Mag. No. 8, Jan., 1845; North C. v. Rives, 5 Ired. N. C. R., 297; Ramsey v. Orleans, 6 Rob. La., 381; Contra Winchestor v. Vimot, 5 B. Monroe, 1. Equity of course would protect the right of the public and of lien holders.

The plaintiff is entitled to judgment directing the company to pay his claim that Pearce apply money in his hand at the time he was served with process on said claim, that for any deficiencies he apply the money that may come into his hand as agent, and this may be enforced by attachment against him and the company or the proper officers who may be made parties for that purpose, to carry which judgment into effect, the case is continued. 3 Daniel Ch. Pr. 709. Judgment accordingly.

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*ATTACHMENT. 385

Superior Court of Cincinnati, Special Term 1859.]

†PHELPS, Bliss & Co. v. C. S. WETHERBY.

When an affidavit, on which an attachment is issued under Code, section 192 or 231, is made by an agent, he must state affirmatively his personal knowledge of the verity of the charge he has made, as fully as would be required by section 113.

STORER, J.

P. S. Cooper, who describes himself as the agent of the plaintiff, filed his affidavit with the clerk of this court, stating the nature of the claim, its amount, and "that defendant fraudulently contracted the debt for which the note was given." An action was brought at the same time, to recover the amount alleged to be due, and on this affidavit the clerk issued an order of attachment, which the defendant now moves to set aside, on the ground of the insufficiency of the affidavit. Sundry exceptions have been taken, one of which, as it must determine the case, we will only examine.

The allegations in the affidavit are expressly made: they are absolute in their character, as to the nature of the claim, and the fraudulent contracting of the debt. The plaintiffs have not assumed the responsibility themselves, of the truth of the charges averred, except as it may be implied by the use they may hereafter make of the order of attachment. On the other hand, Cooper, who assumes to be the agent of the plaintiffs, without any qualification of the nature or extent of the power confided to him, positively swears to the truth of all the facts he has stated. And this is done without any reservation, or reference even to the fact, that he has any personal knowledge of the verity of the charge he has made.

†For a contra decision see White et al. v. Stanley, 29 O. S. 423.

He has deposed in a matter, in which it does not appear that he was ever interested. We are not advised even that he knew of the existence of the note, much less the circumstances attending its origin, except from the implication that generally follows the unreserved statement of a fact.

He does not appear to represent the plaintiffs in this particular transaction, though it is declared his agency is general.

If he has sworn falsely, he only suffers the deserved punishment; the plaintiffs are not involved in his guilt, and if they should disown his acts, they would not be compelled to indemnify the defendant for any loss he may sustain by reason of the attachment.

It certainly is the policy of the law to require parties who avail themselves of summary and harsh remedies, to make personal application for the intervention of the court in their behalf. They alone are supposed to be conversant with the true condition of the case; they alone are interested, and it is but just that they should take the responsibility. It ought not, except in extreme cases, to be permitted that any one appear by proxy, and devolve upon others to establish by induction what is best known, and perhaps only known, to themselves.

Any other rule would place the evidence of hearsay alone upon the level of direct proof. A person whose whole information
386 *of the facts is derived from the plaintiff alone, may give himself the character of agent, swear positively to the necessary allegations to obtain an order of attachment, and the extraordinary processes which may consequently issue, have no true foundation to rest upon. The statute may require proof, and yet its spirit, if not its letter, is violated by the exhibition of what would be rejected on trial of the case as utterly worthless.

An examination of the Code by a collation of the different classes, where it is allowed to agents and attorneys to make affidavits for the principals or clients, satisfies us that we ought always to inquire of him who professes to represent another, to state his personal knowledge of the fact to which he deposes, before we can confide in what he asserts.

The first reference to such affidavits is found in section 115 of the Code.

"When the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself." Here refer to the 1st, 2d, 3d and 4th clauses of the statute. We suppose the intention of the legislature, by thus defining the cases when the oath of the party may be dispensed with, may be considered as clearly expressive of what should be the rule in every other case where a resort should be had to the affidavit of the attorney or agent.

The whole Code must be regarded in *pari materia*. It is a general system of practice and pleading, for the regulation of the courts, and their suitors also. To harmonize the various parts of this system, we must give a judicial meaning to all, whenever the same question arises; we cannot permit the restrictions attached to

the suitor, and those who represent him to be disregarded, because they are not specially repeated, whenever a remedy is allowed. The condition imposed by the act, prescribes the precise form to be pursued, but if it is apparent a mode has been once ordained and its particulars defined, the same mode must govern in every case where a party asks the aid of the court.

It is very plain to us, that when by section 192 it is provided, that the order of attachment may issue on the affidavit of the plaintiff, his agent, or attorney, it must appear as fully if made by the agent, that the facts stated are within his own knowledge, as would be required by section 115. And it would seem that this should be the only sound construction, for the reason, that in the latter case the defendant swears only to his belief, while in the former, he makes a particular allegation.

The same meaning we are satisfied should be given to section 231, allowing attachment in certain cases, as well as to section 146, relative to arrests. They are all portions of the same statute, and can only be consistent and effective by appropriating to each a common meaning.

This is the policy of the New York Code, section 157, which requires "that when the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge and the grounds of his belief, and the subject, and the reason why it is not made by the party." Howard's Code, 260,114 Howard's Prac. Reps. 334.

If we should be required to compel a new verification of pleadings when the affidavit did not contain the excepted cases in which an agent or attorney may represent the party, we ought not to permit an order of attachment to issue, when the only ground on which it rests is the deposition of an agent, that would not sustain a petition, or any other pleading allowed by the Code.

Other grave questions have been raised which we have not now referred to. Sufficient it is, that we find no sufficient affidavit to authorize the order of attachment, and it is therefore dismissed, at the plaintiff's costs.

Thompson & Nesmith, for plaintiffs.

T. Powell and Wm. B. Caldwell, for defendants.

393 *REFORMATION.

[Logan Common Pleas Court, 1859.]

REECE ROBERTS v. JEREMIAH ELMORE.

1. In the absence of fraud or mistake, a provision or stipulation omitted from a written contract by the express agreement of the parties, cannot be made the ground of a reformation, in equity, upon parol evidence.
2. A written contract may be reformed in equity upon parol evidence of fraud or material mistake, and relief may be granted upon the contract as reformed, in the same proceeding.
3. It is competent to show by parol evidence that a deed of conveyance, different in its terms from that required by written contract, was received in full satisfaction of or as a total discharge of such contract.
4. When a petition in equity seeks by parol evidence to reform a written contract by supplying a verbal stipulation omitted by agreement without fraud at the time of executing such contract, such verbal stipulation being contradictory to the written contract, the insufficiency of the petition is well taken by demurrer without answer.

394 *Civil action. Petition avers that on the 8th May, 1856, the parties entered into a verbal contract by which plaintiff agreed to convey to defendant, by deed to be made during the month, 26 acres of land, (described), except a mill-race across the same, previously conveyed by plaintiff to Obenchain, who then and since occupied and used it, in consideration whereof defendant agreed, on receiving said deed, to convey by deed to plaintiff lot 62 in West Liberty, and within one year from May 8, 1856, to pay plaintiff $59.50; that defendant was to occupy said lot until April 1, 1857, and pay plaintiff rent therefor from June 1, 1856, to April 1, 1857, at $150 per year rent in quarterly installments, and that defendant should have possession of said 26 acres from 8th May, 1856, except the mill-race; that afterwards on same day, the parties, intending to reduce said contract to writing, made and signed a written agreement embracing all said terms, except that by mistake following errors were incorporated in the writing: 1st. A slight error in the location of one of the corners of the 26 acres (described). 2d. The exception of the mill-race was omitted. 3d. The rent was made payable all April 1, 1857, instead of quarterly. "That said writing was drawn when plaintiff was not present, but after it was drawn it was read to plaintiff in the hearing of defendant, and plaintiff objected to signing it because it was not in its terms according to said verbal contract, whereupon defendant said to plaintiff, "It makes no difference if the writing does not express all the terms of the contract—we are neighbors and both claim to be honest men—we will have no trouble about the matter. I only want the writing to secure the making of the deed; I will pay the rent quarterly; you can make the description of the land right in the deed."

That by these assurances plaintiff was induced to and did sign said contract. That on 3d June, 1856, plaintiff delivered to defendant a deed for said 26 acres, with description as verbally agreed and

excepting from the grant the mill-race, "which said defendant then accepted as a compliance with said [written] contract," and caused it to be recorded, and then delivered plaintiff a deed for said lot 62, accepted by plaintiff as part performance of said contract. That defendant has occupied said land since said contract, and the lot 62 until April 1, 1857.

"That defendant fraudulently, falsely and unjustly claims that said written agreement is the contract as originally verbally made, that there are no errors or mistake, and is wrongfully setting up the same and the plaintiff's non-compliance as a bar to plaintiff's recovery herein," and objects that the deed to defendant did not convey to him the mill-race.

Prayer to reform the written agreement, for specific performance of the contract as verbally made, for judgment for $59.50 with interest from May 8, 1857, and for rents $125, as follows: $37.50 and interest from Sept. 1, 1856; $37.50 and interest from Dec. 1, 1856; $37.50 and interest from March 1, 1857: and $12.50, April 1, 1857. It is not averred that the omissions or errors in the written agreement were the result of any fraud of defendant.

General demurrer by defendant.

C. W. B. Allison, for defendant, cited: 2 Story Eq., sections 768, 375, note; 1 Sugd., Vend., 266, section xi, section 16; Reade v. Livingston, 3 I. C. R., 481; 1 Greenl. Ev., section 275; Adams Eq., marginal p. 169, note; 20 O., 492; 1 Story Eq., section 160—158; Adams Eq., 169—171; 1 Pet., 1; 1 I. C. R., 512; 2 I. C. R., 60; 12 Pet., 32.

James Kernan, for plaintiff, cited: Greenl. Ev., sections 282, 284 *a*, 286, 288, 294, 303, 304, note 4; I. T. R., 701; 1 Mass. R., 297; 1 U. S. Dig, 244; 17 Conn., 201; 20 O., 147, 159; 9 Pick., 298; 5 U. S. Dig., 210, section 258; 30 Maine, 184; Chit. Cont., 99, note 2; 1 Greenl., sections 22, 27; 3 U. S. Dig., 200, section 27: 10 Barr, 527; 4 U. S. Dig., 192; 2 Maine, 525; 5 U. S. Dig., 195, section 38; 5 O., 194; 4 O., 368; 10 O., 288; 14 O., 228.

*James H. Godman, for plaintiff: Mistakes in written contract may be corrected by parol, and relief granted in the same proceeding: 1 Story Eq. sections 140, 155, 161, n 1, 2 I. C. R. 585, 598, 4 I. C. R. 144, 10, Paige 235, 4 Md. Chy. Dec. 273, 11 G. & I 313, 325. 6 O. S. 459. 395

The Court will reform the contract, not upon the ground of fraud in the original contract, but because to stop at part performance would operate as a fraud: 2 Story Eq section 759; 14 Ves. 386, Mtfd. Pl. 265; 1 Sugd. Vend., 258, 266, note; 1 citing Phyfe v. Wardell; 1 Edw. Ch. R. 51; 14 I. R. 33; 1 Sugd. 269, section 23, section xi: 1 Story Eq. section 160; 1 I. C. R. 273: 11 Gill & Johns 314, 325. If one party object to a written agreement because a stipulation is omitted, and the other promise to rectify it whereupon it is executed, Equity will decree specific performance of this promise: Sugd. 132, 279, section 23 section xi 1 Bro. C. C. 52; 14 Ves; Ir. 524: 1 S. & R. 464. Cager's Exr. v. McGee 2 Bibb. 321; 2 Am.

Chy. Dig. 254; 1 Eq. Cases Ab. 230; 2 Story Eq. section 768; Sellack v. Harris, 5 Vin. Abr. 521, Pl. 31; Podmore v. Gunwing, 7 Sun. R, 644; Maxwell v. Mentacue, Prec. in Chy. 526; Walker v. Walker, 2 Atk, 99, 258; 3 Atk, 389, Oldham v. Litchford 2 Freem. 284; 5 Skett v. Whitmore, Ib. 281; 2 Story Eq. section 768.

Walker & West for defendant. The petition shows that defendant denies that the written contract omits any verbal stipulation, or is erroneous. He is in the position of one who answers and demurs, he does not admit any mistake.

The parol evidence is not competent to afford relief nor to waive an Equity. 2 Parsons Cont. 247; 1 Greenl. Ev. section 296; 2 Story Eq. section 768, section 770, etc., section 767; 4 Phil. Ev. (C. & H. notes) 594, 598, 604; Contract can not rest partly in parol; Ib. 2 Hilliard on real property 344, section 31.

By the Court Wm. Lawrence, Judge. It is now well settled that mutual mistake in the terms or legal effect of a written agreement, may be relieved against in Chancery, upon parol evidence either to waive or debut an equity; Davenport v. Scovill, C. O. S. 462; Hunt v. Freeman, 1 O. 490; Young v. Niller, 10 O. 85, McNaughten v. Patridge, 11 O. 223. 232; Evants v. Strode, 11 O. 480; McLouth v. Rathlone, 19 O. 24; 1 Greenl. Ev. section 296; 2 Parsons, Cont. 547.

And in like manner fraud may be relieved against in all these cases the contract may be reformed and relief granted in the same proceeding Cases above Greely Eq. Ev. 206; 1 Law Monthly. p 574; 1 Greenl. Ev. 246 a, note 369, 2 Cow & Hill, notes to Phil. Ev. 623. But the mistake which authorizes equity to reform a written contract must be mutual—on both sides. "A mistake on one side may be a ground for rescinding a contract or refusing to enforce its specific performance but it can not be a ground for altering its terms. And the mistake must be admitted or distinctly proved." Adams Eq. marginal page 171 note.

But in this case there is no mutual nor any mistake. A mistake only exists when the written contract in its terms or legal effect is different from what the parties believe it to be at the time of its execution. In the contract now under consideration there was then no mistake. When executed the parties knew its terms and effect.

There was at that time no fraud. None is averred. All was there fair and in good faith.

The plaintiff is not therefore entitled to any relief upon the ground of mistake or fraud at or prior to the time the written contract was made.

The statute of fraud requires certain contracts in relation to land to be in writing. But it is now well settled that "part performance" of a verbal contract for the sale of land takes the contract out of the operation of that statute, and when clearly made out, such contract will be specifically performed.

396 But the plaintiff does not rely upon an *independent verbal contract, but seeks to reform one by parol without aver-

ment of fraud, mistake or surprise. A careful examination of the elementary principles and adjudicated cases will show this can be done.

It is asked upon the ground that there is a contract partly in writing and partly in parol with "part performance" the court will decree specific performance to prevent one party from practicing a fraud upon the other.

That equity will decree specific performance of a promise omitted from a written contract upon the faith of such promise.

These propositions are worthy a careful consideration. In Parkhurst v. VanCortland, 14 Johns. R. 33; Thompson, C. J. says: "It is a sound and salutary rule that a contract can not rest partly in writing and partly in parol." And section 1 I. C. R. 274. But he immediately adds that "where 'part performance' is made the basis of the claim for a specific execution of an agreement, parol proof may be connected with written evidence for the purpose of making out the contract."

I can readily conceive of a case where after part performance a contract within the statute of frauds, and resting partly in parol would be specifically performed. Thus a written offer to sell land stating terms verbally accepted without modification. So an entire verbal contract supported by writings to identify or aid in making out its existence and terms, might afford an example of such case. So a written contract professing to state only part of the agreement 14 I. R. 21; Allen v. Bover, 3 Bro. Ch. 149 1 Seh. & Lef. 37: Lewis v. Gray, 1 Mass. 297; 1 Greenl. Ev. section 284.

In Phyfe v. Wardell, 2 Edwards C. R. 47, a written contract was reformed by parol so as to include a stipulation omitted by the fraud of one of the parties. The case evidently proceeds upon the ground of fraud, or if not is unsupported by any other case I have been able to find, and is against the settled doctrines of all the courts.

It is said in 1 Sugd. 269, section xi, section 23: "If either party object to a conveyance on the ground of a term of the agreement being omitted, and the other party promise to rectify it, whereupon a deed is executed, a specific performance of the promise will be enforced." But the case cited in support of the text is Pember v. Mathers, 1 Bro. C. C. in which Lord Thurlow said: "It comes amongst the string of cases where it is considered as a fraud," section 14, Ves. 524.

In Cogers Exr. v. McGee, 2 Bibb. 321, the text of Sugden above quoted is adopted as a part of the syllabus. But the case is decided upon the ground that the parties were mutually mistaken in the legal effect of the contract which was reformed accordingly. In Parkhurst v. VanCortland, 14 John's R. 31, no such principle was decided. A written lease was made with verbal promise at some time to sell, but specific performance was decreed, not upon that promise, but subsequent independent verbal sale with part performance, 1 Greenl. Ev. section 303; 9 Pick 298; 14 John's 330. And Thompson C. J. remarks: "Where it is necessary to make out a contract in writing no parol evidence can be admitted to supply

any defects in the writing," and he adds that Lord Thurlow in commenting on Allen v. Bower, 3 Bro. Ch. 149, "and particularly upon the question whether a defective writing can be supplied by parol observes that this cannot be done when the writing is set up as the sole foundation of the agreement."

If these cases did maintain that an omitted stipulation may be in equity added to a written contract in the absence of fraud or mistake, they do not hold that an omitted stipulation may be added directly contradictory to, and defeating provisions of the written agreement. And if these cases do afford some apparent foundation for the
397 *doctrine contended for plaintiff, other authorities make it clear that the evidence is not admissible. In 1 Sugd. Sex. XI, page 266, section 16, it is said: "Where parties omit any provision in a deed on the impression of its being illegal and trust to each other's honor, they must rely upon that, and cannot require the defect to be supplied by parol evidence." Irhamam v. Child, 1 Bro. C. C. 92; S. C. Dick, 554; Townshend v. Stangworm, 6 Ves., 332; Hare v. Shearwood, 1 Ves. J., 241; 326; Robinson v. Gee, 1 Ves., 251; Ball v. Montgomery, 2 Ves. Jr., 194; 4 B. C. C., 339; 3 Bro. C. C., 168; Hawes v. Hare, 1 Hen. Bl., 659; Portmore v. Morris, 2 Bro. C. C., 219; 1 Hen. Bl., 663; Rosamond v. Melsington, 3 Ves. Jr. 40 n; Taylor v. Radd, 5 Ves. Jr., 395; Henkle v. R. E. A. Office, 1 Ves., 317; 2 Vesey, 375; 1 Bro. C. C., 338; Rich v. Jackson, 4 Bro. C. C., 514; 6 Vesey Jr., 334 n; Gilpins v. Consequa, 1 Pet., 85. 87; O'Harra v. Hall, 4 Dall., 340; Wolf v. Carothers, 3 S. & R., 240; Wallace v. Baker, 1 Binn., 610; McKinney v. Leacock, 1 S. & R., 27; Marshall v. Sprott, Addis, 361; Bruce v. Barber, 3 Conn., 9; 1 Scho. & Lef., 38; Omerod v. Hardman, 5 Vesey Jr., 722; Bridges v. Chandos, 2 Vesey, Jr., 402; Pym v. Blackburn, 3 Vesey, 34: Ex parte Glendenning Buck, 517; Ib., 560; Castledon v. Twener, 3 Atk., 258; Clinan v. Cork, 1 Sch., 22; Whotton v. Russell, 1 Atk., 448; Tyrrell v. Hope, 2 Atk., 560; Turney v. Finney, 3 Atk., 8; Thompson v. Ketcham, 8 I. R., 146; Fitzhugh v. Runyon, 8 I. R., 292; Stackpole v. Arnold, 11 Mass., 27; Movan v. Hays, 1 I. C. R., 339; Stevens v. Cooper, 1 I. C. R., 425; Snyder v. Snyder, 6 Binn., 483; Streator v. Jones, 1 Murphy, 449, 426; 11 I. R., 201; 2 Bay, 94; 2 Story Eq., section 768; 1 Story Eq., section 160, note 3; Fitzgerald v. Fanconlerge, Fitz., 213; Stokes v. Morse, 1 Cox., 219; Ib., 402; Loman v. Whitley, 4 Russ., 423; Ex parte Morley, 2 Ded. & Ch., 50; Croone v. Lidiard, 2 Myl. & K., 25; Flynn v. Calon, 1 Man. & Gr., 589; Ford v. Yates, Sc. N. S., 645; Henson v. Cooper, 3 Sc. N., 248. Clayton v. Nugent, 13 Mees & W., 200; 2 Mann & Gr., 452; 4 Sc. N. R., 77, 370; 3 Mann. & Gr., 759; Gresley's Eq. Ev., 278.

In Adams on Equity it is said: "In the absence of mistake or fraud a provision or stipulation omitted from a contract by the express agreement of the parties cannot be made in general the ground of a reformation upon patrol evidence." Adams Eq. Marginal page 169 note.

To this note there is of course the exception that when no statute of fraud intervenes, and perhaps in some cases notwithstand-

ing the statute, a trust may be engrafted by parol upon a deed, contract or will. Collins v. Hope, 20 O., 497; 2 Story Eq. section 768; 1 I. C. R., 339; Fleming v. Donahue, 5 O., 258. The trust is a separate contract, not intended to be embraced in the original one which is not therefore contradicted or added to by evidence of it.

Judge Story says: "Where there is a written contract all antecedent propositions, negotiations and patrol interlocutions on the same subject are to be deemed merged in such contract." 1 Story Eq. section 160, 158.

Greenleaf says: "When parties have deliberately put their engagements into writing, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking was reduced to writing; * * * and all oral testimony of a previous *colloquium* between the parties, or of conversations or declarations at time when it was completed or afterwards * * * is rejected." 1 I. C. R., 274; 7 Paige 137; 1 I. C. R., 425; 3 Edw. Ch., 14; 1 U. S. Eq. Dig., 454; Ib., 37; 1 Green Ch., 438

And so are all the elementary writers on evidence. Starkie on Ev., 2; Phillips on Ev., 351, 278, 306; Sweets Ed. Byth. & Jar. Conv. Vol. 1, p. 348; Gresle'ys Eq. Ev., 278, 287; Wigram on Wills; Rands Ed. Matthews on Press. Ev.

The current, if not all the English and American cases, sustain the elementary writers. (see cases above). In *Stevens v. 398
Cooper, 1 I. C. R., 425, an attempt was made upon parol evidence to reform a mortgage by adding an omitted stipulation, but Chancellor Kent remarks in that case, "there is no allegation of fraud, mistake or suprise in making or executing the mortgage; and those I believe are the only cases in which parol evidence is admissible in his court against a contract in writing.

In Rich v. Jackson where it was attempted to reform a lease so as to add an omitted stipulation made at the time of signing the agreement Lord Loughborough said: "I looked into all the cases; I cannot find that this court has ever taken upon itself to add to the form of the agreement; but in repeated instances the court has refused to do so." 4 Bro. C. C., 518; 6 Vesey, 334 n Gresley, Eq. Ev., 278. Of course there is the exception that parol evidence may be received to add to or to vary or supply in a deed, etc., the date and consideration. Gresley Ex. Ev., 287.

This unbroken current of authority is supported by the whole weight and reason of the rule that excludes parole evidence from adding to a written contract. The temptation to perjury, the uncertainty of parol evidence, will be much aggravated if these rules are infringed, no less in the case under consideration than in any other. The same uncertain memory or corrupt purpose to commit perjury can alike invent the omitted stipulation, and the agreement of the adverse party verbally to perform it in all cases.

The objection is well made by demurrer.

But for another reason the demurrer must be overruled. The petition shows that after the contract defendant accepted a deed for the 26 acres, with a corrected description, excepting the race as and for

compliance with the contract. If this is so defendant must pay the $59 and the rent $125, bnt the contract cannot on the facts be reformed so as to make the rent payable quarterly, and thus give the plaintiff interest from the end of each quarter. A subsequent parol variation of the contract may be proved; 1 Green. Ev., section 304, 302; 3 Metc., 486; 1 T. R., 638; 5 Greenl. R., 9; 7 Con., 50; 5 Con., 497; 2 Doug., 684.

Demurrer overruled.

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401 *GUARANTY.

[Superior Court of Cincinnati, Special Term, 1859.]

ROOTS & COE v. JENIFER & SMITH.

Under the following guaranty: "In consideration of facilities afforded to F. by R., in the shape of cash and acceptances, we hereby guarantee the prompt fulfillment of any contract F. shall make with R., and by this instrument become responsible to R. to the amount of $15,000, as indemnity against any delinquencies of F. to meet at maturity any engagement he may make with R.,"—as the surety is to be bound only in default of the principal understanding, and therefore notice of the acceptance of the guaranty by R. and of the amount of his advances must be averred to have been given, or a knowledge of the facts charged in a petition upon the guaranty.

STORER, J.

The plaintiff's action is founded upon a written guaranty. It is claimed by the defendants the obligation is collateral, only, and not absolute, upon the assumption of which the contract could not be operative, until notice had been given to the defendants of the acceptance of its terms by the plaintiffs.

We give a copy of the instrument on which the action is brought:

CINCINNATI, November 17, 1858.

"In consideration of facilities afforded to E. & J. C. Fallis by Roots & Coe, in the shape of actual cash, New Orleans, New York and Cincinnati acceptances, we do hereby guarantee the prompt fulfilment of any contract that said E. & J. C. Fallis shall make with said Roots & Co., and by this instrument become responsible to the said Roots & Coe to the amount of fifteen thousand dollars, as indemnity against any delinquency on the part of E. & J. C. Fallis to meet at maturity any engagement they may make with the said Roots & Coe.

ISAAC P. SMITH,
R. JENIFER.

A very careful examination of the cases given by the counsel, has satisfied us the only real distinction between an absolute and a collateral undertaking is this. Is the surety bound in the first instance, or only in default of the principal debtor? Is his liability

created *ipso facto*, by the undertaking with the creditor, or does it depend upon something to be subsequently done by the creditor?

When we speak of a bond, or note, or other contract, to which principal and surety are joint obligors, or makers, we can readily understand how all the parties are primarily bound to perform the undertaking. And so, when the payee becomes an indorser, his liability is equally well determined.

When, for a debt already contracted, a guaranty is made by a third person, it is clear there must be a new consideration arising between the parties to sustain it, and the contract itself is collateral to the original claim.

This distinction is well set forth in 12 Pick. 133, Babcock v. Bryant, where Judge Putnam puts the interrogatory, "Is the defendant liable in the first instance, or is he only responsible on the default of another to pay or perform?"

In all cases when the undertaking is not absolute, but collateral merely, it is the settled law in the Supreme Court of the United States, that the guarantor must be notified of the acceptance of his guaranty, as well as the amount advanced upon its credit. 7 Cranch 69, Russell v. Clark; 5 Peters 624, Edmonston v. Drake; 7 do 125, Douglass v. Reynolds; 10 do 494, Lee v. Dick; 12 do 211, Adams v. Jones; ib. 504, Reynolds v. Douglass; 1 Howard 169, Bell v. Bruen; 2 do 453, Lawrence v. McCalmont. The principle of these cases is affirmed by our supreme court in 10 O. 495, Taylor v. Wetmores. The rule is followed also in very many of the state courts, though other tribunals, *particularly the courts of New York, 402
have dissented from its propriety.

No one who has examined these opinions can fail to have perceived how diverse have been the reasons which seem to have influenced their determination. And it has appeared to us that, in their anxiety to ignore the judgment of the supreme court, many of them have indicated not a little pride of opinion, if not a degree of positiveness, not always consistent with patient research, or a clear perception of the grounds they have assumed. We need not refer to the many cases read in the argument, or to those we find in the briefs of counsel; we would only say they do not, in our judgment, impair the reason of the rule settled so often, and as we think upon just principles, by the highest judicial authority in the Union.

The rule commends itself to our sense of right, as it is but the equivalent of a similar principle modified, it is true, when applied to guaranties, but which pervades the whole law applicable to commercial contracts, when indorser and indorsee, principal and surety, are concerned.

Notice, however, is not the privilege of the guarantor, as alone determining his liability, nor is it yet arbitrary, as to the time or manner of giving it.

Although upon mercantile paper the day of demand, as well as of notice, are authoritatively fixed, and of themselves create the right of the holder, without regard to the insolvency of the princi-

pal debtor; in the class of cases before us, the notice need not be given at any stated period, and the neglect to do so, does not impair the creditor's claim, if the guarantor has not suffered from the omission. 8 East 242, Warrington v. Furbor; Taunton 206, Phillips v. Astling; 12 Peters 503, *infra;* 10 Peters 492, *infra;* 2 Howard 457, Rhett v. Poe.

Some of the cases go so far as to say that the insolvency of the principal known to the guarantor, before suit brought, will dispense with notice, and the result of the rule seems to be, no express notice need be proved, but it may be inferred from the facts of the case, and the conduct of the parties.

If the law which is to govern in the construction of the contract before us, is as we have indicated it to be; let us ascertain the legal liability of the defendants, in the premises.

We are bound to give the ordinary meaning to this guaranty that we would apply to any similar undertaking. No forced construction, no unnatural use of language, can be permitted. We must ascertain the intent of the parties from the instrument itself, as well as the purpose for which it was executed, as it appears in the pleadings.

Although the guaranty commences with the statement "in consideration of facilities afforded," we are not necessarily to regard it as referring to a fact already existing, or a credit previously given; for such a construction would leave the guaranty without consideration, as it would merely obligate the guarantors to pay a debt already incurred; and for which no new element to support the contract, is alleged. We must, we apprehend, regard the agreement as prospective only, intended to secure future advances, not indeed to exceed a stipulated sum, but to be made, as the plaintiffs and the Messrs. Fallis might agree, both as to time or amount. This view reconciles all seeming contradictions in the language used by the parties, and places them before us, as we believe they intended to stand between themselves.

And this is sustained in the court of exchequer in the late case of Broom v. Bachelor, 37 E. L. & E. 577, where the guaranty was nearly similar in its terms with that signed by the defendants.

If it was intended to embrace future advances only, to be determined by the *parties originally contracting for the facili-
403 ties to be afforded by the plaintiffs, the case before us is of easy solution; and the rule requiring notice of the acceptance of the guaranty by the plaintiffs, as well as the amount of their advances, to be given, or knowledge of these facts charged upon the defendants within a reasonable time after the contract was accepted, and the facilities furnished, must prevail.

The petition, does not, in express terms, aver that such notice was given, and there are no allegations from which we can infer it; to that extent, the plaintiffs may be therefore, required to make the statement of the cause of action more definite and certain.

As we have already said, the question of notice, is mixed of law and fact; what it was, how given and when given, are matters

of evidence, the reasonableness of which is to be decided by the court, upon hearing all the facts. From the averments of the plaintiffs' petition, nor yet from the introductory part, which professes to disclose the connection between the parties, the object of the advances and the purpose of the guaranty, we cannot infer that such notice was given.

We suppose the knowledge of the defendants of the facts would be equivalent to notice, but the notice must be nevertheless alleged, though it may be proved, by other evidence than the actual communication of the facts, by the plaintiffs to the defendants.

To this extent the petition must be amended.

This case has been very elaborately argued, and very many authorities cited; we have patiently considered the views of the opposing counsel, and examined carefully the principal authorities upon which they have relied. Without attempting to reconcile many seeming contradictions, in the opinions of some of the courts, and not feeling it to be our duty to decide how far their peculiar views are in harmony with the English cases which are quoted to support those views, we are satisfied the rule we have adopted is the only safe and satisfactory one, equally demanded to protect the rights of the holders of mercantile guaranties, as well as to limit, by some established principle, the liability they legally impose.

It was truly said by Baron Parke in the leading case of Vyre v. Wakefield, 6 M. and W. 442; "that there were certain cases where from the nature of the transaction, the law requires notice to be given, though not expressly stipulated for," and it cannot be denied that in every case where one is bound for another by an instrument collateral to the original contract, and when the liability to be assumed, when actually created, is within the especial knowledge of the creditor, that the duty devolves upon him to notify the guarantor of the acceptance of his indemnity, as well as the extent to which it has been applied. There may, we admit, be an agreement to guaranty the transactions of another, which by the consent of all the parties, becomes a part of the subject matter of the contract and forms with the other portions, but one obligation, but this must occur, when all parties assent, and their undertaking of the liability of each other may be fairly inferred from their acts. But it is not necessary to state such a case in the pleadings, it may be proved on trial or a part of the "*Res gestae.*"

There is no such averment in the plaintiffs' petition, and we do not think they were required to make it either by way of inducement, or direct allegation.

All we now decide is the abstract question of the creditor's duty to give notice. We are not to be understood as limiting the time, or prescribing the manner, in which that duty shall be performed, nor yet to deny the right of the plaintiffs to recover should no notice have given, when the principal debtors have become insolvent, immediately after the acceptance of the guaranty, or making the advances under it.

404 *These questions need not now be adjudicated, they will more probably arise when all the facts are exhibited on trial.

We could have wished that the facts of the case could have appeared in the pleading as they really existed, with all the circumstances attending the execution of the guaranty, the advance and the privity of the defendant in the transaction; a demurrer would then have reached the case, and whether the notice was sufficient or not, whether it was properly averred, or an excuse existed for its omission, would have involved the whole merits of the controversy between the parties. As we have been asked, however, to examine a question of pleading, more or less affecting the rights of all parties, under the contract set forth in the petition, it is our duty to decide it, though it may not eventually affect the liabilities of either party.

Plaintiffs are required to amend their petition.

[Superior Court of Cincinnati, Special Term, 1859.]

PHELPS BLISS & CO. v. C. S. WETHERBY.

This case was reprinted on account of errors. For correct opinion, see *ante*. 205, *p. 385.

*DOWER—PLEADING. 5

[Superior Court of Cincinnati, General Term, 1860.]

THE LITTLE MIAMI RAILROAD v. HANNAH F. JONES.

1. A widow can have no dower right in property condemned by statute, where her husband received full compensation for the land taken.
2. In a petition for dower it must be definitely alleged that the defendant is the holder of the next immediate estate of inheritance, or what is equivalent, that he is seized in fee of the property in which dower is sought.
3. The only person who can assign an estate of dower to the widow, is the heir, or the grantee of the husband, or one who is in privity of title with him.

ON ERROR.

The opinion of the court was delivered by

STORER, J.

The plaintiff in error seeks to reverse the judgment of one of our colleagues in special term. He held the defendant in error was entitled to her dower in property owned by the plaintiffs, and in daily use for the purposes of their railroad.

Mrs. Jones is the widow of George W. Jones, who was seized of the property in fee many years since, and during his marriage sold the same, without his wife's relinquishment of dower. During his life and long after he had transferred his estate, and while it was held in fee by Silas Atkins and others, his grantees, the land was appropriated by the railroad company for the purposes of "constructing and maintaining" their road, and proceedings were heard before the propate judge of Hamilton county, as the law provided, for the condemnation of the property. The value was ascertained by a jury, and the amount paid to the owners, judgment being rendered "that the railroad company were entitled to the possession thereof, for the purposes then described in their petition."

The claimant's marriage, her husband's seizin during coverture, his death, and the appropriation of the property for the purposes of a railroad, are admitted. The only important question now to be considered, is, can Mrs. Jones, on the state of facts presented, claim her dower in the premises.

We are satisfied the widow's right is conferred solely by legislative power. In this country it may be regarded as the offspring of the law, not as expounded by the opinion of commentators, or to be claimed, as it often has been, as founded on the marriage contract, and therefore a vested interest in the wife, to be lost only by her misconduct, transferred by her deed, or barred by ante-nuptial agreement, but, on the contrary, cheated by statute alone. Hence the diversity in the several states as to the nature of the interest itself. Thus, it is held in Vermont, Connecticut, Tennessee, North Carolina and Georgia, that no dower can be claimed except when the husband dies seized of the property.

5 Cowen 317, Stewart v. Stewart; 1 Hay 243, Winstead v. Winstead; 4 Yerger 218, Coombs v. Young, 14 Vermont 107, Thayer v. Thayer.

So, in Massachusetts, New Hampshire and Maine, there can be no dower in wild or uncultivated lands, on the ground that cutting down timber, or working a quarry or a mine, would be waste, and the life estate therefore liable to forfeiture.

15 Mass., Connor v. Shepherd; 2 N. H. 56, Johnson v. Porter; 3 Shipley 371, Martin v. Martin.

In Pennsylvania dower is not allowed where the land has been sold on *execution, to pay the husband's debts, either before or
6 after his death. 3 Harris 115 Halfrict v. Obernger.

The legislatures of other states have restricted the wife's claim in many particulars not consistent with dower at common law, and even in England, by statutes 3 and 4, Wm. IV., her right is now confined to lands of which her husband died seized.

Statutes at Large, vol. 73, page 999.

It is clear, then, that the wife's inchoate estate is not to be considered in the light of a vested interest, which she alone can release, for, even after the death of her husband, she is held to have no estate, until her dower is set apart or judicially determined; it is a chose in action, only, which she is not allowed to alien, nor can it be sold on execution; she may, however, release it to a party in possession, or one who holds the fee.

2 Comstock 245, Stodart v. McMaster; 1 Bar. B. S. C. 500, Green v. Putman; 1 Greenleaf's evidence 189, ch. 3 section 1, and authorities cited in note; 14 O. 418, Adm'r Miller v. Woodward.

But the principle we have stated has been directly decided by the supreme court in 6 O. S. 547, Weaver v. Gregg. "Dowery," say they, "is not the result of contract, but is the creation of law, founded on reasons of public policy, and subject, while it remains inchoate, to such modifications and qualifications as the legislature, for like reasons of public policy, sees proper to impose."

This opinion is in harmony with the judgment of the supreme court of New York in the well considered and very ably argued case of Lawrence v. Miller, 1 Sandf. S. C. Rep. 517, where it is said "the estate of dower arises solely by operation of law, and not by force of any contract, expressed or implied, between the parties; it is the silent effect of the relations entered into by them, not, as in itself, incidental to that relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive institution of municipal law."

See also 2 Comst. 245, same case on error.

This principle was also recognized in the same court by Chief Justice Oakly, in 4 Sandf. 456, S. C. R., Moore v. The Mayor of the city of New York, which was afterwards sustained in the court of appeals, 4 Selden, 110.

"No estate in dowry or tenancy by the courtesy," says Judge Story, "can be acquired, except by such persons, and under such circumstances as the local law perscribes, hence, where, by the law

of one state, a widow is dowable, it does not follow she can claim her estate in another, where the right is not admitted." Conflict of Laws, section 448.

Indeed, it would seem to me that, where there is no statute of descents, the children of the intestate might as well claim to inherit their parents' estate on the ground of a right vested in them at their birth, as to assert that the right to dower exists in the wife as the result of marriage merely, where there is no law prescribing the nature of the interest or the mode of conferring it.

If the plaintiff's right, as has been stated, was merely inchoate when the defendants, by the judgment of the probate court, were adjudged the possession and ownership of the land out of which she now seeks to recover her dower, we will inquire what was the legal operation and effect of that judgment.

As we have already intimated, in many of the states, as well as England, the husband may convey his property during coverture, and thus bar his wife, whether she joins in the deed or not. She is confined solely to the land of which he may have seized. In Ohio, the right of dower extends to all inheritable property of which the husband was seized during the marriage, as well as that he owned at his decease, and the hitherto settled construction has been to decree for the widow *in all cases, whether the estate may have been alienated by 7
the husband or sold on the execution to pay his debts, founded, as we suppose, upon the idea that the wife ought not, by any voluntary act of the husband, to be deprived of her right; yet it could not at any time be asserted, as a conseqence of this practice, that the husband might not be deprived of his estate by a legislative act, the effect of which would be to disseize him, cut off the inheritence, and of course deprive the wife of her claim.

If the husband has no estate there can be no dower to the wife, as her right exists in virtue of his seizin. 6 Ohio Statutes 552, Weaver v. Gregg. Her estate is but a continuation of the husband's; it is not only necessary that he should have an estate of inheritance, but it must be "*simul et semel*" in him; Greenleaf's Evidence 181. statute 6, chapter 2, section 17. It arises alone upon the title of the husband, and cannot be higher or more extensive than his estate. 2 O. S. 417, Firestone v. Firestone.

If his title is defeated by a recovery at law, or by forfeiture, as in England, by the commission of felony, as there would be no estate to go to the heir, no dower could consequently attach, and under a law, which forfeits the land to the government for the non-payment of taxes, after title conveyed by the proper officers the same result would seem properly to follow.

Thus it is held in the cases already referred to in 2 and 6 O. S., "that the right of dower attaches subject to all the equities existing against the title of the husband," and again "it subsists in virtue of the husband's seizin and the right is subject to any incumbrance, infirmity or incident, which the law attaches to that seizin,

either at the time of the marriage or when the husband became seized."

On this construction of the law, it has been decided, that the legal title to an estate acquired after coverture by the husband, will enure without the incumbrance of dower, to a purchaser before the marriage, who held an equitable title to the property from the husband, 2 O. S. 415. It has been also held that a sale in partition proceedings in the lifetime of the wife of one of the tenants in common, divests her inchoate right of dower, 6 O. S. 547, *supra*.

By the appropriation of the property in question to the use of the defendants, in the mode prescribed by the statute, a perpetual servitude at least over the premises was acquired by the railroad company, subject only to be divested by a forfeiture of their corporate franchise on the judgment of a competent court. Until then, the unrestricted possession is not only indispensable for the purposes of the road, but is alone consistent with the paramount right of eminent domain, which has been imparted by the state through the legislature. This right, which is an attribute of sovereignty is necessarily paramount to this claim of the private citizen, and when exerted, it compels the owner to part with his estate for a price to be adjudged by a jury, thereby changing his estate from land into money, and as a full price is required to be paid by the constitution of Ohio, without reference to any benefit the contemplated improvement may confer the condemnation of the land was therefore doubtless intended as it must necessarily do, to confer the whole title upon the corporation, who have paid the assessed value.

Such would be the result, where the state should directly exert her power, and appropriate as she has done, the lands of the citizen for navigable canals, or any other public improvement, and we can discover no reason why the same rule should not hold, where the railway company upon whom the power has been conferred by its charter "to enter upon and take such real property as should be necessary for the construction of their road," have exerted that
8 power in the mode defined *by law, submitted to the judgment of the court, and receive the possession of the land thereby appropriated.

On this hypothesis the husband does not alien his estate as in the case of a sale to a purchaser, nor is it taken to satisfy his debts, in both of which cases dower would still remain, but he is said to lose his estate or rather to part with it "invitum." He could not have prevented the act of the law transferring his realty, nor yet contest the mode of its execution. An exercise of sovereign power by the body, in which for all the purposes of maintaining civil government, it necessarily rests, which existed before any title to property could be said to pass to individuals, as in case of escheat, it becomes reinvested with his title, and may be therefore said in some sense to have originally imparted it, must include within the alienation it compels the entire title. The land is conveyed, and those who represent it must consequently be deprived of their several rights, if they are made parties to the proceeding by which it is appropriated,

a *fortiori*, where there is no perfect right "in *esse*" but the possibility only of a future claim.

We might refer to the difficulties that would follow from an attempt to assess dower in such property as this and they are truly formidable, but we prefer to meet the question on principle, without reverting to the argument "*ab inconvenienti*."

The point we are now considering was fully argued in 4 Sandf. 461; it was there held, "that the power of the state to take private property for public uses, results from its right of eminent domain, and that power is not restricted except by the constitutional provisions, that such compensation be made to the owner in this case, the husband was deemed to be the owner of the entire estate in the land, and the inchoate right of the wife was not considered by the commissioners, and we think justly so, as an interest distinct from that of the husband, as the subject of estimate separate from his." In affirming this case in all points, the supreme court in 4 Selden 112, say, "the land was taken against the estate of the husband by an act of sovereignty for the public benefit: the only person owning and representing the fee, was compensated by being paid full value, the wife had no interest in the land, and the possibility which she did possess, was incapable of being estimated with any degree of accuracy."

Our supreme court, we think, have affirmed the law thus stated, by sustaining the principle upon which they decided the case of Weaver v. Gregg, already referred to, where they refer to the judgment of the N. Y. Courts, and quote the opinion of the judge in Moore v. the city of N. Y., with approbation. Indeed if we may hold the inchoate right of the wife of a tenant in common in premises sold on partition proceedings, is barred by the sale, we may well maintain, that she can have no right in property condemned by statute, where her husband receives full compensation for the land taken.

The case of Gwynne v. The City of Cincinnati, 3 O. 26, denied dower to the wife in property dedicated by her husband during coverture for a market space; no public act of appropriation had been made under any statute, but a voluntary donation of the land by the proprietor, gave title to the corporate body.

The court confined their opinion to the impossibility as well as inconvenience of assigning dower in a public street, in any mode prescribed by law; and assimilated the widow's claim to what would be equivalent, in England, to the grant of dower in a fort or castle for defense, where such an interest was never held to exist.

A very careful examination of the authorities has furnished us no reported case where dower, under like circumstances with the present, has been decreed; but on the contrary, all the decisions we have *been able to find are opposed to the plaintiff's claim, and we are satisfied such should be the ruling in this case. 9

We have been told the plaintiff is not the widow of the party who owned the land when it was appropriated by the defendants, and is not, therefore, within the spirit of the rule we have recog-

nized. The distinction is plausible, but it is not solid. If we are right in the opinion that the whole estate is taken by the application of the power of eminent domain, it must be immaterial who may have had an inchoate right of dower when the judicial condemnation was had; the principle applies to all who might possess such a right, they stand upon the same basis—if the estate of one is destroyed that of all is destroyed.

We have confined ourselves to the important question involved in this controversy, without referring to any defects in the pleadings, but we cannot refrain from stating that in the petition for dower it must be definitely alleged that the defendant is the holder of the next immediate estate of inheritance, or what is equivalent, that he is seized in fee of the property, in which dower is sought. This the statute requires, for the obvious reason, the only person who can assign the estate to the widow, is the heir, or the grantee of the husband, or one who is in privity of title with lien.

The allegation here is, that the defendants are the owners of the property, without any description of the nature of the ownership —whether for years, for life or in fee. This is sufficient. No demurrer is filed; on the contrary, the defendants answer, and we will not permit the defect at this stage of the proceedings to avail as an objection to the action.

Nor is it necessary for us to ascertain what was the nature of the estate vested in the defendants by the condemnation of the land —whether in fee simple or a right of use for the corporate purposes so long as their power to act may continue. The law on the subject may be found in 4, O. S. 308, Grisy v. Cincinnati, Wilmington & Zanesville R. R. Co; 7, O. S. R. M. Junction R. R. v. Ruggles, and in Redfield on R. R., C. 11 section 7, where the learned author has collected the authorities and stated very clearly their results.

We are all of opinion the judgment below should be reversed, on the ground the plaintiff has no right of dower in the premises claimed by the defendants.

Judgment in the special term is reversed.

BILLS AND NOTES—USURY.

[Superior Court of Cincinnati, Special term, 1860.]

JAMES LEE & CO. v. J. W. HARTWELL.

1. Where a note made payable to the cashier of a bank is discounted by the bank and no personal security is demanded of the maker, such note is but the evidence of a loan between the parties.
2. The bank in discounting such note could not charge more than seven per cent. for the time such note had to run.
3. If the bank charged an additional sum as exchange which sum was unauthorized by law and directly opposed to the provisions of its charters, then such transaction renders the contract illegal and void, and it cannot be sustained between the original parties.
4. A purchaser of such note is bound to inquire whether the payee, (the bank) could by its charter legally incur the liability, and the rule applicable, to such purchaser is that which attaches to all who deal with chartered bodies whose powers are defined by statute.
5. The purchaser failing to inquire as to the validity of such note is nevertheless charged with the result to which his inquiry would necessarily have led him.

STORER, J.

The plaintiffs ask judgment upon a note, of which the following is a copy :

CINCINNATI, August 3d, 1857.

Sixty days after date I promise to pay S. P. Bishop, Assistant Cashier, or order, fifteen hundred dollars, value received, at office Ohio Life Insurance and Trust Co., New York.

Signed,

$1,500. JOHN W. HARTWELL.

Pay to E. Ludlow, Cashier, or order. Indorsed,

S. P. BISHOP, A. C.

EDWIN LUDLOW,

The defendant answers that the note was made by him payable to the assistant cashier of the Ohio Life Insurance and Trust Co., for the benefit of that institution, and was presented by him for discount, secured by collaterals; that it was discounted by the company, at their office in Cincinnati, and the proceeds $1,476.75 placed to the defendant's credit; the company deducting $15.75 for interest, and $7.50 for exchange—$23.25. That the note was transmitted by the assistant cashier of the company to their office in New York—where the same was made payable—for payment; he having first indorsed the same to the cashier, who had charge of the office in that city.

That the note was transferred by the cashier, Ludlow, without authority, and * without any valuable consideration in good faith, or in the usual course of business, and the plaintiffs are not innocent holders, that there can be no recovery upon the note, a the same was taken and discounted by the trust company, contrar

to the provision of their charter, at a greater rate of interest than they were allowed by law to receive.

A replication is filed, denying all the allegations of the answer.

The testimony proves the discount, the rate of interest and exchange paid the trust company, the transmission of the note to New York, and the purpose for which it was sent there. No evidence is adduced to show the manner in which the plaintiffs became the holders of the paper, whether for a present consideration paid, as collateral security or otherwise. The transfer is made by the indorsement of Ludlow, who affixes no word or initial denoting his official character. His name only is found on the note.

On these facts two questions arise, the solution of which will determine the rights of the parties.

First, were the Ohio Life Insurance and Trust Co. ever the legal holders of the note in controversy?

Second—If they were not, could they impart to the plaintiffs a better title than they had themselves; or can the plaintiffs claim to hold the note as innocent purchasers, without notice of any original illegality in its consideration.

The law incorporating the Ohio Life Insurance and Trust Co. was passed February 12, 1834. By section 23, it is provided among other things, "If said company shall suspend payment of its notes or bills in silver or gold coin, lawful money of the United States, for more than thirty days or, shall demand and receive a greater rate of interest in any case than seven per cent. per annum, its charter shall be thereby forfeited."

This restriction upon the power of the corporation, like every other which is intended to limit its exercise, should be construed to effect the object the Legislature must have proposed to accomplish, when they made the grant. A company, who could have no legal right, by their charter to loan money, as bankers, except it was expressly conferred, cannot disregard the restrictions of the statute giving the authority to discount notes and bills, and the assumption to act in derogation of a prescribed mode of procedure, would be equivalent as a general rule, to the assumption of a franchise, by individuals that could alone be imparted by the legislature. There is either a legal right, or there is not. If one exists it is created by law, conferred upon the condition only, that the body exercising the right, shall comply with all statutory provisions. Any other or more enlarged claim on the part of the corporators, as it would be inconsistent with the legislative grant, must necessarily be unauthorized and void. A distinction it has been said, exists between those statutes, which declare the act done in derogation of the power shall be void, or when they merely prohibit it; but it seems to us, in a case like this, there is more plausability than soundness in the proposition, as well as the argument used to sustain it. If, as in the case before us the taking of interest on loans exceeding seven per cent. is sufficient cause to produce a forfeiture of the charter, we ought not to permit an action upon the contract made in violation of its express provisions to be maintained. It is a familiar principle,

that courts will not aid a party to do an illegal act, and cannot therefore permit him, through their instrumentality, to ask it to be enforced; and this distinction applies to all cases where the consideration is unlawful, against public policy, or prohibited by express statute. The word "void," or the infliction of a "penalty," or a clear denial of the right, when found in the charter, are *practically but the expression of the law makers intention, and should be held as conveying the same meaning. The object to be attained is the restriction of the corporate body, which can only be accomplished when all these terms are thus harmonized. 11

This view of the law was taken by the supreme court of Ohio, in the bank of Chillicothe v. Swayne and others, 8 O. 279, where Judge Hitchcock, in giving the opinion of the court, held "that a bill of exchange drawn and discounted for a loan made at a greater rate of interest than six per cent., was void in the hands of the bank because it was such a contract as the corporate body had no power to make."

The clause in the charter of the bank, which forbade the receipt of more than legal interest, on which the court decided the contract was invalid, was in the following words: "The said corporation shall not take more than at the rate of six per cent. per annum on its loans and discounts." This doctrine was fully recognized in the subsequent case of Creed v. The Commercial Bank of Cincinnati, 11 O. 492, where it was said "the principles settled in the case just referred to rest on safe and solid foundations, and sound policy requires they should be asserted and maintained." The bank in this case had power by its charter "*to discount bills of exchange on banking principles and usages;*" the prohibition found in other acts of incorporation, as to any excess of interest being omitted, yet it was said "the corporation had no power to receive more than six per cent. per annum in advance, as interest on its loans, and discounts, and when it receives more there is a defect of power to make a valid contract."

The same rule was affirmed in 13 O. 1, Miami Uxp. Co. v. Clark and in 1 O. S. 233. The Bank of Wooster v. Steven, and others.

These rulings are in harmony with the opinion of the supreme court of the United States, in 2 Peters 535, Bank U. S. v. Owens, and others.

We have, it is proper to state, heretofore held that a bank may well take on the purchase or the discount ot bills, not merely the legal interest allowed by statute, but the current rate of exchange, between the place where the contract was made, and that where it is to be performed, on the principle that the exchange "is a just and lawful compensation for receiving payment at a place where the money is expected to be less valuable, than at the place where it is advanced or allowed," but when as in the case of bills drawn in the west on the eastern cities, the money when paid by the acceptor, is more valuable in New York, for instance, to the holder here, than the proceeds would be if received in Cincinnati, the reason of the

permission to charge an additional sum to the ordinary interest for exchange, no longer exists; if it did the terms premium and discount, would be convertible, or have no definite meaning.

But when a bill is neither purchased, nor discounted in the ordinary course of business, but assumes the shape of such an instrument only to enable the bank to charge for exchange, when the real transaction is a loan of money, and the form of a bill is adopted to evade the statute, the acts of the parties will be thoroughly scrutinized, and their real purpose ascertained. The artificial character of the contract will give way to its substance and every shift or device be disregarded in determining the merits of the case. If the contract violates the law, the form in which it is manifested is immaterial. 11 Ohio. 489, supra, 13 Peters, 65, Andrews v. Pond, et al. 13 Howard, 171, Buckingham v. McLean. 7 B. Monroe, 549, Pilcher v. The Banks.

When the agreement between the parties is in effect a loan, it
12 cannot be changed *under color of the purchase or the discount of a bill.

But the case before us is that of a note, discounted by the bank, made payable to its cashier, without personal security demanded of the maker; the collaterals are said to have been deposited. It is but the evidence of a loan between the parties, and it appears to us it was so intended, as well as regarded.

We are also satisfied that the bank could not charge, upon the discount of the note, more than seven per cent. for the time it had to run; that the additional sum charged as exchange was unauthorized by law and directly opposed to the provisions of its charter. The contract, therefore, was illegal and void, and could not be sustained between the original parties.

It is said however, that the 4th section of the law of 1850 restraining banks from taking usury, Swan 107, permits "a note or bill to be purchased or discounted by any bank in Ohio, if the interest is made payable without the state, at a rate exceeding 12 per cent. per annum," may be held to authorize the Ohio Life Ins. & Trust Co. to have done what they were prohibited from their charter. But we do not so understand the statute. The charter of the trust company must control the acts of its officers, more especially as all its banking powers, strictly speaking, terminated in the year 1843, when its authority to issue bills and notes for circulation ceased. Section 23. The company had nevertheless the right by the 7th clause of section 2 to buy and sell drafts and bills of exchange, and by the third clause of the same section "to make contracts involving the interest or use of money and the insurance of life."

As the company could not pay out its own issues at the time the note in controversy was discounted, their ability to loan money must have depended upon the receipt of interest on their original capital or their deposits, both of which, we suppose, might have been invested at an interest not exceeding the restriction allowed by the charter.

Granting, however, the power to loan money on a bill or draft, still section 5 of the law of 1851 excludes the application of section 4, "as no officer of a bank is permitted to discount or purchase a note or bill at the increased allowance of exchange if he knows or has reason to believe that the parties to such paper will not be prepared or do not intend to pay the same at the place of payment, or when any device is resorted to in order to secure to said bank a greater profit than it could realize from the discount or purchase of such paper if made at its own counter, it should be deemed and held unsurious and unlawful within the meaning of the act."

If the contract was illegal and void between the original parties, and it has been transferred to the plaintiffs, before it became due, by one of the officers of the bank, upon whom is the burden of proof to show that the plaintiffs paid a valuable consideration for its transfer, and took it in the usual course of business in good faith?

In the ordinary course of things the holder is *prima facie* regarded as the owner for value, and he is not bound to prove that he has given any value for the note until the other party has shown the want, or failure, or illegality of the consideration; when this is done the burden lies upon the holder to prove he took the note in the ordinary course of business and paid a sufficient consideration. 3 O. S. 158, McKesson v. Stamberry; 5 Pickering, 413, Monroe v. Cooper, et al.

The pleadings in the case exhibit this point directly, and, in our opinion, just such a state of fact as makes it the duty of the plaintiffs to prove affirmatively that they paid a sufficient consideration for the note and received it *bona fide*. This they have failed to do, and can hold, therefore, no better title than the Ohio Life Ins. & *Trust Company had at the time of the transfer.

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But it is not necessary, as we understand the evidence, to resort to the rule we have referred to. The note, we find, is made payable to the cashier of the company, with the usual designation of the office he held; it was the property of the company to every legal intent, and his indorsement was the transfer of the corporation—not his own, and as the plaintiffs derived their title through that indorsement, they would be estopped from asserting they held the note discharged from the equities of the maker. But the indorsement is not in blank, it is in full, made by S. P. Bishow, assistant cashier, payable to E. Ludlow, cashier, and the indorser, Ludlow, derived no other title than that which would have authorized him to receive the proceeds for the payee; his transfer to the plaintiffs gave no better right than was vested in him; if he has transferred the note by his individual indorsement it cannot be claimed that the original condition of things is changed.

Hence, it follows, the transfer of both cashiers is, in effect, that of the company alone; and the party taking the note is clearly within the restrictions imposed upon the corporation with whom the contract was made. He is bound to inquire whether the payees could by their charters legally incur the liability; in other words,

the rule applicable to him is that which attaches to all who deal with chartered bodies whose powers are defined by statute. "*Caveat emptor*" in every such case is not only the true doctrine of the law, but is sound ethics, also.

We cannot regard the position of the plaintiffs as similar to that of the indorser for value where the payee has the right to engage in any department of business, to buy and sell and receive notes or bills as an equivalent, without limit as to the mode or description of the negotiations he may make. This, then, is, in the possession of the general power, possessed by every private individual. It cannot be demanded for those who deal with a corporation limited in the extent of its business, the commodities in which it may speculate, and the amount of percentage it may charge.

We must consider the plaintiffs, when they received the note were bound to inquire into its validity. If they had done so, they would not, probably, have taken it. Though it does not appear they did, they are nevertheless charged with the result to which their inquiry would necessarily have lead them.

Judgment for the defendant.

[Superior Court of Cincinnati, Special Term, November, 1855.]

BLACHLY & CO. v. ANDREWS.

For opinion in this case see 1 Disney, 78.

This case was affirmed by the supreme court, with opinion. See 11 O. S., 89.

*PLEADING—BREACH OF WARRANTY. 37

[Logan Common Pleas Court, April Term, 1860.]

JOSEPH BYERS v. JAMES RIVERS.

1. Under the Ohio Civil Code, section 80, an action *ex contractu* and action *ex delicto* may be united in the same petition, if they are included in the same transaction, or transactions connected with the same subject of action provided they are not inconsistent.
2. An action to recover for a fraud and breach of warranty in the sale of a horse may be included in the same petition.
3. In such case there should be two counts, one for the fraud, and one for the breach of warranty, each separately stated and numbered. Code section 86.
4. The general rule is that the pleadings must state facts, not conclusions of law, but some apparently legal conclusions are facts, and as such may be so averred by terms without stating the acts or omissions which constitute or prove them—thus express malice, want of probable cause, negligence, unsoundness and the like.
5. Where a plaintiff sues for damages for breach of warranty of soundness of a horse, or for fraudulent representation of soundness, and the breach assigned is that the horse was unsound, without specifying in what respect, the court will on motion when necessary to enable the defendant to make proper defense, require the petition to be made sufficiently definite to disclose the nature of the defect complained of.

Petition filed February, 1860, contains one count claiming to recover damages for that defendant sold to plaintiff a horse and warranted him sound and also falsely and fraudulently represented him sound, knowing him to be unsound.

Demurrer that *tort* and *contract* cannot be united.

C. W. B. Allison, for plaintiff, cited Sturges v. Burton, 8 O. S., 215—Abbott's Practice, 258. This was the practice in chancery and should be so under the Code.

James C. Lake, for defendant, cited Nash Practice 32, citing Furniss v. Brown, 8 Pr. R., 59; Burdock v. McAmbly, 9 Pr. R., 117.

LAWRENCE, J.

Under the practice which prevailed prior to the Civil Code, tort and contract could not be united in the same declaration. The original New York Code did not authorize *tort* and *contract* to be united. But the amended Code of 1852 provides that "the plaintiff may unite in the same complaint several causes of action * * * where they all arise out of the same transaction, or transactions connected with the same subject of action." And this provision is contained in the Ohio Code. But since this amendment it has been held in New York that *tort* and *contract* can only be united when *consistent* with each other.

In Sweet v. Ingerson, 12 Howard Pr., 331, at a special term it was decided that the plaintiff could unite a claim to recover for breach of warranty of a horse and for fraudulent concealment of

defects of the same horse, but on appeal that judgment was reversed. And see Smith v. Hallock, 8 How., 73; Moore v. Smith, 10 How., 361; Dorman v. Kelan, 4 Abb. Pr., 202; Notes to New York Code, section 167, by Voorhies & Howard; Hulse v. Thompson, 9 How., 113; Cowell vs. N. Y. & Erie R. R. Co., 9 How., 312; Abbott's Practice, 307, note b; 258 b, Edick v. Crim., 10 Barb., 445.

While it would seem that the New York courts in a case like this would sustain the demurrer, I think it equally certain that such is not the practice in Ohio. On the contrary, the construction given to the Ohio Code is that a cause of action founding in *tort* may be united with one founding in *contract* if they be *consistent*, and "arise out of the same transaction or transactions connected with the same subject of action," Code, section 81, and that there is no *inconsistency* between a claim that a defendant has both *warranted* and *fraudulently represented* a horse to be sound.

38 *The Code Commissioners in a note to section 81 say: "Except only in cases where several causes of action arise out of the same transaction, some of which may sound in *tort* and some in *contract*, it is not permitted by this title that actions *ex contractu* and actions *ex delicto* shall be joined." Code Commissioners, Report 48.

In Sturges v. Burton, 8 O. S., 218, Judge Swan says: "If the causes of action do not arise from the same transaction or transactions connected with the same subject of action, then causes of action *ex contractu* cannot in general be united with causes of action *ex delicto*."

It will of course be conceded that *inconsistent* causes of action cannot be united in the same petition even involving the same transaction; for as the petition must be sworn to, the court will not permit a plaintiff to claim a right to recover upon facts contradicted by himself. In such case he would be required to elect for what cause he would proceed. But a party may at the same time, in relation to a horse, *warrant* him sound, and *fraudulently* conceal a defect, or represent him sound knowing him to be otherwise. All these circumstances might exist. The plaintiff has a right to prove all of them. The whole policy of the Code, and its express letter, are disregarded, if a plaintiff may not in *the same petition* set up a right to recover for all the reasons stated.

In this case the plaintiff has stated in one count, two reasons why he should recover—if these two reasons, or causes of action can be joined in the same petition, the question whether they should be "separately stated and numbered," is made by motion, not by demurrer Code sections 87, 118. It is insisted upon the authority of Sturges v. Burton 8 O. S., 218, that both reasons should be united in the same count. Thus Judge Swan says, "if the plaintiff has but one cause of action the facts cannot be subdivided so as to present fictitiously as might have been done under common law pleadings, two or more causes of action." But he evidently holds that where two reasons exist, either of which would

enable a plaintiff to recover, they should be stated and numbered as separate causes of action, for he says "the causes of action required to be separately stated are such as by law, entitle the plaintiff to separate actions." This is the case with fraud and false warranty. The law gives separate actions of them. The plaintiff may sue for each separately or both at the same time. I therefore hold, in this case that the fraud and the warranty should have been stated as separate causes of action, and so numbered, and for these reasons:

The Code declares that each "cause of action" shall be "separately stated and numbered." Code, section 86. A "cause of action" now, is just what it was before the Code. It is just what it was at common law. That expression having a settled judicial meaning, is supposed to be incorporated into the Code with its common law interpretation. Gray v. Askew, 3 O., 480; Sedgwick on Stat., 226. Prior to the Code, the plaintiff might sue either for the fraud or for the breach of warranty or failing in one, pursue the other, for they were each separate causes of action, and could not be united in the same declaration; 1 Chit., Pl., 201; 2 Saund., 47; 3 Wils., 309; 1 Chit., Pl., 198, 478.

The fact that the Code has authorized them to be united in the same petition, does not connect the two causes of action into one.

A judgment against the plaintiff in an action, for the fraud was not prior to the Code, and is not now a bar to an action on the warranty, 3 Bouv. Just., 527; 2 U. S. Dig., section 156, 157; 1 Chit. Pl. 198, 475.

The Code it is true, declares that "the petition" must contain "a statement of the facts constituting the cause of action" Code, section 85. But section 86 provides that "where the petition contains more than one cause of action, each shall be separately stated and numbered." It is clear therefore, that it was intended that every *one set of facts, which constituted a right to recover, should be separately stated and numbered as a cause 39
of action.

This comports with all our ideas of what a cause of action is. It always has been any one set of facts which give a right of action. If there be more than this, there is more than a cause of action.

The Code certainly never was designed to introduce that objectionable duplicity which it was the policy of the common law pleadings to prevent. Yet this will be done if each set of facts which constitutes a right to recover a judgment must not be separately stated and numbered. I will illustrate this by a hypothetical case. Suppose a plaintiff sues a railroad company for killing his horse. He may have a right to recover for five different reasons: *First*—Because the killing was negligent; 3 O. S. 172; 8 Barr 366; 2 Am. R. R. Cases 325. *Second*—Because the killing was intentional; 4. O. S. 425. *Third*—Because the plaintiff being *remotely* in fault the killing occured by the *grdss negligence* of defendant; 4 O. S.

425. *Fourth*—Because the defendant, (no negligence averred) killed while doing an *unlawful act*, as by running on Sunday, in some circumstances; 4 O. S. 568; Kent 463 note b. Gould Pl. 179; 1 O. S. 15. *Fifth*—Because defendants killed (no negligence averred) having agreed with plaintiff or being bound by law to keep up fences, which was not done; note 3 to page 362 section 165 Redfield on Railroads; Corning v. N. Y. & Erie R. R. Co. 3 Kernan 42.

Now, here are five different reasons or facts, any one of which would enable the plaintiff to recover, or it may be so assumed for the purpose of illustrating the point under consideration. Prior to the Code these five reasons would have constituted five different counts in the declaration, or at least so many of them as could have been united in one declaration, all for killing the same horse. If united in a single count it would have been bad for duplicity; Gould Pl. 172, 220, chapter 4 sections 5, 99; 1 Chit. Pl. 226, Steph. Pl. 251; Nash Pr. 55, 60; Gould Pl. 220.

Now, every reason for avoiding duplicity at common law exists under the Code. And the Code should not be held to abolish common law forms except so far as its language may require.

The mode of stating each cause of action separately is preferable for many reasons. It will enable the jury to pass on each cause of action by a verdict, and thus give a remedy by error if the petition is defective as to any one.

It will enable a defendant to plead to one and demur to another, whereas it would seem there can be no demurrer to a part if all are united in one count. Code, sections 91, 92. Under the old chancery practice a defendant might plead to part and demur to part of a bill, but this can scarcely be so as to one cause of action in a Code petition. So a motion in arrest of judgment will be embarrassed for want of ground upon which the jury decided.

In the case now under consideration it is most material to the defendant's *reputation* whether there shall be a general verdict for the plaintiff, on one count, embracing a charge of fraud and warranty or whether he may have a verdict in his favor on a count for fraud, and test the questions, whether the alleged defect was *unsoundness* and therefore warranted against, or only a vicious habit, not warranted against. The New York Practice seems to require each separate state of facts, constituting a right of recovery, to be saparately stated and numbered. Thus in Sweet v. Ingerson, 12 How. Pr., 331, the breach of warranty was stated as one count and the fraud as another, both relating to the same horse and transaction. And see Smith v. Hallock 8 How., 73; Durkee v. Saratoga 4 How., 226; 2 Code R. 145; Getty v. Hudson 8 How., 177; Moore v. Smith 10 How., 316; and see Abbott's Practice 94, note x; Landon v. Levy 1 Abbott's Pr., 376, as to whether each count must be complete in itself or whether one may refer to another for a part of its facts; and see 2 Handy R. 171.

40 *It is only where the *same facts* are stated in different counts in different form that the unnecessary count will be struck out, Lackey v. Vanderbilt 10 How., 155. This petition avers

that the horse was unsound. The defendant asks that it be made more definite the defendant alleges that the unsoundness complained of is crib-biting; that he asks to be informed if this is so, or if there be any other defect complained of; that this defect is not *unsoundness* but only a *vice*.

The general rule is that pleadings must state *facts*, not *conclusions of law*. But there are some apparent exceptions to this rule or rather there are legal conclusions which are facts. Thus express malice, want of probable cause, negligence, unsoundness, and the like are generaly stated as facts. Cooper v. Greely 1 Denio; Dial v. Holton 4 O. S. 228; 1 Swan Pr., 452, 339; 1 Chit. Prec., 2 Chit. Pl., 681, 280, Warranty, Deceit. When it is averred that an act was done negligently, the act or ommissions constituting the negligence need not generally be stated. So when it is averred that a horse is unsound in violation of a warranty of soundness, it has never been the practice to state all the defects specifically.

But the degree of certainty requisite is one somewhat in the discretion of the court, and in this case there is a manifest propriety and necessity for stating the defect complained of more definitely, so the defendant may be enabled to prepare his defense. A petition charging that a horse warranted sound was unsound would generally be sufficiently definite. But in this case as the real defect complained of is "crib-biting" (stump-sucking) and so experts have differed as to whether that is unsoundness or only a vicious habit, the defendant has a right to have the issue narrowed down to that single question.

Demurrer overruled—Plaintiffs required to number and state the action for the fraud, and on the warranty separate causes of action, and to make the petition more definite by disclosing the nature of the defect complained of.

Defendant to pay costs of demurrer, Plaintiff to pay costs of motion to reform and of defective petition.

41 *BILLS AND NOTES.

[Hamilton District Court.]

S. D. GRAFLIN v. P. & T. GIBSON.

Where an indorser, ignorant of the fact that liability has never been fixed by demand and notice, promises to pay on the supposition that he is legally liable, his mistake of fact avoids the new promise, and there is no sufficient consideration to support it.

SCOTT, J.

Defendants were accommodation indorsers on a note for $ 500. It was not protested. Several months after, plaintiff's attorney called on P. Gibson, who had been absent in Europe, and was not aware that the note had not been protested. The parties agreed that two new notes of $175 each, should be given in settlement. The next day P. G. learning that the note had not been protested, got back his two notes given in settlement, and returned to plaintiff's attorney the $500 note.

This suit was brought to recover the amount of the compromise notes.

Held: That where an indorser, ignorant of the fact that his liability has never been fixed by a demand and notice, promises to pay on the supposition that he is legally liable, his mistake of fact avoids the new promise, and there is no sufficient consideration to support it.

Judgment for defendants.

King & Thompson for plaintiff.

J. Miner for defense.

*GUARDIAN AND WARD. 53

[Superior Court of Cincinnati, Special Term. April, 1860.]

FREDERICK ENGEL v. FREDERICK ORTMANN.

WILLIAM T. FORREST v. FREDERICK ORTMANN.

1. The guardian of an infant or lunatic has a right to receive payment of a chose in action in anticipation of maturity, or to sell the same, in a proper case, in order to pay the debts or provide for the maintenance of his ward. The act of April 12, 1858, does not deprive the guardian of this right, but, properly construed, recognizes and provides for it.
2. In case of the sale of a promissory note belonging to the ward, the purchaser is not bound to see to the application of the purchase money, nor need he inquire as to the necessity of the sale, but may trust the representations of the guardian, or purchase without inquiry.

HOADLY, J.

It apears from the testimony that the late Charles Snyder was the guardian of Frederick Engel, a lunatic, that as such guardian he held the note of Ortmann payable to "Charles Snyder, guardian of Frederick Engel, or order," dated August 18, 1858, payable twelve months after date, for five hundred dollars, with interest from date, and secured by a mortgage of real estate, and that early in the month of December, 1858, he endorsed and delivered the note, and on the 8th of January, 1859, assigned the mortgage to William T. Forrest, who now holds and claims to own them—Engel, having been restored to reason and discharged from guardianship, also claims the note, and Ortmann has paid the money into court, the causes having been consolidated upon an order entered by consent, under which the parties are now interpleading.

It appears also that Forrest had been employed as the attorney of one Brown to collect from Snyder an overdue note of something more than four hundred dollars. Snyder told him that this note had been given for money borrowed by him to pay Engel's debts, and proposed transferring the note now in suit to Brown in payment, receiving money for the surplus. Brown declined and Forrest then sued Snyder. After suit brought, Forrest purchased the note from Snyder at the solicitation of the latter, by giving him up the Brown note, and paying the amount of difference between them, about ninety dollars, the proper interest at the rate of six per cent. being added to each, and taking upon himself the responsibility of the debt to Brown. He has not yet paid Brown, because, as he says, his client knows that the money is safe, and has never asked for it, and when advised of what was done, expressed himself content with the arrangement. He added that he does a sort of banking business with some of his clients, including Brown, paying them interest at the rate of six per cent. per annum on their money, and using it to better advantage himself, and that he holds in this way six or eight thousand dollars of which this is part.

It is further in evidence that before the sale of the note to Forrest, exceptions had been filed to Snyder's accounts in the probate court, and a citation issued against him, and that on the 13th of January, 1859, pending the controversy with regard to his accounts, Engel was found a sane mind and discharged from guardianship, and that on the first of April, 1859, Snyder was ordered to bring this note into the probate court, and that the controversy with regard to the accounts is still pending, a balance being claimed on both sides.

54 *The question presented by these cases is, to whom does the note belong? and to whom shall the fund in court be adjudged?

That the guardian of a lunatic has the same powers as the guardian of an infant, is established by statute in Ohio. 53 O. L., 91.

That a guardian has power to sell his ward's real estate, no one will assert.

That he has full power to sell his chattels, no one will deny.

The question is as to chose in action. These, it is admitted, he may collect when due. Nor, do I believe, will it be seriously contended, that he may not receive payment by anticipation of the day of payment from the debtor.

And if from the debtor, why not from any other person? and if from any other person why may he not so transfer the note as to pass to the other person his right as against the debtor? The estate of the ward does not suffer in such case, for it receives payment advantageously, that is, in advance of the time, and the ward cannot suffer, for the guardian would have the right at all events to collect when due—he must depend at some time upon his guardian's integrity, and has his bond for security.

Observe that I am not speaking of cases where the guardian submits to usury; that is not claimed here, but of cases where the estate is paid the full sum then accumulated, and simply transfers the chose in action that the transferee may collect the amount from the debtor. Nor does the case present the question how far the ward's estate becomes liable upon an endorsement under such circumstances, but simply whether the transfer can be so made as to authorize a third person to collect from the debtor.

It is difficult to draw the distinction upon principle between different classes of personal property. There seems to be no reason why a guardian may sell a horse and not a note. The necessity may be as urgent in one case as the other. The law does not give to guardians the benefit of the delays incident to the settlement of decedents' estates, and the argument that no such power need be inferred because the personal property of wards is usually in money, distributed by executors and administrators, fails to apply to the case of a lunatic, when not only are debts to be at once provided for, but in many cases a living ward claims support.

Upon principle I see no reason why a guardian should not be allowed the same control over choses in action as over ordinary

chattels, and I can find no foundation for the distinction, in the authorities, or the language of our statutes.

In Field v. Schieffelin, 7 Johns. Cha. 152, Chancellor Kent considered the power as established beyond controversy. He says: "The bond and mortgage which the plaintiff claims, were taken by William James Stewart, in his character of guardian of the person and estate of Hopkins, the infant, and to which trust he had been duly appointed by this court. That he had a legal control over that bond and mortgage, and a right to collect and receive the money due thereon, and a legal right to sell and assign the same, in the due exercise of his discretion as guardian, is a proposition which does not seem to admit of dispute."

To the same effect is Fletcher & Lyon v. Fletcher, 29 Vermont (3 Williams), 98.

And in Ellis v. Proprietors of the Essex and Merrimack Bridge, 2 Pick, 243, it was held that a guardian has full power to sell bridge stock of his ward without a previous order of the probate court.

The act of April 12, 1858 (O. L., 54), was in force at the time of the transfer of this note. Section 14 prescribes the duties of guardians. Two clauses of this section affect the question; those namely which give him power; second, to manage the estate for the best interest of his ward, and fifth, to pay all just debts due from such ward, out of the estate in his hands, and collect all debts due such ward; and in case of doubtful debts to compound the same.

*This fifth clause, upon the principle "*expressio unius est* 55
exclusio alterius," may negative all other powers with regard to debts, and so would forbid a sale of choses in action, unless it can be so construed as to permit a receipt of the debt before due and a transfer of the note without recourse under the phrase "to collect all debts due such ward." etc.

But without resorting to any forced construction, I am of opinion that the power to sell is not taken away by this act; that while this language gives express authority to collect notes when they become due, it was not intended to preclude sale before due.

The rule "*expressio unius est exclusio alterius*," is one of interpretation, and circumstances may concur to deprive it of any proper application.

The language vesting the guardian with power to manage the estate for the best interests of the ward, is certainly broad enough to give a power to sell choses in action. And the duty of paying debts and supporting an infant or lunatic requires that this authority shall reside somewhere. The law contains no provision whatever for an application to the probate court for powers to sell personal property. In this respect it differs from the act of 1824, which it repeals, and which authorized the court of common pleas "on good cause shown to authorize such guardian or guardians to sell all or any part or the property, whether real or personal, of his or their ward or wards."

In the next place, while the act does authorize an application to the probate court for a sale of real estate, it expressly requires the guardian in his petition to show the amount and disposition made of the personal estate. It was never the intention to allow a sale of realty, while personalty remained untouched. And yet if there is no power to sell choses in action the case will often arise when with abundant means in the shape of mortgage notes, a lunatic's debts or support will have to be provided for by a sale of real estate.

It is manifest then that the general assembly in depriving the probate court of the power expressly given by the act of 1824 to authorize sales of personal property, while retaining the authority to sell realty in cases of insufficient personalty; in requiring guardians to support their wards and pay their debts, and manage their estates for their best interests, did not intend by the grant of express power to collect debts due, to forbid the absolutely necessary adjunct of authority to sell choses in action not due.

In the cases at bar, the note was sold before due, and the guardian received in payment his own paper for about four hundred dollars, and some ninety dollars in money. But it was made upon the statement of Snyder, "that this four hundred dollars that he had borrowed from Brown had been used to pay Engel's debts."

How far a person dealing with a guardian must take notice of the mode of execution of the trust has been elaborately considered in two of the cases above cited.

In Field v. Schieffelin, Chancellor Kent says: "The bond was not due when it was assigned to the plaintiff, but if the money was wanting for the purposes of the trust, either for discharging incumbrances, or for making more advantageous investments, or for payment of debts and for the better maintenance and education of the ward, or for any purpose whatever, connected with the faithful discharge of the trust, and beneficial to the infant, the guardian had just right and lawful authority to raise the money by the assignment of the bond and mortgage. The necessity or expediency of the measure vested entirely in the judgment and discretion of the guardian. He was, as between him and the purchaser, the proper and exclusive judge of that expediency. It was not the duty or the business of the purchaser to inquire into the necessity of the assigment, or to see
56 to the application *of the purchase money. He had a right to presume, in the absence of all direct and plain proof to the contrary, that the guardian was exercising his power fairly and faithfully, in conformity with his duty."

And again, he says, page 154: "In every instance he acts under responsibility to his ward for the faithful and judicious discharge of his trust; but the stranger who deals with him justly and fairly, has a right to presume that the guardian acts for the benefit of the infant, and he does not partake of that responsibility until the presumption of fair dealing is destroyed by evidence of fraud and collusion."

So, also, in Ellis v. Proprietors of the Essex and Merrimack Bridge, Chief Justice Parker says: "It is true the guardian ought not to sell personal estate unless the proceeds are wanted for the due execution of his trust, or unless he can by the sale produce some advantage to the estate, but, having the power without obtaining any special licence or authority, a title under him, acquired *bona fide* by the purchaser, will be good, for the purchaser cannot know whether the power has been executed with discretion or not, and the estate is always supposed to be secure by the bond given by the guardian for the faithful execution of his trust and discreet management of the property."

In this case, if Snyder had really borrowed money to pay Engel's debts, he would be entitled to indemnity out of the estate; not that, as guardian, he could borrow, but, having himself borrowed and advanced the proceeds to the estate, he is entitled to repayment. And, if he had power to sell for the purpose of paying Engel's debts, he would have a like power where it became necessary to reimburse his own advances. Now, as a stranger might trust his statement and safely buy in one case, or, even as the authorities say, might buy without inquiry, there seems to be no reason why Forrest might not trust Snyder's statement that the debt he was seeking to pay was incurred for Engel's benefit. For all that appears in this case, that was true; but even if it was not, there is no evidence here of "fraud or collusion," and no reason to suppose that Forrest did not believe Snyder's statement.

For these reasons, I am of opinion that the transfer by Snyder to Forrest vested the latter with the title to the note, and that he is entitled to judgment accordingly, and Engel must seek his relief against the sureties of Snyder.

King & Thompson, for Engel.

Stallo & McCook, for Forrest.

PARTNERSHIP—TRADE MARK.

[Superior Court of Cincinnati.]

WEISR V. MOHLENHOFF.

The same principle regulating trade marks applies to the uses of signs, and therefore the use of a partnership name will be enjoined where a partner, without authority, after a dissolution of the firm, uses the firm name for the purpose of bringing to his establishment any benefit that the name of the retiring partner might bring.

APPLICATION FOR INJUNCTION.

STORER, J.

The plaintiff avers that he was a co-partner of the defendant in the Queensware business; that a few months ago the partnership was dissolved—the defendant purchasing the interest of the plaintiff, and by common consent being permitted to remain at the old stand, 44 Fifth street. The plaintiff commenced business in the same line and in the neighborhood; and it is averred that he still keeps possession of the old sign, and has over it his own name, and the words in very small letters "successors to"—all which the plaintiff claims is wrong, unjust and fraudulent, the sign for all practical purposes, holding out the idea that the co-partnership was still in existence.

The defendant alleges that he paid $400 for the good will. If he did, (remarked the court), there was nothing wrong in his employing any words to show he had succeeded to the whole interest; but then it would be proper to have the words sufficiently large to indicate the real purpose. The plaintiff, however, denies that he received a dollar for the good will.

Judge Storer said that the same principle regulating trade marks, applied to signs. A hotel, which opened in New York under the designation of The Howard House, was restrained from using the name, *the same name was established in a different part of the city. So the proprietor of the compound known as "Balm of a Thousand Flowers," obtained an injunction to the use of the same name for a different preparation.

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Christy, the proprietor of a band of minstrels, applied for an injunction in New York, against a party who used his name; and Judge Clarke, in disposing of the case, goes into some moral reflections, and says:

"Man does not live by bread alone; that is, the complete enjoyment of his physical existence does not depend on mere food or raiment, or other material substances, but upon the exercise of various and numerous mental and moral faculties, with which God has endowed us. It may be as necessary for us to laugh as to eat, and I am persuaded if men would eat less and laugh more, that their moral as well as physical well being would be materially improved." That is the opinion of a Judge in New York.

In the present case, the court was of the opinion that the construction claimed by the plaintiff was correct; that the object of the

defendant was to indicate to the public that he had not only control of the stand, but a right to use whatever influence the name of the retiring partner might bring to his establishment for his peculiar benefit; and this without any authority, and as it might be to the injury and inconvenience, if not the liability of the plaintiff; the court would allow the injunction, and order the defendant to erase the name of his former partner.

Stallo & McCook for plaintiff.

Taffel for defendant.

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*WATER-CRAFT LAW. 85

[Superior Court of Cincinnati.]

GEORGE W. COFFIN ET AL v. THE STEAMBOAT FRED TRON.

1. The act of April 12, 1858, amendatory of the water-craft law of 1840, confers such a lien that the creditor by seizure will obtain a preference over a sale or mortgage made by the owner, or an attachment or execution levied upon the craft, after the date of the supply of materials or other transaction out of which the liability accrued, but before actual seizure.
2. As between conflicting claimants under the water-craft law, however, the lien does not attach until seizure and priority of distribution is, therefore, determined by priority of date of seizure.
3. This lien does not accrue in favor of creditors claiming upon transactions occurring out of Ohio.
4. But it was not the intention of the legislature, although they could not give a *lien* upon foreign transactions, to take away the *remedy* by seizure in such cases.
5. Although the water-craft law of 1840, before the amendment of 1858, was held to confer no lien, but only to provide a cumulative remedy against the owner, it was at the same time always, though somewhat inconsistently decided that a sale under it passed title to the craft free from any right to seize subsequently upon prior claims. The proceeding being thus *quasi in rem*, and the seizure operating upon the thing itself, and not merely the owner's interest, a seizure upon a claim accrued in Ohio, after April 12, 1858, has no preference over a seizure of the same date, upon a claim, whether domestic or foreign, accrued before that time, or partly before and partly after. All seizures take their priorities in the order of time, those of the same day sharing *pro rata*.
6. *Semble:* That seizures upon foreign claims or upon those of an earlier date than April 12, 1858, will not have preference over foreign attachments or executions levied before actual seizure, but after the right of seizure accrued.

HOADLY, J.

This cause was reserved to general term for the decision of a motion for distribution of a fund arising from the sale of a steamboat by the sheriff upon proceedings under the water-craft law, as amended April 12, 1858.

The agreed statement of facts signed by the counsel interested in the several judgments calls for the determination of the proper construction of the amendatory act alluded to above, with a view

to ascertain the nature of the lien thereby provided, and the date from which it can be said to fix itself upon the water-craft, as against several classes of claimants, to-wit: The owners; purchasers or mortgagees under them; foreign attachments; and seizures, as well upon claims arising before the passage of the amendatory act, as those accrued after, or those claiming for supplies furnished partly before and partly after that date.

Before examining the structure and language of the act in question, it will be well to consider the circumstances out of which it originated.

The water-craft law of 1840 was originally regarded in the light of an act giving a lien or *quasi* lien to be enforced by a proceeding *in rem.*

Steamboat Monarch v. Findlay, 10 O., 384; Canal Boat Huron v. Simmons, 11 O., 438.

In the case of Steamboat Waverly v. Clements, 14 O., 28, the court (Judge Wood pronouncing the opinion) held that a purchaser with notice of a pre-existing liability of seizure did "not take the boat discharged from the debt," but added: "It seems to us entirely unnecessary to decide whether the liability of the boat for debts contracted on her account is strictly to be regarded as a lien or not in the present case. When it becomes necessary to decide that question, our opinion will be expressed, but sufficient for the day is the evil thereof.

86 In the same volume, page 90, Judge Hitchcock uses this language in pronouncing *the opinion of the court in the case of Kellogg et al v. Brennan et al, where a prior mortgage was postponed to a seizure: "On the one side it is insisted that this law creates a lien upon the craft in favor of a creditor. This is earnestly denied by the other side. It seems to me that if we can ascertain the intention of the legislature it is a matter of very little consequence what name we give to the interest or claim of the creditor; it is a matter of very little consequence whether, technically speaking, it is a lien or not. * * * It may not be technically a lien, but it is something which appropriates the property as effectually, if not more so, than ordinary liens."

It is true that in the case of Jones v. The Steamboat Commerce, reported in the same volume, page 408, Judge Birchard in announcing the opinion of the court to the effect that a judicial sale of the craft under the act conveys a complete title, "divested of all liability to be again proceeded against under the statute, for a claim existing at the time of sale," avers that the statute gives no lien until seizure, but he repeats that a purchaser with notice takes the boat subject to seizure upon an existing claim.

In Provost et al v. Wilcox et al, 17 O., 359, it was again held that a mortgage must be postponed to a seizure.

In Webster v. The Brig Andes, 18 O., 187, it was held that "sub-contractors and day laborers employed to perform work on such watercraft have a lien which they may assert against the craft in whosever hands she may be found."

This discussion, which at one time defined the liability created by this act as a lien, at another refused it that designation, and at a third suggested that it appropriates the property so effectually that that word was inadequate to express its force, was finally ended by the decision of the case of Thompson v. The J. D. Morton, 2 O. S., 27, when it was held that the act gave no lien, but only provided "a cumulative remedy for the recovery of the lien against the owner."

In accordance with this final expression of the judicial mind, Judge Gholson in Barker, Hart & Co. v. The Flag, 1 Handy, 385; decided that a foreign attachment was not to be postponed to a latter seizure, both being remedies open to the creditor, between which the law expressed no preference, but justly rewarded *his* diligence who first enforced either.

In 1845, congress extended the admiralty jurisdiction of the federal courts to the lakes, and the decision of the case of the Propeller Genessee, Chief v. Fitzhugh, 12 Howard 443, not only sustained the constitutionality of this act, but going further, pronounced that the constitution itself clothes the courts of the federal government with admiralty jurisdiction beyond the ebb and flow of the tide, and as far as navigation extends inland upon rivers as well as lakes.

It had long before been held, that The General Smith, 4 Wheat., 438; that the material man has no admiralty lien upon domestic vessels; but the 12th rule of the supreme court of the United States in admiralty recognized liens in favor of material men, created by state laws, and lent the aid of admiralty process to their enforcement. The recent modification of this rule does not affect the argument.

Cases in admiralty now began to be frequent in the federal tribunals of the western states, and questions were soon presented to those courts involving the rights of citizens of Ohio under the act of 1840.

It is obvious that as an admiralty sale passes title free from all claims, a creditor has no remedy except by intervening for his interest in the cause. And an Ohio citizen supplying goods to an Ohio boat, if once the boat was seized in admiralty, was without remedy altogether, if the act of 1840 was construed as a remedial law, giving no lien. And so it was held by the admiralty courts. Wick v. The Schooner *Samuel Strong, 1 Newberry, 187; 87
Scott v. Propellor Plymouth, *Ibid*, 56.

Even if an Ohio creditor in such case attempted to anticipate the action of admiralty by issuing out a warrant under the act of 1840, his remedy was deprived of most of its value by the difficulties thrown round the sale by other rulings of the federal courts. For they held that a sale under this act did not divest a previous admiralty lien but the purchaser took subject thereto. See case of the Steamboat M. W. Thomas, not yet reported, decided by Judges McLean and Leavitt. Riggs v. The Schooner John Richards, 1 New-

berry, 73; Harris v. The Steamboat Henrietta, *Ibid*, 284; Ashbrook v. The Golden Gate, *Ibid*, 296.

It follows from this condition of the law, that the construction given to the act of 1840, in 21 Ohio, effectually deprived our citizens of all relief for supplies furnished to Ohio vessels, unless they were content to rely upon the personal liability of the owners. They were turned out of admiralty because they had no lien. If they enforced the state law, admiralty disregarded the title acquired under their proceedings. Of course, with *caveat emptor* so emphatically presented to the maritime public, buyers at a sale under state authority would be few.

To meet, and as far as possible, remedy this state of things, the law of 1858, (55 O. L., 72,) was adopted in these words: "That steamboats and other water-craft navigating the waters within or bordering upon this state shall be liable, *and such liability shall be a lien thereon*, for debts contracted on account thereof by the master, owner, steward, consignee, or other agent for materials, supplies and labor in the building, repairing, furnishing, *insuring* or equipping the same, or due for wharfage; and also for damages arising out of any contract for the transportation of goods or persons, or for injuries done to persons or property by such craft, or for any damage or injury done by the captain, mate, or other officer thereof, or by any person under the order or sanction of either of them to any person who may be a passenger or hand on such steamboat, or other water-craft at the time of the infliction of the damage or injury, *provided that the lien by this section created, shall only attach to vessels of 20 tons burthen, and upwards, enrolled and licensed for the coasting trade according to the act of congress.*"

This action is substituted for the first section of the act of 1840, leaving the other parts of that law and its other amendments unchanged. The changes it introduces consist in the addition of the italicized words, and are three in number.

1. The liability to seizure is made a lien on the vessel.

2. The lien is extended to debts contracted for materials, supplies or labor in insuring the craft. This must refer to debts due for premiums of insurance, but it is a novel way of expressing that idea.

3. The lien given by the act does not cover canal boats or vessels of less than 20 tons burthen, or those of more not enrolled and licensed for the coasting trade.

With the second and third of these we have nothing here to do, except so far as they may shed light upon the questions presented in considering the more important change introduced in the attempt to give a lien.

The language of the act is "such liability," (namely to seizure,) "shall be a lien thereon." As to the owner and all who claim under him, this lien, it is obvious, must date from the time the supplies are furnished. For from that time there is a liability to seizure which it was not intended to allow the owner to control or to defeat by a sale or mortgage. Even before this the mere *liability* to seizure

was held to supersede a subsequent conveyance or mortgage, and though the inflexible law of logic might in time have required a different rule as the consequence of considering the act as furnishing only accumulative *remedy against the owner, yet now that it is clearly made a lien law, there is no reason why we should not follow the decisions in 14 and 17 O. to that effect. 88

And so, too, it must now follow that a foreign attachment cannot stand upon terms of equality with a seizure, at least a seizure upon a claim arising within the state, for as will be seen presently, foreign claims occupy a different position.

They are no longer both remedies against the owner. One has become a proceeding to subject the property to a superior right, the other remains an attachment of only whatever title the debtor has, subject to all liens. Accordingly it was held that special time by me that in a conflict for distribution between an attaching creditor and subsequent seizures upon prior claims accrued after the amendatory act took effect the attachments must give way. Patterson v. The Gulnare 8 Weekly Law Gazette 401.

But because as against the owner, and those claiming under him or seeking to subject his interest, the lien dates from the time the *liability* to seizure accrues it does not follow that such is the case when the question arises between conflicting seizures.

For the lien intended to be given being of a maritime character, it follows that the legislature must have designed, unless the contrary appears, to have clothed it with the ordinary attributes of a maritime lien. Now while the word lien is frequently used to describe this class of rights, it is obvious that in several particulars it varies from ordinary common law liens. The most important is that it exists without possession; hence it may be rather termed a privilege than a lien, a right against or upon the thing, not a strict hypothecation.

He who trusts a vessel does so ordinarily in ignorance of the condition of her title, and in the faith, secured to him by the law of admiralty, that if he pursue his claim diligently, it shall take rank, not by the date of its creation, but of its assertion in law, of the suing out of process for its recovery. Hence this has become a peculiar feature of maritime liens, namely, that while as the owner they date from their inception, and cannot be defeated by sale or mortgage, or any claim not of an equal rank, against him, as among themselves they are paid in the order of seizure.

The Globe, Blatchford, 427; The Triumph, 1 Blatchford, 433, note; Dudley v. Steamboat Superior, 1 Newberry, 176.

This being the general character of maritime laws, it is reasonable to suppose that the legislature had it in view in the passage of this act. We can hardly suppose they designed what is the necessary consequence of treating the lien given by the act as a strict hypothecation, viz.: That each item of a material man's account is secured by a separate lien.

There are other reasons for this conclusion. The well settled construction of the act of 1840 was that warrants of seizure were

to be preferred in the order of their execution. The act of 1858 makes no change in the portions of the law which provide for the form of proceeding, the judgment and the execution. Had it been designed to introduce a change in this respect, we must believe it would have been expressly provided for by an amendment regulating the mode of distributing the fund derived from a sale.

And again, the legislature could have intended altering the laws no further than the mischief made it necessary—There had been no complaint against the order of distribution established under the act of 1840. The mischief was that no lien being given, the extension of admiralty jurisdiction to the western waters interfered with the operation of the law upon Ohio vessels, and impaired the rights of Ohio creditors. It being unnecessary to give a lien upon canal boats and other *craft not employed in the coasting trade, and not likely to get into admiralty, the amendatory act does not provide it—Hence a proper construction will induce us to change the established practice no further than the evils intended to be corrected and the plain language of the law require.

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We are of opinion, therefore, that as between conflicting warrants, the amendatory act introduces no new rule, but that they stand according to priority of time of seizure.

Now can claims which have accrued since the act of 1858 be distinguished from those of an earlier date, or those partly of one, and partly of the other class?

Having established the principle that the lien given by this act does not so fix itself upon the vessel as to give precedence until seizure, all claimants that are entitled to seize the thing itself, and not merely the owner's interest are entitled to share according to priorities of seizure; and we do not suppose it can be successfully denied that under the act of 1840, notwithstanding the case in 2 O. S., 27, *supra*, the seizure was of the thing, and not of the owner's interest, and the sale of bar to any adverse claim then existing, at least any asserted by seizure under the act. It is true that the decision referred to describes this proceeding as merely a remedy against the owner, and the strict application of logic might lead to an opposite conclusion. But it has never been possible to treat the act of 1840 in that way, and courts have found it necessary to handle it with practical sense and not always with logic. Hence the law is to be found rather in the reports of cases which have occurred and the practice which has grown up, than in the printed letters of Swan's Statutes. The latter are silent with regard to the effect of a judicial sale, and the order of priorities of seizures. The former have so firmly established the laws on both these points that it is too late, at least for an inferior court to disturb them, because of the apparent logical incompatibility of the decision in 2 O. S., 27, *supra*; Steamboat Baltimore v. Levi & Lindauer, 2 Handy, 35. And cases will every year be less likely to arise in which claims accruing before April 12, 1858, or partly before and partly after, will come in conflict with those said to be liens under the act of that date.

Another question presented by the agreed statement is, whether this act shall have an extra territorial operation, that is to say, whether claims arising out of the state may be prosecuted under it, and as to such, when the lien attaches, if at all?

We do not suppose the legislature intended to repeal the declaratory act of 1848, by which claims arising out of Ohio were expressly permitted to be enforced by seizure. The object was to *amend* the first section of the act of 1840, not to repeal the act of 1848.

So far then as the acts of 1848 and 1858 are compatible they must stand together.

Nor do we suppose the legislature intended or have power to affix the character of lien upon a transaction happening out of the state, merely because the boat subsequently comes into Ohio. If so, then every sale of supplies to a steamboat, every breach of a contract of transportation, every assault and battery by an officer upon a passenger or hand, anywhere in the known world, constitutes an inchoate lien, waiting the happy moment when the ignorant owner pilots his craft within the limits of Ohio to spring into vigor and life.

Young v. Steamboat Virginia, 2 Handy, 137.

The true rule would seem to be this: Upon transactions occurring in Ohio a lien is created which excludes the possibility of a subsequent transfer by the owner, or the levy of an attachment or execution upon his interest so as to defeat it. Upon transactions beyond the limits of *the state, it passes legislative power to give such lien, but there is still left a right of seizure, with all the incidents, with which the settled construction of the act of 1840 clothed it, including the right to share according to priority of seizure with other claimants. 90

The case will be remanded for distribution, first to the claim of George W. Coffin & Co., whose seizure was made August 2, and the residue to be divided *pro rata* among such of the seizures made August 3 as upon the views expressed above are entitled to share in the distribution.

STORER and SPENCER, JJ., concurred.

J. G. Douglass for plaintiff.

T. J. Henderson, Dodd & Huston, Bates & Scarborough, Stallo & McCook, for other parties.

110 *HUSBAND AND WIFE—MORTGAGE.

[Hamilton Common Pleas Court.]

CHESTER BAXTER v. WILLIAM F. AND EMILY A. ROELOFSON.

1. Where a married woman executed a mortgage upon her separate property under representations which were false and fraudulent, which mortgage would not have been executed had such misrepresentation not been made, and at the same time her husband made a negotiable promissory note, which was secured by, and accompanied this mortgage, and such note passes into the hands of a holder without notice for value, the wife may make a valid defense to such note, because the mortgage is the principal debt, and the note is incident to it.
2. A mortgage is in no sense a security similar to a negotiable promissory note and does not allow the principles of law which apply to notes or bills to be applied to it.
3. A note which accompanies a mortgage is subsidiary to the mortgage, and cannot be treated as an independent contract of itself.
4. A defense valid on the ground of fraud as between mortgagor and mortgagee will be valid as between the mortgagor who is the maker of a negotiable note secured by mortgage and an endorsee of such note, even though the latter be a holder for value.
5. Where a married woman mortgages her separate property to secure the notes of her husband and such mortgage is procured by misrepresentation, she may defend against a suit to foreclose, when it is attempted to charge the land with the debt, when no defense would be open to her husband in an action against him on the nots by an innocent holder for value.

COLLINS, J.

This is a suit to foreclose a mortgage made by defendant, May 27, 1854, to secure ten notes made by defendants. William Roelofson, of same date, payable to the order of Cassius P. Peck, and given to secure the payment of $10,000 five years after date, with interest, payable semi-annually, at the rate of ten per cent. per annum.

William F. Roelofson makes no defense to the suit. His wife files an answer by her next friend. The property mortgaged was the separate property of Emily A. Roelofson, wife of William F. Roelofson whose notes were to be secured.

To her answer a demurrer is interposed; and the opinion of the court is required upon the following facts: At the same time that Mrs. Roelofson executed the mortgage in this suit, and as a part of the same transaction, she executed eight other mortgages to secure other notes of her husband, amounting in the aggregate to $75,000, all payable to the order of C. P. Peck, and bearing ten per cent. interest, and all the mortgages being upon her separate property.

The mortgages were duly recorded, and delivered with the notes to Mr. Peck for the purpose of being taken to the East and sold, for the benefit of Mr. Roelofson. The notes were sold and endorsed, and the mortgages assigned by Peck, and came into the hands of plaintiff as a *bona fide* endorsee or purchaser.

111 *It is further alleged that Mrs. Roelofson was induced, by false and fraudulent misrepresentations made by said Peck, to execute all of said mortgages, to-wit: That said Peck represented

to her that he intended to establish a banking business in partnership with her husband, having a house in New York, and another in Cincinnati, and that about $50,000 of the money to be raised on said notes and mortgages, was to be put into said business, as her husband's share of the capital; and that the balance of the proceeds, to the amount of twenty, or not to exceed twenty-five thousand dollars, was to be applied in liquidation of a debt which her husband owed to the house of C. P. Peck & Co., in New York, as his share of the loss in a disastrous corn speculation. Whereas the fact was, as Peck well knew, that the liability of her husband to the firm of C. P. Peck & Co. of which said Peck was a member, was fully equal to the whole amount of said notes, and her husband being insolvent Peck contrived this fraud to obtain security for her husband's large indebtedness upon her separate property; and that she would have made neither of said mortgages except she had believed that it would not only release her husband from all indebtedness, but furnish him also a capital of $50,000, or more, to establish a banking business, and that she has never assented to any other use of said notes and mortgages.

Now, upon this state of facts, I have no difficulty in declaring that the defendant's mortgages were obtained from her by false and fraudulent pretenses; and, while in the hands of the mortgagee, were totally void. The difficulty of the case arises from the fact, that the mortgages were made *to secure negotiable promissory notes*, and, with the notes, have passed into the hands of holders without notice and for a valuable consideration. No defence can be made against the notes, and judgment must be given against W. F. Roelofson, maker. Can any defence be made by Mrs. Roelofson against the enforcement of the lien created by the mortgages on her separate property? Is a mortgage negotiable so as to cut off all equities between the original parties, when it is made to secure and accompany a negotiable instrument, and passes with that instrument into the hands of an innocent holder?

It would seem, from the prevalence in our money market of mortgage notes, and their frequent sale, with an assignment of the security, that this question must have been often raised, and that the rights of the assignee of such mortgages must have been well defined by adjudication. Yet, judging from failure of counsel on either side, after the most diligent research, to produce any well-considered decision upon the point (and from such further examination, as in the pressure of other business, I have been enabled to give), I am without a well-considered precedent in the cases, or any direct rule in the elementary treatises by which to be guided in my decision. I must therefore treat the present case as one of first impression; and being such, it is with a less degree of confidence that I announce the conclusion to which I have arrived.

There is no difficulty in stating the general rule to be, that *mortgages, as such, are not negotiable*—they are mere *choses in action*—simply a right in the mortgagee to subject specific property to the satisfaction of his debt. If he assigns his right, the assignee

takes it subject to all equities or matters of defence then subsisting be ween him and the mortgagor. The books are full of cases showing all manner of defences which the mortgagor has been permitted to make against the assignee. 1 Hilliard on Mortgages, 361, sec. 50; 24 Pick. 221; 22 Pick. 231; 7 Vesey, 28.

Different practices have, however, prevailed in regard to the mode of evidencing the debt secured; it being sometimes evidenced only by a recital, acknowledging it in the clause of defeasance, in the body of the mortgage.

But in New York, and other of the Eastern states, as well as in England, the debt was commonly evidenced by a bond under seal; the reason being, that while a mere note would outlaw in six years, a bond would not be barred in less than fifteen. Hence in those markets the common phrase is *bonds and mortgages*—and rarely, if ever, do we hear of a *note* secured by mortgage. This will sufficiently account for the absence of adjudicated cases in those states. It is, perhaps, more a Western custom, where seals to evidences of debt lend no additional sanctity, to make use of negotiable notes and mortgages, and we shall see, the only two reported cases bearing upon the direct question before us, are found, one in Michigan, the other in Wisconsin.

If a mortgage, as such, becomes subject to the rules of negotiable instruments, when made to secure a negotiable instrument—by what reason or authority is it? The debt is one thing, the pledging of specific land for its security, another. The contract for the pledge may not be made until long after the contract of the debt, and it may be cancelled long prior to the debt. It is true, the contract of pledge cannot exist prior to the debt or after it. It is, in other words, an incident to the debt, but not a necessary incident.

Because the debt is in negotiable form, must, therefore, the pledge be also negotiable? Must the incident, merely because it is an incident partake of all the qualities of the principal? The parasite cannot stand without the oak on which it climbs—if the oak falls, it falls—yet, it is not, therefore, identical in character with the oak. So is the power of attorney to confess judgment frequently an incident of a note, and a valuable incident to, springing into being at the same time, written on the same paper, and incapable of life after the note is paid. Yet our supreme court has held that the power of attorney, attached to a note, and being frequently part of the same contract, does not pass to the endorsee of a note; is not negotiable. Osborn v. Hawley, 19 Ohio 130.

So a guaranty of payment, written by a third party on the back of a note, or on a separate paper, though it may be much the most valuable thing about the note, does not even pass to the endorsee of the note, unless there be express words of negotiability in the contract of guaranty, as distinct from the same words in the body of the note. In other words the guarantor's contract cannot be negotiated unless it contain apt words to make it negotiable. 5 Wendell, 307; Ketchell v. Barnes, 24 Wend. 356; McLaren v. Watson's

Ex'rs., 26 Wend. 425; Story on Bills, sec. 457; Chitty on Bills, ch. 6, page 273; 2 Hill, 188.

In 5 Wendell, 308, Chief Justice Savage says: "Promissory notes are negotiable only by virtue of the statute, but this negotiable quality is not *extended to any other instrument relating to the note.*"

Indeed the quality of negotiability, by which a party to a contract is precluded from making any valid defense he may have against the binding obligation on such contract, is peculiar to notes and bills; and in several of the States even promissory notes do not have that quality, though payable to order. It is in many cases, even as to notes and bills, productive of harsh results; but on the whole is of so great commercial necessity and convenience as to have found a ready acceptance among mercantile classes in England, even before the statute of 3d and 4th Anne, to have been recognized now by positive legislation in nearly all the States, and to be cheerfully, and even rigorously upheld in the courts.

I could not dare, however, to bring any other class of contracts within the same rule, unless I clearly saw the same public necessity for it—and even then, under the modern distribution of powers in government, I should say it clearly belonged to the legislative department to first establish the rule.

It is observable that in every case of negotiability yet recognized by the courts, the existence of *two elements* has been required. First, it must appear that *by the terms of the instrument* the parties have themselves expressly undertaken to make it negotiable. Secondly, the law must find the contract of the parties to be one to which, for reasons of policy, it feels bound to give the legal effect proposed by them. These two elements were distinctly recognized in the early case of Girard v. La Costa, 1 Dallas, 215, to be the grounds on which mercantile paper was clothed with the qualities of negotiability. Judge Shippen said in that case: "To make bills and notes assignable, the power to assign them must appear in the instruments themselves; and *then* the custom of merchants, in the cases of bills of exchange, and the act of Parliament, in the case of notes, *operating upon the contract of the parties*, will make them negotiable."

It is upon precisely the same grounds that the parties *expressly* so undertook, and that the law found reasons of general policy for sanctioning that undertaking, that *guaranties* of negotiable paper have in certain cases been held to be negotiable. These principles have hitherto been of universal application.

Neither of these elements exists here. The mortgagor has used none of these expressions of promise which have been held by the law to constitute a negotiable promise. The first and most important element is wanting. Is the second element here? Is there any such public necessity requiring a mortgage to be negotiable as well as mercantile paper? The object as to such paper is to facilitate its transfer from hand to hand, its remittance by mail, or otherwise, to distant points, so that the party receiving it need not stop

the course of his business to inquire into its origin, and the present relations of the original parties to it.

But dealings in mortgages do not admit of the same rapidity. He who proposes to purchase must, if he act with any prudence, pause sufficiently to ascertain that the mortgagor had a title, whether the mortgage is executed in due form of law, and whether it be a first, second or third lien. Mortgages are not intended, like notes and bills, to form a part of the currency to be passed from hand to hand. They are rather a means of permanent investment, and their purchase necessarily puts the purchaser to inquiry and deliberation. It will add little to his inconvenience to require of him also to ascertain from the mortgagor the subsisting relations between him and the mortgagee.

We might say that as a contract of guaranty on a note would be negotiable, if it appeared to be the design of the parties to make it so, likewise would it be with a mortgage; and that when a party makes his mortgage as security to a negotiable note, the plain inference is that he intends the mortgage to be negotiable also. But as the Court of Errors in New York, in the cases cited, refused to declare a guaranty negotiable by construction, and without apt words witnessing the intention of the grantor, much less would I feel disposed to infer negotiability for the more unwieldy mortgage.

It may also be said that it makes no difference to the obligor whether he is precluded from defences on his mortgage or not, so long as he is precluded from denying any part of the debt in a suit on the note. And this is ordinarily true. He must pay his debt at any rate, and if his land is not subjected to its payment under the mortgage, it as well as other of his property, is liable in execution

To this purport is the citation from Powell on Mortgages, vol. 3, page 908, note *t*, in which is expressed the opinion of the author merely, that where a mortgage accompanies the negotiable note of the mortgagor, it may be regarded as negotiable, because the assignee has *a legal remedy* which a court of equity will not take away. That is, the mortgagor being liable, at all events, to pay the amount of the note to the holder of the note and mortgage, a court of equity will not permit him to evade the payment of an admitted debt by withdrawing from it the security which he himself had appointed for its payment

Of the like purport is the case in 5 Barbour, 132, in which, it having been already determined in a suit at law for the debt, that the debtor, who had also made a mortgage, could not avoid payment of the debt on the ground of usury, and judgment had gone against him. In a subsequent suit in equity for foreclosure of the mortgage, the same defence being set up by the defendant, the court said: "It is enough that he had an opportunity of trying the question, and that matter has been adjudged against him."

So in Reeves v. Scully, Walker's Ch., 248; Scully having made his negotiable note, and a mortgage to secure it, they were assigned by the mortgagee to the plaintiff. The suit was to foreclose the mortgage, and Scully attempted to defend on equities between him

and the mortgagee. The court said: "The decree must be entered for the amount of the note and mortgage. Reeves, as *bona fide* endorsee of the note, was not affected by the equities existing between maker and payee. It would have been otherwise if a bond instead of a note had been given with the mortgage." No authorities are cited to sustain the judge's opinion, and though it may seem to assert that the mortgage was negotiable because the note was, I am unwilling to follow him to that extent.

But the case we have in hand is not the case where the maker of a negotiable note makes a mortgage on his own property to secure that note. It seems to me to be quite another and a different case, and to be outside of the equitable consideration governing the foregoing cases. Here the mortgagor makes her mortgage to secure not her own debt but another's, and though the maker of the notes, the debtor, may be precluded from all defences against the innocent endorsee of the notes, yet it does not follow that his surety, who makes her mortgage to secure his debt, shall be similarly affected. He makes one contract. viz: to pay the debt; she another, viz: to hold her property subject to the lien of the debt. His contract is negotiable, as containing apt words to make it so, and by special authority of the statute as well as the law merchant; while her contract contains no apt words to make it negotiable, and is not within the statute relating to negotiable instruments. No proof is offered, either, of any custom among the merchants or others, by which a contract of pledge is negotiable.

There may be, and I am inclined to think there is, among the bar a prevalent notion that a mortgage made to secure a negotiable note is itself negotiable in as full a sense as the note. Such was my own impression before the argument of the present case, and it has been with a good deal of hesitation that I go counter to it. Whence has such an impression sprung among the bar? In analyzing my own ideas upon the subject I find it was in my mind from the force of the maxim—that the mortgage is an incident of the debt, and *follows the debt* into whosever hands it goes The maxim is undoubtedly correct and founded in good sense. In the leading case establishing it, Martin v. Mowlier, 2 Burr., 969, Lord Mansfield observed, with his usual vigor of expression: "A mortgage is a charge upon the land, and whatever will give the money will *carry the estate in the land along with it, to every purpose.*"

The same doctrine has been adopted in innumerable cases since, and with no exception or qualification. Yet what are the cases? With a single exception, to be more particularly noticed, every one of them, so far as I am aware, were cases in which the question simply was as between the mortgagee and his assignee. Thus, the mortgagee having transferred the debt, and made no formal transfer or assignment of the mortgage, the question was whether an assignment of the mortgage followed by construction of law. The courts said certainly it did. It could do the mortgagee no good to withhold the security after he had transferred the debt. It would simply be acting the part of the dog in the manger, and the law

would not presume that he intended so to act when he transferred the evidence of the debt. It would presume that he intended at the time to transfer also the security for the debt. Walker's Ch. 251; 5 New Hamp., 420; 8 Pick., 490; 4 Ohio, 320. Yet if, for reasons subsisting between him and the mortgagor, he especially desired not to transfer the mortgage security, but the debt only, and so stipulated with the assignee of the debt, he might do so, and then the debt would not take the security with it. 5 Cowen, 202.

Or, if in transferring the debt, it being evidenced by a negotiable note, he also transferred the mortgage, but the latter with an express stipulation that the transfer or assignment was subject to all equities existing between him and the mortgagor; that he might do.

Such reservation of the rights of the mortgagor was made in Fisher v. Otis, 3 Chandler, 83, and the case really turned upon that. Yet the court did also go further, though not necessary to the conclusion in the case and asserted all that is claimed by plaintiffs in this case. Hubbell, Judge, said: "The rule is well settled that a mortgage is a mere incident to the note, and may be extinguished by its payment or *passed by its transfer*." This is all true enough, but then he proceeds and says, that where the note is negotiable and passes into the hands of an innocent holder, the "mortgage, in such cases, would pass *as an incident to the note, and might be enforced by the holder*, in spite of any existing equities between the mortgagor and mortgagee. This doctrine is sustained by respectable authorities, and by the reason and sound policy which have long ruled in relation to commercial paper." The learned judge did not, however, cite any authorities, respectable or otherwise, that sustained more than his first proposition, unless it be Powell on Mortgages, vol. 3, page 908. This I have already considered as not sustaining the doctrine as claimed. I have also expressed my views upon the question of commercial policy as involved, and cannot, for the reasons stated, agree with Judge Hubbell in that case.

Nor does the maxim, that the mortgage is an incident to the debt, seem necessarily to imply, as I have before said, that it partakes of all the characteristics of the debt.

There is also another reason which seems entitled to weight in this matter, when a third party makes a mortgage on his property to secure the debt of another. In such case the mortgagor is a mere surety, and as such is to be deprived of no right by implication. Unless his mortgage is clearly negotiable, and is obtained and used for the purpose represented, a court would not enforce the lien. 11 Maryland, 469; 16 Penn. St., 415; 3 Paige, 614; 3 Sandf., 135; 2 Storey's Eq., 1373.

But supposing the foregoing views to be erroneous, there is still another reason peculiar to this case, against giving any further effect to the mortgage than its terms plainly import, namely, that it is made by a married woman, by one who is competent in law to make only a particular kind of contract, who could not by any possibility make a bill or note or other negotiable instrument, who can

ordinarily charge her land, only for some benefit actually received to her estate, and who cannot even charge herself individually in debt. Yale v. Dederer et ux., 18 N. Y. Smith, 265.

If, in incumbering her lands in the only possible legal way for her husband's benefit, viz: by the joint execution with him of a mortgage in due form of law, she is defrauded into the act, in such a manner as to make her mortgage totally void, as between her and the mortgagee, would it not be an anomaly that the law should force upon the mortgage, by analogy or implication merely, the character of negotiable instruments, and say, that she should not set up the fraud against the enforcement of the lien; provided the mortgage had been transferred to one who knew nothing of the fraud, but made no inquiry as to the good faith by which the mortgage was obtained?

Finally, taking the pleadings to be true, I conclude that this mortgage was procured by false and fraudulent representations; it was therefore void *ab initio*. The mortgagee took no rights under it, and could transfer none. The false representation that the money was to be used in the main in establishing her husband in business, with the concealment of the fact that he was hopelessly insolvent, and that this large sum would no more than pay his indebtedness to C. P. Peck & Co., seems to me to affect alike the whole consideration.

The demurrer to the answer is therefore overruled.

[*Lucas District Court.] 152

MICHAEL FOX v. JOHN BURNS.

For opinion in this case see 2 Dec. R., 311, s. c. 2 W. L. M., 387.

[Crawford District Court.]

COMMISSIONERS OF CRAWFORD COUNTY v. HALL.

For opinion in this case see 2 Dec. R., 313 s. c. 2 W. L. M., 390.

165 *SALE OF INTOXICATING LIQUORS.

[Logan Common Pleas Court.]

STATE OF OHIO v. JAMES CLEMENS.

Under the third section of the act of May 1, 1854, "to provide against the EVILS resulting from the sale of intoxicating liquors in the State of Ohio," it is not a crime to sell such liquors in good faith for medicinal purposes to a person "in the habit of getting intoxicated."

The defendant was indicted for selling intoxicating liquor to a person "in the habit of getting intoxicated." The evidence was, that the person to whom the liquor was sold was in the habit of getting intoxicated; that defendant knew that fact; that said person had the ague, and procured from a physician medicine in a bottle, with instructions to put whiskey thereon and drink at stated times; that upon the represention of this fact defendant sold and put in said bottle the whiskey, for the sale of which he was indicted. The jury rendered a verdict of guilty, subject to the opinion of the court but found and reported "that the sale was made in good faith, as a sale of medicine to a person diseased for the purpose of relieving his disease."

Motion for judgment and sentence on the verdict for the State.

John Pollock, prosecuting attorney for the state; Henry M. Shelby, for defendant.

BY THE COURT.

LAWRENCE, J.

The defendant is indicted under the third section of "An act to provide against the evils resulting from the sale of intoxicating liquors in the state of Ohio," passed May 1, 1854. [52, O. L. 153.] The third section of that act declares, "That it shall be unlawful for any person or persons, by agent or otherwise, to sell intoxicating liquors to persons intoxicated or who are in the habit of getting intoxicated."

This statute, according to its *strict letter*, makes no exception in favor of any class of persons, no matter what may be the object of the sale. In this respect it differs from the act of March 12, 1851; 2 Curwen 1649.

There is no reported case in Ohio which decides the question now presented. But it seems to me quite clear that the act under which this indictment was drawn was not designed to make the selling proved in this case a crime. I arrive at this conclusion from several considerations. The statute being highly penal to be strictly construed. No more acts are to be deemed criminal than its language fairly and clearly makes so. Hall v. State, 20 O. 15; Sedgwick 324. The *title* of the act is to be taken into consideration in construing its provisions. Lafayette v. Lewis, 7 O. 80, 86; State v. Granville, 11, O. 10; Sedgwick on Stat. 50; 5, O. 416; 1, T. R. 44; 4

T. R. 790; 3, M. & S. 66; 1, Blackst. 60. The mere *letter* of the statute must yield to its manifest object, reason and spirit. Slater v. Cave, 3 O. S. 80; Champaign v. Smith, 7 O. S. 49; Broom Legal Max. 298; Sedgwick on Stat. 292–312; Ch. 7, State v. Carson, 1 West Law Mo. 333; Aultfather v. Ohio, 4 O. S. 468; Miller v. Ohio; 5 O. S. 275.

The Bolognian law, which enacted "that whoever drew blood in the streets should be punished," was held not to extend to the surgeon who opened the vein of a *person who fell down in 166
the street with a fit, because of the *effects* and *consequences* of a literal interpretation, and in such case we are told by high authority "we must a little deviate from the received sense" of the words. 1 Blackstone, Com. 60.

Under the third section of the "liquor law" of May 1, 1854, if construed *literally* it would be a crime to sell intoxicating liquor to a physician in the habit of getting intoxicated, even if the purpose of his purchase was to immediately administer it to a person "who fell down in the street in a fit." So it would be a crime to sell to a person in the habit of getting intoxicated, if he should purchase to relieve *tetanus* or other spasmodic affection. But such sales as these are not within the design of the statute. Such sales are not "evils." The title of the act shows it was only aimed at "the evils resulting from the sale of intoxicating liquors." The evils contemplated by the act in all its provisions are those which result from the *use* and the *example* of using intoxicating liquors. This is attested by its history and by public opinion at the time it was enacted. When liquors are sold in good faith, for a lawful and harmless purpose, attended by no evils, it can be no violation of the design of the act. True, liquor thus sold might be used for evil purposes, but the purchaser must not die for want of it for that reason, for he is not required to beg and cannot lawfully steal. This construction is by no means forced; no more so than the decisions in Aultfather v. Ohio, 4 O. S., 468 and Miller v. Ohio, 5 O. S., 275.

The statute declares it shall be unlawful to sell to minors, and makes no reservation in favor of persons ignorant of the minority; but the supreme court has held that knowledge of the minority is essential to constitute crime, and so must be averred and proved. It cannot be that every druggist who in good faith sells for a medicinal purpose, even to a person in the habit of getting intoxicated, is guilty of crime. That would be an unreasonable construction to give the statute.

Motion for judgment and sentence overruled.

[*Crawford District Court, 1860.] 173

SARAH H. JARVIS v. HENRY D. JOHNSON.

For opinion in this case, see 2 Dec. R., 312, s. c. 2 W. L. M., 388.

[Wyandot District Court, 1860.]

DAVID STRAW v. THOMAS C. DYE.

For opinion in this case, see 2 Dec. R., 312, s. c. 2 W. L. M., 388.

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181 *REPLEVIN.

[Logan Common Pleas Court, July Term, 1860.]

WM. DEMPSEY v. HARVEY HILL, "AS CONSTABLE OF MONROE TOWNSHIP, LOGAN COUNTY, OHIO."

1. If a sheriff or constable by virtue of an execution levy upon chattels owned by some person, other than the judgment debtor it is "official misconduct," both in the SEIZURE and the DETENTION.
2. But an action of replevin or trespass in such case is not an action for "official misconduct" within the meaning of the tenth section of the justice's act, of March 14, 1853.
3. Justices of the peace have jurisdiction in such actions of replevin, or trespass against constables and sheriffs, "where the sum or matter in dispute" does not EXCEED one hundred dollars.
4. If the damages claimed before a justice exceed one hundred dollars in an action of replevin, his jurisdiction is ousted.
5. The common pleas has original jurisdiction in replevin, where the value of the property and amount of damages added together as claimed exceed one hundred dollars, although neither separately exceed that sum.
6. In an action of replevin originally commenced in the common pleas, the plaintiff will recover costs if the appraised value of the property, and the damages recovered when added together exceed one hundred dollars. The value of the property and damages for detention are the measure of damages when the action proceeds as in DETINET for damages alone, and the jurisdiction, and right to costs are no less when the property is restored. If this were not so the defendant by withholding or restoring possession under the order of delivery, would control the question of costs and jurisdiction.

On 11th October, 1859, plaintiff filed his petition in the common pleas in which he "complains of said Hill as constable, as aforesaid for that on 7th October, 1859, defendant was constable, etc.;" that an execution was issued to him by a justice of the peace on a judgment of Johnson v. Banks; to collect five dollars and costs; that said Hill, as said constable levied on plaintiff's mare of the value of $70 to satisfy said execution, well knowing she was plaintiff's and not the property of Banks, that plaintiff is the owner and has a right to immediate possession of said mare, that Hill, as constable, wrongfully detains her and has detained her for four days, to plaintiff's damage $100. Prayer for judgment against Hill as constable for restitution, and for $100 damages so sustained by reason of said detention.

With this was filed an affidavit under the Code, section 175; to procure "an order of delivery."

The order issued to sheriff, who caused the mare to be taken, appraised at $50, and delivered to plaintiff who gave proper undertaking, all as in replevin. Code, sections 176, 180, 178.

Answer—denies plaintiff's ownership, and asserts title in judgment debtor.

Tried by jury—verdict for plaintiff, damages assessed for "illegal detention of property" one dollar and forty-five cents.

Defendant now objected to judgment:

I. That the common pleas had no jurisdiction—that the case was within the exclusive jurisdiction of a justice of the peace.

II. That if this court had jurisdiction, the plaintiff could not recover costs.

James Kernan, for plaintiff.

The action is against the constable for misconduct done in the exercise of his office. Replevin is a personal action *ex delicto*, 1 Chit., Pl., 125; at common law it was brought whenever the *taking* was wrongful. Ib., 162, 3 u; 1 Swan, Pr., 16; 12 Wend., 39; 10 Johns, 369; *Nash., Pr., 404. Code, section 185; though the mode of proceeding is *in rem* it is still a personal action; 1 Chit., Pl., 162, and as such is much extended by the Code, section 186; it is a proper action for the official misconduct; 1 Swan, Pr., 16; Wright R., 159; 3 Wend., 23; 7 Johns, 140; Gilbert on Repl., 161; 2 Geeul. Ev., section 560; 4 O. S., 418; 1 Chit. Pl., 185, note *i*; Code, section 426, justice's act, section 101, 3 Curwen, 2069; 1 U. S. An. Dig., 105, sections 83, 85; 10 Metc., 309; 2 Barr, 49; 4 Comst., 173. 182

This court has jurisdiction and a justice has not; Justice's act, 3 Curwen, 2054, section 10—2. 52 vol. stat. 73, act of April 29, 1854; Swan's Tr., 43, 402, 403; 1 Swan, Pr. 12.

Walker & West, for defendant.

Replevin is not for "official misconduct," because the judgment creditor may be substituted as defendant, and the sheriff released, Code, sections 42, 43, 44.

The levy and taking is "official misconduct;" 4 O. S., 418. But replevin is in the nature of an action *in rem* to recover the specific article, and damages for (not "the taking" which is "official misconduct") but for the "unlawful *detention*." Code, section 175, clause 3. An action for official misconduct seeks damages for that alone, but replevin seeks for restoration. The verdict finds the ownership. Code, section 184, etc.

LAWRENCE, J.

The statutes contain these provisions:

Section 10. "Justices shall not have cognizance of any action: 3. * * * In actions against justices of the peace or *other* officers for misconduct in office, except in the cases provided for in this act. 5. In actions on contracts for real estate."

Section 2. "Justices of the peace within and co-extensive with their respective counties, shall have jurisdiction and authority, * * * to proceed against constables failing to make return, mak-

ing false return or failure to pay over money collected on execution issued by such justice." *Justices act of March 14, 1853*; 3 Curwen, 2052.

"The court of common pleas shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the jurisdiction of justice of the peace;" 52 vol. stat., 73, act of April 29, 1854; and see justices act, section 145; and act of May 1, 1854; 52 vol. stat., 100, section 1. Code, sections 552, 180; Van Buskirk v. Dunlap, 2 West. Law Mo., 126, 132; Hall v. Strong, 1 West. Law Mo., 698.

By this latter act justices of the peace "have exclusive original jurisdiction of any sum not *exceeding* one hundred dollars."

For the present I will assume that the "sum or matter in dispute does not exceed" one hundred dollars. Then as the act of April 29, 1854, gives the common pleas jurisdiction where "the sum or matter in dispute exceeds the jurisdiction of justices of the peace," and as the 10th section of the justice's act declares "justices shall not have cognizance of any action * against * officers * for misconduct in office," the question to be determined is whether this case is an action FOR misconduct in office? If so, the common pleas has jurisdiction, otherwise not.

It has been judicially determined that "a *seizure* of the goods of A, under color of process against B, is *official misconduct* in the officer making the seizure, and is a breach of the condition of his official bond, where that is, that he will faithfully perform the duties of his office. The reason for this is, that the trespass is not the act of a mere individual, but is perpetrated *colore officii*." Ohio v. Jennings, 4 O. S., 418; Gwynne on Sheriff, 258, 570. And as the *seizure* is official misconduct because done *colore officii*, so for the same reason would be the *detention*. There is much force too in the view that every mode of relief known to the law, (replevin included) which is designed to furnish redress for a wrong, is an action for that wrong. Nor can it be denied that if every sheriff is
183 *liable to replevin before justices, some practical inconvenience must result, and it may well be imagined that justices will be required to adjudicate important questions of title, validity of process, etc., to say nothing of questions of conflict of jurisdiction. There would, perhaps, not be much difficulty in holding that, if replevin was an action for official misconduct, a remedy might be had against sureties on a constable bond in some form, since there can be no wrong without a remedy. Code, sections 2, 35, 80, 47, 566; 1 Curwen, Introd. to Stat. 13, Ohio v. Colerick, 3 O., 487; 7 O. S., 118; Abbey v. Searls, 4 O. S., 598. But there are other considerations which show that although the *seizure* and *detention* are misconduct in office, yet *replevin* is not an action for such misconduct within the meaning of the tenth section of the justice's act. It will be observed that the case in 4 O. S., 118, decides that an unlawful *seizure* by an officer is official misconduct, but it does not decide replevin or trespass is an action for such misconduct.

I. The 10th section of the justice's act declares that justices shall not have jurisdiction of actions against officers for "misconduct in office." This covers only those cases where the misconduct is the exclusive gist of the action, and the remedy sought is *wholly* against the officer. Replevin is not a remedy *exclusively* against the officer, it is partly *in rem*. In 1 Chitty Pl., 162, it is said the "modes of proceeding are *in rem*, *i. e.*, to have the goods again." In the analytical table prefixed to 1 Chit. Gen. Practice, replevin is classed under the head of "prevention," not "compensation," page 37. In Bridgman v. Wells, 13 O., 47, it was held that a contract to clear land, repair a tenement, build a house, and leave a farm in good condition, were not contracts "for real estate;" that "a contract for real estate" means "an agreement for the purchase or conveyance of real estate" itself and nothing else. So here, an action "*for* misconduct" means compensation for that wrong, and not restoration of the property. The proceeding *in rem*, is something more; like an injunction, it operates not only on the person, but the property.

It may be that after judgment for damages in replevin, the sureties of the officer would be liable for the official misconduct. Ohio v. Colerick, 3 O., 487.

II. The construction I have given follows the analogy of the decisions made on the 10th section of the justice's act. One clause of it declares that justices shall have no jurisdiction "in actions in which the title to real estate * * may be drawn in question."

Upon that clause the supreme court, in Bridgman v. Wells, has said: "Where the plaintiff, to sustain his case, is compelled *in the first instance* to prove certain facts, or to disprove them, and those facts or either of them is title to lands * * the jurisdiction is excluded; * * but where it is unnecessary for the plaintiff to introduce such proof, the defendant can not, by its introduction, take away the jurisdiction." 13 O., 46; Swan Tr., 44; 15 O., 483; 4 O., 200; 7 O., Pt. 2, 230. The clause of the justice's act as to official misconduct has precisely the same effect as if it had read "justices shall not have jurisdiction in actions in which official misconduct may be drawn in question." Upon the analogy of the case referred to, an action would only be for official misconduct "when the plaintiff, to sustain his case, is compelled in the first instance to prove" *official* conduct, and this is *not* required in replevin.

The plaintiff in this case is not bound to aver or prove that the taking was done by a constable, or done *colore officii*. 3 Curwen, 2075, sec. 139. It is only where the fact of the official character of the defendant is *necessarily* averred by plaintiff that the jurisdiction is ousted. 2 Greenleaf Ev., section 501; Nash Pr., 255, 393; 6 Code, section 85, 175; Swan's Practice, 16, 811. Hence a justice of the peace could take jurisdiction of an *action of *debt* against a sheriff for money received by him as such. It would be an action 184
for the money *ex contractu*. He could not take jurisdiction on his official bond, nor in an action as in *case* for the official delinquency. 1 Chit. Pl., 513. "Misconduct" implies a liability in office *in tort*,

not *contract*. An action for "misconduct" can only be *in tort*. See Webster Dic., prefix '*Mis;*" Gwynne on Sheriffs, 571; State v. Colerick, 3 O., 487; 1 Swan Pr., 93—19; Sedgwick on Dam., Ch. 21, p. 527 n; 7 O. S., 118; 2 O. S., 150, 567.

In *trespass de bonis asportatis*, and in *debt* for money received, and in *replevin* it is not necesssary for the *plaintiff* to aver or prove the *official* character of a constable or officer, liable in such actions, and hence a justice would have jurisdiction. But in an action of *case*, or on the official bond, the *official* character of the officer must be averred and proved, and in such actions the common pleas would have jurisdiction, but a justice would not. 1 Swan Pr. 369, 447, 517, 348, 595; Wilcox Forms, 218, 234; Gwynne on Sheriffs, 584; 2 Chit. Pl., 717, 726. This view is strengthened by the fact that the justice's act, section 2, clause 9, expressly gives justices jurisdiction against constables for failing to make return, making false return, and failing to pay over money. These are, or may be, actions on the *case*, and the express jurisdiction in these implies that there is no other jurisdiction in *such* actions only.

These different actions must continue to exist, not in name but in fact, for they are dependent each on its own peculiar facts and remedies, and no ingenuity can destroy them. Code Com'rs, Rep. 7.

The reason of the decision in Bridgman v. Wells, above cited, is most manifest. The plaintiff in replevin can not properly make any averment of the defendant's official character. Now if the *defendant* can, in his *discretion*, defeat the justice's jurisdiction by setting up his official character, he could, when an action should be brought for the same cause in the common pleas, defeat the jurisdiction there —by omitting to set up the same matter. Swan Tr., 44; Justice's act, sections 2, 10; 52 Vol. Stat., 73, 100; above cited.

III. The history of the action of replevin in Ohio shows that justices now have jurisdiction of it against officers.

The act of February 9, 1846, *first* gave jurisdiction in replevin to justices; 2 Curwen, 1221; 3 Chase, 1756; section 109. That was repealed by the justice's act of March 14, 1853; (3 Curwen, 2090;) which continued the justice's jurisdiction in replevin.

Until the Code was enacted, (March 11, 1853, sections 47, 566, 567,) no action could be brought on an official bond for "misconduct," in the name of the party injured. By the act of February 23, 1816, "any person injured by the misconduct of * * * an officer" was authorized to sue on his bond in the name of the state for the use of such party; 2 Chase, 955.

Now it is certain that an action of replevin could not be maintained under this statute on an officer's bond. The *sureties*, however, are liable for every "official misconduct" for which the principal is liable. Thus, in Ohio v. Blake, 2 O. S., 150, it is said, "for every nonfeasance or misfeasance in office, the officer is liable to the party injured, and this is the liability * * to which the official bond is accessory, and to which the sureties have undertaken to respond." The remedies may be pursued separately, but the *wrong*

complained of—the *gist* of the action, and the relief sought, must be the *same* when the surety is sued, as when the principal is sued. It is upon this theory that a judgment against the principal is *prima facie* evidence against sureties, and if they have notice it is conclusive; 3 O., 487. When the principal is sued, *in case*, so that the *official* misconduct is averred, the sureties may *defend, and 185
under the Code, section 35, might be made parties. Voorhies v. Baxter, 1 Abb. Pr. R., 45.

But in debt, trepass, and replevin, the plaintiff cannot properly aver the official character, and hence, the sureties cannot controvert it. In those actions *the wrong complained of* is not the *same* as when the sureties are sued. In the former, the *man* is the aggressor, in the latter, it is the *officer*.

It seems to me clear, therefore, that the jurisdiction of the justice is only denied by the 10th section of the justice's act, when the action is such as to aver, and require proof of facts which would give a right of action against the sureties, as in *case* or on the bond.

IV. Perhaps the fact that the Code, section 42, authorizes the judgment creditor in such case as this, to be substituted as defendant, may add some weight to the construction I have given. But I am not yet convinced that it is within the constitutional competency of of the Legislature to declare as that section does, that the original defendant "shall be discharged from all liability" without any trial; Ohio const, art. 1, section. 16; Const. U. S. art. 6, amendments.

V. The justice's act, sections 101, 102, 103, and the Code, section 426, show that it was never designed to deny to justices the right to try questions of title to chattels. These sections authorize a trial of the right of property. It was not the difficulty of such trials, therefore, that dictated the policy of the 10th section of the justice's act; Abbey v. Searls, 4 O. S., 598.

From this, it will follow that the common pleas had no jurisdiction, unless "the sum or matter in dispute exceeds" one hundred dollars.

VI. But does the sum or matter in dispute in this case exceed one hundred dollars? What is the test of this question? The value of the *property* as *claimed*, or as *appraised*, or the *damages* as claimed? Or must the property *and* damages *both* be considered in determining the "sum or matter in dispute?"

The act which first gave jurisdiction to justices in replevin declared that "if the plaintiff * * * shall commence his action in the court of common pleas, unless the *appraised value* of said goods shall be one hundred dollars or more, he shall recover no costs." 2 Curwen. 1222, section 2; act of February 14, 1846. There is now no similiar provision in force. But the common pleas *then* had *concurrent* jurisdiction with justices under one hundred dollars.

Now the justice's jurisdiction is *exclusive* of the common pleas in all matters of one hundred dollars and less. Statutes ante.

The justice's act now in force, section 145, declares:

"Whenever the *appraised value* of the property so taken shall exceed one hundred dollars, the justice shall certify the proceedings

upon the said writ to the court of common pleas of his county, and thereupon shall file the original papers together with a certified transcript of his docket entries in the clerk's office of said court; the case there to be proceeded in, as if such suit had *commenced in said court.*" 3 Curwen, 2076.

The Code, section 180, provides: "For the *purpose of fixing the amount of the undertaking*, the value of the property taken shall be ascertained by the oath of two or more responsible persons, whom the sheriff or other officer shall swear truly to assess the value thereof."

This section declares but a single purpose for ascertaining the value, and there is nothing in the Code to determine what *claim* or *valuation* decides the jurisdiction.

It will be seen the common pleas has original jurisdiction 'where the *sum* or *matter* in dispute exceeds" one hundred dollars.

It has been decided that "the amount *claimed* in the petition" determined the jurisdiction, Code, section 112—127; 6 O. S., 597, VanBuskirk v. Dunlap, 2 Western Law Mo., 126. But these de-
186 cisions relate *to actions for the recovery of money only, and are founded on the words of the statute—"the *sum* * * * in dispute."

But the statute also provides for cases "where the * * * or *matter* in dispute exceeds" one hundred dollars. It is true in replevin there is in dispute *damages for detention*, but this is generally nominal and of secondary importance. The primary object of replevin is to determine the *right of possession* of chattles. The *property* is the "matter in dispute."

It may be urged too, with much force, that the statute does not contemplate that the value of the property *and* the damages for detention are to be added together to determine the jurisdiction—since its language is in the *disjunctive*—"where the sum or matter in dispute exceeds" one hundred dollars. It may be urged that this is the design of the statute from other considerations.

The *appraised value* in replevin determined the proper jurisdiction prior to the Code. 2 Curwen, 1222, section 2; Justice's replevin act, February 14, 1846. The Code and the justice's act, both now in force, were prepared, as is well known, by the same Code commissioners, and were enacted, the former March 11, and the latter March 14, 1853. They were designed as parts of one system and are to be construed together.

In the Code report the commissioners say, "we have done little more than copy the old acts." P. 89. And it may be insisted that they therefore designed the *same test* of jurisdiction as in the justice's replevin act of February 14, 1846. 2 Curwen, 1222. And it may be claimed that they for this purpose provided in the justice's act, section 145, that if the *appraised* value exceeded one hundred dollars, the case should be certified to the common pleas, there to be proceeded in as if *commenced there*; that the *appraisement* is the mode of determining the justice's jurisdiction, and the same mode *ex necessitate* must determine the jurisdiction of the common pleas, since

these two courts have the *whole* jurisdiction. But other considerations show that the jurisdiction of the common pleas is determined by the value and damages both together, as claimed.

The justice's act, section 150, and the Code, section 186, both provide that "when the property claimed has not been taken, or has been returned to the defendant for want of the undertaking required, etc., the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper."

Now in *such* case there must be some mode of determining the jurisdiction.—The action becomes a substitute for *detinue*, and the measure of damages is the value of the goods and compensation for detention. 1 Chit. Pl., note c.

It is certainly not limited to damages for *detention* for the Code commissioners say the action may go on "to recover damages for the conversion." Rep. p.,89. But it is not trover alone to recover value of the goods, for trover is elsewhere provided in the Code, and the petition avers damages for detention. Code, Rep., 249. The Code, section 186 uses the same language as section 184, showing that damages for detention are to be considered. The plaintiff's rights cannot be any less because the defendant prevents a delivery than if the goods are delivered. Under our form of pleading the value of the goods and the damages for detention are separate and distinct statements in the petition. Code, Rep., 249: Nash, Pl., 255; Contra p., 396; 1 Swan, Pr., 589.

The Code action of replevin necessarily requires an averment of the *value* of the goods, because it is in the *detinet* not in the *detinuit*, and may proceed for damages only. 2 Chit. Pl., 844, note *n*; 2 Saund. 320, n 1; Com. Dig. Pleader. 3 K., 10; Steph. Pl., 43—4; Second Appendix to Same, 112; Bouv. 4 Inst.,8; Contra Nash, Pl., 396.

At common law, as the replevin preceded the declaration, the latter was in the *detinuit* or in the *detinet*, according as the *property was or was not taken. But in our practice the petition precedes the replevin and must be in the *detinet*, and 187
if the replevin fails to restore the property the case may probably proceed without amending the petition so as to proceed in the *detinuit* under section 186 of the Code.†

I assume, therefore, that in replevin the value of the goods and the damages for detention are separate averments, to be stated as well before a justice as in the common pleas. Justice's act sections 54, 157; 2 West Law Mo. 140.

Now, as both the value and the damages are "matters in dispute," and as there can be no appraisement when the property is not taken, and the action proceeds for damages in such case, the jurisdiction must be determined by the *claim* of the value of the property and damages added together, for both constitute the limit to which the verdict may go. Both constitute the claim. The value indeed would be issuable on plea if it were not for the Code section 127.

Now, as the common pleas has jurisdiction when the case proceeds for damages alone on petition in which the value of the property and damages together, as claimed exceed one hundred dollars, so the common pleas must have jurisdiction in a like case where the property is restored, for the jurisdiction is the same in both cases. Where the appraised value of the property alone, before the Justice, exceeds one hundred dollars, the jurisdiction is transferred to the common pleas Justice's act, section 145.

Where the damages claimed exceed one hundred dollars, independently of the value of the property the jurisdiction of the justice is ousted and that of the common pleas attaches.

This must be so because there is a *sum* in dispute in damages, and the statute declares, in effect, that where *either* "the sum or matter in dispute" exceed one hundred dollars, the jurisdiction of the common pleas attaches. This gives the case of Brunaugh v. Worley, 6 O. S. 597, a uniform application to all cases. And see 2 West. Law. Mo. 130.

In all replevin cases it is safer, perhaps, to add a prayer for judgment for the value of the property, in addition to that for damages. In this case it would be thus: "And for judgment for $70, the value of said property, in case it is not restored to plaintiff by virtue of an order of delivery herein."

But as the Code section 186, declares that "when the property *claimed* has not been taken, etc., the action may proceed as one for damages only," it must so proceed whether the appropriate prayer is added or not. The law makes the *claim* for the plaintiff.

As the Code, section 186, recognizes the property as *claimed*, and as damages are also claimed, whenever the alleged amount of both added together exceeds one hundred dollars, the common pleas has jurisdiction. They are both "matters in dispute." The justice's act, section 145, shows that the damages claimed does not alone determine the jurisdiction, but that the value of the property is to be considered by that purpose also.

The Code, section 552, provides that "if it shall *appear* that a Justice of the peace has jurisdiction of an action and the same has been brought in any other court, the plaintiff shall not recover any costs."

How *appear*? Evidently in the manner authorized by law. 2 West. Law Mo. 130. And as the Code, section 180; Justice's act, section 145, authorize an *appraisement*, and as this is the *only* mode of determining the value, the plaintiff will in all cases recover, in the common pleas, costs, when the appraised value exceeds one hundred dollars.

It seems clear that when the action proceeds for damages alone,
188 and the claim is that the property and damages exceed *one hundred dollars, the common pleas has jurisdiction. The claim is no *less* when the property is restored. To so hold, would enable a defendant who prevents a restoration of the property thereby, to give the common pleas jurisdiction, or by permitting a restoration to defeat it. This would be absurd.

In this case, as the alleged value of the property *and* the claim for damages together exceed $100, the common pleas has jurisdiction. But as the *appraisement* and the verdict show that a justice had jurisdiction, the plaintiff can not recover costs.

Judgment on verdict for one dollar and forty-five cents.

†NOTE.—This question is now pending in the supreme court in the case of Pugh v. Calloway from Hardin county.

PRACTICE—PARTNERSHIP—PROMISSORY NOTE.

[Logan Common Pleas Court, June Term, 1860.]

THOMAS MAGRUDER v. WM. MCCANDLIS, THOMAS MAYS AND MARSTON ALLEN.

1. When a petition under the Code blends in one count, causes which should have been separately stated and numbered, a demurrer will lie to part of the count and an answer to the residue if it is distinctly divisible; but the proper practice is to require the causes to be separately stated, so that the demurrer or answer may be to either seperately.
2. Query: If an answer which avers that defendant does not know whether the facts alleged in the petition are true or not, and therefore denies them, is sufficient.
3. If a note be executed by the signature of two persons individually, it is *prima facie* an individual liability, and the holder would not be entitled to the ordinary equities against the firm composed by the makers, but it may be proved by parol that it is for a partnership liability, and then the firm character attaches to it for all purposes.
4. Where the individual members of a firm execute such note, not under seal for a partnership liabiliity, the debt evidenced by it *prima facie* continues to be against the partners as such unless it is clearly shown that it was designed to constitute an individual debt only.
5. The guarantor in a bond to indemnify one of two late partners against firm liabilities is not entitled to notice of non-payment of such liabilities before he is sued on such bond, except when "the fact on which his liability is made dependent rests peculiarly within the knowledge of the guarantee, or depends on his option."
6. In an action on such bond it is competent to aver and prove that a note executed by the partners individually was given for a firm liability. It then comes within the indemnity unless it is shown that the object of the individual signatures was to convert the debt into an individual debt only.
7. Where such bond of indemnity contains a covenant that the principal maker will pay the firm debts, or when the liability of the obligee is fixed and ascertainable, definitely, an action at law may be maintained by him on the bond for the amount of the liability; or an action as in chancery to require payment even though the creditor does not desire payment and has an action pending against the principal to recover such debt.
8. In such bond the guarantor is liable to the obligee to the amount of the penalty, though at his request or by his action in court he has compelled principal to pay debts of the firm.
9. In an action on such bond interest is only recoverable from the time suit is commenced.
10. Expenses indemnified against, only include those necessarily incurred, not extraordinary or unnecessary charges incurred for the safety of the plaintiff.

The petition avers that up to Sept. 30, 1853, there had been a mercantile firm composed of said Magruder, McCandlis and Orson Knapp, partners, as "Wm. McCandlis & Co;" that said McCandlis and Magruder also up to same date composed another mercantile firm, partners as "McCandlis & Magruder;" that on 26th of November 1852, said *firm* of "McCandlis & Magruder," purchased the interest of Knapp in the property and effects of "Wm. McCandlis & Co." and in payment therefor, executed to Knapp a promissory note, but not under the seal of that date, for $1,000, payable at five years, with interest annually, which note was signed not by the firm name of "McCandlis and Magruder," but by William McCandlis and Thomas Magruder individually; that on 30th of September 1853, Magruder sold to McCandlis his interest in the property and effects of the two firms of "William McCandlis & Co." and "McCandlis & Magruder," in part consideration for which McCandlis agreed to pay the debts owing by the firm of "McCandlis and Magruder," that he, McCandlis, would pay said note to said Knapp, and to secure which, McCandlis, as principal, and Mays, as surety, executed a bond as follows:

Know all men that we, William McCandlis and Thomas Mays,
189 are held and *bound unto Thomas Magruder, his heirs and assigns, in the penal sum of twelve hundred dollars, for the payment of which we hereby jointly and severally bind ourselves. Sealed and dated Sept. 30, 1853. The condition of the above obligation is such, that, whereas said McCandlis has purchased of said Magruder all his interest in the property and effects of the late firms of "Wm. McCandlis & Co.," and "McCandlis & Magruder" in part consideration of which McCandlis is to pay all the claims and debts of every kind and nature due or owing by the firm of "McCandlis & Magruder," all that are now due or that will become due within one year are to be paid by said McCandlis within one year from this date, and *the claim of Orson Knapp* is to be punctually paid by said McCandlis when the same becomes due, and also the interest thereon as it becomes due. Now, if the said McCandlis shall punctually pay all the debts of said firm as aforesaid, and keep the said Magruder clear from the payment of all costs, charges and expenses, by reason thereof, then this obligation to be void; otherwise, in force,

WM. MCCANDLIS, { SEAL. }
THOMAS MAYS.

The petition avers that Knapp assigned said note to Frazer; that on the 22d of Feb., 1858, Magruder paid to said Frazer the amount then due on said note, $596 59–100; that said note is the claim mentioned in the condition of said bond as "the claim of Orson Knapp;" that its non-payment by defendants is one breach of said bond; and for *further breach* of said bond, plaintiff avers that on 30th Sept, 1853, "McCandlis & Magruder" were indebted to Marston Allen, which indebtedness became due within one year from Sept. 30, 1853, of which Mays had notice; and on 2d March, 1858, was $581 and yet remained unpaid, though McCandlis and Mays

have often been requested to pay the same; that plaintiff has incurred and will incur expenses, $100, in paying Frazer and bringing this suit. Prayer for judgment for said $596 59–100 with interest from 22d Feb. 1858, and for said $581, with interest from 2d March, 1858, for reasonable attorney fees and expenses of this suit, and for another proper relief.

Answer of Mays.

1. That said note to Knapp is signed by the individual names in person of said William McCandlis and Thomas Magruder, and is, therefore, not a *firm* debt within the terms of said bond. That "defendant does not know whether said note was the only one held by said Knapp, at the time said bond was executed, or not, and does not know whether or not it is the note intended to be referred to in said bond, and therefore denies the allegation that it is such note."

2. That plaintiff has not paid said claim to Allen, nor has he been sued, that on 1st May, 1856, plaintiff notified defendant to keep him clear of said claim, since which plaintiff has not been asked to pay it. This suit is pending now by Allen against McCandlis, in Iowa, in which he expects to make said claim off of McCandlis.

3. That as to $945 of the penal amount of said bond, plaintiff ought not to recover because on 1st May, 1856, plaintiff notified defendant to keep him clear of said Allen's claim, then $1,000. That defendant accordingly on 7th May, 1856, filed his petition in this court against McCandlis, to compel him to pay said debt, then $945, which suit is yet pending against McCandlis, and garnishees under the code, sections 500 and 502; that by reason of said suit and other exertions of defendant, plaintiff has been kept clear from the payment of said claim, and will be kept clear hereafter; that $420 have been paid to Allen—part by one of said garnishees, and part by McCandlis—in consideration of time given by a continuance of said suit.

4. Defendant denies his liability for attorney fees.

Reply to first answer: That said note to Knapp was for a partnership debt of McCandlis *& Magruder, and was the only note of said McCandlis & Magruder outstanding at the time 190
of the execution of said bond, in which said Knapp was payee, and is the claim of said Knapp mentioned in said bond.

General demurrer to second and third answer.

Mays demurrer to plaintiff's reply.

Allen is in default.

J. H. & H. C. Godman, for plaintiff.

The bond is not only for *indemnity*, but it is an agreement to pay. Its condition was broken when any debt remained unpaid a year from its date. The plaintiff can maintain his action without first making payment, and without demand or notice to obligors. Crofort v. Moore, 4 Vermont 209; Sedgwick on Dam. 305; Ramsey v. Gervais, 2 Bay. 145; Negus' case, 7 Wend 499; Rockfeller

v. Donnelly, 8 Cow., 639; Port v. Jackson, 17 Johns 239; Wilson v. Stilwell, Ohio Supreme Court, Dec. 1859; Weekly Law Gaz. Oct. 8, 1859, p. 293; Thomas v. Allen, 1 Hill 145; Mann v. Eckford, 15 Wend 502; Williams v. Springs, 7 Iredell 384, U. S. Dig. 291, sec. 9; Stewart v. Clark, 11 Metc. 384; Gilbert v. Wiman, 1 Comst. 550; Lathrop v. Atwood, 21 Conn. 117.

The action lies, though the creditors do not desire payment. 11 Metc 384; 21 Comst. 117. The guaranty should be strongly construed against the guarantor. 2 Smith's Lead-Cases 128, 137. Burge on Suretyship 43.

The words, "the claim of Orson Knapp," may be *identified* by parol. Besides, it is a *firm* debt, and may be so proved. 2 Phil. Ev. & Notes (Edit. of 1859), Note 515, p. 747, 717, 708, 743, 636, 644, Note 487; 19 Johns R. 313; 5 Wheat, 326 (4 Pet. Cond. 666); 4 Hill 129: 20 O. 147, 93, 97; 2 Phil. Ev. 711, 714, 718; Burge on Suretyship 31; 1st Smith's Lead-Cases 216; Shortrede v. Cheek, 1 Ad. & El. 59; Fish v. Hubbard, 21 Wend 651; 13 Pet. 89; 6 Pet. Cond. 619; 4 Metc. 80; 3 Gray 72; 15 East. 27 (New Ed. Vol. 8, p. 139); Collyer on part., sections 558, 580, 913.

Payment of part of the debts indemnified against, not made by surety, does not *pro tanto* defeat plaintiff's right to recover or reduce the recovery below the penalty. Lewis v. Dwight, 10 Conn. 95; Gadsden v. Gasque, 2 Strobh. 329; 9 U. S. Dig. 119, Sec. 8.

C. W. B. Allison, for defendant Mays.

The note to Knapp is not covered by the bond—it is not in in legal effect a *firm* debt, and cannot be identified by parol as the claim of Knapp. 1 Pars. on Cont. 495; Russell v. Perkins, 1 Mason 368; 2 U. S. Dig. 474, section 23; Williams v. Hall, 1 O S. 190; Myers v. Parker, 6 O. S. 504 McGovney v. State, 20 O. 93; Grant v. Naylor, 4 Cranch 224; Bank of Washington v. Barrington, 2 Pa. 27; 3 U. S. Dig. 496, section 129; 2 U. S. Dig. 475, section 36; Cremer v. Higginson, 1 Mason 323; Chitty on bills, 55, note c, 205; Wilcox v. Kellog, 11 O. 394.

Plaintiff cannot recover as to Allen's claim, because he has not paid it. 2 Parsons 463.

"The claim ot Orson Knapp," as the expression is used in the bond can only mean a claim in legal effect and form, against the *firm* of McCandlis & Magruder, as to recovery of expenses. 2 Parsons 462, and note *v*, and index "Expenses" and "Counsel Fees."

The bond cannot be reformed as against guarantor: Meyers v. Parker, 6 O. S. 504. But see 56 O. L. 40, act of March 10, 1859.

Notice should have been given to Mays, within a reasonable time after the expiration of the year, as to facts of debts unpaid, and amount of liability. Bank St. Clairsville v. Beele, 6 O. 497; Green v. Dodge, 2 O. 498; 1 Pars. on Cont. 514; Thomas v. Davis, 14 Pick. 354; Talbot v. Gray, 18 Pick. 534; Bathford v. Shaw, 4 O. S. 263; Wolf v. Brown, 5 O. S. 304; Douglas v. Reynolds, 7 Pet. 113; 10 Curtis 415.

Partial payments having been made, they are to be ap- 191
plied by deducting them *from the penalty of the bond. No interest recoverable until after suit brought. McGill v. Bank U. S., 12 Wheat., 512; Lewis v. Dwight, 10 Conn. R., 96.

LAWRENCE, J.

This petition contains but one count, and as it assigns two breaches, it would have been demurrable at common law for duplicity. 1 Chit. Pl. 336; Taft v. Brewster, 9 Johns. R., 334; Gould Pl. Ch. 4, section 100; 1 Wend. R. 207; Byers v. Rivers, 5 Weekly Law Gaz. 37, April 21, 1860; Van Sant. Pl. 238. The several breaches should have constituted separate counts, one at law, the other in equity. State v. Caffe, 6 O., 150. But duplicity is not now a cause of demurrer, Code, section 87, but is of a motion to reform, sections 137, 118; Nash. Pl. 55, 60. But in New York it is held that demurrer will lie. Where a petition blends in one count causes which should have been separately stated and numbered, or in one count states two reasons either of which would give a right of recovery, it seems that a demurrer will lie to part of a count, thus divisible, and an answer to the residue. Van Sanf, Pl. 655; Dowsland v. Thompson, 2 Bl. R. 910; Ogdensburg Bank v. Paige, 2 Code Rep. 75; Voorhies Code, section 145, [123,] *d*; Ohio Code, 86; Powdick v. Lyon, 11 East, 565; Chit. Pl. 470, Ch. 7, Ib. 665; Douglass v. Saterlee, 11 Johns. R. 22; Lang v. Lewis, 1 Raud. R. 277. But the proper practice is to require each cause of action to be separately stated, so that the demurrer and answer may be to either separately, as to first breach—note to Knapp not paid.

In this case, therefore, the question *intended* to be made by the *first answer*, the *reply* thereto, and the *demurrer* to the reply, would all have been directly made by a demurrer to that part of the petition which seeks to recover, because plaintiff paid the note executed to Knapp. These pleadings all refer to that note. The petition assigns *two reasons* for a right of recovery as to that:

First—That in fact and legal effect, if not in form, it is a *firm* liability of McCandlis & Magruder, and so covered by the bond of indemnity.

Second—That if not so, it is covered by that clause of the bond which relates to "the claim of Orson Knapp," and that it may be identified by *averment* to admit parol proof.

These should, properly, have been separately stated and numbered as different counts. Byers v. Rivers, 5 Weekly Law Gaz 37, *ante*, page 231; 2 Code Rep. 75, case *ante*.

But whether so stated or not, the defendant, to avail himself of the defence apparent upon his first answer, should have demurred to that part of the petition which asserts the *first* ground of recovery, and taken issue as he has done, or attempted to do, as to the *second*. The cases cited show that although these *divisible* parts of the petition are not formally distinguished by the successive pleadings, yet they must be so treated for all purposes of the case.

For in *this* case the four several answers only reach *parts* of the petition, and there is nothing in the first answer which reaches the *first* ground upon which plaintiff seeks to recover for his payment of the note to Knapp. The fact of the signature by the individual names to the note appears in the petition, so that the first answer only attempts a denial, going to the *second* ground of recovery—a denial of fact—that it is *the* note intended by the bond. This does not even present the *legal* question whether if so intended it can be averred and proved by parol as against Mays the surety, nor whether he as a legal proposition can insist that nothing can be proved as "the claim of Orson Knapp," except a debt in form and legal effect against the *firm* of McCandlis & Magruder.

As this answer tenders only one issue of fact for a jury, no reply was necessary or proper.

It would seem also that the form of denial in this answer is insufficient. The New York Code, section 149, [128] admits of an
192 *answer denying "any knowledge or information thereof sufficient to form a belief." The Ohio Code, section 92, as to answer, is a copy of the New York, section 149, omitting the clause quoted. The Ohio Code, by omitting that clause, evidently designed to dispense with answers without any knowledge of the subject, probably because the facts can generally be ascertained. But the objection could only be taken by motion, and none is made. And see Smith v. Woodruff, 1 Handy 276. Such answer, if not argumentative, avoids the object manifest from the provisions of the Code, that parties should ascertain the facts.

It would seem, also, that with the issue of fact made by the first answer, the pleadings on that part of the case must cease. Code, sections 260, 261.

If that is so then the result is that as to the *first* ground upon which the plaintiff seeks to recover for the note to Knapp, defendant is in default; and as to the *second*; there is an issue of fact which, when on trial to a jury, will, upon the production of the evidence, raise the questions argued.

Perhaps those questions may arise on the demurrer to reply, by allowing it to reach the petition, since the general rule is that a demurrer reaches that pleading in which is found the *first* substantial fault. Gould Pl. Ch. 9, sections 36, 40; Steph. on Pl. 144.

The parties can amend so as to make the questions argued, and I will therefore decide them.

I. Can the plaintiff recover upon his first ground, that the note to Knapp is a *firm* liability of McCandlis & Magruder?

The note is *prima facie* evidence that its makers are *liable*, not as a *firm*. Collyer on Parts., section 492, 414, 473; 4 Burg. 28. Upon this alone the plaintiff could not recover. But the petitioner avers that it was given for a firm liability, and the answer admits this, and does not aver that the note was taken as *payment* thereof. If under seal, or intended as *payment*, the firm liability would be extinguished, and the plaintiff could not recover, because it would not then be a firm debt. But the note is not the debt, it is

only evidence of it. And when it is shown that it was given for a firm liability, the *presumption* is, that the partnership indebtedness was not intended to be *paid* thereby, and the *onus probandi* is upon parties adversely interested to overthrow this by clear proof. The holder of the note is entitled to his equitable lien for its payment on the firm assets, and formerly, it would have been provable under a commission of bankruptcy. The liability of the guarantor is ancillary to, and co-extensive with that of the principal debtor. No notice of non-payment to the guarantor is necessary before suit brought. For this cause of action, and upon this ground, the plaintiff, therefore, can recover. These views are sustained by authority.

Note not-payment. McNaughlen v. Partridge 11 O. 232; Fullerton v. Sturges, 4 O. S., 535; Merrick v. Boury, 4 O. S., 60; Purviance v. Sutherland, 2 O. S., 478; 2 Aur. L. Cases 179; 15 J. R. 475; 7 T. R. 64; 2 E. C. L. R. 152; 5 T. R. 513; 20 O. 532; Collyer on Part. Book 3, Ch. 2, sec. 2, sections 473, 492; Tyson v. Pollock, 1 Pa. 375; 2 Parsons on Cont. 136, 196; 1 Parsons on Cont. Book 1, Ch. 11, p. 150; 8 C. & P. 345, 8 S. & R. 103. Note provable under commission of bankruptcy against firm, unless intended to release firm liability.

Ex parte Brown, 1 Atk. 225; *Ex parte Bouloerus*, 8 Ves. 542; Collyer on Part. section 481, etc; Denton v. Rodie, 3 Camp. 493; Ex parte Boliths Buck 109; S. C. Bk. v. Case, 8 Barn. and Cres. 427.

Collyer on Part., Book 4, Ch., 2, sec. 3, section 920 *n* (4th Am. Perkins Ed).

As to creditors of firm. 2 Story Eq, sections 1253, 1226, 33; Wilcox v. Kellog, 11 O. 399; Belknap v. Cram, 11 O. 411; Ib. 223; 1 Parsons on Cont. 150 *n*.

As to notice. Bashford v. Shaw, 4 O. S., 263; Wolf v. Brown, 5 O. S., 304; Mann v. Eckford, 15 Wend. 508.

*It is not averred in the answer that any delay has lost to Mays any remedy against McCandlis. 193

II. This view renders it unnecessary to decide whether the bond by its terms is restricted to a claim in favor of Knapp, which is in form and effect a firm debt. But it would seem that "the claim of Orson Knapp," could only be proved when it is a *firm* debt to him, for the condition is, "if the said McCandlis shall punctually pay all the debts of said firm as aforesaid." If the claim of Knapp had been in fact not a firm debt, the bond would not have covered it, nor could it have been aided by parol proof. And it could not, perhaps, be reformed in equity. Myers v. Parker, 6 O. S., 504; Davenport v. Sovil, 6 O. S., 459.

But this clause in the bond—"the claim of Orson Knapp"—recognizes the note as a firm debt, as it is, and the note may be *identified* by averment and parol. The authorities cited authorize this. Shortrede v. Cheek, 1 Ad. & El., 59; 1 Smith's L. Cases, 216; Fish v. Hulbard, 21 Wend., 651; 13 Pet., 89; 4 Metc., 80; 3 Gray, 12 Burge, 31 *u*.

III. THE ALLEN CLAIM—SECOND ANSWER.

The petition avers that there is a debt to Allen covered by the bond of idemnity. The second answer makes two defenses.

1st. That plaintiff has not paid it, nor has he been sued.

2d. That suit is pending in Iowa against McCandlis. The first defense would have arisen on demurrrer to that part of the petition relating to the Allen claim, but the demurrer to the answer makes the whole question.

Is plaintiff denied a remedy because he has not paid the debt to Allen?

There are *three* grounds upon which the plaintiff can recover.

1. The bond in this case contains a covenant that McCandlis will pay the firm debts. It is a rule of law that, "where a bond is given intended as a *bond of idemnity*, but containing a *covenant* that the obligor will pay certain debts for the payment of which the obligee is liable, and the obligor fails to perform an action lies for the breach, and the obligee is entitled to recover the sums agreed to be paid, although it is not shown that he has been damnified, unless from the whole instrument it manifestly appears that its *sole object* was a covenant of idemnity.

Negas case, 7 Wend., 499; Port v. Jackson, 17 J. R., 245; Thomas v. Allen, 1 Hill, 145.

The surety is liable, though the covenant to pay is only by the principal. Mann v. Eckford, 15 Wend., 508.

In 21 Conn., 124, the court say, "If the covenant * * * be to perform some act for the plaintiff's benefit, as well as to indemnify * * * the neglect to perform the act * * * will give an immediate right of action."

Burge in his work on suretyship, Book 3, Ch. 1, p. 322, says, "The surety is equally liable with the principal debtor;" 2 O. S., 150; 1 Parsons on Cont., Book 3, Ch. 8, section 1, p. 495; Chit. on Cont. 523; Theobold 66.

2. The plaintiff is entitled to recover, not only because of the covenant to pay, but because his liability is fixed and ascertainable, and the time stated in the bond for payment is passed. Thus, in Rockfeller v. Donnely, 8 Cowden, 623, 639; it was held that "a bond to indemnify a town concerning a bastard child, given pursuant to the statute, is broken, and an action may be maintained upon it as soon as the town becomes liable or bound to maintain the child; and an action may be maintained upon it without actual disbursement, advance or payment by the town." The court say, "it is an operation which avoids circuity * * * to obtain the means to satisfy the charge."

In Lathrop v. Atwood, 21 Conn., 124 the court say, "If a condition * * * be only to indemnify * * * a party, * * * no action can be sustained for the liability * * * to loss

nor until actual damage *capable of appreciation and estimate* has been sustained." * * *

*In this case the plaintiff's damage is *capable of estimate.* 194
Both these forms or rights of recovery *are at law.*

3. But the plaintiff has a remedy in equity, by making, as he has done, Allen a party, so that judgment may be to indemnify plaintiff by paying the debt to Allen. This seems to have been the form of remedy in Wilson v. Stilwell, 9 O. S., 467.

Thus, in 2 Story Eq., section 730, it is said, "A surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued or not. And upon a covenant to save, harmless, a bill may be filed to relieve the convenantee under similar circumstances." These principles are recognized and supported by a citation of numerous authorities in Burge on Suretyship, Book 4, Ch. 2, p. 372.

The Ohio Civil Code, sections 500, 502, was designed to give the same remedies in favor of sureties, and it is to be liberally construed, doubtless, to include not only sureties but indorsers of notes, and every case in which, in equity, the liability of a plaintiff is or should be secondary as between parties severally liable. Hale v. Wetmore, 4 O. S., 600; Green v. Burnett, 1 Handy R., 285.

In Van Kirk v. Sherman, Logan common pleas, June, 1860, it was held that the plaintiff (who, as payee of a note made by Sherman, indorsed it to Hall, who recovered judgment against the maker and indorser, and levied on the lands of the indorser) could not maintain an action at *law* against the maker of the note, but could proceed by petition, as in chancery, to require indemnity, making Hall a party to receive the money: and that such action, like a creditor's bill, could reach the money due from debtors to Sherman.

The plaintiff, therefore, has the remedy in this form. This is not defeated by the action in Iowa against McCandlis, nor by the fact that Allen does not ask payment.

Stewart v. Clark, 11 Metc, 384; Lathrop v. Atwood, 21 Conn., 117; 2 Story Eq., section 849; Penny v. Fay, 8 B. & Cress., 11; S. C., 2 Maw. & Ry., 181; Toussaint v. Martinnant, 2 T. R., 100, c 71; Burge on S. 378, and notes; 5 Rep. 24.

Thus, it is said in Burge, "it is unreasonable that a surety should be forever at the mercy of the creditor in respect of an engagement which ought to be performed by the principal." 1 Vern. 190.

The facts of this answer may constitute a reason why this case should be delayed, but cannot defeat the action.

III. The third answer makes no defense.

The bond in this case limits the liability of the surety, Mays, to $1,200; but McCandlis covenants to pay *all* the debts of the firm of McCandlis & Magruder. The meaning of the parties is to be gathered from the language used, and that is clearly that McCandlis

should be liable for all the debts, and that Mays should be liable to the amount of $1,200, no matter how much might be paid by McCandlis. The cases cited in argument are conclusive on the point.

Interest is only recoverable from the time suit was commenced.

IV. The word "expenses" in the bond covers such counsel fees and other charges as may be reasonably and necessarily incurred in defending actions brought against the firm—procuring evidence and the like—where by the procurement of others, the plaintiff is subjected to them.

But the attorney fee in this case is voluntarily incurred, and, though proper, is not necessarily indispensable.

It may be that the plaintiff would have been relieved without suit. This is the meaning of the authorities cited.

It is not shown how, why or what expenses were incurred in paying the note to Frazer, and if so shown they would probably be of the class denominated "extraordinary," and not allowable within the authorities.

This part of the petition should have been objected to by demurrer, not by answer.

REPRINT

OF

OHIO CASES PUBLISHED

IN THE

LAW AND BANK BULLETIN

1857-59.

The following cases are taken from the Law and Bank Bulletin, a daily paper published at Cincinnati, O, 1857-59, by W. W. Warden. Matter from the daily was taken to make up a weekly, and after one volume, called the Weekly Law and Bank Bulletin was completed, the Weekly Law Gazette was commenced, the first volume of which was numbered volume 2. In the following will be found the cases contained in the daily and weekly editions of the Law and Bank Bulletin not found in the Weekly Law Gazette.

These cases are reprinted here for the first time, and never have been included in any digest.

[Superior Court of Cincinnati, Special Term, June, 1857.]

JOHN ELSTNER v. CINCINNATI EQUITABLE INSURANCE CO.

For opinion in this case, see 1 Disney, 412.

[Superior Court of Cincinnati, Special Term, June, 1857.]

ADOLPHUS C. SCHAEFFER v. PETER MCQUEEN.

For opinion in this case, see 1 Disney, 453.

This case was cited in Hamet v. Letcher, 37 O. S., 356, 358.

[Superior Court of Cincinnati, Special Term, November, 1855.]

EX PARTE LOCKHART,

For opinion in this case, see 1 Disney, 105.

[Superior Court of Cincinnati, Special Term, March, 1856.]

R. M. MOORE ET AL v. D. A. POWELL.

For opinion in this case, see 1 Disney, 144.

MARINE INSURANCE—CONSIGNOR AND CONSIGNEE.

[Superior Court of Cincinnati, Special Term.]

*CINCINNATI INSURANCE CO v. RIEMAN & SONS.

1. An insurance "for whom it may concern," does not include every person who has an interest, but only those in contemplation. But when the description of the party insured indicated that the agent has taken the policy for the benefit of other persons specially named, the interest of those thus described is alone covered. No other person can have an interest or sustain an action.
2. Where R., obtained insurance on property on account, of S. & K.—loss, if any, payable to R. & Co.,—and a loss happened and payment was made to R. & Co., who accounted with S. & K., the insurance company cannot after such settlement, on account of fraud in S. & K., with which R. & Co., are not connected, recover back the payment. The actions for money had and received will not be against a person who had received a just debt without fraud.

GHOLSON, J.

This case has been presented upon demurrer to the answer. To understand the question presented here I have examined the petition and answer, and particularly the policy of insurance, referred to both in the petition and in the answer.

Under the general allegations contained in the answer, facts might be shown which would undoubtedly constitute a defense to the action. The only question which can be presented, is, whether those general allegations are not so restricted and qualified by the particular facts, set forth as to show that there is, taking the whole answer together, really no defense which the defendant could be permitted to make available. It is stated and repeated in general terms that the defendants acted in the transaction as the agents of Smith & Kissane, but if, under the special circumstances, they could not in point of law be regarded as agents, the general allegations may be rejected.

If the plaintiffs have, as they allege, in their petition, ignorantly, and under a mistake as to the facts, paid money, they are, in justice entitled to recover it back from some of the parties in the transaction. I am inclined to think, that the true test is the one proposed by the counsel for the plaintiffs. Between which of the parties and the plaintiffs was the contract made, out of which the obligation to pay the money arose.

There appears a strong weight of authority in support of the position claimed for the plaintiffs that a consignee, or commission merchant has such interest in goods entrusted to his care, as will entitle him to effect an insurance upon them in his own name. In such a case he would be entitled to recover to the extent of the value of the property, and to hold the amount recovered to the extent of any lien or claim for his own use, and, as to any surplus, for the use and benefit of his principal. Waters v. Monarch, Life & Fire Insurance Co., 34 Eng. Law and E., 116, 121, Goodall v. N. E. Ins. Co., 5 Foster, 186 Story on Agency, section 11, etc.

*This case was affirmed by the superior court of Cincinnati in general term. See opinion, 1. Disney, 396.

. But did Rieman & Sons, in fact, insure with the plaintiffs any goods in their own name, and as their own goods? I am of opinion, upon the statements contained in the pleadings, and on examining the policy, that they did not. On the contrary, it appears to me, that the parties really insured, were Smith & Kissane—that the goods of Smith & Kissane, alone, were covered by the policy. The policy is a general cargo policy—it purports to insure J. H. Rieman, (not Rieman & Sons), for account of whom it may concern, in such amounts, and for such property as may be endorsed; and the endorsement, when made, is for account of Smith & Kissane; they being the consignors and Rieman & Sons the consignees of the property. Had nothing more appeared it is difficult to conceive how there could have been a recovery without showing an interest in Smith & Kissane, at the time of the commencement of the risk, and at the time of the loss.

The endorsement, however, proceeds to state "loss if any payable to H. Rieman & Sons." There is nothing in these words which would preclude proof on the part of the defendants, that they acted in the transaction as the agents of Smith & Kissane. There is a clear and direct authority to this point; Farrow v. Commonwealth Ins. Co., 18 Pickering. 53-5. It is there said: "There are obvious reasons for the introduction in question; the insurance brokers might desire to have the loss paid to them to indemnify them of any advances for premiums, or otherwise, which they might have against the owners; and the insurance company might desire to have the clause to enable them to set off any claim which they might have against the insurance brokers. And it would authorize them to pay the loss to the brokers without any power of attorney from the owners." It appears to me, that this clause, so far from showing, that the contract of insurance was made with Rieman & Sons in the character of consignees, and insuring their interest in the property, absolutely excludes any such inference. For if it were so, the introduction of the clause was unmeaning and useless. But the contract of insurance being with Smith & Kissane, and to indemnify them against the loss of their property, the object of the introduction of the clause is quite obvious. It was to secure to Rieman & Sons, out of money coming to Smith & Kissane, under the contract of insurance, the repayment of their advances, the intent being that they should hold the balance of the money for the benefit of Smith & Kissane.

Under this view of the case as to so much of the money as Rieman & Sons had no right to retain, they were clearly the agents of Smith & Kissane, and the payment over to their principals before any notice of the fraud, or mistake, must protect them from the action of the plaintiff.

It is confidently claimed on the part of the plaintiffs that the money retained by Rieman & Sons, in repayment of the advances made to Smith & Kissane, stands on a different ground; that being merely credited, or passed to account, it is still in the hands of Rieman & Sons, subject to the claim of the plaintiffs.

Assuming that Rieman & Sons received the whole amount of the money, as agents of Smith & Kissane, if what subsequently passed between them amounted to a settlement, it must be considered as having the same effect as if Rieman & Sons had paid over the whole amount, and then Smith & Kissane had out of the money paid the amount due to Rieman & Sons. That there might be such an appropriation or payment, by means of a settlement, and that it would protect the agent from any claim for money he might retain or be allowed, cannot, I think, be doubted. Whether in a particular case there was such a settlement, or a mere passing to the credit or account of the principal, the money received is rather a question of fact than of law. Under the statements contained in the answer in this case, a settlement having the effect indicated may be shown.

There is another point of view in which the case may be considered. The contract of insurance being between the plaintiffs and Smith & Kissane, the amount to which the latter will be entitled in case of a loss is to be paid to Rieman and Sons, and this the plaintiffs agreed to do, and, in fact, have done. The plaintiffs then agreed to pay, and did pay, first, a debt due from Smith & Kissane to Rieman & Sons, and second, by a sum of money to be received by Rieman & Sons, for the use of Smith & Kissane. Now, there was no need of any settlement between Smith & Kissane and Rieman & Sons, to entitle the latter to appropriate the money to the payment of their claim. The authority to do so is contained in the words inserted in the policy. Plaintiffs, then, having, at the request and by the authority of Smith & Kissane, paid a debt justly due from Smith & Kissane to Rieman & Sons can the plaintiffs afterward, on the allegation of a fraud practiced upon them by Smith & Kissane, recover the amount thus paid from Rieman & Sons? It appears to me that they cannot; that it is the same in legal effect as if the payment had been made directly to Smith & Kissane, and the right of action is only against them.

A man, under the influence of fraud or mistake, is induced to pay, and does intentionally pay a debt justly due from the party with whom he deals to a third person, I can see no reason why a third person, having in no way participated in the fraud, may not fairly and justly retain the money. It has been said that "no case can be shown where an action for money had and received has been supported against a person, who has received a just debt without fraud." Bogart v. Nevins, 6, Serg. & Rawle, 361, 368. If the contract in this case is to be regarded as a contract between plaintiffs and Smith & Kissane, and as one of the terms of that contract or under an authority contained in it, the plaintiffs paid a debt justly due from Smith & Kissane to Rieman & Sons, the fraud of Smith & Kissane, or the mistake of the plaintiffs as to the facts, would not affect the right of Rieman & Sons to retain the money received in discharge of the debt. It must be considered, in legal effect, the same thing as if the money had been paid by Smith & Kissane, and as has been said, against them would be the remedy of the plaintiffs.

The only doubt that could arise would be whether the clause "loss, if any, payable to Rieman & Sons," does not constitute a contract between the plaintiffs and Rieman & Sons, so as to bring the claimant within the ordinary rule, as to money paid by one party to another, under a mistake as to facts. The import of these words does not appear to have been clearly defined. There are authorities which appear to show that they would, in some sense, make Rieman & Sons parties to the contract. But, it appears to me, that they rather show a trust as to the money becoming due under the contract, than a contract. No action on the contract of insurance could, I think, be brought in the name of Rieman & Sons, to recover for loss. But if, in any form the plaintiffs were to admit that money was due on account of the loss, as they would by making a payment directly to Smith & Kissane, in disregard of the right of Rieman & Sons, then the latter, to the extent of their right or interest, would have a claim to charge the plaintiff.

It is unnecessary, however, to pursue this inquiry, as the action of the plaintiffs is brought upon an entirely different view of the contract between the parties. The action is brought upon the idea that the contract of insurance itself was made between the plaintiffs and Rieman & Sons, as consignees of the property insured. It is to this view that the answer of the defendants is directed, and I think the facts stated in it are a sufficient answer to the petition, and the demurrer will, therefore, be overruled.

Henry Stanberry and Jones & Ware, for plaintiff.

Taft, Key and Perry, for defendants.

[Superior Court of Cincinnati, Special Term, January, 1857.]

MURDOCK V. REED ET AL.

For opinion in this case, see 1 Disney, 274.

[Superior Court of Cincinnati, Special Term, June, 1857.]

JAMES A. BEAN V. JAMES L. ADAMS ET AL.

For opinion in this case, see 1 Disney, 388.

DIVORCE.

[Clinton Common Pleas Court.]

HARE v. HARE.

Where a husband files a petition for divorce against his wife, alleging that he was a resident of the county, when in fact he was not, and that his wife had grossly deserted his bed and board for three years. Notice of the pendency of the suit being given by publication, but no summons or copy of the petition was ever served the wife, or proof made that her residence was unknown, as the statute requires, and she had no notice, actual or constructive, of the proceeding for divorce until after it was granted: *Held*, that such decree of divorce will be set aside on the ground of fraud of the husband in obtaining it, and because the court granting it had no jurisdiction.

WHITE, J.

At the present term of the Clinton county common pleas, Judge White decided a question in reference to the law of divorce, which we understand has never before been passed upon in Ohio. The facts were as follows: Some time in 1849, after the parties had lived together forty years, and raised a large family of children, Mary Hare, the wife of Jacob Hare, left him on account of alleged cruelty, and filed a bill for alimony in the court of common pleas of Franklin county, and the litigation became very protracted, and, in 1852, Jacob Hare filed a bill for a divorce in the Franklin common pleas, alleging wilful absence on her part for three years, and both suits, after a full hearing, were decided in June, 1853, by the court dismissing the husband's bill for divorce and assigning a home and $800 per year to the wife as alimony, during the joint lives of the parties, it appearing from the testimony that the wife was in the right, and the husband worth $50,000.

The parties continued to reside separately in Columbus, when in September, 1854, Jacob Hare went to Clinton county and filed a petition for a divorce against his wife, alleging that he was a resident of Clinton county, and that she had willfully deserted his bed and board for three years. Notice was given of the pendency of the petition by publication, but no summons or copy of the petition was ever sent to the wife, or proof made that her residence was unknown to the husband, as the statute requires, and she had no notice, actual or constructive, of the proceedings for divorce, until after it was granted at the November term of the Clinton common pleas, and the husband married again and brought his wife to Columbus. Hare, knowing that his wife could successfully defeat his application for divorce, had absented himself only occasionally from the city, so as not to attract attention during the pendency of his application for divorce, and had voted as usual, in the meantime, at the October election in Columbus.

The effect of the divorce was to cut off the first wife from the ower in some $60,000 of property, and also from her alimony, if

the husband died before her, as he was near seventy years old. Accordingly, a petition was immediately filed by Messrs. Swayne & Baber, in behalf of the wife, in the Clinton common pleas, to set aside the decree of divorce on the ground of the fraud of the husband in obtaining it, and because the court had no jurisdiction in the matter, the wife having never been brought into court in the manner prescribed by the statutes, and having no knowledge of the decree until after the court adjourned which rendered it, the husband having purposely concealed the fact of his knowledge of the wife's residence in Columbus, as to prevent her making a defense. The case was very fully argued for the wife by Mr. Baber, of this city, in favor of setting aside the decree, and Mr. Fuller, of Wilmington, for the husband. Judge White delivered an able opinion, setting aside the decree, and declaring it null and void, because this court granting it had no jurisdiction. This leaves the second wife in an awkward position. The courts of New York and Pennsylvania have frequently done the same thing. Is the husband liable to an indictment for bigamy, or to a civil action for damages on behalf of the second wife? Have we Mormonism in our midst or not? Both marriages were certainly legal at the time they were contracted. Let the "saints" and lawyers solve this problem.

[Superior Court of Cincinnati, at Chambers, June, 1857.]

MERCHANTS' BANK OF CLEVELAND v. THE OHIO LIFE INSURANCE AND TRUST CO.

For opinion in this case, see 1 Disney, 469.

The holding in this case was questioned in Sturdevant v. Tuttle, 22 O. S., 111, 114.

CITY WEIGHING.

[Hamilton Common Pleas Court.]

CITY OF CINCINNATI V. BROADWELL.

1. Where a city passes an ordinance creating the office of city weigher, such ordinance does not require individuals to have their merchandise weighed, nor has the city weigher the right to interpose between the vendee and vendor.
2. By the appointment of a city weigher, the city does not have the right to forbid all persons from carrying on the business of weighing.
3. The city council has authority to prevent the usurpation of an office created by it, but when it undertakes to go beyond this and interfere with a trade or business, similar to that created by the city council, not for the purpose of protecting parties from fraud, but to enforce fees, it has exceeded its authority and therefore, it cannot prevent persons from engaging in such business.

CARTER, J.

In the certiorari case, brought in the common pleas court by C. G. Broadwell, on a judgment of the police court, adjudging Broadwell to pay a fine of $10 and costs, for an alleged violation of the second section of the city ordinance passed September 3, 1847, to establish the office of city weigher, a hearing was had yesterday before Judge CARTER.

Broadwell had been formerly city weigher, and has recently (since his term of office expired) been weighing iron and other articles of merchandise (in his private capacity) for merchants and other parties, under contract. His successor in office (Mr. Clarkson) caused him to be brought before the police court for violating the ordinance, the second section of which is as follows:

"That no person other than the city weigher and his deputies, in this city, follow the business of weighing, under a penalty of not less than $5, nor more than $50 for each offense."

Mr. Headington appeared for Broadwell. Mr. Clarkston was present in court, and submitted the case on his part, and said if the city desired to be heard by her solicitor, he could apply to the court for that purpose. The court said they would hear Mr. Headington, and if the court then desired to hear from the city solicitor, he would inform him. The court interrupted Mr. Headington in his argument, saying the case was so clear they did not desire to hear any further argument, and thereupon decided that each of the assignments of error were well taken. *First.*—That said second section of said ordinance was illegal, being in violation of the amendment of the city charter, passed March 5, 1847, namely: That the corporate authorities of the city shall have no power hereafter to enforce, pass, or establish any ordinance providing for the compulsory weighing, measuring or inspection of any article sold within the limits of said city. *Second.*—That said section is unconstitutional, being in violation of the first section of the "Bill of Rights," and an unjust and oppressive restraint upon the trade of the city.

Third.—That the city had failed to make out a case under the ordinance.

The judgment of the police court was, therefore, reversed.

SWAN, J.

Some weeks ago we gave a report of a decision by Judge CARTER, of the common pleas court, in the matter of prosecutions by the City v. Broadwell, a private weigher. The case has been looked at with some interest by the public, and more particularly by a class of the merchants of this city, as involving a question which directly affects their rights. The case was taken to the district court of this county, on a writ of certiorari, by the city solicitor, and there decided, Judge SWAN delivering the opinion of the court, which sustains the decision by Judge CARTER.

In disposing of the case, it was remarked by Judge Swan that the ordinance for the appointment of a city weigher, did not require individuals to have their merchandise weighed, nor had the city weigher the right to interpose between the vendee and vendor, but he came in at the instigation of those who desired to have articles weighed, and weighed them. The appointment was, therefore, simply that of a referee; and the question was whether in the exercise of such a power, the city council had impliedly the right to forbid all persons from carrying on this business because they had appointed a general referee.

Undoubtedly, the council had authority to prevent a usurpation of the office they had created by ordinance; but when they undertake to go beyond this, and to interfere with a trade or business, not for the purpose of protecting parties from fraud, but to enforce fees, they had exceeded their authority. Can the city, who have a city surveyor, prevent persons from engaging in the business of surveying lots, and strike down a trade because it comes in conflict with the exercise of a power to appoint a referee, to hedge round an office by making it a monopoly so far as regards fees? The court supposed they could not do so. The application for a writ of error was, therefore, refused.

Judge E. M. Hart, for the city.

Ketchum & Headington, for the defense.

[Superior Court of Cincinnati, Special Term, October, 1855.]

BURDSALL v. CHRISFIELD & PEEL.

For opinion in this case, see 1 Disney, 51.

[Superior Court of Cincinnati, Special Term, October, 1855.]

HALL & BURT v. THE CINCINNATI, HAMILTON AND DAYTON, R. R. CO.

For opinion in this case, see 1 Disney 58.

[Superior Court of Cincinnati, Special Term, October, 1855.]

DAVID A. LAYMAN v. E. W. BROWN ET AL.

For opinion in this case, see 1 Disney, 75.

PRIORITY OF LIENS.

[Hamilton District Court.]

HARRIET ANN REYNOLDS ET AL. v. GEO. W. CODDINGTON ET AL.

Where one purchases property at sheriff's sale, April 21, 1851, and the sheriff on September 25, 1851, issues a deed to such purchaser, and the latter on the same day, issues a mortgage to J., and in the meantime E., on May 5, 1851, recovers a judgment against such purchaser, but before a levy was made on E's execution, J. delivered his mortgage for record: *Held*, that the lien of J.'s mortgage was prior to the judgment recovered by E.

CARTER, J.

MOTION to distribute proceeds of sales in sheriff's hands.

Judge Carter delivered the opinion of the court.

This cause comes before us by an appeal upon the part of D. K. Este, one of defendants, and complainant, in cross bill from the court of common pleas, on a decree of distribution of proceeds remaining in the hands of sheriff, making the lien of Benjamin Jenifer, another of the defendants and complainants in cross bill, prior to that of said defendant, D. K. Este, and now presents itself to us on motion to distribute the proceeds in hands of sheriff; and we are called upon to decide in this particular, the same question as did the court of common pleas, *viz.*: which of these two defendants are entitled to priority.

The original suit in common pleas court was in chancery for foreclosure of mortgage given by one George W. Coddington to the complainants for the purchase money of lands sold, upon proceedings in partition by the sheriff; and the facts upon which we are to decide this motion are briefly as follows:

1. On the 21st day of April, A. D., 1851, George W. Coddington purchased at sheriff's sale, on proceedings in partition, ordered by the old superior court, the lot of ground described in the bill in this case, and covered by the mortgage hereafter mentioned, made by the defendant, Coddington, to Benjamin Jenifer.

2. On the 7th day of May, 1851, this sale was confirmed by the court, and a deed was ordered to be made by the sheriff to the purchaser Coddington.

3. On the 21st day of May, 1851, this deed was made by the sheriff, and a mortgage, according to the order of the court, was given for the deferred payments of the purchase money to the complainants in this case, which was acknowledged on the 20th day of June following.

4. On the 23d day of September, 1851, the first payment of the purchase money was made to the sheriff, by money advanced by Benjamin Jenifer, and the deed was then delivered to Coddington by the sheriff.

5. On the same day, for this advance and other valuable considerations, and at the same time, a mortgage of lot in question (before referred to) was executed and delivered by Coddington to Jenifer, and immediately recorded. The mortgage itself is indorsed as received for record, 23d September, 1851, at two o'clock, P. M.

On the 3d day of July, 1851, at the May term of the commercial court of that year, the defendant, David K. Este, recovered a judgment against Coddington and one Stotte, for $600.71 and $4.32 costs of suit.

7. On the 22d of July, of same term, execution was duly issued on the above judgment.

8. On the 23d day of September, 1851, (same day as delivery of sheriff's deed to Coddington, and Coddington's mortgage to Jenifer), Este's execution was levied by the sheriff upon the lot covered by the bill and the Jenifer mortgage. And

9. The first day of the May term of the commercial court, A. D., 1851, commenced on the fifth of May.

We do not know whether it is disputed by the counsel in this case, that the mortgage to Jenifer by Coddington, though on the same day, was executed, delivered and received for record before the levy was made on Este's execution. It is wholly a question of fact, and we presume from the fact that we see no contest of the question in the briefs given us, that it is not contested. On looking at the testimony, however, as meagre as it is, we would be impelled to the conclusion that its weight would manifest that the mortgage was received for record before the levy was made. Be this as it may, counsel made little or no question about it: and we will therefore enter upon the great and important question involved in the law of this case, which is as to the priority of the liens of Jenifer and Este.

It is contended by the counsel for Este, that by the law of judgment liens, (Swan's Statute, pp. 467–8,), the lien of Este's judgment takes effect from the 5th of May, 1851—the first day of the term of the commercial court—upon the lands, tenements, etc., of the defendant, Coddington, and that the title of the land in question, vested for such a purpose, if not for all other purposes, in the defendant, Coddington, on the 23d day of April, A. D., 1851, the day of sheriff's sale to Coddington, on proceedings in partition, or at least on the day of confirmation of such sale, 7th May, 1851, and that, therefore, the lien of Este's judgment was prior to that of Jenifer's mortgage, which was on the 23d day of September, A. D., 1851. There is nothing claimed as we can see, in virtue of the levy of Este's execution.

It is contended by counsel on the other side that the title to the land in question did not rest in Coddington until the date of the de-

livery of the sheriff's deed to him, the 23d day of September, A. D., 1851, and that at the same time the title vested in him he executed and delivered his mortgage to Jenifer; and this being before the levy of Este's judgment, the lien of Jenifer's mortgage must take priority.

We suppose it is not and will not be contended by counsel, that the lien of a judgment, under our statute law, attaches to anything but the *legal title* in lands and tenements. This is clearly the meaning of the statute, and has been so decided again and again by our supreme court.

Was, then, the legal title in Coddington to the land at the time of the sale made by the sheriff, or at the time of the confirmation of the sale by the court. As a matter of fact and of law, it was not; for in both instances there was something more to be done to perfect the title or to make it a legal title. A deed was to be ordered by the court, made by the sheriff and delivered to the purchaser, and this provided for by the statute before it could be complete. Whatever interest the purchaser at the sheriff's sale might have, it was subject by the law on the action of the court, to be taken away from him by setting aside the sale and reversing the proceedings, and whatever interest the purchaser might have on the confirmation of the sale, it was further subject to the action of the court, and of the sheriff, for the sheriff might very properly refuse to make and deliver the deed, unless the purchase money was paid. What, then, makes the legal title in the purchaser? We answer, it is the sheriff's deed duly executed and acknowledged according to law. This is the evidence of it. How can a legal title rest when there is something more to make it so One may have the right to the legal title, and may enforce his right, but he does not hold it as subject to the lien of a judgment before he perfects it—for so the law contemplates.

Could the purchaser before deed of sheriff bring an action of ejectment? What could he do? He might possibly have a remedy in chancery, or by mandamus against the sheriff. We are aware of the doctrine of the English common law upon this subject, and that goes to the fullest extent of subjecting subsequently acquired lands and tenements to the lien of a prior judgment, but such doctrine does not prevail in this country since the elaborate decision in sixth Binney. Such a doctrine is no more even argued for by attorneys at bar.

We are aware, also, of the doctrine of relation in this connection which prevails in all the states in our own country for certain purposes—but it is a doctrine of relation, and it does not rest the legal title at once; but it travels back to do so for certain particular and necessary purposes. There are some authorities which, on this doctrine of relation, would subject property to execution from the day of sale to a purchaser, and there are several of our own in this state which look that way. But amidst all the authorities we are disposed to adopt the better doctrine that the principle of relation should only apply for the purpose of protecting a purchaser in his rights as

to the title of the property purchased; and, adopting this view in this case, it is the opinion of the court, that the lien of the Jenifer mortgage is prior to that of the Este judgment, and that, therefore the motion to distribute the proceeds of the funds now in the hands of the sheriff, first to the defendant, Jenifer, prevail.

Mills & Hoadly, for Este.

Tilden, Rairden & Curwen, for Jenifer.

CANCELLATION OF INSURANCE POLICY.

[Hamilton District Court.]

G. W. CODDINGTON FOR USE OF H. CLEARWATER v. MERCHANTS' AND MANUFACTURERS' INS. CO.

1. Where an insurance policy provides that the same may be cancelled "If the risk be increased * * * the insured shall give the company notice thereof and if for that, or any other cause, the company shall so elect, they may cancel this policy." * * * *Held*, that the words "*for any other cause*" cannot be restricted to causes which increase the risk, but the fair interpretation is, that the policy may be cancelled, not wantonly, but for any good and substantial cause, and therefore, the non-payment of the premium note at maturity is sufficient cause, under the policy, for the company's election to cancel the policy.
2. In insurance, as in other contracts, the court should look to the plain and obvious import of the words used by the parties to express the terms and conditions of their agreement.

MALLON, J.

The opinion of the court was delivered by Judge MALLON.

In May, 1850, Coddington procured a policy of insurance for $3,000 on his chair factory— he was indebted to Clearwater and assigned his policy as security. In May, 1851, Coddington had the policy renewed for another year, giving his note for the premium ($150) at sixty days. On the 26th day of July the note matured and was not paid. On the 2nd day of August the insurance company notified Coddington and Clearwater that they had cancelled the policy. Soon after (in August) Clearwater called on the company and they again told him that the policy was cancelled because Coddington would not pay the premium. Clearwater said he would see Coddington and have him renew the policy. Nothing further was said or done till after the loss by fire, which occurred on the 21st of September, 1851. This suit is brought on the policy to recover the sum insured—the plaintiff claiming that the company had no right to cancel the policy, and if they had the right they had not exercised it. The clause in the policy, under which the company acted, is substantially as follows:

"If the risk shall be increased by the use of the premises, or by the erection of adjoining buildings, or otherwise, the insured shall give the company notice thereof, and if for that, or any other cause, the company shall so elect, they may cancel this policy,

giving the insured notice and returning a rateable proportion of the premium."

In insurance as in other contracts, the court should look to the plain and obvious import of the words used by the parties to express the terms and conditions of their agreement, and in this case we think that in ascertaining the intent of the parties, as expressed in this clause of the policy, the words "for any other cause" cannot be restricted to causes which increase the risk, but the fair interpretation is, that the policy may be cancelled, not wantonly, but for any good and substantial cause.

It is claimed that Clearwater's right ought not to be affected by Coddington's default; but it is Coddington that is insured. Clearwater may be said to claim through the contract made between the company and Coddington, and Clearwater's interest depends upon the right Coddington acquired by his contract, and we should first ascertain Coddington's rights before looking after Clearwater's interest.

The plaintiff claims that, by the renewal, Clearwater was insured; that the company took Coddington's note, and that now they cannot say the premium is unpaid. No doubt, if the company had issued a policy to Clearwater, and for the premium had taken a note, of a third party, it would be treated as payment, or if the company had taken a note, and before payment of it a loss happened, they could not set up the non-payment as a defense. But in this case the contract is between Coddington and the company, and upon non-payment of the premium note by Coddington, they do not deny their contract, nor do they say that a consideration is wanting; but they seek to avail themselves of a right or power reserved by them in the contract.

Coddington accepted the policy with this clause, and thereby agreed that the company might cancel the policy for good cause, upon notice, so that the parties might be each restored to their original condition without prejudice or damage. The contract the parties made, dealing upon equal terms, with the proviso as to cancellation, was that the company assumed the risk of $3,000 for a year—upon consideration of which Coddington agreed to pay them $150 in sixty days. He did not pay. Now, the court think that when the insured fails to perform so essential a part of his contract as the payment of the consideration, it is, at least, a sufficient cause, under the policy, for the company's election to cancel what had then become a double risk. But, it is claimed, that if the right exists, the company did not exercise it. The policy provides that they shall give notice of cancellation, and return a proportion of the premium. Notice was given. Clearwater also called at the company's office, and he was told the policy was cancelled. Though he may not then have waived any rights, he, at least, had notice of the company's intentions long before the loss. What more could the company then do? They could have returned the premium note; but there was an amount due them on it for which they might retain it. Without seeing what acts or words would consti-

tute a cancellation of the policy, we are satisfied that, in view of the original contract, the non-payment of the premium note, the notice, of August 2, the conversation afterward in August, and the subsequent conduct of the parties, that there was not a subsisting policy upon the 21st day of September, the time of the loss.

A judgment may be entered for the defendant.

Tilden, Rairden & Curwen, for plaintiff.

Coffin & Mitchell, for defendant.

DEEDS—EVIDENCE.

[Hamilton District Court.]

BERRESFORD V. PRICE ET AL.

A deed containing the usual covenants and other special covenants, is to be considered *prima facie* the contract between the parties and if one of the parties claims other representations and agreements not embodied in the deed, he has to make out his case by clear and certain proofs.

OLIVER, J.

A bill in chancery filed to foreclose a purchase money mortgage.

The defense was that there were representations of Berresford at the time of the sale which induced Price to pay more for the premises than he otherwise would. It was held, Judge OLIVER announcing the opinion, that the deed containing as it did the usual covenants and other special covenants was to be considered *prima facie* the contract between the parties; and if the defendant claimed there were other representations and agreements not embodied in the deed, he was to make out his case by clear and certain proofs; that, under the evidence submitted by defense, there were not such proofs of representations as to show they furnished any material inducement to the contract; and that there was a failure of proof to show there was any contract other than that shown by the deeds and papers.

Judgment for plaintiff.

Strait & Hollister, for plaintiff.

Collins & Herron, for defense.

[Superior Court of Cincinnati, Special Term, December, 1856.]

R. S. NEWTON V. D. W. CLARK, ET AL.

For opinion in this case, see 1 Disney, 265.

BILLS OF EXCHANGE—STATUTORY DAMAGES.

[Superior Court of Cincinnati.]

HUBBELL, ALEXANDER AND DRIVER v. THE OHIO LIFE INS. AND TRUST CO.

A bill of exchange drawn by an Ohio corporation on their agency in New York, payable to the order of plaintiff, was returned under protest: *Held* that the plaintiff was entitled to the statutory damages of six per cent on such protested bill of exchange.

SPENCER, J.

The question was whether the plaintiffs were entitled to statutory damages on a protested bill of exchange, drawn by the Ohio Life Insurance and Trust Company, on their agency in New York. The bill was drawn by the assistant cashier of the Trust Company, in Cincinnati, on E. Ludlow, their cashier at New York, for $1,200, payable to the order of the plaintiffs. The bill was returned under protest. It was contended for the plaintiffs, that Ludlow, being an individual resident in another state, the plaintiffs were entitled to statutory damages of six per cent. On the part of defendant, that the address to "E. Ludlow, cashier," was nothing more than an address to the trust company itself, and that the case came within the decision given by Judge Hitchcock, in The Canton Bank v. Brainerd, 8 O., 292.

Judge Spencer said, in giving an opinion of the case, that he supposed it would be admitted the bill was drawn on an office branch of the bank situated in New York, of which Ludlow had the superintendence; and with this fact assumed to be true, the plaintiffs are entitled to recover damages on the bill. Admitting that, the bill was drawn by one officer of the bank on another. It was for all practical purposes a bill drawn on a foreign office, and falls within the spirit, at least, of the statute, if not within its letter. The question was disposed of last winter, by the supreme court, in the case of West & Co. v. The Valley Bank, 6 O. S., 168, in which it was held that it was not necessary the individual members of a firm should be domiciled at the place where the bill was drawn, it being enough if they had a business domicile; and it repudiates the doctrine laid down by Judge Hitchcock, that these damages are in the nature of a penalty, but affirms they are in the nature of a recompense for the damages sustained by the individual in not getting his money at the place he had the right to expect it would be paid. On the principle held in this case, the court was of opinion the plaintiff was entitled to statutory damages.

T. J. Gallagher, for plaintiff.

Worthington & Matthews, for defense.

[Superior Court of Cincinnati, Special Term, January, 1858.]

M. D. POTTER & CO. v. STEAMBOAT MONARCH.

For opinion in this case, see 2 Disney, 28.

The opinion in this case was affirmed by the superior court in general term, and again in the supreme court. See supreme court opinion 7 O. S., 457.

FORFEITED BASTARDY BONDS—PLEADING.

[Superior Court of Cincinnati.]

STATE OF OHIO v. MORLEDGE.

In an action instituted by the state upon a forfeited bastardy bond, the petition must affirmatively show that the complainant was an unmarried woman and a resident in the state, and that in pursuance of the complaint, the bond had been taken. This not being set forth, the petition is open to demurrer.

SPENCER, J.

An action brought by the State for the use of Cincinnati Township on a bastardy bond, forfeited by the non-appearance of the defendant at the January term of the common pleas court. The petition was demurred to generally, and various grounds were set up. Judge Spencer said there was an objection fatal to the petition not alluded to in the demurrer. In all proceedings instituted under this statute, it should appear affirmatively that the complainant was an unmarried woman, resident in this state, and that, in pursuance of the complaint, the bond had been taken. This not being set forth, the bond did not disclose the cause of action, or, in other words, show the jurisdiction of the magistrate to take it.

Demurrer sustained, and leave to amend.

[Superior Court of Cincinnati, Special Term, November, 1857.]

SMEAD, COLLARD & HUGHES v. FAY & BRADLEY.

For opinion in this case, see 1 Disney, 531.

ATTACHMENT.

[Superior Court of Cincinnati.]

CHAMBERLIN & CO. v. E. K. STRONG.

An attachment upon a debt not yet due will only be permitted where the intention of the party was clear that he was about to commit a fraud or had committed one.

STORER, J.

An attachment had been granted where the debt was not yet due. A motion was made to set it aside on affidavit of defendant, which ignored altogether the statement of plaintiff. Judge STORER said the plaintiff was not sustained in the precise case he had made in his affidavit; and the court had heretofore decided that it required a very strong showing to induce them to sustain an attachment upon a debt not yet due. It was only in that class of cases where the intention of the party was clear that he was about to commit a fraud or had committed one, that this remedy would be permitted. No fraud was made out here, and the attachment would be dismissed. The court intimated, however, that if this were a bill in chancery, they should require a further answer.

Fox & Fox, for plaintiffs.

Collins & Herron, for defendant.

FRAUDULENT SALES—ATTACHMENT.

[Superior Court of Cincinnati.]

BROMLEY v. COHEN & MENDEL.

Where a person obtains goods with no other view than to dispose of the property as quick as possible and pocket the avails, and such vendee confesses judgment on certain promissory notes to enable the parties in whose favor the notes were executed to levy on the property of the fraudulent vendees in order to destroy the effect of an attachment about to be issued by plaintiff: *Held*, that the court will not disturb the injunction enjoining a constable who has possession of the money from paying it over until the attachment suits can be disposed of.

SPENCER, J.

MOTION to dissolve injunction, and on demurrer to petition.

The plaintiffs brought their action, on which an attachment issued against Cohen & Mendel, who, it was claimed, obtained a large amount of goods, last July, in New York, brought them to this city, ran them into market, put large quantities of them into the hands of Heidelbach, Seasongood & Co., at 40 to 50 per cent. less than the real value, pocketed the money and ran off. The petition further avers that C. & M. confessed judgments on nine promissory notes of $300 each, to enable the parties on whose behalf the notes were executed (Stearne & Brother) to levy on the property of C. &

M., in order to destroy the effect of the attachment about to be issued. Constable Ewing, it is alleged, got the money, and it is sought to enjoin him from paying it over until the attachment suits can be disposed of.

It is alleged that C. & M. put in the hands of John Fisher notes to a large amount without consideration, and that Fisher transferred them to Wolf Cohen for collection, and that this arrangement was made to cheat creditors. It is asked that Wolf Cohen be prevented from disposing of the property to the prejudice of plaintiffs. The transaction with Heidelbach, Seasongood & Co. shows, it is claimed, that they aided in the successful conduct of a fraud, and it is urged that they should pay to the plaintiff the difference between the real value and the sum they did pay for the goods.

Judge SPENCER said that the action was misconceived so far as H., S. & Co. were concerned. The validity of the transfer to them was not to be called in question in this form. If a judgment was obtained in the original action against C. & M., and the proper averments made, that execution issued and no goods found to levy on, this would lay the foundation for a judgment creditor's bill against H., S. & Co.; the same might be said of other defendants named in the case. The demurrers, therefore, of these parties, and of Simon, Scholl & Co., and Cohen & Vogle would be sustained. The other demurrers overruled.

In relation to the motion to dissolve the injunction, the court remarked that the case presented the most unblushing fraud that had ever fallen under its observation—a party purchasing from $10,000 to $20,000 worth of goods, selling them at auction in the original packages, and, as stated by some of the witnesses, at one-tenth of their value in some instances, in others at an awful sacrifice—all within ten days, and then vamoosed.

Among other noticeable points in the case, the court said, was the fact that Fisher, one of the parties, appeared to have a sort of ubiquity, and that whenever an affidavit was necessary to be taken in New York or here, he was always on the spot ready, and manifesting that peculiar interest in the transaction, which shows, to say the least of it that he was connected with Cohen & Mendel in their operations. It was further remarked by the court, that they never examined a case in which they could place so little confidence in the integrity of the witnesses. There could be no question, however, that C. & M. obtained the goods with no other view than to dispose of the property as quick as possible, and pocket the avails. In view of the whole case, the court would not disturb the injunction, but let it abide the further developments of the case; because, as far as Stearne & Brother were concerned, (who applied for it,) the money was in the hands of the officer, secured by bond, and there was no reason why it should be put beyond the reach of the process of the court.

Thompson & Nesmith, for plaintiffs.

J. Abraham, for Stearne & Brother.

Stallo, Andrews & McCook, for other defendants.

PERSONAL INJURIES.

[Superior Court of Cincinnati.]

CHARLES WEIGAND v. MITCHELL & RAMMELSBERG.

A party who voluntarily enters a service he is not fitted to perform, and is so unskilled as to injure himself, cannot have a cause of action against another party, at whose instance he enters on the performance of that service.

SPENCER, J.

The object of the action was to charge defendants for an injury sustained by plaintiff while in their employ. Plaintiff alleges that he was employed to superintend the working of a grooving machine; that the foreman of the M. & R. took him from his work to superintend the working of a saw-mill; that the saw was not in good order, and the lumber being wet, the water got into his eyes, and that under these circumstances, and the foreman hurrying him with the work, he sawed off his thumb, and sues now for $5,000.

Judge SPENCER remarked that the only ground on which the action could be maintained would be to show that M. & R. had been guilty of negligence in the management of their business, on the account of which alone, and not by reason of any fault on the part of the plaintiff, the injury had been sustained. But the case shows nothing more than that the plaintiff entered into an employment for which he was not particularly well fitted, and while engaged in it, without the fault of anyone in particular, but through inadvertence, it may be, on his own part, or the want of skill, had his thumb sawed off. The circumstance that the foreman called on him to hurry up the work, does not furnish any cause of action. It does not appear he was improperly hurried; and if he had been, it was enough to say, that a party who voluntarily enters a service he is not fitted to perform, and is so unskilled as to injure himself, cannot have a cause of action against another party, at whose instance he enters on the performance of that service. The action cannot be maintained.

Hassaurek & Elliott, for plaintiff.

King & Anderson, for defense.

CONFLICT OF JURISDICTION.

[Superior Court of Cincinnati.]

POLAND & HENRY v. WM. FOXWORTHY.

Plaintiff brought an action against the defendant in this state. Defendant pleaded the pendency of another suit for the same cause of action in one of the Kentucky circuit courts. A demurrer was interposed to this plea: *Held*, that there could be no conflict of jurisdiction between two courts situated in different states, and that, therefore, defend nt's plea was held to be insufficient and the demurrer was sustained.

SPENCER, J.

To plaintiff's action defendant pleaded the pendency of another suit for the same cause of action in one of the Kentucky circuit courts. A demurrer was interposed to the plea; and the question was whether the pendency of the Kentucky suit for the same cause of action was pleadable n abatement.

Judge SPENCER said he found, on examination, that it was the uniform practice of the courts not to sustain pleas of this character, and the ground taken was that. so far as the states are concerned, they are foreign to each other in all matters of this description, unless where the constitution of the United States declares otherwise.

Several authorities were referred to by the court in sustainment of this view, as well as a case decided by Judge McLean, in 4th Vol. o· McLean's Reports, cited to show an opposite ruling; but where the facts showed merely the relation existing between the state courts and the United States, and where it was important to avoid the conflict of jurisdiction. But there could be no conflict between two courts situated in different states. The plea was, therefore held to be insufficient by the authorities, as well as the principles of the case decided in Johnson, and the demurrer sustained.

Lincoln, Smith & Warnock, for plaintiff.

Haines, Todd & Lytle, for defendant.

JUDGMENT CREDITORS AND MORTAGEES.

[Superior Court of Cincinnati.]

C. H. KELLOGG v. THE CHICAGO RAILROAD CO.

A mortgagee who files his bill, asking the property to be sold, and bringing in the judgment creditor seeks too much from a court of equity when he wants the fund to be taken from the judgment creditor because of a supposed claim of the latter on other property. The most that could be done would be to order the money paid to the judgment creditor and give plaintiff in the action a right of substitution.

SPENCER, J.

Mortgage was foreclosed on real estate, and a party named Lyle, made defendant to the action, claimed his judgment was prior to the plaintiff's mortgage, and should be first paid. The plaintiff alleges that the mortgage having but one fund, and the judgment being a lien on the general property of the railroad company, the judgment creditor must stand aside and not participate in this fund.

It was remarked by Judge SPENCER that there was no averment in this petition, or answer going to show that the judgment was a lien on other property. It rather appeared execution was not levied under this judgment on any property whatever; and, as more than a year elapsed, it might have lost its lien as against junior judgments.

Aside from all this, and on general principles. a mortgagee who files his bill, asking the property to be sold, and bringing in the judgment creditor seeks too much from a court in equity when he wants the fund to be taken away from the judgment creditor because of a supported claim of the latter on other property. The most that could be done would be to order the money to be paid to the judgment creditor, and give the plaintiff in the action a right of substitution.

Mills & Hoadly, for plaintiff.

Ferguson & Long, for Lyle.

Judge Woodruff, for defendant.

CONTRACT—PLEADING.

[Superior Court of Cincinnati.]

PHILIP VANIDA v. ADAM KROPP.

1. An action for damages may be maintained for the breach of a contract for the sale of real estate purchased at auction, but afterwards refused to be accepted by the purchaser, defendant, upon the tendering of the deed by plaintiff.
2. In order that plaintiff may recover on such contract, his petition must set forth the fact that he had title to the property and that he was in possession, or had the right to make the conveyance.

SPENCER, J.

Before Judge SPENCER on demurrer.—

The action was to recover damages for the breach of a contract for the sale of real estate purchased by the defendant at auction, for $2,000. The auctioneer at the time, made a memorandum of the sale, describing the property, naming the parties, the terms of payment, etc. The plaintiff alleges that he tendered the deed and demanded payment, and, in consqeuence of the refusal of the defendant claims damages in $300.

The court remarked that no doubt, an action might be maintained for the breach of a contract for the sale of real estate, or that the plaintiff was entitled to recover the damage he sustained. Further, the memorandum taken by the auctioneer contained all the essential elements of a contract, and, if the objection to the petition related to this point of the case, it was not well taken, as the fact showed a sufficient compliance with the statute of frauds, to entitle a recovery on that ground. The petition, however, was defective on another ground; it did not set forth that the plaintiff had any title of the property, was in possession, or had any right to make the conveyance. On this ground the demurrer was sustained, and leave given to amend.

Cox & Kerr, for plaintiff.

W. T. Forrest, for defendant.

CONTEST OF WILLS—JURISDICTION.

[Superior Court of Cincinnati.]

JACKSON v. JACKSON.

1. The whole matter of proving wills is within the cognizance and jurisdiction of the probate judge. If he admits the will to probate, there is no appeal from his decision.
2. A party may contest the validity of a will that has been admitted to probate by filing a petition in the court of common pleas, and this is the only tribunal provided for the hearing of this question.

SPENCER, J.

To a petition filed to set aside the probate of a will on the ground of the alleged incompetency of the testator, a demurrer was raised claiming the want of jurisdiction in the court. A lengthened opinion was given by Judge SPENCER. The whole matter of proving wills, is, in the first instance, within the cognizance and jurisdiction of the probate judge. If he admit the will to probate, there is no appeal from his decision. As to matter of probate, his action is final. But the law steps in and says, a party may contest the validity of the will in a particular manner, namely; by filing a petition in the common pleas, and this is the only tribunal provided for the hearing of a question of this description. The demurrer should, therefore, be sustained.

ACTION ON RECOGNIZANCE.

[Superior Court of Cincinnati.]

STATE OF OHIO, FOR USE OF ELLEN GAVIN v. W. B. BYRNE.

The superior court has no jurisdiction to try actions on recognizances taken and forfeited in the common pleas court.

GHOLSON, J.

An opinion, in general term, was delivered by Judge GHOLSON, in this case, The question reserved was, whether this court has jurisdiction to try actions on recognizances taken and forfeited in the common pleas. By reference to the statute (Swan 735, 784-85, Practice in Criminal Cases), it appears that the court in which the recognizance is taken, has a discretion which cannot be properly exercised by any other court. This, as originally held in England as to bail, appears a clear reason why the proceedings on the recognizance should be in the court in which it was taken. Case remanded, with instructions to set aside the judgment and dismiss the action for want of jurisdiction.

Piatt & Piatt, for plaintiff.

Hilton & O'Neill, for defense.

LIENS—BAILMENT.

[Superior Court of Cincinnati.]

EDWARD OWEN, BY NEXT FRIEND v. DUHME & CO.

Plaintiff purchased a watch from defendant, paying him part of the purchase price, receiving credit for the balance. Afterwards plaintiff left the watch with defendant to be repaired: *Held*, that defendant had no lien on the watch for the balance of the purchase price, and that when he received the watch for repairs he was merely a bailee and all he could demand was the cost of the repairs.

MOTION to require petition to be made more definite and certain. It was apparent to the court a substantial cause of action had been set forth. The plaintiff bought from defendant a watch for $175, paid $100, and there was a credit for the balance. The plaintiff left the watch for repairs, and when he called for it he was told he could not have it until he paid the balance due. The question was whether defendants had a lien on the watch. The court presumed they had not. When the watchmaker received it back for repairs he was a bailee, and all he could demand was the cost of the repair. Motion to amend petition overruled, and leave to answer.

Mills and Hoadly, for plaintiff.

Lincoln, Smith & Warnock, for defendant.

CONFLICT OF JURISDICTION.

[Superior Court of Cincinnati.]

WOLF & CO. v. THE OHIO LIFE INS. & TRUST CO.

The fact that a suit is pending between the parties in the same cause of action in another jurisdiction is no defense to an action brought in this state.

The answer to the plaintiff's petition was that a suit was pending between the parties in the same cause of action in Indiana. To this answer a demurrer was put in, which the court sustained, remarking that the fact of a suit pending in another jurisdiction was no defense to the action.

Kebler & Force, for plaintiff.

Worthington & Matthews, for defendant.

PLEADING.

[Superior Court of Cincinnati.]

JOHN M. STOUT v. OHIO LIFE INSURANCE AND TRUST CO.

An action on a check in which the petition fails to aver that the defendant had funds of the party who drew the check, is demurrable.

The action was on a check which was assigned. The court said that there was no averment in the petition that the Trust Company had any funds of the party who drew the check, and sustained defendants demurrer.

Thompson & Nesmith, for plaintiff.

Worthington & Matthews, for defendant.

TREASURER OF TOWNSHIP.

[Superior Court of Cincinnati, Special Term.]

*HAMILTON POLLOCK, TREASURER v. HATCH & LANGDON.

Under section three of the act to punish the embezzlement of public money (2 Curwen, 1286), a contract by a township treasurer with bankers for the deposit of township funds and interest thereon is void, and neither the treasurer nor the township can recover the contract.

STORER, J.

The petition avers that plaintiff, as treasurer of Symmes township, held certain moneys, the property of the township, which he deposited for safe keeping, as well as to obtain interest thereon for the benefit of the township, with the defendants, who agreed, it is alleged, to keep them safely, pay them out from time to time as required for the purpose of the township, and allow six per cent. interest. A demand for the amount still held by defendants is averred and their refusal to pay.

The defendants demur; and, it is claimed, the case comes within the spirit, if not the letter, of the second and third sections of this act of April, 1856, (53 O. L., 158,) "to punish the embezzlement and unlawful use of public moneys," which provides:

"If any officer, agent or servant entrusted with the custody of public moneys of the state, or of any county, township, city or incorporated village, or school district, shall loan any money, securities, or other evidences of debt in his custody, or under his control, shall, on conviction thereof, be fined in a sum equal to the amount loaned, or to the value of the security appropriated, defined to inure to the benefit of the public owing the money or security."

The object of this statute is obvious. It was intended to check if it could not fully prevent the use of public money, by public agents, for purposes other than those for which it was deposited;

*The judgment in this case was affirmed by the superior court, in general term, see opinion 2 Disney, 181.

whereby the public had been often defrauded of large amounts in the shape of interest, and public offices, instead of being public trusts had become the subject of speculation and private gain—a penalty is imposed on the unfaithful servant who thus perverts the trust and unquestionably destroys any claim he may assert to any interest upon the amounts loaned or deposited.

But the prohibitions must apply to a case where the officer deposits the public money for his individual benefit, or loans it to any one, whether for his individual benefit or not. He is excluded from the use directly and indirectly, of the funds intrusted to his charge, except for the purpose prescribed by law, and will be held to strictest accountability. The body he represents may, nevertheless, authorize him to deposit the public money with a banker, and agree to receive interest for its use, if there is no obligation on their part to continue the deposit for any specified time, which would thus change into a loan what would otherwise be a mere deposit. If the parties exercised a sound discretion, and in good faith select a safe depositary, there could be no objection to their adopting such a course, and they would then have done no more than they ought to.

The present case is not one where the public officer claims any private advantage, or any act on his part is disclosed which can be construed to come within the mischief the statute was intended to remedy.

If, however, there was a state of fact presented to us authorizing an inference that a loan or deposit has been made by the plaintiff, as township treasurer, can the penalty he consequently incurs defeat the right of the township to recover the money from the borrower or depositary? We believe the punishment would be inflicted on the agents without absolving them with whom he is implicated from their liability to repay the amount loaned or deposited, the illegal loan, or deposit, cannot affect the title of the township to the original fund.

We are referred to the case of Condell v. Dawson (422 B., 375,) as an authority to prove when an act is prohibited by statute which inflicts a penalty for its commission, that any agreement made which contravenes it is, necessarily, void. We admit the general principle, but must confine its operation to the parties themselves. When they are asking us to interfere, and we are satisfied we must if we take cognizance of the claim. aid either party to violate the law. Our course is plain—we leave the parties where we found them.

But it is not always true that a statutory penalty, or an act of misfeasance, necessarily avoids a contract, where, by express words, the law does not declare it shall be, as in Smith v. Mourhood, (14 M. & B.)

Demurrer overruled.

Tilden, Rairden & Curwen, for defendants.

[Superior Court of Cincinnati, Special Term, November, 1857.]

ANNA VANDYKE v. CITY OF CINCINNATI, AND M. L. HARBESON.

For opinion in this case, see 1 Disney, 532.

GUARANTEE OF DEPOSIT—SURETIES

[Superior Court of Cincinnati.]

H. T. DEBRUIN v. ADMR. OF H. STARR.

An indulgence to a principal at his request, unless it is founded on some contract cannot be considered as discharging the surety.

GHOLSON, J.

An action on a written guarantee of H. Starr, deceased, as to a deposit of money made of $900 by plaintiff with P. B. Manchester. Judge GHOLSON delivered the opinion, remarking that the court differed on some questions in the case, but the point of agreement was that the pleadings should be amended to raise the question properly.

The certificate was to the following effect:

"People's Bank, June 2, 1851.

"Cin.–$900–Shadford Easton has deposited in this bank, in American gold, $900, payable to the order of H. J. DeBruin, in American Gold, with interest at the rate of 10 per cent. from date until paid, by giving sixty days' notice before drawing it. P. B. Manchester."

The money was deposited in June, 1851, and guarantor died in two months after.

In the opinion of Judge GHOLSON, the guarantee, in terms, contemplated an agreement between plaintiff and Manchester, as to the conditions of deposit, which must be deemed to be within the guarantee; and that it appearing the guarantee was acted on, the liability of Starr to make good the money, on the part of Manchester, attached. The next question was whether the liability was discharged by anything that subsequently occurred On one ground presented, a judgment might well be claimed for defendant. It appears, from a credit endorsed on the certificate, that interest in advance, for a certain period, was taken by plaintiff.

From this a contract to forbear for that time might be inferred; and this, according to the terms of the contract of deposit, would have been a change prejudicial to the security, and have operated as a discharge. It is true, there is a statement of the plaintiff, which is in evidence, that shows he had no such intention. This, however, was a matter of the weight of evidence, and the decision of the court at special term, as to the rule on the subject was conclusive. But no such defense was made in the answer. The same

might be said as to another defense—the want of notice as to default. This was matter of discharge. 57 Eng. C. L. 810.

The only defense set up as the answer, except the denial of the fact that the deposit was made on the credit of the guarantee, is the mere laches or delay of the plaintiff, at the instance of Manchester, in withdrawing his deposit after the death of Starr. An indulgence to a principal at his request, unless it be founded on some contract —and then it is not properly an indulgence—cannot be considered as discharging the surety.

The only defenses set up in the answer, therefore, failing for reasons stated, and the others relied on not appearing in the record, the judgment must be reversed, and the cause remanded for the purpose, if desired, of amending the pleadings and for a new trial.

Judge STORER was of opinion that the transaction changed into a loan, and lost its original character as a deposit money. It seemed it was nothing more nor less than a man agreeing to do one thing, and the party for whose benefit it was done doing another.

Caldwell & Paddock, for plaintiff.

Groesbeck & Thompson, for defendant.

[Superior Court of Cincinnati, Special Term, November, 1857.]

SOCRATES GLAYS v. A RAFT OF PINE LUMBER, ETC.

For opinion in this case, see 1 Disney, 503.

[Superior Court of Cincinnati, General Term, March, 1858.]

THE MARINE RAILWAY v. THE STEAMBOAT MONARCH.

For opinion in this case, see 2 Disney, 117.

The opinion in this case was affirmed by the supreme court. See opinion, 7 O. S., 478.

MALICIOUS PROSECUTION.

[Superior Court of Cincinnati.]

EHRMAN V. HOYT ET AL.

1. If a party enters, even upon his own property, forcibly, by forcing a door or committing violence on the inmates, his whole act becomes unlawful, and there would be probable cause for bringing an accusation against such person, and the person bringing such action would not render himself liable to an action for malicious prosecution.
2. If a person entertained an honest belief that another had committed a violation of the law, and acting on that belief, caused the prosecution of such person to be instituted from a desire to bring the supposed offender to justice, then such person who thus instituted the proceeding is not liable to an action for malicious prosecution.

Below we give a brief outline of the charge to the jury in the case of Ehrman v. Hoyt et al. We propose in a few days, to publish a statement of facts, and the court's charge to the jury, in full, from the manuscript of Judge SPENCER, and we take what follows from the report in the *Commercial*, of yesterday, but there is sufficient novelty and interest in the case to warrant us in publishing hereafter a full statement as above proposed:

SPENCER, J.

The court charged the jury, that if a party enters, even upon his own property, forcibly, by forcing a door or committing violence on the inmates, his whole act becomes unlawful, and there would be probable cause for bringing an accusation against him; and if there were probable cause for the prosecution instituted against Ehrman, the jury should render a verdict for defendants. If they were of opinion there was not probable cause, the next inquiry would be whether the prosecution was instigated or carried on maliciously by defendants. In the absence of testimony either way, the want of probable cause might in itself raise an inference of malice; but where the circumstances were disclosed on which the parties act, it was for the jury to say whether malice existed in reality or not—by malice, in this connection, being meant the promptings of a bad heart, or improper motives—the desire, not to bring a supposed offender to justice, but of accomplishing some private end or purpose not connected with the public good; and as such motive was of the essence of the act, it was of importance to ascertain what that motive really was. If the defendants entertained an honest belief that Dr. Ehrman had committed a violation of the law, and, acting on that belief, caused the prosecution to be instituted from a desire to bring a supposed public offender to justice, then such of the defendants who so acted, are not liable in this action. But, if, instead of acting for the public good, their purpose was to drive Dr. Ehrman away from the premises, or prevent Dr. Nichols from getting possession, or for other private purposes, the motive was an unlawful one, and no defense to the action.

It appeared two meetings were held at Yellow Springs, the object of which was to prevent Dr. Nichols from coming there. Whether malice was to be inferred from these meetings must depend on the view the jury took of the purposes to be accomplished by them. At the first meeting extracts were read touching the principles it was supposed would be inculcated in the institution about to be reared there by Dr. Nichols. At this meeting a committee was appointed to wait on Dr. Ehrman, and induce him, if possible, to break off with Dr. Nichols. When that committee called on Dr. E. they were told by him that he had already contracted with Dr. Nichols. At a subsequent meeting the committee reported, and Dr. Nichols being then present, explained his views and purposes, upon which the meeting seemed satisfied and broke up without taking further action. The jury should determine whether this meeting furnished evidence of hostility to Dr. Ehrman, or only to the institution it was supposed Nichols was about to establish. If the latter, only, it was no evidence of malice; if the former, it did furnish such evidence.

As to the measure of damages, (in the event of the jury finding for the plaintiff,) any actual injury he sustained, any expense he sustained thereby or through loss of business, was properly chargeable against the defendants. The first effort of a jury should be to make compensation for the actual damage sustained; but beyond this the law allows vindictive damages, or "smart money," as it is sometimes called, for the sake of preserving the peace of society from malicious wrong. In this respect it would be proper to discriminate between the defendants according to the degree of malice shown by each, but if all acted for a common purpose, all were alike guilty

CERTIFICATE OF DEPOSIT—INDORSEMENT.

[Superior Court of Cincinnati.]

J. B. FUNK v. ELLIS & STURGES AND T. F. SMITH.

The inference applicable to promissory notes and bills of exchange regarding their indorsement ought not to be applied to certificates of deposit, when the owner of such certificate, having transferred it, is importuned to indorse it, and at the time of making the indorsement he does not intend to be bound by it, having been assured by the indorsee that the object of indorsing it was merely to enable him to collect it.

STORER, J.

The defendant, Smith, gave $2,000 cash, and a certificate of deposit, amounting, with interest, $200, on Ellis & Sturges, for the purchase of property in Fulton. The evidence was diverse on the point as to whether the certificate was taken for cash or for what it might be worth.

Disposing of the case, Judge STORER was inclined to think that the weight of evidence was to the effect that it was intended to be transferred to the seller for whatever he might be able to obtain for it. It appeared the plaintiff asked defendant, Smith, to indorse the certificate; and he (plaintiff) says he knew at the time he first saw it that it was payable to order, and that if Smith indorsed it he would be liable as indorser. On the other hand, Smith says he did not expect to be held as indorser; that he did not know what the liability of an indorser was, never having before indorsed a note; but that, being importuned, and told that the object was to enable plaintiff to collect the money, he put his name on it; and the question was whether, in good faith, and common honesty, plaintiff ought to recover. What did the parties understand they had done at the time this was transferred? If there was no mutuality as to the effect of the act to be done, then there certainly could be no contract.

Were it not for the ruling of the supreme court in Miller v. Austin, he (Judge S.) should be inclined to hold with the supreme court of Pennsylvania, (affirmed since the decision in the case of Miller v. Austin,) that these certificates of deposit could not be brought within the category of promissory notes that were negotiable. But regarding them as negotiable for the purposes of this suit—the very appearance of such a paper as this certificate was out of the ordinary course—for there are no bills of banks payable after date They are held to be void, and ought to be, for no bank ought to issue a post-note. This was not one of those transactions where one party supposed he was paying cash, and the other believed he was receiving it. Hence, although the inference would be where a promissory note was made payable in the ordinary way, and the parties were solvent, that the indorser intended to be bound, that when a paper of this kind was transferred, worth only 33⅓

in market on the face of it, the court would hold that the inference applicable to promissory notes and bills of exchange generally, ought not to be applied. They should, therefore, hold, when Mr. Smith put his name on the back of that paper, he did not intend to be bound by it.

King & Anderson, for plaintiff.
Tait & Perry, for defendants.

[Superior Court of Cincinnati, Special Term, October, 1857.]

CARNEY V. KIRBY.

For opinion in this case, see 1 Disney, 479.

ATTACHMENT.

[Superior Court of Cincinnati.]

MARY MULLIGAN V. H. B. RUGGLES.

The mere act of selling, or the intention to sell, could not be fraudulent, unless accompanied by such circumstances as necessarily implicate the parties in a design to defraud their creditors and, therefore, where an attachment is secured upon filing an affidavit alleging that defendants were about selling their goods to certain parties for the purpose of defrauding plaintiff: Such attachment upon motion will be dismissed, as the ground assumed for the same is untenable.

STORER, J.

The motion to dismiss the attachment issued in the case of Mulligan v. Ruggles and wife, on an affidavit of the plaintiff that defendants were about to sell their property to defeat the plaintiff's claim, founded on the verdict of a jury, for $400, was disposed of on the 25th ult., by Judge STORER. The court remarked, in the course of a long opinion, that the claim set up was merely a demand for damages, which, though assessed by a jury, there was, as yet, no judgment to confirm the right to recover. For aught the court knew, the verdict may be set aside and a new trial granted. And if the party should die while the suit was pending, it would abate, and the plaintiff's claim be immediately lost. It was then equivalent to an ordinary demand for damages, after the petition was filed; and if an order for attachment could not be allowed then, it could not be now. The ground assumed for the attachment is untenable. The allegation was that defendants were about selling their goods to certain parties in the state of New York, for the purpose of defrauding the plaintiff. But this did not bring the case within the language, certainly not within the meaning of the Code. The mere act of selling, or the intention to sell, could not be fraudulent, unless accompanied by such circumstances as necessarily implicate the parties in a design to defraud their creditors.

The remedy by attachment was a peculiar and very stringent one, and must be construed strictly, and if the court could not find in the affidavit a clear and unequivocal ground to sustain the order, it should be set aside.

It appearing that an attorney was the only security upon the undertaking of indemnity on the issuing of the attachment, the court alluded to the 25th rule of that tribunal, declaring that attorneys should not be received as bail or surety, (except as surety for costs for non-resident plaintiffs,) and remarked that, were it necessary they might require a new surety to be given, but, as they had disposed of the case on other grounds, it was not necessary to do so.

The order of attachment was accordingly dismissed.

[Superior Court of Cincinnati, Special Term, December, 1857.]

SAMUEL WIGGINS v. THE COVINGTON AND CINCINNATI BRIDGE COMPANY.

For opinion in this case, see 1 Disney, 573.

[Superior Court of Cincinnati, Special Term, December, 1857.]

R. CREIGHTON v. F. KELLERMAN.

For opinion in this case, see 1 Disney, 548.

[Superior Court of Cincinnati, Special Term, December, 1857.]

CHARLES WILSON v. GIOVANNI FERRARI.

For opinion in this case, see 1 Disney, 579.

MUNICIPAL CORPORATIONS.

[Superior Court of Cincinnati.]

ANN HEDERICK v. P. F. CHRISTMAN AND WILLIAM A. DICK.

Where a city by ordinance provides for the regulation of its markets, constituting the superintendents of them as special officers for the purpose of removing all obstructions and to see that parties are prosecuted who violate these regulations: *Held*, that such superintendent is justified in arresting a person who refused to take any location he could lawfully make, and such arrest could be lawfully made without the officer providing himself with a warrant.

SPENCER, J., AND A JURY.

The plaintiff sought to recover damages for an assault alleged to have been committed by defendants.

On the morning of the 23d of April last, in the Sixth Street Market the defendants, one of whom was superintendent of markets, and the other his assistant, found the plaintiff, during market hours, exposing to sale certain merchandise, on a stand placed by her on the south-west corner of Western Row and Sixth street; and the defendants; regarding her position there as contrary to the ordinance of the city, removed her stand and wares across to the north-east corner. It appeared in evidence that some altercation took place, which resulted in the defendants taking her to the city prison, the occurrence having transpired early in the morning, before the police office was open for the dispatch of ordinary business. After the court was opened, the plaintiff was discharged by the police judge, as it would appear, without any trial.

In his charge to the jury, Judge SPENCER referred to the matters set up in the defense,—viz.: Three ordinances passed by the city council—the first bearing date, 15th August, 1855, by the fifty-eighth section of which it is made the duty of the superintendent to assign proper stands for all persons dealing in the markets, to remove all obstructions and to see that parties are prosecuted who violate the regulations—the superintendents being created special officers for that purpose; and if resisted in the discharge of these duties, such resistance was pronounced a misdemeanor, for which the party was liable to be punished by a fine not exceeding $20. The next ordinance relied on was passed on the 5th of February, 1857—the fifth section providing that no person except infirm men or women, should expose any merchandise for sale except on the north-east side of the market's space. Another ordinance was passed on the 22d April, which imposes a penalty of $50, or imprisonment, on any one violating this last ordinance; but this ordinance, passed only the day previous to this occurrence, could not, because of its non-publication at the time, be applied in such a manner as to subject the plaintiff to a prosecution under it, and could not, therefore, furnish any justification to the defendants for taking the course they did; and whatever justification they could make properly de-

pended (as Judge SPENCER instructed the jury), on the prior ordinances.

It was incumbent on the defendants to show they were warranted in taking the course they did. No doubt they would be responsible unless they justified themselves under the ordinance. The superintendent says he assigned to her the north-east corner, and she refused to be confined to any position, unless she had a particular one on the south-east corner.

Now, if she refused to take any location he could lawfully make, he was justified in removing her property to any place in the market, or outside of it, if he thought proper—and the question then would be whether the removal was properly made—whether the defendants made use of more force or violence to her person than was necessary. If they did not, then her resistance would have been unauthorized; and to make their justification complete, it would be necessary the officers should have first provided themselves with a warrant. They were, also, justified in taking her to the city prison for the purpose of prosecuting the case. Her acquittal would furnish *prima facie* evidence that she was not guilty; but, nevertheless, the defendants in this matter would not be responsible if the jury should believe the case was at least a proper one for prosecution. The jury, after a short deliberation, returned a verdict for defendants.

Piatt & Piatt, for plaintiff.

E. P. Norton & W. Disney, for defendants.

[Superior Court of Cincinnati, Special Term, December, 1857.]

ERAMUS DENNISON v. C. T. JESSUP.

For opinion in this case, see 1 Disney, 580.

This case was affirmed by the superior court in general term. See opinion 2 Disney, 150.

[Superior Court of Cincinnati, Special Term, December, 1857.]

JAMES B. RAMSAY & CO. v. GEO. OVERAKER.

For opinion in this case, see 1 Disney, 569.

SCHOOLS—TAXATION—INJUNCTION.

ISAAC WARRING ET AL v. R. C. HAZLEWOOD, TREASURER ET AL.
D. E. FELTER ET AL v. HAZLEWOOD ET AL.

1. An injunction will be granted to restrain the treasurer from collecting a tax for the building of school houses in the subdistricts, on the ground that the said districts had been charged, in some cases, with the entire, and, in other cases seven-eighths of the cost of building the said school-houses.
2. A law authorizing a board of education to assess in the subdistricts the largest proportion of the expense of buil ing a school-house is unconstitutional, as all taxes must be uniform.

BY THE COURT.

In the case of Isaac Warring and others v. R. C. Hazlewood, treasurer, and the school board of Columbia township, and D. E. Felter and others v. Hazlewood and the board of education of Anderson township, and in one or two other suits of the same character (instituted by different parties) petitions had been filed asking injunctions to be granted to restrain the treasurer from collecting tax for the building of school-houses in the subdistricts, on the ground that the said districts had been charged, in some cases, with the entire, and, in other cases, seven-eighths of the cost of building the said school-houses. On the part of the petitioners it was plain that the law authorizing the board of education to assess in the subdistricts the largest proportion of the expense of building a school-house was unconstitutional, as all taxation must be uniform; and, also, that, under the law of 1857, no taxes could be levied exceeding two mills on the dollar, unless the question was first submitted to the voters of the township.

The court (Judge OLIVER and MALLON being on the bench) remarked that the questions involved were of great importance.

They were satisfied there had been a great deal of carelessness or want of foresight in the manner of getting up the school law; and without fully determining the questions presented to them in the argument, they were satisfied there was sufficient appearing in the case to allow the injunction. The parties could be further heard upon answer. The motion to dissolve the injunction was accordingly overruled.

Fox & Fox, Dennis and Peat, Johnston & Carroll and Oliver Brown appeared in the cases.

DEBTOR AND CREDITOR.

[Superior Court of Cincinnati.]

EUREKA INS. CO. v. DUBLE.

EUREKA INS. CO. v. IRWIN & CO.

Where the debtor owes diffierent debts to the same creditor, and make a partial payment, he has the option to require the application to be made to which one he pleases. If, however, he makes the payment without qualification, and does not ask any special appropriation, the creditor may indorse it or credit it as he sees fit. Should the creditor neglect to do so, and suit be brought, the court would make the application as might be equitable between the parties.

Action against Duble on a promissory note made by Irwin & Co., and endorsed by Duble for the accommodation of the makers, dated April 30, 1857, payable July 2, for $750. In the other action, against Irwin & Co., the plaintiff seeks to recover on a note made by that firm in May, 1857, payable September 4, to plaintiff's order for $843. Irwin & Co. were the principal debtors on both notes, which were given for premiums and risks taken by plaintiff.

STORER, J.

On the 30th July the first note being due, the defendants, Irwin & Co., were enlisted to a credit for an average loss due them by plaintiffs, amounting to $155. This sum should be credited on one or other of the notes, and the question presented was on which it should be appropriated.

There could be no doubt as to the general rule, that where the debtor owes different debts to the same creditor, and makes a partial payment, he has the option to require the application to which one he pleases. If, however, he makes the payment without qualification, and does not ask any special appropriation, the creditor may indorse it, or credit it as he sees fit. Should the creditor neglect to do so, and suit be brought, the court would make the application as might be equitable between the parties.

In the present case no actual payment was made by the debtor, the amount sought to be applied being a credit in the hands of the plaintiffs, in favor of E. & Co., which the latter had a right to receive in cash, unless the plaintiff could retain it for a subsisting debt, as a note on which Duble was indorser was due and unpaid at the time this credit arose, the course to be pursued would be to indorse a credit upon it. Unless this was done, E. & Co., would then have recovered the amount from plaintiffs. Ordered, that the credit be entered on the note endorsed by D.

Mills & Hoadly, for plaintiff.

Caldwell & Paddock, for defendants.

[Superior Court of Cincinnati, Special Term, November, 1855.]

THE DAYTON AND CINCINNATI R. R. CO. v. GEORGE HATCH ET AL.

For opinion in this case, see 1 Disney, 84,

[Superior Court of Cincinnati, Special Term, January, 1858.]

CHARLES CONAHAN v. THOMAS CULLIN.

For opinion in this case, see 2 Disney, 1.

This case was distinguished in the case of Rocke v. Raney, 15 Bull., Dec. 333, 334.

SALE OF LANDS—GUARANTY.

[Superior Court of Franklin County.]

BOYD V. MILLER AND HAPGOOD.

Where a vendor at the time of sale of certain lands gives a guaranty of its quality, and such lands afterwards prove to be of an inferior quality, the vendor will be liable on such guaranty.

MATTHEWS, J.

A case of considerable interest to land dealers and speculators has just been decided in the superior court of this county, Judge MATTHEWS presiding.

About one year since, Miller and Hapgood, then in partnership, sold to Thomas Boyd, in part exchange for his farm, a tract of land containing three hundred and sixty acres, in Alamakee county, Iowa, at a price of six dollars per acre, at the same time giving to Boyd a guaranty, in writing, that said tract was of first rate soil, and not of a mountainous character. This guaranty or warranty was given before the deed of Boyd and his wife had been signed by them, but subsequent to the making of the deed by Hapgood and Miller, and, as was contended by the defendants, was a gratuity on the part of the vendors, not having been stipulated for in the article of agreement of sale previously made between the parties.

At trial, the plaintiff (Boyd) brought evidence to show that the land was of inferior quality, and the defendants producing no evidence to oppose this, the jury rendered a verdict against the defendants of $2,000 damages, being only $160 less than the whole consideration money. There was no charge of fraud against the defendants, and it was only by a departure from the usual course in land sales in giving guaranty as to quality, that they were rendered liable.

The case will probably be taken up, on error, to the supreme court of the state, now in session.

C. N. Olds, for plaintiff.

Henry C. Noble, for defendants.

[Superior Court of Cincinnati, Special Term, December, 1857.]

EDWIN LUDLOW v. EDWARD HURD ET AL.

For opinion in this case, see 1 Disney, 552.

[Superior Court of Cincinnati, Special Term, March, 1858.]

JOHN B. PURCELL v. NICHOLAS GOSHORN AND LORENIA GOSHORN.

For opinion in this case, see 2 Disney, 90.

This case was affirmed by the supreme court. See opinion, 11 O. S., 641

OPERATING AND MAINTAINING A FERRY.

[Superior Court of Cincinnati.]

6592 SAMUEL WIGGINS v. JOHN GOOD.

7192 —— —— v. —— ——.

1. Where a person owns a ferry right and sells and conveys an undivided half of his right to another, such purchaser takes his half with all its advantages and incumbrances, and whatever the previous arrangement between the city and the sole owner might have been regarding the furnishing of a landing, such purchaser takes an undivided half of its benefits and burdens and the joint owners become equally bound to furnish a proper landing, for the use of the ferry.
2. The rights and obligations of the parties in conducting the business of such ferry, was that of partners, and any advances made by one for the benefit of both, is a matter of account, and must be settled as such.

One of these cases was tried by a jury, a verdict rendered for the plaintiff, and a motion for a new trial made by the defendant. The other was submitted to the court. The latter case, and the motion for a new trial in the former, were argued together, with a view to a particular question supposed to arise in each case, and involving the right of the plaintiff to sustain either of the actions in the form in which they were brought. This question involved an inquiry into the nature of the relation between the plaintiff and defendant, as the owners of a ferry between the cities of Cincinnati and Covington.

It appeared from the evidence that Wiggins & Garniss owned the ferry right from the public landing in Cincinnati to Kentucky, and the right to use, for the purposes of the ferry, so much of the landing as might be required. An arrangement was made with the city by which the use of the landing was relinquished under certain conditions. Wiggins and Garniss agreed to remove the ferry landing to wharves of their own, or such as they might obtain, between Main and Vine streets; and, in consideration of this, and during the

time the arrangement continued the city gave to them the use of the landings at the termination of Walnut and Vine streets, and extended their exclusive right of a ferry to Vine street. Garniss afterwards sold out to Wiggins, and the latter became the sole proprietor. Wiggins then sold and conveyed to Good an undivided half of his ferry right. Wiggins and Good, in connection with the owners of the ferry right on the Kentucky side of the river, procured the necessary boats, and conducted a ferry, which is still in operation.

It appeared that the owners of the ferry right on the Kentucky side had nothing to do with furnishing a landing on the Ohio side, that obligation devolving on Wiggins & Good, or one of them.

The first and principal matter of dispute between Wiggins & Good involved in both cases, was whether both of them, or Wiggins alone, were bound to furnish a landing for the ferry. Good claimed that he had nothing to do with furnishing a landing, that matter devolving on Wiggins, and Wiggins alone being interested in the landings at the termination of Walnut and Vine streets. It appeared that, in point of fact, from the time of the sale to Good to the commencement of these suits, Wiggins had furnished a landing upon wharf property owned by him. The suits were brought—one to recover a portion of the expense incurred in improving the landings at the termination of Walnut and Vine streets, and the other for the use of the wharf of Wiggins as a landing for the ferry.

I have examined the conveyance from Wiggins to Good, and, in connection with it, the contract between Wiggins and Garniss and the city. What were the rights acquired by Good depends entirely on the construction of that conveyance and contract. I am satisfied that they did not vest in Good any right or interest in the individual wharf property of Wiggins. There is nothing in them to bind Wiggins to furnish a landing on his individual property. Whatever may have been the intention in that respect, there is no language in the writings that, in my opinion, can be construed to have such an operation. The writings might, by some proper proceeding, be set aside or changed, and parol evidence as to the intent of either, or both of the parties, might be received for that purpose; but, in the present cases, I cannot consider any such evidence.

When the conveyance from Wiggins to Good was executed and delivered, the latter became possessed of one undivided half of the ferry right, or franchise. He took it with all its advantages and incumbrances. Whatever the arrangement with the city may be considered, Good took an undivided half of its benefits and burdens; and I hold that Good, equally with Wiggins, became bound to furnish a landing between Main and Vine streets, for the use of the ferry.

Such being the rights and obligation of the parties, and they actually conducting the business of a ferry between Cincinnati and Covington, what was their relation in that business? I am satisfied it was that of partners, and that, as to any advances made by one

for the benefit of both, it is a matter of account, and must be settled as such.

The right and title of the plaintiff and defendant as owners of a ferry right or franchise, and the connection between them thus created, is to be distinguished from the relation created by the use of their joint property. As to the former, they are to be regarded as tenants in common real estate, but as to the latter, as partners. The two owners of a ferry right are under no obligation as such to each other to procure boats and run the ferry. If they agree to do so, then their rights and obligations in the running of the ferry depend upon their agreement, and not on their joint ownership of a ferry right. It differs nothing in principle from the case of two tenants in common of a field, or lot of land, who should agree to carry on upon it the business of farming or gardening.

In the present case I am satisfied that there are, in fact, two joint adventures in which the plaintiff and defendant have been involved from carrying on the ferry. One in connection with persons in Kentucky, and the other as between themselves; and the latter appears to be limited to the matter of furnishing a landing under the arrangement with the city. It necessarily became a joint matter, and what are the respective rights and obligations of the parties growing out of it must, I think, be settled in one action, framed for the purpose. In this view, it is my conclusion that the present actions are improperly conceived, and cannot, as they stand, be maintained. But I think the two cases may be consolidated, and by the proper amendment, be made to present a fair case for determination. To enable this to be done, the verdict will be set aside, and leave given to consolidate the cases, and amend by asking an account of the dealings of the parties in reference to a landing for the ferry, up to the time of notice, putting an end to any implied understanding between the parties.

[Superior Court of Cincinnati, Special Term, January, 1858.]

SIDNEY S. HARTSHORNE ET AL v. JOSEPH S. ROSS, ADMR., ET AL.

For opinion in this case, see 2 Disney, 15.

This case was affirmed by the superior court in general term. See opinion, 2 Disney, 444. Quoted in Doyle v. Doyle, 50 O. S., 330, 343.

TRUSTS AND TRUSTEES—CORPORATIONS—EQUITY.

CHAPIN V. SCHOOL DISTRICT NO 2, IN WINCHESTER.

1. A gift of real or personal estate to promote education is a charity.
2. A corporation may be the trustee of a charity, provided the trust be not repugnant to or inconsistent with the proper purposes for which the corporation was created.
3. If a corporation be incompetent to hold as a trustee, that will not make void the devise or grant, but equity will appoint a new trustee to carry out the objects of the charity.
4. A variation from the strict legal designation in a devise or conveyance to a corporation, for charitable purposes, will not make void the devise or grant, provided the corporation meant can be sufficiently ascertained from the terms used.

BY THE COURT.

A gift of real or personal estate to promote education is a charity.

A corporation may be the trustee of a charity, provided the trust be not repugnant to or inconsistent with the proper purposes for which the corporation was created. If a corporation be incompetent to hold as a trustee, that will not make void the devise or grant, but equity will appoint a new trustee to carry out the objects of the charity.

A variation from the strict legal designation, in a devise or conveyance to a corporation for charitable purposes, will not make void the devise or grant, provided the corporation meant can be sufficiently ascertained from the terms used.

A grantor, "in consideration of helping to support and maintain a school for the purpose of teaching the art of reading, writing and arithmetic, in the second school district of the town of W.," conveyed "unto the inhabitants of the district forever, for the sole purpose of supporting a school in the district, a tract of land, to have and to hold the same to the said inhabitants of the said second school district and their successors forever." He, also, at a subseqnent time, made another conveyance of another tract, in consideration of one dollar and other valuable considerations, to William Allen, agent of the district, "or to his successor as agent for said school district forever;" "the profits and rents of which are forever to be applied for the benefit of the inhabitants of the district, for building a meeting house thereon, and toward the support and maintenance of worthy ministers of the gospel," to have and to hold to "him, the said William and successor as agent of said district." Both deeds contained the usual covenants of warranty,

Held, that the conveyances were in trust for charitable purposes and not upon condition. That the district was a good trustee under the first deed, and that the grantee was sufficiently designated to take the deed. That the district could not be a trustee

under the second deed, the object of the trust being inconsistent with the design for which school districts are created; but that the beneficiaries being sufficiently ascertained, a court of equity would appoint a trustee to uphold the charity.

DAMAGES—NEW TRIAL.

[Hamilton Common Pleas Court.]

MARY JANE CRIBBETT v. WILLIAM MATHERS.

motion for a new trial upon the ground that the damages awarded were excessive cannot be granted by the court unless it also appears that the jury acted from passion or prejudice.

MALLON, J.

In the case of Mary Jane Cribbett v. William Mathers in which a verdict had been returned for the plaintiff for $10,000, the motion for a new trial, presented by defendant's counsel, was passed upon by Judge MALLON.

The court remarked that the ground on which a new trial was asked was, that the damages were excessive. The plaintiff had alleged a breach of promise of marriage, and the allegation that under that promise the defendant had accomplished her seduction, was allowed to go to the jury in aggravation of damages. Much had been said by counsel on both sides as to what public opinion was in this case. The court did not try to ascertain what that public opinion really was, or think it proper to consult it. It would be an unsafe and improper guide for a judge to follow. The law pointed out clearly and distinctly the course which the court must pursue in a motion of this character. Where there was no rule of damages, except the feelings and opinions of the jury, it was difficult to say that the damages were excessive, although the amount might appear to be large. The rule is that the judge cannot set aside a verdict because the damages are excessive, unless it appear also that the jury acted from passion or prejudice; and, although the verdict awarded a larger amount than he (Judge MALLON) would have given, and that in giving it the jury had probably looked at the case in a stronger light against the defendant than the evidence would justify, he could not say they acted from prejudice or passion The circumstances, as he supposed, would have warranted the jury in finding much less damages; but they had a right to pass on the evidence; and though, therefore, from the first there was a disposition on the part of the court to set aside the verdict, they did not, after a careful examination of the law, find anything to authorize them to do so. The application for a new trial should, therefore, be refused.

The defendant's counsel, W. T. Forrest, intimated that he should tender a bill of exceptions.

[Superior Court of Cincinnati, General Term, January, 1858.]

B. MATLACK ET AL., TRUSTEES, v. J. DAN JONES, AUDITOR, ET AL.

For opinion in this case, see 2 Disney, 2.

[Superior Court of Cincinnati, Special Term, November, 1854.

THE CITY OF CINCINNATI v. THE BOARD OF COMMISSIONERS OF HAMILTON CO.

For opinion in this case, see 1 Disney, 4.

[Superior Court of Cincinnati, General Term, June, 1856.]

MARINE RUFFNER v. COMMISSIONERS OF HAMILTON CO. ET AL.

For opinion in this case, see 1 Disney, 196.

This case was cited in the dissenting opinion in the case of McGill v. State, 34 O. S., 228, 264, 265. Also cited in Hays et al. v. Jones et al., 27 O. S., 218, 232; State v. Shearers, 46 O. S., 275, 282. Cited and distinguished in Benninger v. Gall, 1 C. S. C. R., 331, 334.

[Superior Court of Cincinnati, Special Term, May, 1856.]

RUFUS MAYHEW v. COMMISSIONERS OF HAMILTON CO.

For opinion in this case, see 1 Disney, 186.

[Superior Court of Cincinnati, Special Term, March, 1858.]

PROBASCO v. JOHNSON ET AL.

For opinion in this case, see 2 Disney, 96.

[Superior Court of Cincinnati, Special Term, November, 1857.]

W. A. WORK & SON v. MITCHELL & WANZER.

For opinion in this case, see 1 Disney, 506.

[Superior Court of Cincinnati, General Term, February, 1858.]

MARK BUCKINGHAM, ADM'R, v MATILDA CARTER, ADM'X.

For opinion in this case, see 2 Disney, 41.

A contra opinion is found in Doughman v. Doughman, 21 O. S., 658.

[Superior Court of Cincinnati, General Term, March, 1857.]

ROBERT W. EADGELY v. COMMISSIONERS OF HAMILTON CO.

For opinion in this case, see 1 Disney, 316.

[Superior Court of Cincinnati, Special Term, May, 1858.]

GOODMAN & CORWIN, TRUSTEES, ETC., v. THE CINCINNATI & CHICAGO R. R. CO.

For opinion in this case, see 2 Disney, 176.

[Superior Court of Cincinnati, Special Term, March, 1857.]

SANDERSON ROBERT v. NEW ENGLAND MUTUAL INS. CO.

For opinion in this case, see 1 Disney, 355.

This case was affirmed by the superior court in general term. See opinion, 2 Disney, 106. Distinguished in Mutual Life Ins. Co. v. French et al., 30 O. S.. 240, 254. Cited in Klein v. N. Y. L. Ins. Co., 14 Otto, 88, 91.

[Superior Court of Cincinnati, General Term, March, 1858.]

SANDERSON ROBERT v. NEW ENGLAND MUTUAL INS. CO.

For opinion in this case, see 2 Disney, 106.

[Superior Court of Cincinnati, Special Term, June, 1856.]

THE SOUTHERN BANK OF KENTUCKY v. G. BRASHEARS AND J. W. LAWS, PARTNERS.

For opinion in this case, see 1 Disney, 207.

[Superior Court of Cincinnati, Special Term, March 1858.]

JAMES M. MARTIN v. WILLIAM H. GAYLE.

For opinion in this case, see 2 Disney, 86.

[Superior Court of Cincinnati, Special Term, March, 1858.]

A. D. GRIEFF & CO. v. MADISON COWGUILL.

For opinion in this case, see 2 Disney, 58.

[Superior Court of Cincinnati, General Term, June, 1857.]

THE CINCINNATI INS. CO. v. RIEMAN & SONS.

For opinion in this case, see 1 Disney, 396. For special term decision see *ante*, P., 280.

[Superior Court of Cincinnati, General Term, January, 1858.]

CHARLES CONAHAN v. CHARLES LEGGITT ET AL.

For opinion in this case, see 2 Disney, 9.

[Superior Court of Cincinnati, Special Term, June, 1856.]

JAMES WINSLOW, TRUSTEE, ETC., v. THE TROY IRON AND NAIL FACTORY, ET AL.

For opinion in this case, see 1 Disney, 229.

[Superior Court of Cincinnati, Special Term, May, 1857.]

THE WESTERN FEMALE SEMINARY v. JOHN M. BLAIR.

For opinion in this case, see 1 Disney, 370.

[Superior Court of Cincinnati, General Term, April, 1858.]

JOHN C. SMITH v. ROBERT B. BOWLER.

For opinion in this case, see 2 Disney, 153.

[Superior Court of Cincinnati, General Term, April, 1858.]

C. T. JESSUP v. E. B. DENNISON.

For opinion in this case, see 2 Disney, 150.

[Superior Court of Cincinnati, Special Term, June, 1857.]

JAMES L. VAN INGEN v. R. S. & O. E. NEWTON.

For opinion in this case, see 1 Disney, 458.

DEEDS.

[Superior Court of Cincinnati, Special Term, June, 1857.]

JOHNSON v. SIMPSON.

In the description of a deed, if the premises intended to be granted appear clearly and satisfactorily from any part of the description, and other circumstances of description are mentioned which are not applicable to such premises, the grant will not be defeated, but those circumstances will be rejected as false or mistaken.

STORER, J.

BY THE COURT.

In the description of a deed, if the premises intended to be granted appear clearly and satisfactorily from any part of the description, and other circumstances of description are mentioned which are not applicable to such premises, the grant will not be defeated, but those circumstances will be rejected as false or mistaken.

The defendant owned a lot of land known as No. 330, which he purchased of one S. It was bounded north by a passage-way twenty-five feet; east by lot No. 329; one hundred and twenty-six feet south by Merrimack street twenty-five feet; and west by lot No. 331, one hundred and twenty-six feet. He conveyed it to the plaintiff, who went into possession on taking the deed. The description in the deed to the plaintiff gave the correct boundaries on the north and south; and also the length of the lines correctly on the east and west; but it stated the lot on the east to be No. 347 instead of 329, and on the west to be 349 instead of 331. It stated, also, that, it was the same lot conveyed to him by S.

Held, that the error in the numbers of the lots on the east and west did not affect the validity of the deed, and that the defendant was not liable for damages on his covenants of warranty.

EVIDENCE.

[Superior Court of Cincinnati.]

BURNHAM V. AYER.

If a witness has any knowledge of the hand-writing of a person, which knowledge has been derived from seeing him write, or from seeing his writings or signatures on papers, that have been recognized by him as genuine, or from an intimate acquaintance with his signatures which have been adopted into ordinary business transactions, he may give his opinion of such writing.

STORER, J.

In assumpsit for money had and received, the plaintiff produced a mortgage of personal property to his intestate, purporting to be signed by the defendant, on the back of which was the usual affidavit of genuineness of the debt set forth in the mortgage. He proved the handwriting of the signature to the mortgage, and also to the affidavit, but did not produce the witnesses to the execution of the mortgage. *Held*, that upon the issue of non-assumpsit, the evidence was competent.

If a witness has any knowledge of the handwriting of a person, which has been derived from seeing him write, or from seeing his writings or signatures on papers that have been recognized by him as genuine, or from an intimate acquaintance with his signatures which have been adopted into ordinary business transactions, he may give his opinion of the handwriting. But it must appear that he has some such knowledge before he can be permitted to testify to his opinion.

[Superior Court of Cincinnati, General Term, November 1857.]

NEVILLE & CO. V. ADMINISTRATOR OF STEPHEN HAMBO.

For opinion in this case, see 1 Disney, 517.

PLEADING—PRACTICE.

[Superior Court of Cincinnati.]

D. E. MEIGS & CO. v. GUSTAVE GUIRAUD.

In an action upon a promissory note, in which the petition is in the usual form, but the note incorporated therein is in French, the court will not enter up a judgment on such petition until the plaintiff has amended it by furnishing a copy of the note sued on in the English language.

SPENCER, J.

Judge SPENCER said the action in the case was on a promissory note. The petition was in the usual form, but the note incorporated therein was in the French language, and no translation of it was furnished. If it went on the record in that form, nobody hereafter, in contemplation of law, would be presumed to know the cause of action. The court would not be bound to study French to determine it. They might have the whole of the petition in French as well as part of it. It is bad enough (continued Judge SPENCER) to print election tickets in a foreign language, but when it comes to proceedings in a court of justice, I think the practice must be discountenanced. I cannot, therefore, enter up a judgment. The plaintiff will be required to amend by furnishing a copy of the note sued on in the English language.

[Superior Court of Cincinnati, Special Term, December, 1857.]

JAMES B. RAMSAY & CO. v. GEORGE OVERAKER.

For opinion in this case, see 1 Disney, 571.

[Superior Court of Cincinnati, General Term, April, 1856.]

DOE EX-DEM. VILLAGE OF FULTON v. JOHN MEHRENFIELD.

For opinion in this case, see 1 Disney, 151.

RAILROADS—CONTRACTS—COVENANTS.

[Superior Court of Cincinnati.]

A. T. DUNHAM v. DAYTON AND CINCINNATI R. R. CO.

1. In determining whether the covenants in a contract are dependent or independent, the intention of the parties to the contract is to be regarded—there is no technical rule.
2. In an action on a contract for the construction of part of defendant's railroad, in which defendant agreed to assign to plaintiff a certain quantity of work each month, and plaintiff agreed to do all the work required to complete the road, for which he was to be paid a specified rate: *Held*, that plaintiff after a reasonable delay on the part of defendant to assign work, was bound to wait on defendant no longer, and was therefore, entitled to recover of defendant to a certain extent.

GHOLSON, J.

This action is founded on a contract for the construction of the part of the railroad of defendant known as "The Tunnel." There are various provisions in the contract, and the petition is framed on the idea that it is devisable, and that an action will lie for each monthly default on part of the defendant in ordering work to be done. There are, therefore, in the petition, several distinct causes of action. A demurrer has been filed to all and each of the causes of action

The first point to be considered is, whether the contract be devisible. If it be not, then none of the causes of action, except the first, can be sustained.

In determining whether covenants are dependent or independent, the intention is to be regarded—there is no technical rule. "The parties have a right to make their agreements dependent or independent; and as they make them, the courts are bound to enforce them." 5 Ohio, 490; 1 Ohio, 330. Any rule which has been laid down on this subject is really only in aid of the ascertainment of the intention of the parties, and must yield to the intention, if otherwise clearly ascertained.

The defendant agreed to assign each month a certain quantity of work to the plaintiff, but the plaintiff agreed to do all the work required to complete the tunnel, for which he was to be paid at a specified rate. Now it appears to me that it was not the intention that the plaintiff might fail or refuse to do the work for one, two, or three months, and then return and require work to be assigned. So if the defendant, after having exhausted the time allowed for suspension, neglected or refused to assign work, the plaintiff was bound to wait on them no longer; if they gave no work in August, they could not expect the plaintiff to be ready and willing to do work in November.

It may be that the provisions, as to suspension and giving out work, were intended to protect the plaintiff against delay, and secure at the same time to the defendants they not being required

to progress beyond their means. In this view, however, the damages would be for the delay, and not for the price or profits, and the action is brought for the latter.

The demurrer to all the causes, except the first, must be sustained, there being no sufficient averment of performance on the part of plaintiff, or breach on the part of defendant. But the first cause is sufficient—it shows a right to recover to a certain extent. The damages are, I think, properly laid, but, were it otherwise, a plea to the damage only is bad, unless the damage is so essentially connected with the causes of action, that, without it, the action could not be maintained; 53 E. C. L., 926; 49 E. C. L., 1002; 15 M. & W., 330; and this must be still more true of a demurrer under the Code.

BILLS AND NOTES—INTOXICATING LIQUORS.

[Superior Court of Cincinnati.]

SIMON LOWENSTINE v. SAMUEL MALES.

In an action upon a note, the defendant answered that it was given partly for cash loaned, the balance of the consideration being a certain amount of alcoholic liquor, which defendant claims was adulterated with strychnine and other active poisons, and that therefore there was a failure of the consideration, the liquor being useless to him as an article of merchandise: *Held*, that this answer did not set up a complete defense, but only a bar to the extent of the failure of the consideration.

SPENCER, J.

Submitted to Judge SPENCER on a demurrer to the petition. The action was brought on one of two notes, which, it appears, from the answer of defendant, were given partly for cash loaned, the balance of the consideration being one hundred and seventy-five gallons of alcoholic liquor, sold, as defendant claims, for "pure French brandy," while it was adulterated with strychnine and other active poisons. In consequence of the alleged impregnation, he states there was a failure of the consideration, the liquor being useless to him as an article of merchandise.

Judge SPENCER remarked that, though in contemplation of law, the defendant may have got an article useless to him as a matter of merchandise, (as he could not sell it without becoming amenable to the law), to render the contract void, it should appear the plaintiff had acted in violation of the first or second sections of the act prohibiting the use of active poisons in the manufacture or sale of alcoholic liquor, either in the process of preparation by rectifying or otherwise; or, if engaged in the manufacture, sale or rectifying of the same, by omitting to have branded on the cask or barrel the words "containing no poisonous drug or other added poison."

In the present case there was no pretense that the plaintiff was engaged in the manufacture of this liquor, but that he was a dealer in it, and undertook to sell it as pure brandy. The answer does not set up a complete defense, but only a bar to the extent of the failure of the consideration; and to this the replication of the plaintiff

furnished an answer, that the entire matter had been submitted to an award, by which it was determined that defendant received two hundred dollars for damages sustained by reason of the deteriorated liquor. The demurrer was accordingly overruled.

Kebler & Force, for plaintiff.

Crapsey, for defendant.

RAILROADS—JURISDICTION.

[Superior Court of Cincinnati.]

THE QUINEBAUG BANK V. DAVIS ADAMS AND THE MARIETTA AND CINCINNATI R. R. CO.

THE ATHENS BRANCH BANK V. BARGER AND THE MARIETTA AND CINCINNATI R. R. CO.

A cause of action can be properly maintained in the superior court of Cincinnati against a railroad that has its principal office properly established in the city of Cincinnati.

SPENCER, J

In these suits, representing a class of cases pending in the court, Judge SPENCER delivered an opinion. The actions were brought against the first named defendants as drawers, and against the Railroad Company, as indorsers of certain bills of exchange, and were submitted on issues tendered by the answers of defendants, claiming that the court had no jurisdiction to try the causes of action alleged against them, because, as it was averred, they were not residents of the city, and were not personally served with process therein, and that their codefendants, the Marietta and Cincinnati Railroad Company, had no principal office or place of business in this city, and that no part of their road extended to the same at the time the suit was brought. So far as the defendants were concerned, the court remarked, they were not properly served with process, unless the action had been rightly brought against the Marietta and Cincinnati Railroad Company, as they had not been served by any process in this county, but by process, directed to the Sheriff of Ross county. If the actions had been rightly brought against the Railroad Company, the defense must fail. The court here referred to various sections of the act establishing the court, and, in relation to the fourth section or classification of causes, (the construction of which was principally involved), remarked that the decision of the court, heretofore, had been practically against the position of the defendants as they had ruled that the county commissioners might be sued in the city of Cincinnati, by virtue of this fourth section of the act, on the ground that their principal office was within the city, and that the commissioners might be served within the city personally, although the county of Hamilton being more extensive, could not be said to be within it. It is manifest a railroad of this description could not have its loca-

tion in the city. Generally speaking, a corporation may be said to be local when the franchise must necessarily be exercised in a given locality. Hence municipal corporations are in their character local, and railroad companies, exercising their franchise within particular limits, or created carriers within certain points, are local so far as the exercise and enjoyment of their franchise is concerned, yet cannot be said to exist as an entire corporation or thing in one county. They have their existence in different counties, and could not be sued unless there was a provision of the law, statutory or common, which allowed an embodiment of the corporation in another way for the purpose of recognition. In this case the Railroad Company had their office within the district, for which they were organized as a company. It was not necessary it should be literally on the road, as a reasonable intendment would allow of a location at any convenient point in the vicinity of the line of the road. It was not necessary the road should have been completed between the termini before the office could be located, nor that a particular line should have been established instead of a general one.

Was the office, then, properly located in this city when the suit was brought? It appeared that the road was in running order from the Eastern terminus to Blanchester, and that a contract was entered into between this company and the Hillsboro road, by which the former was permitted to use the track of the Hillsboro road for the transaction of its business to Loveland, and that, subsequently an arrangement (made after the passage of the law which authorized the company to extend its road to Cincinnati), was effected with the Little Miami Railroad Company, by which the right of the road of the latter company was leased for the purpose of transporting freight and passengers over the road; further, it appeared the Marietta and Cincinnati Railroad had built a side-track, which connected with a depot they had constructed for the reception of freight in this city. Now, does this amount to an establishment of their road to the city of Cincinnati, so that an office existing in this city could be said to be within the line of an established road? It did not seem to the court necessary for this purpose, that the company should actually lay down its own rails from one end of the line to the other, to constitute a complete continuous line, when they had formed a contract of union with other companies, and established an independent freight depot connected with their track.

As to the point claimed by defendant, that an office of this description could not be established without the publication of a notice, the court was of the opinion that this was not a condition precedent, but directory, and, therefore, the omission of the notice did not render the act void.

The court holding, finally, therefore, that it has jurisdiction over the Railroad Company, which had its principal office properly established in the city, found the issue joined in favor of the plaintiffs.

The defendants' counsel intimated that they would present a bill of exceptions embodying the testimony; and the court inti-

mated that if answers were prepared disclosing a meritorious defense, they would allow them to be filed.

S. S. Cooke, for the Quinebaug Bank.

Mr. Welch and Taft & Perry, for the Athens Bank.

Judge Green, M. L. Clark and Judge Sloan, for defendants,

ADMISSION TO THE BAR.

[Hamilton District Court.]

EX PARTE DANIEL PORTER.

1. An attorney at law is not an officer within the purview of article XV, section 4, of the constitution.
2. An alien who has filed his declaration of intention to become a citizen of the United States, and who has also applied for admission to the bar, and having been examined as to his legal attainments and found to possess the necessary qualifications will be entitled to be admitted to the bar.

OLIVER, J.

Daniel Porter, Esq., an alien, who had filed his declaration of intention to become a citizen, and produced to the court his first papers, applied for admission to the bar.

A committee, appointed to examine him, touching his legal attainments, unanimously reported him qualified, but they directed the attention of the court to article 15, section 4, of the constitution of the state, to the effect that "no person shall be elected or appointed to any office in this state, unless he possesses the qualifications of an elector."

Upon the question presented under this revision of the constitution, the majority of the court was of the opinion (announced by Judge OLIVER) that an attorney at law was not an officer within the purview of this provision of the constitution; and that, consequently, inasmuch as the legislature, by the act of March 13, A. D., 1858, regulating the qualification and admission of persons to the bar, had provided that those who were citizens of the United States, or had made their declaration of intention to become such, and possessing the other qualifications, might be admitted, the court felt themselves bound to admit the applicant. Being of the opinion that the act of the legislature was not unconstitutional, the majority of the court did not feel that they were authorized or called upon to inquire into the policy of the legislature.

Judge MALLON concurred in this opinion.

The applicant was accordingly sworn and admitted.

CARTER, J. (dissenting.)

Judge CARTER, in expressing his dissent from the majority of the court, said he held that an attorney at law was, in contemplation of the constitution, an officer of state, as he was bound to swear to support the constitution and take an oath of office; and

he, therefore, regarded the act of March last, permitting an individual who declared an intention as to citizenship to become an attorney, as unconstitutional and void; and, beyond this view of the question, that it was improper for an individual, while owing allegiance to a foreign government, to swear to support the constitution of the United States and the constitution of the state of Ohio, or to take the oath of office, which was required of every citizen admitted to the bar. So far as the applicant was concerned, he believed him worthy of admission to the bar; but he regarded the rule now laid down a bad precedent. The gentleman should bear in mind that, as his admission was based on his declaration of intention to become a citizen, he was bound now to carry out that intention in good faith, and to become a citizen.

[Superior Court of Cincinnati, Special Term, March 1858.]

WILLIAM PIERSON v. THE CINCINNATI & WHITEWATER CANAL COMPANY.

For opinion in this case, see 2 Disney, 100.

[Superior Court of Cincinnati, General Term, 1858.]

HATCH & LANGDON v. HAMILTON POLLOCK, TREASURER.

For opinion in this case, see 2 Disney, 181.

[Superior Court of Cincinnati, Special Term, May, 1858.]

JOHN LOWDEN v. THE CITY OF CINCINNATI.

For opinion in this case, see 2 Disney, 203.

WHARF PRCPERTY.

[Hamilton Common Pleas Court.]

A. & V. SHINKLE v. STEAMER "VIRGINIA BELLE."

Where defendant moored his boat at his wharf in such a manner that it lapped over and extended below plaintiff's wharf, so as to prevent and in fact did prevent the plaintiff's boat from landing at her usual place: *Held*, that this was such an obstruction of the use of plaintiff's property and gives him a right of action and he may recover damages therefor.

MALLON, J.

The plaintiff claims that the defendant obstructed the use of his wharf, and prevented steamboats from landing at his wharf boat. The defendant answers that she was moored at Gilmore's wharf, unloading her cargo there, and that, as usual, the current of the river swung her down in front of the plaintiff's wharf boat; that it is customary for boats to lap over upon each other, and upon or in front of property below; that the Ohio is a navigable river, and that the plaintiff holds and enjoys his wharf property subject to the rights and usages of navigation.

The case has been presented and treated as if between the adjoining proprietor, Gilmore defending for the boat. It appears that the "Belle," was placed so low on Gilmore's wharf that she lapped over and extended below Shinkle's wharf boat, so as to prevent, and did prevent the "Lancaster" from landing at her usual place, Shinkle's wharf. It appears, as claimed by the defendant, that it is impracticable to prevent the stern of boats from swinging, but it does not follow that the bow of the boat may be placed and fastened at the lower point of a wharf boat so as to swing three-fourths of the boat against the wharf boat, and actually upon the proprietor below, nor is it a sufficient reason that his neighbors above lap over thus on him. If there were but two hundred feet of wharf at Cincinnati, plaintiff and defendant each owning one-half such a construction would give it all to the party owning the upper half.

Witnesses who have had charge of wharf boats for many years were examined, and it appears there is no custom fixing the rights of the adjoining owners. It is admitted in the case that, for the conveniences, etc., furnished, the proprietors have the right to receive and charge. It is not claimed that either party have proprietorship in the stream in front of their property. It is important to the public and the owners that they should get the full benefit and use of the wharf, yet each, in the enjoyment and use of his own, should not forget the maxim, "Enjoy your own property in such a manner as not to injure that of another person." It is true that a man is not to be restricted in the reasonable use of his own property, because it may be unpleasant to his neighbor, and that more or less pressure must be submitted to, and must be overcome by boats proposing to land; but property of this kind, limited

in its use by the rights and interests of the public in the river, may be used by putting on boats as long as there is room sufficient to get out the gangway plank, so as actually to appropriate the wharf below; and in the present case, if Gilmore's wharf master so placed and fastened the boat at his wharf that Shinkle was prevented thereby from landing the "Lancaster" at his wharf, with her bow up even with his upper, or east line, it is such an obstruction of the use of his property as gives him a right of action, and he may recover therefor.

Judgment for plaintiff for $10.

W. C. McDowell, for plaintiff.

Taft & Perry, for defendant.

HUSBAND AND WIFE.

[Hamilton Common Pleas Court.]

SHILLITO & CO. v. DUHME.

In an action against a husband for goods sold his wife, the husband is not bound to give notice of separation, and if the merchant sells his goods without inquiry, he is bound by the then existing relations of husband and wife, and if the wife voluntarily separates from her husband, the husband is not liable for such goods sold her.

MALLON, J.

Petition filed for bill of goods sold Duhme's wife. Answer by Duhme that his wife, at the time, had voluntarily separated from him. Replying that Shillito & Co. had no notice of separation. Duhme demurs. *Held*, by Judge MALLON, that cohabitation is the foundation of the husband's liability; and the only question raised by the pleadings is, were Shillito & Co. entitled to notice from the husband of his wife's separation, or did they sell the goods to her at his peril. There is a conflict in the authorities upon this point, but the better opinion, and the result of the American authorities, seems to be that the husband is not bound to give the notice, and that if the merchant sells his goods without inquiry, he is bound by the then relations of husband and wife; and if the wife voluntarily separates from her husband, the husband is not liable.

[Superior Court of Cincinnati, Special Term, May 1, 1858.]

WM. RESOR v. MCKENZIE, STERRETT & CO.

For opinion in this case, see 2 Disney, 210.

This case was cited in Wilkins v. Bank, 31 O. S., 565, 568.

BILLS OF EXCHANGE—STATUTORY DAMAGES.

[Superior Court of Cincinnati.]

THOMPSON v. WRIGHT, ET AL.

In an action for statutory damages on bills of exchange in which action the petition fails to allege that the bills had been protested for non-payments: *Held*, that the petition was defective, as protest was indispensable to the recovery of statutory damages.

STORER, J.

Action on three bills of exchange on which plaintiff claimed statutory damages. Upon a demurrer to the petition, *Held*, that the counts in the petition should be separated, the damages claimed being distinct causes of action; that the petition was defective in not alleging the bills had been protested for non-payment, the protest being indispensable to the recovery of statutory damages.

Thomson & Nesmith, for plaintiff.

Corwin, & Hayes, for defense.

CONTRACTS.

[Superior Court of Cincinnati.]

BARR & CO. v. STEAMER POCAHONTAS.

An action cannot be maintained against a steamboat on an executory contract.

STORER, J.

Action on a contract claimed to have been made by an agent of the boat, for the transportation of 200 barrels of potatoes from Rising Sun, Indiana, to New Orleans. The property was never delivered to the boat or her agents, but there was an allegation that the officers of the boat refused to transport it under the contract, whereby it was lost to plaintiffs, and that it had been frozen in consequence of the delay to transport it.

Held, that under the authority of the case of The Canal Boat Montgomery v. Kent, 20 Ohio Reports, page 54, an action cannot be maintained against a steamboat on an executory contract, and as the present suit was clearly founded on such a cause of action, it could not be sustained. Judgment for defendant.

W. B. Probasco, for plaintiff.

Lincoln, Smith & Warnock, for defendant.

PLEADING—PRACTICE.

[Superior Court of Cincinnati.]

HARVEY v. ARMSTRONG.

The filing of an answer by defendant is a waiver of a previous demurrer to the petition and motion to make more definite and certain.

STORER, J.

Defendant filed a demurrer, and motion, also, to compel plaintiff to make his petition definite and certain; and he afterwards filed his answer. Judge STORER held, that the filing of the answer was a waiver of the previous motion and demurrer, and defendant could not rely on either, but must stand on his answer.

Edwards, for plaintiff.

Gibbons, for defendant.

BAILMENT.

[Superior Court of Cincinnati.]

SPEARS, CASE & CO. v. THE OHIO LIFE INSURANCE AND TRUST CO.

A bailee, such as a bank, taking notes to collect, or money to sell, has no right to turn a party over to pursue his remedy against some other person.

GHOLSON, J.

The action was to recover for an amount of uncurrent money, placed in the hands of the agency of the Trust Company at New York, and which, with funds belonging to other individuals, was taken in a parcel and sold to a party in New York, who gave a check for the whole amount to the officer attending to the matter on behalf of the Trust Company. Before that check was cashed it was attached as the property of the Ohio Life and Trust Co., who now claim that, having used all the diligence in their power to make the money available to the present plaintiff, they are exonerated as bailees; and that his remedy should be against the person who attached the check.

The court remarked that the defense could not avail; if the Trust Company intended the plaintiff should pursue this check, they should have kept this property separate, for he could not pursue the check now without uniting in a proceeding with others with whose funds his own were mingled. A bailee, such as a bank, taking notes to collect, or money to sell, has no right to turn a party over to pursue his remedy against some other person. The defendants, in this case, did not deny they were indebted to the individual attaching, or show a conversion by any wrong-doer, and were, therefore, bound to respond to this demand.

Judgment for plaintiff.

Taft & Perry, for plaintiff.

Worthington & Matthews, for defendant.

MORTGAGES—INTEREST AND USURY.

[Superior Court of Cincinnati.]

J. H. KELLOGG v. A. R. STRONG.

Plaintiff desiring to sell a certain lot of land authorized his broker to offer a loan of $3,300 to be taken in conjunction with its sale. Defendant desiring to raise money to purchase plaintiff's lot, his mother allowed the title to a piece of property to be placed in his name, and by an arrangement he mortgaged it, and took plaintiff's lot at $3,300 and the loan of $3,300, and gave his notes for $6,600, payable in two years, interest to be paid punctually, if not, then the whole debt was to be considered due: *Held*, that plaintiff's lot was not worth half the sum for which it was sold, and further, that the whole transaction was a device or shift to avoid the law in reference to interest, and the usurious rate should, therefore be deducted, and the plaintiff's claim reduced by the sum of $2,000. But defendant would not be relieved from the penalty of not having paid the interest punctually, and therefore, the ordinary decree for foreclosure or sale would be entered.

GHOLSON, J.

Kellogg becoming interested as mortgagee in a certain lot of land on Vine street hill instituted proceedings to foreclose, and, no one else bidding at the sale, he became the purchaser at two-thirds. He put it in the market for sale afterward; but, to use his own language he found "it would not sell unless he put money along with it," and he authorized a broker to offer a loan of $3,300 to be taken in conjunction with a sale of this lot. The defendant, "Strong," desiring to raise some money, his mother allowed the title to a piece of property on Fifth street to be placed in his name, and, by an arrangement, he mortgaged it. taking the lot above mentioned at the price of $3,300, and the loan of $3,300, and giving his notes for $6,600, payable in two years, with the privilege of renewing. There was an agreement, however, that if the interest was not paid punctually the whole debt was to be considered due.

The question was whether Strong was bound to take this lot at $3,300, or whether the transaction was to be considered as a loan.

The court remarked that there was an overwhelming weight of testimony to the effect that his lot on Vine street, put at $3,300, was not worth half that sum; and, from the circumstances of the case, they had no hesitation in coming to the conclusion that the transaction was a device or shift to avoid the law in reference to interest, and the usurious rate should, therefore, be deducted. The plaintiff's claim should be reduced by the sum of $2,000, and the ordinary decree for foreclosure or sale would be entered. The court declined to relieve the defendant from the penalty of not having paid the interest punctually.

Mills & Hoadly, for plaintiff.

Kebler & Force, for defendant.

BILLS AND NOTES.

[Superior Court of Cincinnati.]

ALEXANDER LEVY v. WM. GLENNY.

In an action on a note executed by defendant, and given in consideration for the purchase price of a certain amount of intoxicating liquors, which was to be of a certain standard but which upon proper examination was found to be of an inferior quality: *Held*, that defendant was entitled to have the market value of such liquors deducted from the price at which it was sold, and only the difference allowed the defendant as a failure, to that extent, of the consideration of the note.

The plaintiff alleges, in his petition, that the defendant is indebted to him in the sum of $371.75, upon a note, of which he (plaintiff) is the owner, drawn by defendant in favor of Napthali Levy. The defendant answers, and says that he executed the note in question, and that the same was given for a quantity of brandy sold by N. Levy to defendant at the date of said note under the following contract: Said N. Levy agreed if defendant would buy said brandy, and, upon trial of it in his business as druggist and apothecary, it did not answer the demands of his trade, that he, said N. Levy, would take back the brandy and surrender said note. The said N. Levy further to induce the defendant to buy said brandy represented to defendant that it was the best quality of Cognac and "Dark A. Seignette Brandy," and, in all respects, suitable for use and retail in defendant's business, defendant being then and now engaged in business, in this city, as a wholesale and retail druggist and apothecary. Upon these representations and assurances of said N. Levy, defendant agreed to take said brandy, the same being then in the city of New York, and endeavoring, on several occasions, to sell the same in the usual course of his business, but he found it to be entirely unsalable and useless for his business, and he here avers that the said brandy is of the poorest kind, and such as cannot be used in the business in which defendant is engaged, in short, that the said brandy is, in no respect, such as it was represented to be by said N. Levy. And defendant immediately upon discovering the character of said brandy, informed said N. Levy of its inferior quality, and wished him to come and take it away and surrender his said note as he had agreed to do, but the said N. Levy has neglected to do so, though he agreed to do so before said note became due. Defendant has at all times been willing, and is now ready to deliver said brandy to said N. Levy, and insists that he shall be compelled to take the same. Defendant further says that if the plaintiff is the holder and owner of said note, he is not a *bona fide* holder and owner for value, and that if he took the same from said Levy for any consideration at all he did so since said note became due and long since defendant demanded of said N. Levy to take back said brandy as aforesaid.

E. S. Wayne, professor of chemistry in the Ohio Medical College, being called as a witness, testified that about the first of May last, he examined two kinds of brandy (pale and dark) from Glen-

ny's establishment. The base was whisky. The dark brandy was flavored with Cognac oil, capsicum, and colored with caramel or burnt sugar. The pale brandy contained Cognac oil and more sugar, a small portion of wine, but no capsicum.

Cognac oil is an artificial ether, resembling the essential oil of brandy. It is not poisonous in the quantities used in the manufacturing of artificial brandies. A piece of steel placed in a brandy is no test. Any brandy or liquor will lose both its color and flavor by immersing iron and steel in it, become muddy and of a different color.

Dr. H. Cox, liquor inspector of Hamilton county, testified that he had examined the brandies in question, according to scientific principles, and found the base to be whisky, and, in small quantities, sulphuric acid, capsicum, prussic acid, nitric and butyric acids, ascetic ether, copper and oxide of iron. The pale brandy contains all that is stated, but more sugar and copper—enough to make it pernicious. Polished iron or steel are the *tests* for copper, and he applied both. Found three to five ounces sulphuric acid to forty gallons whisky, and prussic acid in minute quantities. He also applied test papers.

E. S. Wayne, being again called, states that all liquor contains copper, more or less. Whisky is ascertained from the peculiar odor, and all liquors contain acid. Impossible to ascertain the presence of these articles named from the test of Dr. Cox. Prussic acid could not exist in brandy after any length of time—it rapidly decomposes and is not used in making brandy; oil of bitter almonds is used instead. It would be very difficult if not impossible to detect prussic acid in brandy.

E. Grasselli testified that he had been a chemist thirty years. Does not detect copper on the knife; would not detect anything but acid; would burn the brandy and detect it (if any) in the ashes. This is the only test.

N. Levy testified as to the contract of sale, and that, in a settlement with his brother (the plaintiff) he transferred the note of defendant after the same was returned for non-payment about the 16th of October, 1856.

The balance of testimony sufficiently appears from the charge of the court to the jury.

GHOLSON, J.

This was an action by the plaintiff, as indorser of a note made by the defendant, payable to N. Levy. The note was indorsed after its maturity. The defense was that the consideration of the note was two barrels of brandy, sold under the names of "Cognac" and "A Seignette," and which the defendant alleged were warranted to be pure French brandy. The article, upon an examination by the liquor inspector of Hamilton county, was condemned as impure and injurious to health, from deleterious mixtures contained in it. On an analysis by the professor of chemistry in the Ohio Medical College, it was found to have, as its base, corn whisky, to which had been added Cognac oil, capsicum and burnt sugar. But these arti-

cles were not considered as likely to add injuriously to the effect of the whisky. It was stated by the professor to be almost impossible to get any pure brandy, and he believed that manufactured brandy is imported from abroad through the Custom house. It did not appear that the vendor in this case, who was a dealer in foreign wines and brandies in the City of New York, had any knowledge of the character of the article sold, and there was no charge of any fraud.

It was claimed in the defense that under the term pure brandy, as bought and sold in this country, brandy properly manufactured from whisky and other articles, not in themselves hurtful and injurious, might properly be included ; that no one expected to buy, in this country, French brandy, strictly pure, or obtained from the juice of the grape raised in France. It was a matter of doubt, upon the evidence, whether, if there had been a warranty, and it had been broken, whether the brandy had not become the property of the defendant, so as to require him to keep it, and allow its value. In this view he would only be entitled to a deduction of the difference between the price at which the brandy had been sold—$5 and $3.50 per gallon—and the actual worth of the article.

It was left to the jury to find, as questions of fact, whether there was a warranty that the article was pure French brandy. It was said that if the term "French Brandy," in its original and ordinary sense, was a liquor made in France, out of the juice of the grape, and such an article was required by the warranty, a compound of whisky, Cognac oil, capsicum and burnt sugar could not be properly delivered ; that the jury would not be justified in finding, without clear evidence, that dealers in any article meant a thing entirely different from the ordinary and natural import of their language. As to the value of the article, if the jury should have to consider that question, it was stated that if they believed that whisky was made deleterious to health by the introduction of foreign and noxious ingredients, the jury would be justified in finding that it had lost any value it might intrinsically have ; and if the jury should believe that the compound had been made, not as deriving any additional virtue or good quality by the addition to its base whisky and the other ingredients, but a mere device to practice a fraud, by enabling persons, whether the manufacturer or subsequent dealer, to pass it off on the ignorant and unsuspecting as pure French brandy, then courts and juries could not be required to ascertain its value, such value depending, as it would, on its more or less adaptation to carry out an intended fraud ; that if it was a fair article of commerce, and there had been a delivery and acceptance of the article, so as to make it the property of the defendant, (the requisites to constitute such delivery and acceptance having been explained to the jury,) then its market value should be deducted from the price at which it was sold, and only the difference allowed the defendant, as a failure, to that extent, of the consideration of the note.

The jury found a verdict for the defendant.

Strait & Hollister, for plaintiff.

W. B. Probasco, for defendant.

ADMINISTRATORS.

[Superior Court of Cincinnati, Special Term.]

PURCELL V. HEINBERGER, HEINBERGER V. PURCELL.

Where there is an administrator in this state, appointed by the proper court, his claim to collect and administer the assets is to be preferred over that of a foreign administrator. But such administrator may be required to pay over the assets to the administrator of the domicil for distribution, but he is entitled to collect them, for the purpose of administration, and such administration is under the control of the proper court.

GHOLSON, J.

These cases, which have been consolidated, were submitted on an agreed statement of facts. Some of those facts, in the view I take of the case, are not material. The following are the material facts:

John Benzinger, who had his domicil in the state of Indiana, died intestate, holding, at the time of his death, certain certificates, or evidences of indebtedness, to the amount of about $10,000, which had been given by Edward Purcell, a resident of the state of Ohio. Letters of administration on the estate of Benzinger were granted, by the proper court in Indiana, to John Heinberger. Afterward letters of administration were granted, by the proper court in Ohio, to William Labon and Andrew Zoller. It is not disputed that the courts, both of Indiana and Ohio, had jurisdiction to grant letters of administration; and the question is, whether the administrator in Indiana or the administrators in Ohio are entitled to collect the assets in Ohio?

By the law of Ohio a foreign administrator is entitled to sue for, and recover, demands due to his intestate. But it is clear that this provision does not, and was not intended to interfere with the jurisdiction of the proper court in Ohio, to grant letters of administration; and when granted, their effect cannot be affected by the provision allowing the foreign administrator to sue; and I think it is clear that, where there is an administrator in this state, appointed by the proper court, his claim to collect and administer the assets is to be preferred. He may ultimately be required to pay over the assets to the administrator of the domicil for distribution, but he is entitled to collect them, for the purpose of administration; and that administration is under the control of the proper court.

Whether, when there is a foreign administrator, proceeding to collect the assets in Ohio, it is necessary or proper to appoint another in Ohio, is a matter for the determination of the probate court. It may be, where there are no creditors in Ohio, and the effect will be to accumulate unnecessary charges on the estate, the probate court might, very properly, refuse to grant letters; or, where they had been improperly obtained, might revoke them. But this, in my opinion, is a matter proper only for the consideration of that court. So long as the letters are in force, other courts

are bound to suppose that there is a necessity for the administration in Ohio, of the assets in Ohio.

I shall not, therefore, inquire whether there are or are not creditors in Ohio interested in the administration. All that I feel at liberty to do is to suspend, for a reasonable time my judgment in this case, to enable the parties interested to apply to the probate court to revoke the letters granted in this state; and this, if desired, under the circumstances of this case, will be done, until the last day of the present term.

ADMINISTRATORS.

[Hamilton Probate Court.]

IN RE ESTATE OF E. KLUMPERINK, DECEASED.

An administrator having failed to file his account within eighteen months, a citation was issued, at the instance of one of the heirs requiring the administrator to file his account current. Such administrator will be bound to pay only the ordinary costs of citation.

In the matter of the estate of E. Klumperink, deceased v. Johannas Klumperink, a citation was issued, at the instance of one of the heirs, requiring the administrator to file his account current. The party came in, and admitted that the eighteen months allowed by law had expired some time ago, and he was willing to pay the ordinary costs of citation, because he had been in default; but he claimed he was not bound to pay the extraordinary fees of a large array of witnesses, in respect to matters not now before the court.

HILTON, J.

The administrator was not bound to pay more than the ordinary costs, and that the extraordinary costs were to be paid by the party summoning those witnesses. The court adverted to the duties of administrators and executors filing their accounts current; that the law required such to be filed within eighteen months, and then every twelve months thereafter, and render such further accounts, from time to time, as might be demanded by the court, until the estate was fully settled up.

This discretion, of course, was not to be exercised capriciously, but on judicial principles. The law was peremptory and explicit. Should an administrator, after personal service of summons upon him, neglect to return an inventory, as required by law, or show cause why an attachment should not be issued against him, he might be committed to jail. A question had arisen as to whether the probate court, on its own judicial discretion, could compel an executor or administrator of an estate to file an account current, when, by the records of the court, the parties had been under bond. Sitting there as a conservator of the rights of widows, orphans and heirs, the court entertained no doubt that, where he found a default apparent to the records of the court, he had the right (under the authority of the 158th section of the act to provide for the settle-

ment of the estates of deceased persons,) to issue the citation on his own motion. Why the court did not heretofore act under this provision he did not know. It was one that certainly looked to the best interests of society. He should feel it his duty to see every provision of the law carried out to the letter; and when once it was known to the community that the laws are to be rigidly enforced, there would be a better observance of them.

W. T. Forrest and P. J. Sullivan, represented the parties.

BILLS AND NOTES.

[Superior Court of Cincinnati.]

CHISHOLM v. DAVIS.

In an action to recover the value of certain checks, transferred by plaintiff to defendant, to take up a mortgage, the defendant claimed that the checks were taken by him in consideration of the transfer "without recourse" of a note and mortgage of a third party. Plaintiff denied this, and there being a conflict in the testimony, it was held that the parties must be remitted to the contract arising by presumption of law, that is, that the note and mortgage would be considered to have been agreed to be transferred in the ordinary mode, with recourse upon the endorser.

STORER, J.

Action before Judge STORER to recover the value of certain Trust Company checks, transferred by plaintiff to defendant, to take up a mortgage held by the bank. The defendant claimed that the checks were taken by him in consideration of the transfer "without recourse," of a note and mortgage of a third party. The plaintiff denied this, and asserted that the note and mortgage were to be received by him as security only. The court held, upon a review of the evidence, that there being a conflict of testimony as to the exact terms of the agreement, the parties must be remitted to the contract arising by presumption of law, that is, that the note and mortgage would be considered to have been agreed to be transferred in the ordinary mode, with recourse upon the endorser, and that the defendant had been remiss in not offering to perform the contract.

Judgment for plaintiff.

BILLS AND NOTES.

[Superior Court of Cincinnati.]

JOHN A. DUBLE v. THE CINCINNATI AND CHICAGO RAILROAD CO., ET AL.

A creditor extending the time on a debt secured by a note, discharges the endorsers on such note from all liability.

The indorsers set up for defense that they are discharged from all liability on the note sued upon, by reason of the plaintiff having given to the railroad company an extension of time on the debt evidenced by the note. Judgment for Powell, and decree in favor of plaintiff against the other defendants.

Ware, for plaintiff.

Fox & Fox, for Powell.

Lincoln, Smith & Warnock, for other defendants.

SURETIES ON ADMINISTRATION BOND.

[Hamilton County Probate Court.]

STATE EX REL., PHILLIPS ET AL., V. ROBERT C. BRASHER, EX., ETC.

The mere decease of one of the sureties on an executor's bond, is not, in itself, a cause requiring a new or additional bond or surety, provided the sureties or the estate of such sureties are sufficiently able to pay the amount of the bond as when originally taken.

The defendant was brought into the probate court on a citation, to show cause why he should not give a new bond or additional securities as executor of said estate, on the ground that Hanson L. Penn, one of the two sureties on the board (F. J. Phillips being the other), is deceased; the law requiring that the executor shall enter into bond with two or more sureties to the satisfaction of the court.

HILTON, J.

When persons become sureties on the bond of an executor or administrator, they are severally bound together with their heirs, executors and administrators, for the performance of the full conditions of the bond, and that until all these requirements shall have been faithfully fulfilled the liability of the sureties is not at an end. The bond is an obligation extending to the full settlement of the estate, or until the removal of the executor or administrator for cause. Therefore the mere decease of one of the sureties is not, in itself, a cause requiring a new or additional bond or surety, provided the sureties or the estates of such sureties are as sufficiently able to pay the amount of the bond as when originally taken.

Section 192 of the act to provide for the settlement of the estates of deceased persons is as follows:

"That any surety on the bond of an executor or administrator may, at any time after the expiration of six years from the date of the bond, upon his petition, be discharged from all further responsibility upon such bond, if the court, after due notice to all persons interested, shall think it reasonable to discharge him."

This is the only section referring to a release of the sureties on the bond, except for cause, when waste or malfeasance in office is alleged; and, as neither of these are charged against the executor, the citation will be dismissed.

The costs will be taxed against the estate on the ground that the applicant, being one of the sureties without any reward for the act, sought his own security and that of the estate by his application.

Smith & Lowe, for petitioner.

Coffin & Mitchell, for respondent.

DEPOSITIONS.

[Superior Court of Cincinnati.]

RIDER V. SMITH.

The fact that there was no cross examination of witnesses whose depositions were taken, is not a subject for consideration in an action in which such depositions are used, but such depositions must be considered as they are.

The plaintiff sold on faith of warranty; was sued; gave notice to defendant of action; was mulcted in consideration of $150 and costs.

The answer denies warranty, and demurs to the matter about suit. Demurrer overruled; trial on issue of warranty; recovery of value and costs of action above mentioned.

Held:. That the fact that there was no cross examination of witnesses whose depositions were taken, was not a subject of consideration, but that the depositions must be considered as they are.

Judgment affirmed.

PLEADING—PRACTICE.

[Superior Court of Cincinnati.]

WAYNE, HAYNES & CO. v. JONES & HOWELL.

In an action on an account for goods sold and delivered, the defendant, if he wants a more particular statement of the goods sold, may demand it under section 361 of the Code.

STORER, J.

Petition on account for merchandise. On demurrer. It is claimed by the defendant, that the account attached to the petition is not sufficiently specific. We think it is *prima facie*. If the defendant wants a more particular statement of the merchandise sold, he may demand it, under section 361 of the Code.

Demurrer overruled.

INSOLVENT ESTATES.

[Logan Common Pleas Court, December Term, 1859.]

C. T. MCCREA & CO. ET AL. v. WM. DARNELL ET AL.

Attempt of an insolvent debtor to prefer creditors.

William Darnell, an insolvent debtor, in contemplation of insolvency with the design to prefer the firm of Davis & Herron, to whom he was indebted $1,926, on 23d August, 1858, executed to them a chattel mortgage then deposited with the township clerk on a stock of store goods, worth $2,379.61, with this condition therein: Provided, that if said Darnell, cause to be paid to Davis & Herron said indebtedness, within ten days from date, or secure the payment thereof to their satisfaction, then said goods are to be returned to the possession of Darnell, and in default of such payment, or securing the same to be paid as aforesaid, Davis & Herron are to sell said goods at public auction or private sale, and the proceeds thereof, after paying said Davis & Herron's claim and expenses and cost is to be paid over to Darnell or his order and Davis & Herron are to have the use and occupancy of the store room in which said goods now are, for ten days.

Some days before this Darnell had agreed with Carpenter to sell him these goods at original cost for eighty acres of land at $1,700.00, and notes for residue, the goods to be invoiced. While the invoice was being made this mortgage was given; part of the goods was delivered in the name of all, the store room key was delivered to mortgagees, and it was immediately delivered back to Darnell, and was verbally agreed that Darnell should cease retaining, keep the store room closed, that the goods should be considered in the possession of the mortgagees, that Darnell should take care of

them, furnish the invoice, complete the sale to Carpenter, within the ten days subject to the condition that the attorney of Davis & Herron should be present on the final closing of the contract with Carpenter, cancel the mortgage and deliver up the goods on receiving a mortgage on the land which Carpenter agreed to convey to Darnell, and any notes as collateral to secure the claim of Davis & Herron to the satisfaction of said attorney.

Darnell completed the invoice, which footed up $3,966.03 nominally, but Carpenter refused to complete his purchase. The ten days expired. It was agreed the goods should remain as before in the care of Darnell, as custodian for Davis & Herron, until they could be removed from the store room in Lewistown where they were, to Bellefontaine to be sold by the mortgagees.

Before the goods were removed judgments were rendered before a justice of the peace against Darnell, and executions levied by a constable on said goods, subject to said mortgage as follows:

D. Loomis & Co.,	Judgment,	Sept.	13, '58,	$164 89,	levied	Sept.	14.
Loomis & Barnett,	"	"	13, '58,	128.80	"	"	14.
C. T. McCrea & Co.,	"	"	14, '58,	70.59	"	"	15.
C. T. McCrea	"	"	14, '58,	143.56	"	"	15.
C. T. McCrea	"	"	14, '58,	26.99	"	"	15.

On September 14, 1858, Darnell executed to C. T. McCrea & Co., a chattel mortgage, but it was cancelled at the time of their levy.

On September 16th, the attorney of Davis & Herron, having notice of these levies, in consideration that the constable would permit him to remove the goods, gave him a writing as follows:

"Whereas Davis & Herron, have the possession of a certain lot of store goods recently owned by Wm. Darnell, by virtue of a contract between said Davis & Herron and said Darnell, and in pursuance of said contract, now have the right to dispose of said goods at public or private sale; and whereas, Simeon Woodrow, constable, by virtue of sundry executions to him issued, levied on said stock of goods, subject to said Davis & Herron's claim, and lien on said goods, and another mortgage in addition to said Davis & Herron.

"The said Davis & Herron, will account for any balance over and above what pays their claim, costs and expenses according to law.

"DAVIS & HERRON,
"Per D. B., Attorney."

The attorney thereupon with the assent of Darnell, removed the goods to Bellefontaine, sold part of them for $550.63, within three or four days, and with like assent on the 20th of September, delivered the residue to S. W. Coe, who was to sell at retail and receive 20 per cent. for his commission. He sold to the amount of $1,485, up to September, 1859, and then took residue at $312.80. After paying expenses and commission, the amount realized is $2,023.27. These sales were all made at retail or private sale, with-

out notice to the judgment creditors, and with knowledge on the part of Davis & Herron that the judgment creditors objected to their proceedings.

On September 17, 1858, these judgment creditors united in a petition in the nature of a "creditors' bill" in chancery to reach the goods or their proceeds, and subject them to payment of their judgments. Code section 458.

An injunction was allowed to restrain the sale or disposition of the goods, undertaking failed, summons served on Herron and notice to the attorney of Davis & Herron, all before the arrangement made with Coe was completed. If, with a knowledge of the pending petition, etc., service of a summons was evaded to effect a sale to Coe, the defendants would be in no better condition than if served. Ohio Code, section 78, 458, 15 How., N. Y. R., 8. The arrangement with Coe was designed to be a *sale* and so called, but he was to sell for thirty days at invoice cost, then for thirty days at ten per cent. below cost, then for thirty days at twenty per cent. below cost, and to pay for the goods eighty per cent. of his sales. The plaintiff had a right to treat this as a *sale* or as it was in legal effect an *agency* at their option. Hill on Trustees, 474, 1 McLean 199–4. J. C. R. 368–3. Kerman, 587.

N. W. Mason & Co. having a judgment against Darnell without levy, is made defendant on leave since petition filed.

Stanton & Allison, and Walker & West, for plaintiffs.

Pollock and James Kernan, J. A. Jordan, for Davis & Herron.

BILLS AND NOTES.

[Hamilton Common Pleas Court.]

EXECUTOR OF SHURRAGAR v. C. S. CONKLIN AND DANIEL CONKLIN.

A promissory note signed by a minor in the presence of his father, who at the same time endorsed the note and handed it to a third person, and said note afterwards came into the hands of plaintiff before its maturity, nothing being said by the maker or endorser about non-age: *Held*: In an action on such note that judgment would be entered in favor of the maker, the minor, and against the endorser, the father, as upon an original undertaking.

CARTER, J.

This action was brought to recover upon a promissory note. Two separate defenses were interposed: minority on the part of C. S. Conklin, and want of notice for the other. The testimony showed that the defendant, C. S. Conklin, was twenty years and nine months of age at the time of the execution of the note sued upon; that it was signed in the presence of his father, Daniel Conklin, who then endorsed and handed it to one John F. Kimball; that it was a negotiable note, and came into the hands of Shurragar before its

maturity, and that nothing was said by either C. S. Conklin or his father, about non-age. It was conceded that the note had not been given for necessaries. The counsel for plaintiff contended that the execution and negotiation of the note, under the peculiar circumstances of this case, was a fraud on the part of the defendants; that the defendant could not take advantage of his own wrong and fraud, and therefore, notwithstanding his minority, C. S. Conklin was liable; and that it was the plain and apparent duty of the defendants to have notified the party to whom the paper was given, of the minority of C. S. Conklin.

The court said, that while it was true that fair dealing would require an *expose* of non-age at the time of the transaction, and although the principal defendant had so nearly attained his majority, yet the court could not legislate, and this case must be decided according to the rule laid down in the statute, and that, notwithstanding the statute might, and did work hardship in particular cases, yet it was beneficial in the main. The court had examined with great care the authorities presented by the counsel for plaintiff, but could not perceive that they varied the rule as applicable in this case, and he saw no such peculiar circumstances justifying a departure from precedent.

Judgment would, therefore, be entered in favor of C. S. Conklin, and against Daniel Conklin, as upon an original undertaking.

W. T. Forrest, for plaintiff.

Snow & Bradstreet, for defendants.

WATERCRAFT.

[Superior Court of Cincinnati, Special Term, June, 1857.]

*MARINE RAILWAY & DRY DOCK CO. v. STEAMBOAT MONARCH.

Under the watercraft law, a steamboat will be responsible for the hire of a barge employed by the master to carry freight, although by reason of low water the steamboat, during the course of the voyage, is compelled to forward the barge and freight by a lighter steamboat.

GHOLSON J.

This was an action for money agreed to be paid by the master of the steamboat on behalf of the owners for the use of a barge, to aid in transporting a cargo of lumber to St. Louis. The steamboat having changed owners, the question presented was, whether the contract was within the statute allowing suits against a steamboat by name.

The language of the statute is: "That steamboats and other watercraft, navigating the waters within and bordering upon this state, shall be liable for debts contracted on account thereof, by the master, owner, steward, consignee or other agent, for materials, supplies or labor in the building, repairing, furnishing or equipping the same, or due for wharfage." From the general language of the statute it may be fairly inferred, that whatever a steamboat may require in the nature of materials, supplies or labor, and in aid of its general object, navigation of the rivers and the transportation of passengers and freight is embraced. For the purpose of navigation a steamboat might very properly have as a part of its usual equipment a barge or barges. In point of fact, it is known, that boats in a particular trade—the transportation of coal—are constructed with the view of carrying on their business with barges. If barges may be part of the permanent equipment of a boat, there is an equal propriety, under certain circumstances, that they should be used temporarily; for example in the case of a low stage of water. If a steamboat in view of a possible detention by low water should procure the use of a barge, I can see no good reason why it should not be deemed a proper charge upon the boat within the intention of the statute. In this case it is shown by the evidence, that for the purpose of aiding the steamboat in carrying freight the barge was hired. It was to be used in connection with the boat and to be impelled by the same power. It was, I think, for the time, a part of the equipment of the boat and comes within the meaning of the statute.

There will be a finding for the plaintiffs.

King, Anderson & Sage, for plaintiffs.

Coffin & Mitchell, for defendant.

*The opinion in this case was affirmed by the superior court in general term. For opinion, see 2 Disney, 117.

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Vol. I. [O. S.]

*[Cuyahoga Common Pleas Court, May Term, 1853.] **685**

BOWEN & MCNAMEE v. THE LAKE ERIE TELEGRAPH CO.

For opinion in this case, see 1 Dec. R., 574; s. c. 10 W. L. J., 415.

Vol. II. [O. S.]

*[Superior Court of Cincinnati, Special Term, June, 1854.] **631**

RUSSELL A. STEERE, ADMR., v. ELLIS & MORTON.

For opinion in this case, see 1 Handy, 71.

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*DEVISE. **101**

[Hamilton Common Pleas Court, January Term, 1854.]

†FRANCIS A. PARISH v. ELIPHALET FERRIS ET AL.

†The judgment in this case was reversed by the supreme court. See opinion, 6 O. S., 563. The latter case was approved and followed in Niles v. Gray, 12 O. S., 320, and in Smith v. Hankins, 1 C. S. C. R., 449, 450. Cited in Carter v. Reddish, 32 O. S., 1; Rhea v. Dick, 34 O. S., 420, 422.

1. "Heirs" construed to mean children, from the context.
2. Adverbs of time, as *when*, *then*, *after*, *from*, etc., in a devise of a remainder are to be construed as relating to the time of the enjoyment of the estate, not to that of its vesting in interest.
3. Devise of a life estate, and if the first taker 'should die without children," then over, *held* under the circumstances to mean *without having had* children.
4. A testator devised as follows: Secondly, "to my daughter E, the use" of 267 acres of land, "during her natural life, to have full use and control of the same, with the appurtenances to the same belonging, as long as she shall live." Thirdly, he devised to his "daughter E's children (if she shall have any heirs), their heirs and assigns forever," the 267 acres of land "after E is done using and occupying it, and at E's death." Fourthly, If his "daughter E should die without children," then he devised the 267 acres to his "brothers and sisters, their heirs and assigns forever, after the death of E as aforesaid." E was unmarried at the testator's death, but married afterwards. She had but one child, which lived only a few hours, and soon died herself, having devised all her estate to her husband.
102 **Held*, that the limitation to E's children, and that to the testator's brothers and sisters, were alternative contingent remainders in fee, the contingency being the *birth* of children; and that the first remainder vested in E's child at its birth, descended at its death, upon E; and then passed under her will to her husband.

PETITION TO QUIET TITLE.

Worthington & Matthews, for plaintiff.

Taft & Storer, Sage, Groyune, and William Johnston for defendants.

STALLO, J.

This is a petition filed by the plaintiff, Francis A. Parish, in which he seeks to have his title quieted to some two hundred and sixty acres of land in Hamilton county. The defendants, in their answer, deny the plaintiff's title, claiming the legal title to be in themselves. The facts upon which the controversy arises are substantially the following:

On the 7th day of June, 1849, Andrew Ferris, having an only daughter then unmarried, made his will, in which he undertook to devise the property in dispute: This will contained the following clauses:

"*Secondly*—I give to my daughter Elizabeth A. the use of two hundred acres, more or less, of land, on which I now live, it being the north-east quarter of section No. 22, of the fourth township, of the second fractional range, in the Miami purchase, and one share of the Morrison estate, on the south-east quarter of section 23, of said township; also, six acres, more or less, in section 21 of said township, it being the west half of the north-east quarter of said section, exclusive of the forfeiture, during her natural life, to have full use and control of the same, with the appurtenances to the same belonging, as long as she shall live.

"*Thirdly*—I give and bequeath to my daughter Elizabeth's children (if she shall have any heirs), their heirs and assigns forever, all of the above described two hundred and sixty-seven acres of land, after Elizabeth is done using and occupying it, and at Elizabeth's death.

"*Fourthly*—If my daughter Elizabeth A. shall die withot children, then, and in that case, I give and bequeath the said 267 *acres, above described, to my brothers and sisters, their heirs and assigns forever, after the death of Elizabeth A., as aforesaid." 103

The will was duly proven in 1849, after the death of Andrew Ferris. In 1850, Elizabeth A. married Francis A. Parish, the present plaintiff, and in 1852 she was delivered of a child, which lived only about one hour. On the 22d of August, 1852, a few days after the death of her child, she made her will, devising to her husband, his heirs and assigns forever, all her property, and soon after died, leaving no children surviving her.

Andrew Ferris left brothers and sisters, the defendants in this case, surviving his daughter.

The controversy in the case arises upon the construction of Andrew Ferris's will; and in consequence of the wide range pursued in the argument on both sides, we deem it necessary at the outset briefly to adduce the cardinal principles of construction applicable to wills, as we understand them to be settled.

I. Wills are not construed strictly, like deeds, but liberally, so that the manifest intention of the testator, though not expressed in technical terms, may be effectuated; for wills, unlike deeds, are usually made by persons when they are unable to avail themselves of the assistance of persons skilled in the law. Nevertheless,

First—The intention of the testator must be collected from the will, and from that alone.

Second—Technical words are presumed to be used in their established legal acceptation, unless the contrary plainly appears; and other words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected from the context.

Third—The general rules for discovering the intentions of the testator, as established by adjudged cases, as well as the adjudicated meaning of certain words or expressions, are to be adhered to; and

Fourth—The construction must be such, if possible, that the testator's intent is consistent with the rules of law.

II. The manifest general intent controls particular expressions, which may seem to be at variance with it. But,

First—A mere reason presumed or expressly assigned, or an inductive *inference from other parts of the will, or an inaccurate summing up or reference to the contents of the will by 104 the testator himself, cannot prevail over an express and positive devise.

Second—Mere inconvenience or absurdity of a devise is no ground for varying the construction, when the terms are without ambiguity, although conflicting expressions are to be so construed as to effectuate a rational and consistent, rather than an irrational and inconsistent purpose; and the construction is not to be varied, because the testator did not foresee all the consequences.

Third—Favor or disfavor to the object, appearing from the will itself or *aliunde*, cannot affect the construction.

III. Next to those of the testator, the law favors its own intentions; and, therefore, wills are never so construed as to disinherit the heir at law, unless this be required by the express words of the will, or their necessary implication.

We have recited these rules, rather pedantically, perhaps, because the simple statement of them relieves us of the necessity of examining in detail a variety of somewhat strained positions taken in the construction of this will, into which counsel appear to have been betrayed by insisting upon rules which are true only when taken with their appropriate limitations.

Keeping the above principles of interpretation and construction in view, then, I shall now proceed to the task of ascertaining, if possible, the meaning of Andrew Ferris' will. So far as this affects the case in hand, it is to be gathered from the 2d, 3d and 4th clauses of the will as above quoted.

The language of the second clause does not require any particular comment for the purpose of its own construction; it is obviously the devise of a life estate to Elizabeth A. Parish.

The language of the first part of the third clause is: "I give and bequeath to my daughter Elizabeth's children (if she shall have any heirs) their heirs and assigns forever, all the above described 267 acres of land." But for the distinction between the words "children" and "heirs" in their legal and grammatical import, this would be at once conceded to mean the limitation of a remainder, after Elizabeth's life estate. to her children, contingent upon their birth.

105 *Now, does the use of the word "heir," instead of "children," in the parenthetical reference after the latter word vary the construction? We think not. The word "heir" is evidently not defined by its strict grammatical or legal acceptation; for, if it were, it would embrace collateral heirs, and the sense thus resulting would not only be manifestly repugnant to the other provisions of the will, but the word would be an utter anomaly in the place where it occurs, having no possible connection with the word children, to which it is parenthetically appended. And after we have once been constrained to discard the strict legal import of the word "heirs," it can only be defined by its obvious reference to the immediately preceding word "children," for which it then becomes a mere substitute, so that the accent falls on the word "have." The devise then is to Elizabeth's children, if she should have any, which undoubtedly creates a remainder over to the children, contingent upon their birth. The doctrine that the word "heirs" may be construed to mean children, if the manifest intention of the testator requires it, rests upon the authority of numerous cases; among them a case in our own state, that of King v. Beck, 15 O., 559.

But, in the second half of this clause, the testator adds the words: "after Elizabeth is done using or occupying it, and at Elizabeth's death." It is contended that the use of these words is

evidence of an intention to point out the time of Elizabeth's death as the period when the remainder over to the children was to vest, so that not the birth of the children, but their surviving their mother, was the contingency upon which the vesting of the remainder depended. This argument is valid, if the testator meant to postpone the vesting in interest of the estate, as devised to Elizabeth's children, to the time of her death; but it falls to the ground, if he merely intended to designate the time when the possession was to be taken. Abstracting from the fourth clause of the will, we think it clear that the latter view is correct, and that the words of the third section relate merely to the time of the enjoyment of the estate, and not to the period when it was to vest in interest. In this connection, it is important to revert to the language of the second clause, under which Elizabeth is "to have full use and control of the property as *long as she shall live;" just as in the third clause the same property is given to Elizabeth's children, "after Elizabeth is done using and occupying it, and at Elizabeth's death." The language in both instances fixes the limit between the "use and occupancy;" in other words, the possession by the mother, and the possession by the children. What was to succeed the "use and occupancy" by the mother? Naturally not the interest of the children, but the "use and occupancy" by them. 106

The view we take of the meaning of this part of the third section of the will is, then, that the words "after Elizabeth is done using and occupying it, and at Elizabeth's death" were meant to express simply the fact that a remainder was to vest in Elizabeth's children, if she have any, and not the time when that remainder was to vest. This view becomes very striking, when we recollect that the will has a separate clause for each single devise. Each clause disposes of the testator's property to a certain extent; and it is very difficult to escape the conviction, that the effect of every succeeding clause, in the testator's mind, was to extend over so much ground only as was not covered by the preceding clause or clauses, so that having once ascertained the scope of the devise in the preceding clauses, the extent and validity of the subsequent devises is preliminarily determined. Thus, in the second clause, the testator gives a life estate to Elizabeth; there was then a remainder left. This remainder is to go to Elizabeth's children; and in the first half of the third clause, "I give and bequeath to my daughter Elizabeth's children, (if she shall have any heirs,) their heirs and assigns forever, etc.," the testator expresses his intention that an estate shall vest in these children, if any there be; and in the latter half, 'after Elizabeth is done using and occupying it, and at her death," he defines this estate as the remainder after the life estate of Elizabeth. In the first half of the clause he designates the persons who are to be the objects of his bounty; in the latter half he describes the thing, the nature of the bounty he means to confer.

The rule of construction which is here applied to the words relating to the death of the first taker, is established by a series

107 *of authorities. Among them we may refer to a very recent case, that of Johnson v. Valentine, 4 Sanford Rep. 36, which is selected because it expressly decides that "adverbs of time, as when, then, after, from, etc., in a devise of a remainder, are construed to relate merely to the time of the enjoyment of the estate, and not to the time of the vesting in interest;" and because it thus disposes also of the argument derived from the fourth clause of the will, where the language, "after the death of Elizabeth" is employed, from which, in connection with the words already commented upon, counsel infer that the state of things at Elizabeth's death was the time contemplated by the testator for the vesting of the remainder. Other cases to the same effect, illustrative of the principle (from which this rule follows,) that the law favors the vesting of estates, will be hereafter noticed in another connection.

After thus giving to his daughter Elizabeth a life estate, in the second clause, and a remainder over to her children, if she had any, in the third, what further had the testator to dispose of? Obviously nothing; unless, in the language of the third clause, Elizabeth "shall have no heirs;" *i. e.*, shall have no children. In the progress of the exhaustion of the estate, through all its parts and contingencies, the testator then arrived at the fourth clause, which reads: "If my daughter Elizabeth A. shall die without children, then," etc. The contingency referred to in third clause, we have seen, was, that Elizabeth might have no children; in the fourth clause, the same contingency, instead of being spoken of in the same words, is denoted by the expression "dying without children." The phrase "to have no children," would seem to be plain enough; it does not mean to have no children at any particular time, but it means, to have no children at all, at any time,—to have no children born. The contingency, as first contemplated by the testator, and referred to in the third clause of the will, was, therefore, that his daughter Elizabeth might never have any children. Now, does the use of the different words "dying without children," evidentyl descriptive of the same contingency, force us to

108 conclude that the testator had changed his mind when he *wrote or dictated the fourth clause? We think not. It may be difficult to determine, whether the more natural meaning of these words be "dying without having had children," or "dying without children living at the parent's death." But the question we are now considering is not, whether the former be the more natural interpretation, but, whether it be generally an admissible interpretation; in other words, we are now inquiring, whether or not there be any necessary repugnance between the words of the fourth and those of the third clause, relating to the same subject-matter. And we cannot see that the words "dying without children" are violently distorted from their true meaning by being interpreted to mean "dying without having had children."

This leads us to a consideration of the authorities cited on either side, chiefly in reference to the construction of the words "dying without children." It is urged on the one hand that these

words are equivalent to "dying without issue," which latter words have been adjudged in an almost interminable series of cases to mean not a dying without issue living at the time of the death of the first taker, but a general or indefinite failure of issue. On the other hand, it is contended that the words "dying without children" are by the authorities distinguished from the words "dying without issue," and restricted to the sense of "dying without children" living at the death of the first taker.

We have examined these cases as carefully as time would permit, and we think it cannot be denied that looking to the mere letter the authorities appear to be conflicting. But we also think that, in a great measure at least, the discrepancy vanishes when it is recollected that all these cases deal with the construction of wills and not with that of deeds or other deliberately framed instruments; that they seek to define not the force of a word, but the general sense of a context; and that from the very nature of the investigation the tendency there is to fuse words and their meaning, not to petrify them. When we come to examine what were the questions raised in the different cases, and upon what grounds the decisions rest, they can, with few exceptions, be harmonized without much difficulty.

*Without attempting to review all the cases in detail, then, we will simply announce the conclusion at which we have arrived, that the distinction between the words "dying without issue or heirs" and "dying without children," wherever it is made, is made solely with the view of escaping the rigor of the rule that executory devises limited to take effect after a dying without heirs, or without issue, or without leaving issue, are void, because the contingency is too remote—the words "dying without issue," etc., having invariably been held to import an indefinite failure of issue. 109

In order to uphold the intentions of the testator against the effect of this construction, courts have availed themselves of the slightest circumstance, the least variation in the phraseology, in order to construe the failure of issue contemplated by the testator as definite—as occurring at a precise time fixed by the testator himself, such as the death of the first taker—and not as indefinite, as happening sooner or later, whenever the whole line of descendants of the first taker should have become extinct. Thus, courts have adopted one rule of construction in regard to bequests of personal property, and applied another to devises of real estate, even going so far as to interpret the same words differently in the same will, on the ground that owing to the perishable nature of personalty, the testator could not reasonably be presumed to have contemplated the failure of issue at a period indefinitely remote, when the property itself would be no longer in existence. So also the use of the word "children," instead of "issue," coupled with other expressions in the will clearly indicative of the testator's intent, has been construed to limit the failure of issue to the time of the death of the first taker; because "children," in the primary sense of the word, are descendants of the first degree, and not, like

"issue," descendants generally. But in order to appreciate the value and scope of this distinction, it is important to bear in mind two things. First, that the question in those cases where the distinction was made was, whether or not the executory devise was valid at all, in any case, no matter what the facts otherwise might be; *i. e.*, whether or not upon its face, and upon a mere interpretation of the words "dying without children," etc., the executory
110 devise should be *pronounced void for remoteness, in spite of the obvious intent of the testator, even if there never had been any children; and therefore the question was, not so much when the estate limited over was to take effect, but whether or not the estate was, in any event, to take effect at all; so that the question of time was merely incidental: and secondly, (what is in substance the same,) that the question stood between an indefinite time when the devise was meant to take effect, and a definite time, and not between one definite time (the death of the first taker,) and another equally definite time (the birth of a child of the first taker.) Indeed, the very reason why the definite is preferred to the indefinite period is, that the former is less remote; and it would be a strange perversion of the whole reasoning, which upholds the distinction claimed for the defendants, if it were so applied in this case as to postpone the vesting of the estate instead of hastening it.

The true doctrine illustrated by all these cases is, that the law favors the vesting of estates; a doctrine which is supported by all the authorities. We have no doubt, therefore, that the contingent remainder limited to Elizabeth's children vested at the moment of the birth of the first child, subject to open and let in after-born children, if any there be. It is almost a matter of supererogation, to refer to the cases directly bearing upon this point; we will only notice a few. One is the case of Macomb v. Miller, 9 Paige, 265, where there was a devise to A for life, with remainder to her child or children, if she should leave any; and if she should die and leave no lawful issue, with remainder over. A survived the testator, and had one child, and she survived her child, and was left a widow. It was held that the devise to her children or issue was a contingent remainder in fee, and which, on the birth of a child, became a vested remainder in fee, subject to open and let in after-born children. Another very recent case is that of Wight and Wife v. Baury, 7 Cush. 105, where the devise was to the daughter for life, and then to her children, their heirs and assigns; and if she should leave no child, then to the testator's grand-children. Judge Shaw, in deciding this case, says: "In the actual case, as there were children in being, it is a vested remainder. It may be proper to
111 *remark, in passing, that if there were no child in being at the death of the testator, it would have been a contingent remainder until a child should be born, but would immediately vest on such birth." See also 7 East, 521; 12 Engl. Com. Law. Reps., 392; 4 Comstock, 257; 2 Barbour Ch. R. 314; 26 Wendell, 229; 17 Serg. & Rawle, 441; 12 Gill. & Johns, 83; 3 Atk. 774, and other cases.

In apparent hostility to all this, however, stands a case in 5 Day, 517, Morgan v. Morgan. The devise there was to the testator's sons, B, C, D and E, their heirs and assigns forever, with a clause, that in case either of his sons should die without children, his brothers should have his part in equal proportion. B was married and had issue, a son, who died during the life of B. B died and left no children living at the time of his death. It was held, that the limitation over was good by way of executory devises and that the words "die without children" meant a dying without children living at the death of the first devisee.

The anomaly of this case is explained, when we look not only to the decision of the court, but also to the argument; from which it appears, that in this as in other cases, the question raised and decided was, whether or not the executory devise was void for remoteness. That it was not so void, is really the only principle supported by the reasoning of the case; and it does not in the least shake our faith in the correctness of the construction we are compelled to give to Andrew Ferris' will.

Against this construction it is urged, in addition to the arguments already noticed, that the manifest general intent of Andrew Ferris was to keep his property in his own family,—to leave it to his lineal descendants, in preference to other relatives, but in the absence of direct issue to give it to his collateral kindred; and that, if now alive, he would repudiate that construction of his will, the effect of which is to give the property to a stranger, whom he, perhaps, never saw. This may be so; but it is fully answered by the supposition of another case put by counsel for the plaintiff. Elizabeth might have had a child, which, living to the age of maturity, might itself have had issue, and then died before Elizabeth, leaving, *not a child, but a grand-child still surviving Elizabeth. 112
If the testator's intention was, that his property should go to his lineal descendants in preference to his collateral heirs, this intention would then surely have been defeated by the construction now claimed on behalf of the defendants. The truth is, the testator's intention must be ascertained by the fair construction of his will, not by conjecture; after all, it is the intent of his written testament which we are to seek, not a possible intention of the testator in case he had foreseen every imaginable contingency. We cannot attribute to him a shifting intention varying with the play of unforeseen events. His last will and testament is the fixed, irrevocable word of a dying man; we can, in pious regard for his last wishes, concede to it all the pliability necessary to accommodate one abiding purpose, but we cannot quicken it with the consistent activity of a living mind, and its fresh, present, continuing volition. Andrew Ferris, undoubtedly, had a theory of the future, by the light of which his will must be read, and, as is usual, that theory was incomplete, because it failed to embrace elements which time added to the calculation. It is for us, however, not to complete that theory by interpolating the data of subsequent experience, but, if, possible, to reproduce the testator's faint vision, in order thus to see how the

objects and events among which he contemplated the course of his property to lie will group themselves. The true construction of Andrew Ferris' will must be the same now, as it would have been given in 1849, before or immediately after the testator's death, when the marriage of Elizabeth with Francis A. Parish was only one among many other possibilities which have never been realized.

Our opinion is, that the devises to Elizabeth's children and to Andrew Ferris' brothers and sisters are alternative contingent remainders, of which the former vested at the birth of Elizabeth's child, whereby the latter was defeated. There will accordingly be judgment for the plaintiff, quieting his title.

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432 [*Superior Court of Cincinnati, Special Term, December, 1854.]

JAMES WILSON & CO. v. BAILEY & SON.

For opinion in this case, see 1 Handy, 177.

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498 [*Superior Court of Cincinnati, Special Term, November, 1854.]

AGUSTUS ISHAM v. THOMAS GREENHAM.

For opinion in this case, see 1 Handy, 357.

This case was cited in Manhattan L. Ins. Co. v. Smith, 44 O. S., 156, 171; Bickett v. White, 1 C. S. C. R. 170, 176.

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49 *COURTS OF THE UNITED STATES—JURISDICTION.

[Hamilton District Court, April, 1855.]

Bartley, Parker and Van Hamm, JJ.

ALFRED STUNT v. THE STEAMBOAT OHIO.

1. The provision of the constitution of the United States expressly conferring appellate jurisdiction on the supreme court, does not authorize the exercise of appellate power by that tribunal, over the state courts, but extends simply to appeals from the subordinate federal courts.
2. There is no provision in the constitution from which a supervising power in the supreme court of the United States over the state courts, can be derived by way of incident or implication.
3. The supreme court of the United States has not been constituted the exclusive tribunal of last resort, to determine all controversies in relation to conflicts of authority between the federal government and the several states of the Union.
4. The state courts and the federal courts are co-ordinate tribunals, having concurrent jurisdiction in numerous cases, but neither having a supervising power over the other; and where the jurisdiction is concurrent, the decision of that court, or rather, of the courts of that judicial system in which the jurisdiction first attaches, is final and conclusive as to the parties.

BARTLEY, J.

This cause comes before us, at this time, on a motion to make an entry on our journals by an order of court, certifying that on the trial of the cause, the validity of a statute of the state of Ohio, under the authority of which the suit was prosecuted, was drawn in question, on the ground of its being repugnant to the constitution and laws of the United States; that the decision of this question *became necessary in the determination of the case; that it was decided in favor of the validity of the said law; and that 50
this is the highest court of law and equity in the state, in which the parties can, as a matter of right, have the case decided. This entry is asked in order to lay the foundation for the removal of the cause by way of appeal to the supreme court of the United States.

The suit was instituted under the authority of the statute of this state for the collection of claims against steamboats and other watercraft, and authorizing proceedings against the same by name, by which it is provided, that steamboats and other watercraft shall be liable for debts contracted on account thereof, for materials, labor, etc., in the building or repairing of the same; and also among other causes of action, for any damage or injury done by the captain, mate, or other officer thereof, to any person who may be a passenger or hand on such boat or craft, at the time. The plaintiff complains of an injury and damage done to him on board the defendant, by the mate, an officer thereof, on the waters of the Ohio river, out of this state, and while the boat was within the borders of the state of Indiana, and sailing under the authority of a coasting license from the United States.

Some years ago the validity of this state law was questioned, on the ground of an alleged conflict with the clause of the second section of the third article of the constitution of the United States, which provides that the judicial power of the United States, among other cases, "shall extend to all cases of admiralty and maritime jurisdiction." And the judiciary act passed by congress in 1789, provides that the district courts of the United States shall be invested with "exclusive cognizance of all civil causes of admiralty and maritime jurisdiction." It was adjudged, however, by the supreme court of this state, in the case of Thompson v. Steamboat Julius D. Morton, 2 O. S., 26, that this state law was not unconstitutional; that it was competent for a state to authorize a concurrent remedy by proceeding at common law, or by statute, over causes of civil action within its jurisdiction, which constitute grounds for proceeding in admiralty, in the federal courts; and that the exclusive and original cognizance of all civil causes of *admiralty 51
and maritime jurisdiction conferred on the district court of the United States was to be construed as exclusive only as between the district and the circuit and other courts of the United States. And this is understood to be in accordance with the doctrine laid down by the supreme court of the United States, in the case of The Genesee Chief v. Fitz Hugh et al., 12 Howard, 124. And the correctness of these decisions is conceded by the counsel making the

motion now before us. But the validity of the law is now questioned upon another and different ground. It is insisted that the tort for which the plaintiff brought this suit, is one for which the owner of the boat would not be liable in a proceeding *in personam* against him; and that to subject his boat to the satisfaction of the liability of the officer for his wrong, would be taking the property of one person to discharge the liability of another, and therefore, a violation of the constitutional guaranty of the inviolability of private property; and that especially, this could not be done for a tort committed on the boat while within the jurisdiction of another state, and while engaged in the coasting trade under a license and enrollment, pursuant to the revenue laws of the United States. And it is insisted that this question, although it turns mainly on the construction to be given to the constitution and statute of Ohio, is an appropriate one for the determination of the supreme court of the United States.

The first question which arises on this motion, is whether the supreme court of the United States can exercise any supervisory control by way of appeal or writ of error, over the adjudications of a state court. If no such appellate power exists, we can have no authority for making the entry requested, and it would be improper to do so. It is said that the supreme court of the United States as entertained appeals from this court, and also from the supreme court of the other states, on a similiar entry, in cases of recent occurrence involving the question of the validity of the laws of this state taxing the property of banks. The entries made in the supreme court of the state in the bank tax cases, which were removed to the supreme court of the United States, were entries drawn up
52 and made by the consent and agreement of the *parties. But this fact that the supreme court of the United States would entertain the appeal from this court upon the certificate proposed, is not conclusive on the question before us. The existence of such appellate power by the authority of the constitution, is necessary to warrant the record of such an entry in this court, and, therefore, a matter to be passed upon by us on the motion under consideration. The decision of the supreme court of the United States in favor of its own power, is entitled to great respect; but, however high the consideration due the decisions of that tribunal, they cannot be above the reach of respectful examination and inquiry into the reasons and authority upon which they rest, when brought under review in the determination of a matter imposing the duty of judicial action in a state court.

The question of the appellate power of the supreme court of the United States over the state courts, has recently acquired an importance of great and vital interest in this state. In the exercise of this appellate power, that tribunal has recently assumed to reverse the judgment of the supreme court of Ohio, and annul a state law, by declaring it unconstitutional, on a mere question of the judicial construction to be given to the constitution and statutes of the state; and that, too, in regard to a matter relating solely

to the local revenues of the state, and in nowise whatsoever, affecting the interests or due administration of the general government. See State Bank of Ohio v. Knoop, 16 How. 369. And under this decision some fifty banking corporations in this state, with an aggregate amount of taxable property exceeding twenty millions of dollars, are, at this time, claiming exemption from the taxing power of the state, and successfully resisting the authority of the state to exact an equal and just tribute of taxation from them. The increasing and fearful interest and importance of the question of the appellate power of the supreme court of the United States over the state courts, has become such as to require the most profound consideration. And as it is fairly and fully presented on the motion before us, we feel no disposition to shrink from the responsibility of meeting it fairly and fully. And inasmuch as this appellate power is claimed upon the ground of great *weight of 53
authority, we deem it not inappropriate, and indeed, no less than a duty in expressing an opinion on it, to give the subject a full, searching and thorough examination.

Does the constitution confer any power on the federal government, by which the supreme court of the United States is authorized, in the exercise of its appellate jurisdiction, to review and reverse the judgment of a state court?

It cannot be pretended that Congress can confer this power by statute, without a delegation of authority in the constitution. Under our system of government, a law originating in an exercise of power not given by the constitution, is void. The United States is a government of expressly defined and limited powers, and all powers not delegated in the constitution, are expressly reserved.

It would be to little purpose, indeed, that the people should expressly define and limit the powers of their government by a written constitution, if the limits prescribed could be passed by those intended to be retained, and laws enacted without authority derived from the constitution. "This doctrine," (in the language of Chief Justice Marshall, in the case of Marury v. Madison, 1 Cranch, 137,) would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure; and thus reducing to nothing what we have deemed the greatest improvement on political institutions—"a written constitution." It is incontestible, therefore, that if this power be not conferred by the constitution, it cannot be legitimately exercised.

We may here promise, that it is a settled rule of interpretation. founded on sound reason, that every written instrument conferring

limited and expressly defined powers must be strictly construed; and that to warrant the exercise of special authority thus delegated,
54 *the grant of it, must appear affirmatively and distinctly to be within the terms of the prescribed limits. If this rule be important in any instance, it is so in its application to the written constitution of a government of limited and expressly defined powers. If the exercise of doubtful authority, derived by vague and far-fetched construction and implication, be warranted or allowed, a written constitution will be of but little consequence as a restraint upon ambition and cupidity. The rigid application of the strict rule of construction above mentioned, is also authoritatively required by the ninth or tenth additional amendatory articles of the constitution, declaring that the powers not expressly delegated, are reserved, and that the enumeration of certain rights in the constitution shall not be construed to deny or disparage those retained. Without this express requirement of a strict construction, the constitution would not have been adopted by the states.

Bearing in mind, therefore, this rule of interpretation, we will proceed directly to an examination of the question under consideration.

The whole judicial power of the federal government is conferred by the third article of the constitution. The first section of this article prescribes the courts in which this judicial power is vested, in the words following:

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

The second clause of the second section of the article, distributes the jurisdiction under which this judicial power is to be exercised as follows:

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make."

These two provisions contained in the same article, and closely connected in their relation to the same subject matter, must be
55 *construed together. The whole jurisdiction conferred is vested in the supreme court of the United States, and the inferior courts established by Congress. None of the judicial power of the United States, therefore, can be exercised by any other courts than the courts of the United States. No other courts but these are mentioned in this article; and clearly none other could have been in contemplation. In a few specified cases only, is original jurisdiction given to the supreme court; as to all other

cases, the jurisdiction of that court is appellate. An appeal is the removal of a suit from the determination of an inferior court, to the jurisdiction of a superior court under the same judicial system. It is a continuation of the same suit under the judicial power of the same government, but under the jurisdiction of a higher court, than that in which it has been once decided. Appellate jurisdiction is the cognizance which a superior court takes of a case removed to it, by appeal or writ of error from the decision of an inferior tribunal. The power of the appellate court necessarily includes the power not only to reverse the judgment, but also to control and direct the subsequent action of the subordinate court. Appellate jurisdiction, therefore, always implies the existence of subordinate courts in the same judicial organization over which the court in which it is vested exercises a supervising or correcting control. The appellate jurisdiction, which is here vested in the supreme court of the United States, is conferred in the same constitutional provision which authorizes the establishment of the inferior federal courts as well as the supreme court; and of course has a direct reference to appeals from the inferior federal courts, being the subordinate courts under the same judicial organization. No other courts than the United States courts are mentioned, or even alluded to in this article of the constitution; and none other could have been contemplated. This constitutional provision is the fundamental law for the organization of a judicial system. It vests all the judicial power of the government in a supreme court, and certain inferior courts belonging to this judicial organization. No other judicial system is mentioned. The constitution contains no provision creating any connection between this and any other judicial organization. *When therefore, this constitutional provision distributes the judicial power of this system, by vesting appellate jurisdiction 56
in the supreme court, it mould be a gross absurdity to say, that this appellate jurisdiction could have reference to anything else than appeals from the inferior tribunals here mentioned as belonging to the same system, and which are essential to make upon the organization of the courts in which the whole judicial power of the United States is vested.

Where a constitution organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislative branch of the government may ordain and establish; then enumerates its powers, and proceeds so far to distribute them as to define the jurisdiction of the supreme court and to confer upon it appellate jurisdiction the plain import of the words is to confer jurisdiction or a supervising control by appeal or writ of error over the judgments of the subordinate tribunals here mentioned and established in the same connection, as a part of the same organization. If the appellate jurisdiction here conferred had reference to any other subordinate courts than those mentioned in this provision of the constitution, language would certainly have been used expressly including them. The judicial system of each state is different and distinct from that of the federal government, and or-

dained and established under a different constitution—originating from a different source, and distinct in its organization, it is clothed with independent judicial power derived from the people of the state, and wholly distinct from the judicial power of the United States. If the appellate jurisdiction conferred on the supreme court of the United States had reference to the removal of cases by writ of error or appeal from the state courts, as well as the inferior federal courts, it is fair to infer that the express mention of them would not have been omitted and the state courts not having been mentioned as subject to this appellate power, they are excluded by a well settled and universal rule of interpretation. Each of the states has always claimed to be sovereign and independent, and at the time of the formation of the constitution of the United States, each
57 state was especially jealous of encroachments *on its state sovereignty by the powers delegated to the federal government. It is certainly by no fair or reasonable mode of interpretation, that the language of the constitutional provision above recited, could make the courts of the states subject to the supervising control or the appellate power of the supreme court of the United States without the mention of them, or language clearly and expressly including them.

But it has been argued, that the language of the constitution conferring appellate jurisdiction on the supreme court of the United States, is not expressly limited by reference to any particular subordinate courts, but general and restrained only by "such exceptions and such regulations as the congress shall make;" and that therefore, the language of the constitution does not limit this appellate power to the inferior federal courts. This argument overlooks one of the plainest and most common rules of interpretation. The language of every instrument must be construed with reference to the connection in which it is used, and the context and subject matter to which it relates. The article of the constitution in which this appellate jurisdiction is conferred, establishes a separate, distinct and independent judicial system, vests the whole judicial power of the federal government in the federal courts, provides for a supreme court and the inferior courts of the system, and in the distribution of the jurisdiction, confers appellate jurisdiction on the supreme court. Was it neceessary to say in so many words that the appellate jurisdiction here conferred applied only to proceedings in the subordinate tribunals here mentioned and provided for—the tribunals belonging to the judicial organization in this connection established—tribunals exercising judicial power here conferred, a part of which, and indeed a mere continuation of which, after the commencement of its original exercise, is the appellate jurisdiction under consideration? It is clear that the words specifically applying this appellate jurisdiction to the proceedings of these subordinate courts of the same organization, could not have made this consitutional provision plainer than it is. No other court or judicial system is in any manner referred to or even recognized as having an existence. This grant of appellate jurisdic-

tion, therefore, taken *in the connection in which it stands, has as plain and clear an application to the supervising control over 58
the subordinate federal courts alone as express language could make. Such is the fair and reasonable import of the whole article; and any other construction would not only violate a settled rule of interpretation, but be at variance with reason and plain common sense.

The constitutional provisions for the establishment of the several judicial systems for a number of the states, furnish practical illustrations of the interpretation here given to the constitution of the United States. The first section of the fourth article, in the constitution of Ohio, is as follows:

"The judicial power of the state shall be vested in a supreme court, in district courts, courts of common pleas, courts of probate, justices of the peace, and in such other courts, inferior to the supreme court, in one or more counties, as the general assembly may from time to time establish."

The second section of the same article, continues:

"The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum, or to pronounce a decision. It shall have original jurisdiction in *quo warranto*, *mandamus*, *habeas corpus*, and *procedendo*, and such other appellate jurisdictions as may be provided by law."

Here a supreme court and certain subordinate courts are created, and in the distribution of the judicial power, appellate jurisdiction is conferred on the supreme court in general terms, without expressly mentioning the subordinate courts over whose proceedings it shall be exercised. The provision here is substantially the same with that in the constitution of the United States, in regard to the appellate jurisdiction. But did any ever doubt as to the subordinate courts to which the appellate jurisdiction here conferred was applicable? Was it ever supposed, that it could be extended beyond the subordinate courts mentioned in the same connection and authorized under the same judicial system? What would be said of a legislative enactment in Ohio authorizing an appeal, or writ of error from the subordinate federal courts sitting within the state, to the supreme court of the state? Would the supreme court of the United States—a tribunal which has never been wanting in a disposition at least, to protect, to the utmost extent, the powers of the federal *judiciary—acquiesce in such an interpretation of 59
the constitution of Ohio? It certainly would not. And yet the language of the constitution of the state, and the relation of the state to the federal government, would justify such an interpretation and sustain such appellate power in the state court, upon the very same ground upon which this appellate power claimed for the supreme court of the United States rests.

The judicial system of each state is entirely distinct from that of the federal government, and the judicial power of the federal government being wholly distinct from the judicial power of each

state, it cannot be blended with it. All the judicial power vested in the federal government, must, from the very nature of the grant, be original, or capable of original cognizance of any case commenced under it. Without original, there can be no appellate jurisdiction. The latter is a mere continuation of the judicial power originally acquired or taken over the rights of the parties in a suit. The authority given to congress to ordain and establish inferior courts, to any extent deemed proper, was evidently intended to enable the federal government to provide subordinate tribunals in each of the states, competent to take original cognizance of all matters of federal jurisdiction within its limits so far as the same might become necessary. The state courts were not relied on as means of exercising any of the judicial power of the United States and no portion of it was vested in them by the constitution of the United States. It has been settled by solemn adjudication that congress cannot by law impose jurisdiction on the state courts, nor can the legislature of a state impose jurisdiction on the United States courts. The exercise of the appellate jurisdiction, therefore, by the supreme court of the United States over the state courts, is not only not provided for in the constitution, but is incompatible with the theory of our government, and the distribution of power under it. Hence the express provision in the constitution, that "the judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may ordain and establish,"—thus confining the judicial power of the federal government to the federal courts, by express provision.

60 *But it is insisted that the power of the supreme court of the United States, to control the judgments of the state courts, is acquired by virtue of the first clause of the second section of the third article of the constitution, which is in these words:

"The judicial power shall extend to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens or subjects."

The effect of this provision, is not to confer appellate jurisdiction, but to define the objects, and limit the extent of the judicial power of the United States. The judicial power mentioned, is of course the judicial power of the United States as distinguished from that of the several states; and it is extended only to the subjects specially enumerated; so that the federal courts are courts of limited, and not courts of general jurisdiction. Their jurisdiction is to "extend" to all cases arising out of the several matters specifically enumerated. There is no expression used to give the judicial

power here conferred, any exclusive character. The term "extend" means to stretch, reach, or continue in any particular direction, (Webster's Dictionary.) There is no meaning in the word "extend," which carries with it the exclusion of anything else extending to the same matter. It is in the nature of the jurisdiction of courts of justice, that it never operates, till it is invoked by the institution of a suit, or other proceeding in court. When, therefore, the judicial power is extended to any particular subject, it is simply empowered to take jurisdiction over it, whenever it is invoked by the commencement of a suit or other proceeding. Had the phraseology of the constitution been as follows: The courts of the United States shall have jurisdiction in all cases brought before them, touching the several matters mentioned, instead of the language used, it is very clear, that the same, and no different meaning would have been expressed. The state courts are not mentioned nor referred to *nor do they appear to have been in contemplation, from any language used. The bare extension 61
of the judicial power to all cases, or which is the same thing, to all suits or proceedings which may be instituted invoking its action, touching the enumerated subjects, does not give any exclusive character to the power granted, so as to exclude the concurrent jurisdiction of co-ordinate tribunals.

The object of a written constitution is to enumerate and distinctly describe the power delegated by the people to the government, so that they may not be left matters of doubt or conjecture. Had it been the intention of the constitution to exclude the concurrent jurisdiction of the state courts in the cases to which the judicial power of the United States is extended, language would certainly have been used, clearly manifesting such intention. But as no such words are employed, and all powers not expressly conferred are reserved by the very terms of the constitution, it is plain and certain that no such exclusive jurisdiction is given by the constitution, to the federal courts.

Much hypercriticism has been expended on the words "all cases in law and equity, arising under the constitution, laws, and treaties of the United States," to which the federal jurisdiction is extended. There is no occasion for any strained interpretation, or search for the far-fetched meaning to ascertain the plain import of the language used. What constitutes "a case" in law or equity, arising under the constitution, etc., is a matter of legal interpretation. A case in law or equity is a suit or proceeding in court, invoking the exercise of judicial power, and consisting as well of the parties as of their rights. There is a manifest distinction between a question in law or equity, and a case in law or equity. Although every case in law or equity involves a question, yet many questions may arise seriously affecting the rights of persons, which do not constitute a case in law or equity. It appears that Chief Justice Marshall, when a member of congress, in a debate in relation to the famous case of Jonathan Robins, gave an exposition of the term "a case in law" as used in the constitution, in the following words:

"By the constitution, the judicial power of the United States is extended to all cases in law and equity arising under the constitution, laws and treaties of the United *States; but the
62 resolutions declare the judicial power to extend to all questions arising under the constitution, laws and treaties of the United States. The difference between the constitution and the resolutions was material and apparent. A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties that had taken a shape for judicial decision. If the judicial power extended to every question under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States, it would involve almost every subject upon which the executive could act. The division of power, which the gentleman had said could exist no longer, and the other departments, would be swallowed up by the judiciary. By extending the judicial power to all cases in law and equity, the constitution had never been understood to confer upon that department any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit." 5 Wheat. Rep. Appendix.

This interpretation is unquestionable. Cases in law and equity within the meaning of the constitution, therefore, are suits or proceedings in court requiring the exercise of judicial power. And as this article of the constitution refers to and has in view no courts but the federal tribunals, it is manifest that the language "the cases in law and equity arising under the constitution, laws and treaties of the United States," comprehends only suits or proceedings instituted in the federal courts, invoking the exercise of the judicial power of the United States. The constitution does not say that the judicial power shall extend to all questions arising under the constitution, laws, and treaties of the United States. The idea that the judicial power of the United States extends to every question arising under the constitution, laws and treaties of the United States is not only an absurdity, but an impracticability.

The judicial power acts only when its operation is invoked; and its action is invoked only by a case or suit instituted under its jurisdiction. It is not possible, therefore, for the judicial power to take cognizance of any question, except where a suit or judicial proceeding has been instituted under its jurisdiction, calling it into operation. A case, therefore, within the meaning of the constitution, and to which the judicial power of the United States extends,
63 must *be, first, a suit or judicial proceeding instituted under the authority of the federal constitution, invoking the action of the judicial power of the United States; and, second, it must involve a question, or relate to a subject matter pertaining to the constitution, laws or treaties of the United States, or involve one

of the other elements of federal jurisdiction, specified in the constitution. Such would be a case arising under the constitution of the United States; and to all such cases, and none others, is the judicial power of the United States extended.

There is, therefore, no foundation for the doctrine that the first clause of the second section of this article of the constitution confers an exclusive jurisdiction on the federal courts over all questions arising under the constitution, laws and treaties of the United States. And the very claim to appellate jurisdiction in the supreme court of the United States from the state courts, over cases involving these subjects, for adjudication, is an admission that the state courts may take cognizance of, and determine these questions, and that the jurisdiction of the federal court over them is not exclusive. So that it cannot be claimed that the language of the constitution extending the judicial power of the United States to all cases arising under the constitution, laws and treaties of the United States, is exclusive.

It is insisted, however, that the state courts, as to these questions are courts of inferior jurisdiction to the federal tribunals, and that, therefore, appellate jurisdiction as to them from the state courts, may be given to the federal courts. But, as has already been shown, the appellate jurisdiction of the supreme court of the United States, is expressly defined by the second clause of this second section, plainly limited to the supervision of the decisions of the inferior federal courts. And as there is no provision whatever in the constitution, giving the federal courts appellate jurisdiction over the state courts, it follows that, as to these cases, to which the judicial power of the United States is extended, the state courts exercise a jurisdiction, concurrent and not inferior to that of the federal tribunals. And it is inherent in the nature of *concurrent jurisdiction, that the courts which exercise it are 64
tribunals of co-ordinate and co-equal authority, and neither control the determinations of the other by the exercise of appellate power; but the adjudication of the court in which the jurisdiction first attaches, is conclusive and final. This is a fair deduction from the provisions in both the state and the federal constitutions. The jurisdiction of the state courts is admitted, and the judicial power of the United States is extended to the enumerated cases, but by no language which makes it exclusive. It follows that the jurisdiction of each is concurrent and, there is nothing in the constitution giving either appellate control over the other. Appellate jurisdiction by either over the other, would be fundamentally incompatible with the theory and structure of our system of government.

As nothing can be found in the third article of the constitution which provides the organic law for the judicial system of the United States, authorizing the exercise of appellate jurisdiction by the federal court over the state courts, can it be pretended that this extraordinary power can be derived from any other part of the constitution? There is no provision in the succeeding fourth, fifth, sixth and seventh articles, even remotely bearing upon it; nor is

there anything in the second article which defines the powers of the executive department, in any way relating to the subject. And certainly there is nothing to be found among the enumerated powers of congress, in the first article, to warrant congress in clothing the federal courts with any such authority. The eighth section of this article, containing the specific enumeration of the powers of congress, authorizes congress to establish courts inferior to the supreme court; but there is nothing empowering congress to authorize appeals from the state courts to the supreme court, or to exercise any authority whatever over the state courts. The first clause of this section confers the power "to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare of the United States." The authority here given to raise revenue with a view to pay debts
65 *and provide for the common defense and general welfare, clearly contains no grant of judicial power. The most latitudinarian construction heretofore given to the constitution, has not conceded to congress general discretionary power to pass laws providing for the general welfare. On the contrary, it appears to be settled that this authority of congress to provide for the common defense and general welfare, has relation to the enumerated powers, and can be exercised only pursuant to, and in the execution of the express powers granted and specifically enumerated.

Where, then, is the authority in the constitution for this appellate power? Can it be found among the implied powers of the government? The eighteenth clause of section 8, article I, empowers congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." This is the express authority for the exercise of the incidental powers, and having relation to the express powers can only be exercised pursuant to them. It authorizes the enactment of all laws "proper and necessary" for the execution of the express powers vested in the several departments of the government. Now, as the express power giving the supreme court of the United States appellate jurisdiction, is that which is contained in the third article of the constitution, and has relation only to appeals from the inferior federal tribunals, it follows that the incidental or implied power in relation thereto, is limited to necessary and proper laws relating to appeals from the inferior federal courts to the supreme court, and nothing more.

The second clause of the sixth article of the constitution, declaring the constitution, laws and treaties of the United States, the supreme law of the land, has been urged in support of the alleged supremacy of the judicial power of the United States over the State courts. This clause, however, is merely declaratory, and vests no specific power whatever in the government, or any of its departments. No one questions the supremacy of the constitution,
66 *laws and treaties of the federal government. This supremacy is not, however, absolute, and is limited to the sphere of

the delegated powers of the federal compact. And the state courts are bound to observe this supremacy in all matters judicially brought before them, as well as the federal courts. This supremacy, therefore, imposes subjection to the constitution, laws and treaties of the United States, but no subjection to the federal courts. The constitution and statutes of each state is the supreme law of the land within the sphere of the state authority; while the constitution, laws and treaties of the United States, are the supreme law of the land within their appropriate operation. But how can this mere declaratory provision authorize appellate jurisdiction in the federal courts over the state tribunals? The very clause of the constitution which contains it, requires that the judges of every state shall be bound by the constitution, laws and treaties of the United States, as the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. And the succeeding clause of the same article requires of the judicial officers of several states, together with other officers, an official oath to support the constitution of the United States. Although the official oath of the federal officers requires the same thing, yet, it does not enjoin upon them the duty of supporting the constitution of the several states. Not only, therefore, is no distrust in the state judiciary shown by the constitution, but the fidelity required by the oath of office, implies that the determination of matters pertaining to the federal constitution, laws, etc., might occur in the state courts, as well as in the federal courts. And if a revising or controlling power over the state courts, in this respect, by the federal courts, had been contemplated, it would undoubtedly have been expressly and distinctly delegated. But this not having been done, the judicial officers of the several states as well as the federal officers, are required, under the injunction of an official oath, to observe and support the constitution, laws and treaties of the United States, as the supreme law of the land.

The existence of the appellate power in the supreme court of the *United States over the state courts, has been argued from its tendency to produce uniformity of decision, and prevent 67
conflict between the adjudications of the state and federal tribunals. This argument is founded on the supposed utility or beneficial tendency of such a power. It is an argument in favor, rather of the propriety and policy of the power, than of its existence; and would be more appropriate on a political question before a convention or legislative assembly, than on a legal question before a court of justice. The judicial question before us, is a mere question of interpretation; and is to be determined from the language of the constitution by and application of the known and settled rules of judicial construction. The duty of judicial action does not go beyond this. But it is to be lamented, that the political bearing of questions of mere constitutional interpretation in our courts, has been heretofore, a source of too frequent error in this country, leading to determinations making the constitution by construction,

what the judges wish it to be, or what they think it ought to be, rather than what it actually is.

The alleged salutary tendency of this appellate power for the purpose of uniformity of decision, has been greatly exaggerated, and made a mere pretense to justify the power in question. For that uniformity is not in fact attained, or in good faith attempted by the 25th section of the judiciary act of the congress of 1789. That act authorizes the appeal in cases, where the uniformity of decision may exist, and denies it in cases where the uniformity may not exist. It is only where the decision is in favor of the authority of the state, or against the power of the federal government, that the appeal is authorized. When, therefore, the state court has decided in favor of the validity of a state law, on the ground that it is not repugnant to the constitution of the United States, and the supreme court of the United States, either, has already decided, or would decide in favor of the validity of the law, there is uniformity of decision, and yet, the appeal in such a case is allowed. On the other hand, where the state court decides against the validity of a state law, and the federal court, either, has already decided, or
68 *would decide in favor of the validity of the law, there is want of uniformity; and yet, in that case, the appeal is denied. Uniformity of decision is, it would appear, a matter of no importance, providing the decision of the state court be in favor of the authority of the federal government. But where the state court decides to sustain the validity of a state law, there the want of uniformity will justify the federal court in reversing the judgment of the state court! The enormity of this solecism is made even more glaring by the fact that the judges of the federal courts, are under no official oath to support the constitutions of the several states, against the authority of which, they are allowed to decide, while the judges of the state courts are placed under the solemnity of that official injunction, to support the constitution of the United States, as well as that of their state. Yet notwithstanding this, the decision of the court of last resort in a state, is, according to this law of congress, presumed to be right, and therefore final, if it be against the authority of the state, and in favor of that of the United States, but if the decision be to the contrary, it is presumed to be liable to error, and therefore, subject to revision and reversal in the federal court. This presents the monstrous absurdity in judicial action, of making the judgment of a court of justice final or not according to the party in whose favor it may happen to have been rendered, of making a court, the court of last resort or not in the determination of a cause, according as it may be decided in favor of one or the other of the parties. This novel and extraordinary feature in the judicial system of the United States, is founded on a want of confidence in the integrity and fidelity of the state courts, and only admits that they are to be trusted as impartial, when they decide in a particular way, in other words, in favor of the power of the general government. The manifest effect of this incongruity, is to

aggrandize the federal government at the expense of the degradation of that of the several states.

Upon no ground whatever can uniformity of decision be urged as an argument in favor of the existence of this appellate power.

The courts of this country are prone to follow precedents, and *sometimes, even go too far, for the sake of uniformity of 69
decision. Notwithstanding this, there is often as much want of uniformity in the various decisions of the same court, as is to be found between the decisions of the courts of the different states, or between the decisions of the state and the federal courts.

And there can be no conflict of authority between the courts of concurrent jurisdiction, as it is settled that, as between courts of concurrent jurisdiction, the adjudication of the court in which the jurisdiction first attaches, is final and conclusive upon the parties. And in all cases of concurrent jurisdiction in different courts, the plaintiff selects the tribunal in which to bring his suit; and having selected his tribunal, he should abide by the decision. Nor has the defendant any right to complain in such case, and have another trial in the federal courts, when the decision of the state court is against him. Whether he be a citizen, or mere non-resident or sojourner in the state, he is bound to acquiesce in the decisions of its tribunals, having subjected himself to this liability by voluntarily putting himself under the protection of its laws.

It has been argued in favor of this appellate power, that appeals were allowed from the state courts to the courts etablished by congress under the Articles of Confederation of 1778, an instrument which as it has been said encroached far less on the sovereignty of the states than the present constitution. The foundation of this, as an argument drawn from analogy, when accurately understood, is in reality against, instead of being in favor of the existence of this power under the present constitution. The only provision in relation to the exercise of judicial power, contained in the Articles of Confederation, is the following, in article ninth: "The United States, in congress assembled, shall have the sole and exclusive right and power of appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures." The judicial power here given, over piracies and felonies upon the high seas is "sole and exclusive." So also, is the power *of 70
establishing appellate courts of dernier resort for the final determination of all cases of captures "sole and exclusive." Some such language as this would have been used in the constitution of the United States, had it been the intention to give to the federal courts exclusive jurisdiction over, or the exclusive final determination of, the various cases to which the judicial power of the United States was extended.

This provision, however, in the Articles of Confederation, affords no ground for argument founded on precedent or analogy, in favor of this appellate power over the state courts. The relation of the states to the authorities under the confederation, was essen-

tially different from that of the states to the federal government. Under the constitution of the United States, the federal government is a distinct and independent government, to which the several states stand in the relation of distinct, equal, and co-ordinate powers. But the confederation did not, in reality, possess the essential elements of a distinct government. The only distinct branch of government established by it was the congress, and that was greatly dependent on the states. The confederation was a mere alliance of the states for common defense, and certain general regulations respecting their foreign relations, commercial affairs, etc. It was not a distinct government, in and of itself, but a mere agency of the states, exercising their confederated authority. No distinct judicial system was, in fact, established by the confederation; no superior and subordinate courts authorized, and no distribution of jurisdiction provided for. So that, no precedent or analogy whatever is to be found here, for this supervisory control over the state courts.

It has been said that this appellate power of the supreme court of the United States, is sustained by contemporaneous construction of the constitution. This is, however, chiefly founded on the opinion expressed in the political work entitled "The Federalist," consisting of a series of articles written by Messrs. Hamilton, Madison, and Jay, over the signature of "Publius." While this work is not entitled to the weight of judicial authority, it is liable to the further objection that it was a newspaper publication, written in the
71 haste *and excitement of a political contest. And although the authors were gentlemen eminently distinguished for ability and patriotism, yet they took part with the political party which in the constitutional convention insisted on an enlargement of the powers of the federal government beyond that which was conceded by the convention in the formation of the constitution. It is a historical fact that the convention which formed the constitution of the United States was to a considerable extent divided into two parties one of which insisted on the establishment of a national government with an absolute negative on the power of the state governments while the other insisted on a strictly federal government reserving and securing to the several states their freedom and sovereignty as distinct equal and co-ordinate governments. On the one side it was urged that the danger to be apprehended was that the reserved powers of the states would combine and destroy the efficiency of the delegated power: and on the other side it was strenuously insisted that the danger to be feared was that the delegated powers of the general government would absorb the reserved powers of the states and result in a consolidated government destructive to the sovereignty of the states and dangerous to the freedom of the people. This division of opinion was manifested in the proceedings of the convention throughout its deliberations and produced much solicitude and excitement among the people of the several states. Those in the convention in favor of a national government were found in the minority; and although they yielded in the con-

vention and ably advocated the adoption of the constitution they did not abandon their political views but sought still to carry them out to some extent by enlarging the powers of the general government by a very liberal and in some instances a latitudinarian construction of the constitution. The authors of the "Federalist," acting with the party which insisted on giving the greatest strength and energy to the general government, placed that construction on the constitution which tended most to enlarge its powers. It is true Mr. Madison afterwards somewhat changed his course, united with Mr. Jefferson and his friends and for a time adopted the strict construction of *the constitution, as appears from his report and 72
resolutions in the legislature of Virginia, in January, 1800.

The articles in the "Federalist," therefore, should be received with many grains of allowance on account of their partisan character. And written in the heat of a political contest, it is not surprising that they are not in all their parts, perfectly consistent.

It is true, that the 82d number of the articles in this work, and which was written by Mr. Hamilton, expresses the opinion that "the national and the state (judicial) systems are to be regarded as one whole;" and that an appeal lies not only from the state courts to the supreme court of the United States, but on the last page of this article he adds, "I perceive at present no impediment to the establishment of an appeal from the state courts to the subordinate national tribunals, and many advantages attending the power of doing it may be imagined!" This opinion as expressed is not deduced from a close and satisfactory analysis or interpretation of the language of the constitution. And if it be followed, congress would have the power, and may, whenever that body deems it proper, make the judgments of the highest courts in the several states subject to revision and reversal in the United States district court, which is held by a single judge, or in any of the other subordinate courts of the United States. If the doctrine of this work is to be adopted in the construction of the constitution, congress may pass a law authorizing appeals from any of the courts of a state, even from justices of the peace, to any of the federal tribunals; and the judgments of the supreme court or of any of the other courts of a state may be made subject to revision and reversal in any of the subordinate federal tribunals, even in that of a mere commissioner under the federal judiciary, now in the exercise of judicial power, notwithstanding he is not appointed by and with the advice and consent of the senate. If this doctrine be tenable, the constitution has provided no safeguard whatever for the independence and sovereignty of the states.

In the 81st article of the "Federalist," Mr. Hamilton expresses the opinion, that congress may confer jurisdiction on the state courts *to try causes arising out of the federal constitution, and 73
adds, in his own words: "To confer upon the existing courts of several states the power of determining such causes would perhaps be as much 'to constitute tribunals' as to create new courts with the like power," etc. How is this to be reconciled with the first section

of the third article of the constitution, containing the positive provision that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish, the judges of which courts shall hold their offices during good behavior, and at stated times receive for their services a compensation from the United States which shall not be diminished during their continuance in office? Are not the judges of the inferior courts, in whom the judicial power of the United States is authorized to be vested, federal courts exclusively? By whom are they to be appointed? From what source are they to receive their salaries? And can their compensation be diminished during their term of office?

As a further instance to show the liberal construction given by Mr. Hamilton to the constitution, it may be added that in his report as secretary of the treasury of the United States, of December 5th, 1791, he expressly contends that it belongs to the discretion of congress to pronounce upon the objects which concern the general welfare, for which an appropriation of money may be made; and in his own words says, "There seems to be no room for a doubt, that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce, are within the sphere of the national councils, as far as regards an appropriation of money." Such a construction, once conceded, would result in a consolidation of all the controlling civil power and influence in the general government, and a total annihilation of the sovereignty and freedom of the states.

Yet on the fifth page of the 45th article in the "Federalist," the following language is used by Mr. Madison:

"The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to
74 remain in the state governments are numerous *and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and that internal order, improvement, and prosperity of the state." * * * * "If the new constitution be examined with accuracy and candor, it will be found that the change which it proposes, consists much less in the addition of new powers to the Union, than in the invigoration of its original powers."

Many pages might be occupied in presenting the conflicting and irreconcilable opinions and speculations of the distinguished authors of this political publication. But more attention has already been given to it than would have been deemed necessary, but for the fact, that it has been greatly relied on as authority, on the subject under consideration even in the reported opinions of the supreme court of the United States.

In further support of this alleged contemporaneous construction of the constitution the opinion of the first congress which assembled, and by which the judiciary act of 1789 was passed, providing for this appellate power, is sometimes referred to. This is also an authority novel in its character. The very question involved, is that of the constitutionality of the twenty-fifth section of the judiciary act, providing for the exercise of this appellate power. And is this to be determined by the opinion of the legislative body which enacted the law? If this be good authority, every unconstitutional law can sustain itself; for the law itself is an authoritative expositon of the opinion of the august body by which it is enacted. By such authority, the constitutionality of the alien and sedition laws could be sustained, which vested arbitrary and despotic power in the President of the United States, and abridged the freedom of speech and of the press, in plain violation of the constitution; and also the constitutionality of the numerous other acts which have been repealed, and are now repudiated by the force of public sentiment as wholly unwarranted by the constitution.

*But it is said, as the congress which enacted the judiciary act of 1789, was composed of a number of eminent men, 75
who were prominent members of the convention which formed the constitution, the legislative construction thus given to the constitution is entitled to great consideration. This reasoning is in conflict with the principle which has been deemed of vital importance in all free governments, by enlightened writers, including the authors of the "Federalist," that the power of making and the power of expounding a law or constitution should not be given to the same persons.

No one will deny that the illustrious men who took a leading part in forming our government, are entitled to great credit for ability and patriotism. But it would be a manifestation of imbecility in their descendants, to attribute to them the perfection of wisdom, and an exemption from the ordinary infirmities of humanity. In the establishment of our government, they made an experimet in the science of goverment new in theory, and vast and complicated in its operations. They made no pretention themselves that it was perfect, or that they could foresee all the dangers or imperfections incident to its operations, and which time and experience alone could fully make known. Mr. Madison, in the 38th article in the "Federalist," uses the following language:—"Is it unreasonable to conjecture, that the errors which may be contained in the plan of the convention, are such as have resulted, rather from defect of antecedent experience on this complicated and difficult subject, than from the want of accuracy or care in the investigation of it, and consequently, that they are such as will not be ascertained until an actual trial will point them out? This conjecture is rendered probable, not only by many considerations of a general nature, but by the particular care of the Articles of Confederation. It is observable, that among the numerous objections and amendments suggested by the several states, when these

articles were under consideration, not one is found which alludes to the great and radical error, which on trial has discovered itself."

The justness of these remarks is fully illustrated by the practical *operation of the system under the constitution, which
76 has fully demonstrated that the opinion of those eminent men who formed the constitution, (and which doubtless led to the adoption of the 25th section of the judiciary act,) that the powers of the general government would prove too weak to resist the influence of the state governments, was groundless; and that, on the contrary, the weak point in the system is now fully shown to consist in the concentration of power and influence in the federal government, tending rapidly to absorb the entire sovereignty of the states.

I concede to the fullest extent, that high respect and deference for the decisions of the supeme court of the United States justly and properly due, from a consideration, not only of the position of that tribunal, but also of the eminent intellectual and moral qualities which have distinguished its incumbents. But timid submission to the exercise of extraordinary civil power, without even an inquiry into the reason or authority for its assumption, is not required by the high consideration due that court, nor is it a peculiarity of the age or country in which we live. It is not to be expected, in case of conflict between the authorities of the federal and the state governments, that the decision of the federal tribunal is to be above the reach of respectful examination even by the authorities of the co-ordinate power. The sentiment which would exact such submission may be becoming under the exercise of despotic power where an inquiry into its reason or authority is not allowed but it is not suited to the temper and characteristics of a free people.

It is said that this appellate power of the supreme court of the United States has been exercised for many years and sustained by repeated adjudications. If unauthorized, it is a sufficient answer to this, that the usurpation of civil power, in this country, never becomes constitutional or legal by prescription, or frequent repetition. And although the federal court has decided in favor of its own assumptions of power over the state courts, its decisions have not been universally acquiesced in; on the contrary, some of the states have not only absolutely refused submission, but successfully
77 *resisted its power. In the case of Hunter against Martin, devisee of Fairfax, in which the validity of a treaty of the United States was drawn into question, the supreme court of appeals of the state of Virginia unanimously refused obedience to a mandate from the supreme court of the United States, holding that the 25th section of the judiciary act was unconstitutional, that the appellate power of the supreme court of the United States could not be extended to the proceedings of the state courts, and that the proceedings of the federal court in that case, purporting to reverse the judgment of the state court, were *coram non judice*. It appears from the report of this case, in 4 Mumford's Rep., p. 1, that the subject was thoroughly investigated on the hearing, and an elabo-

rate opinion from each member of the court is given, maintaining the position taken, by arguments remarkable for ability, and the dignified and dispassionate view taken of the whole subject.

The case of Worcester v. The State of Georgia, 6 Peters, 515, was a writ of error from the supreme court of the United States to the superior court of Gwinnett county, to reverse the judgment of the state court, under which Worcester had been convicted and sentenced to the penitentiary for the violation of the criminal provisions of a statute of Georgia, in relation to white persons residing within the Cherokee nation of Indians, without permission and conformity to the laws of the state. The supreme court of the United States, in 1832, gave judgment reversing and annulling the judgment of the state court, and directing a special mandate to be sent to the state court, to carry the judgment of reversal into execution.

And in the case of Butler v. the State of Georgia, which was a case of the same kind, the supreme court of the United States rendered the same kind of a judgment, and made the same kind of an order as that made in the case of Worcester, 6 Peters, 597.

It appears, however, that on the receipt of the mandate in each of these cases, the authorities of the state of Georgia treated them as matters of no validity, wholly disregarded them, and not only *kept Worcester and Butler in the penitentiary, in defiance of 78
the orders of the supreme court of the United States, but also continued to execute the state law under which they were convicted.

Two other cases occurred in Georgia, of even a more serious character: one, the case of Tassels, 1830, and the other, the case of Groves, in 1834. Each of these persons having been convicted under the criminal laws of the state, and sentenced to the punishment of death, the supreme court of the United States in each case, on the application of the defendant, had allowed a writ of error to the state court; but the state authorities, in each case, treated the proceedings in the federal court with contempt, and executed the sentence of the state court by hanging the defendants. But the matter was not allowed to stop here. In reference to the case of Tassels, the legislature of the state of Georgia, in 1830, adopted, among others, the following resolutions:

"*Resolved*, That the state of Georgia will never so far compromise her sovereignty as an independent state, as to become a party to the case sought to be made before the superior court of the United States, by the writ in question.

"*Resolved*, That his excellency, the governor, be, and he and every other officer of this state, is hereby requested and enjoined to disregard any and every mandate and process that has been, or shall be served on him or them, purporting to proceed from the chief justice, or any associate justice of the supreme court of the United States, for the purpose of arresting the execution of any of the criminal laws of this state."

Resolutions were also passed by the legislature of that state, to the same effect, in reference to the case of Graves, in 1834.

It is understood that the states of Virginia and Georgia have ever refused to recognize, or acquiesce in, the exercise of this power by the supreme court of the United States. And in the recent case of Padelford, Fay & Co. v. The City of Savannah, decided in the supreme court of Georgia, 14 Georgia, 440, an elaborate opinion is given, exposing and condemning in strong and severe terms, this unwarranted exercise of power by the supreme court of the United States.

79 *In the case of Commonwealth v. Cobbet, 3 Dallas, Rep., 467, the supreme court of the state of Pennsylvania, by a solemn adjudication, unanimously refused to submit to the control of the federal judiciary over the state courts, provided for in the judiciary act of 1789, on the ground of its unconstitutionality. And in this case, Chief Justice McKean, very fully expressed the opinion of the court against the interpretation of the constitution by which this appellate power is claimed.

I am not informed of a single instance, in which the question has been fairly made in the supreme court of a state, where this power claimed for the supreme court of the United States has been approved, although it has been reluctantly submitted to, in a number of instances.

It may well be claimed, therefore, that this doctrine of the supreme court of the United States is not of unquestionable, nor of unquestioned authority. On the contrary, it appears, that since its first assumption, although it may have been submitted to, in a number of instances, without the question being made, yet it has been always questioned in some of the states, and not only denied in their courts, but in some cases successfully resisted.

The decisions of the supreme court of the United States, in favor of its own assumptions of power, and the enlargement of the powers of the general government, have not been satisfactory, and have greatly detracted from the weight, which would have been otherwise conceded to the opinions of that tribunal. The federal courts, at first, even assumed jurisdiction of crimes at common law. 2 Dallas's Rep. 297, 384. This jurisdiction, was afterwards abandoned and is now conceded to have been an unauthorized exercise of power. And it is a remarkable fact, that almost every unwarranted stretch of power by congress, has been sustained by the supreme court of the United States. This is a matter of public history. The alien and sedition laws; the vexatious regulations of the embargo and non-intercourse acts; the act to incorporate a bank of the United States, (passed in the exercise of a power, not only not found in the constitution, but which the convention
80 *which framed the constitution of the United States, by a distinct vote, positively refused to delegate;) the recent bankrupt law, (which, by its retro-active operation, invaded the rights of private property, and to an alarming extent, impaired the obligations of actual contracts, made on the faith reposed in the integrity of the government, and on the terms of existing laws;) these, and numerous other acts, which might be mentioned, now repealed,

and wholly repudiated by the force of public sentiment, as unwarranted by the constitution, received a ready sanction in the supreme court of the United States. In view of the unmistakable disposition manifested by that tribunal, to enlarge the powers of the general government by construction; in view of the fact, that it has taken under its protection almost every species of corporations, political, pecuniary, and eleemosynary; in view of its repeated encroachments in the sovereignty of the states, by annulling laws which, in no way whatever, concerned the affairs of the federal government, or interfered with the progress of its legitimate administration, it must be admitted, although much to be lamented, that the decisions of that tribunal have not only lost much of their moral influence, but much weight as judicial authority in the courts of the states.

In asserting this appellate power over the state courts, the supreme court of the United States has not deduced it from the constitution by any clear and satisfactory interpretation. The cases in which the court has attempted to defend this power by argument, are Martin v. Hunter, 1 Wheat., 304, and Cohens v. Virginia, 6 Wheat., 413. In the first, the opinion of the court is by Mr. Justice Story, in the latter, by Chief Justice Marshall. In both these opinions, the second clause of the second section of the third article of the constitution, which contains the clause providing for the appellate power of the supreme court, is separated from its connection with the other parts of its subject matter, and taken abstractly, is declared to give appellate power in general terms, without any reference whatever to the inferior courts over which it shall be exercised. This, as I have already shown, is an unfair and unwarrantable mode of construing the constitution. Taken in its *proper connection, the appellate power here given has 81
a clear and undoubted reference and application to the inferior federal courts mentioned and authorized as a part of the same judicial system.

Again, remarkable as it may seem in both these opinions, the first clause of this second section, which provides that "the judicial power of the United States shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties," etc., is relied on to sustain this appellate power. I have already shown that this provision clearly confers neither appellate nor exclusive jurisdiction.

In the case of Martin v. Hunter, 1 Wheat., 340, the supreme court of the United States concedes the fact, that the language of constitution extending the judicial power to "all cases" arising out of enumerated subjects, does not confer exclusive jurisdiction touching these matters. But Mr. Justice Story says, that, as the state courts will exercise concurrent jurisdiction over many of these enumerated subjects, if no appeal can be taken from the state courts to the federal courts, the judicial power of the United States will extend only to some, and not all such cases! This is certainly an

unsatisfactory mode of reasoning. If even the right of appeal from the state courts to the federal courts existed, it would frequently happen that an appeal would not be taken from the adjudication in the state court. In such case, could it be pretended that the constitutional exercise of the judicial power of the United States was defeated? Certainly not. It may be said, however, that the failing party had the option to appeal, and bring his case within the judicial power of the United States. But if this extension of the judicial power of the United States to all cases, etc., is answered by leaving it to the option of one of the parties to bring the case within the exercise of it, the option of the party instituting the suit to bring it in the federal courts, is all sufficient. This would be extending the judicial power of the United States to all the enumerated cases in accordance with the constitution, which can mean nothing more than authority to exercise jurisdiction over any of the specified cases, whenever a party shall elect to institute a suit in the federal courts touching the same.

82 *In both these opinions, the federal court has manifested great sensitiveness and jealousy in regard to the concurrent jurisdiction of the state courts. The leading consideration in the strained construction given to the constitution by the federal court, appears to be founded on the supposed abuse of power by the state courts. It seems to be taken for granted that the state courts are not to be trusted, and will be unfaithful to the constitution of the United States, notwithstanding the judges are sworn to support it. And Judge Story, in Martin v. Hunter, 1 Wheat., 348, said that "mischiefs truly deplorable" would exist, if the federal court did not exercise a supervisory control over the state tribunals. And in the case of Cohens v. Virginia, 6 Wheat., 264, Chief Justice Marshall said, "It would be hazarding too much to assert that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals."

The anticipated abuse of power by the states, and the supposed disregard of the constitution and laws of the United States, by the state courts, is made the pretext for the assumption of this appellate power over the state courts. In both the opinions of the supreme court of the United States mentioned, the burden of the argument is, that this supervisory power is reasonable, proper, and highly necessary. The necessity and utility of the power has ever been the tyrant's plea for the usurpation of power. This argument founded on the utility and necessity of the power, would have been legitimate in the convention which formed the constitution, or on a proposition to amend the constitution, but in giving a construction to the constitution, it is entitled to no consideration whatever, if the power be not fairly and clearly deducible from the language of the instrument.

In both of these opinions of the supreme court of the United States, the "Federalist" is relied on as very high authority. And here the remark is not inappropriate, that one of the leading points

decided in the case of Cohens v. Virginia, *supra*, was, that this appellate jurisdiction could be exercised against a state as a party defendant. On this point, however, the authority of the "Federalist" is in *direct conflict with the decision of the court, as appears by the following extract from the 81st article of that work. 83

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind, and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal." * * * * "The contracts between a nation and individuals, are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be, to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident it could not be done, without waging war against the contracting state, and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

Although the Federalist is cited as reliable authority to sustain the appellate power of the supreme court of the United States over the state courts, yet the opinion expressed in this work, that a state is not amenable to a suit brought against it in the federal courts, is wholly repudiated. And as early as the case of Chisholm v. Georgia, 2 Dallas, 474, the supreme court of the United States, held, that the judicial power of the United States extended to a suit against a state, since which it has been no rare occurrence for a state to be arraigned before the bar of the supreme court of the United States. And inasmuch as Judge Story, in a note in his Commentaries on the Constitution, vol. 3, p. 548, not only repudiates the doctrine of Mr. Hamilton above recited in the 81st article of the Federalist, as irreconcilable with the reasoning of the next preceding article of the same work; but also, on page 546, of his commentaries, copies extensively from this preceding article in the Federalist, to sustain the opposite opinion, I will take the liberty of sustaining the doctrine of the Federalist in article 81, above recited, by an authority entitled to very great respect. In the convention of Virginia, on the occasion of the ratification of the constitution of the United States, John Marshall, (afterwards chief justice) in a speech in the convention, said:

"I hope no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases, in which *the legislature of Virginia is a party, and yet the state is not sued? It is not 84
rational to suppose, that the sovereign power shall be dragged

before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But say they, there will be partiality in it, if a state cannot be defendant, if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided." Elliott's Debates, vol. 2, page 405.

It would appear, therefore, that the Federalist is not only not always consistent with itself, but not always consistent with the doctrine of the supreme court of the United States; that Chief Justice Marshall anounced a doctrinefrom the bench the very opposite of that which he had previously declared in the convention of Virginia, when urging the adoption of the constitution; and that Mr. Justice Story while he adopted the doctrine of one article in the Federalist as high authority, repudiated that of the next succeeding article as irreconcilable with the part of the work which he had adopted! The opinions of these great, and no doubt, good men, entangled with plain inconsistencies and confounded by conflict, constitute the chief weight of the authority to sustain the supervisory power of the supreme court of the United States over the state courts. It is true, that the commentaries of Chancellor Kent, and also the works of some other highly respectable elementary writers, are sometimes referred to as sustaining this appellate power. But it is to be remarked, that none of these writers have entered into any investigation of the subject themselves. They simply give the opinions declared by the supreme court of the United States, and that found in the Federalist, on which the whole doctrine appears to rest.

The admitted fact that the supreme court of the United States cannot control the action of the state courts by *supercedeas*, *procedendo*, or *mandamus*, furnishes a most conclusive argument against the right to the appellate jurisdiction in question. Such power of control over subordinate courts is essential to the complete and proper exercise of the appellate power.

The twenty-fifth section of the judiciary act of 1789 provides only for its exercise in cases where the record of the state court discloses the fact that questions arose connected with some of the
85 *enumerated subjects of the federal jurisdiction. And the supreme court of the United States have, in numerous cases, adjudged that it was essential to the exercise of this appellate power over the state courts, that the record of the state court should explicitly show the following indispensable requisites, to-wit: *First*, that a question arose in the state court involving some one of the specified subjects of the judicial power of the United States. *Second*, that a decision was actually made on the question in the state court, in the way pointed out in act of congress. *Third*, that the decision became necessary in the determination of the case. And if each one of the requisites do not appear by the record, it is held, that the jurisdiction fails. Crowell v. Randall, 10 Pet., 368; Commercial Bank of Cincinnati v. Buckingham's Exrs., 5 Howard, 341.

Now, it is unquestionable that the state courts have ample and complete control over the records of their own proceedings; and may, in most cases, successfully defeat this appellate power, by causing their records to be so made up as not to show that any such questions arose, or were decided. And it is undeniable that each state has the power even to prohibit the allowance of a copy of the record of any of its judicial proceedings, for the exercise of this appellate jurisdiction by the federal courts. And the supreme court of the United States being clothed with no power by mandamus or otherwise, either to control the form of the record in the state court, or to compel the furnishing of an exemplification, this appellate power must be wholly dependent on the discretion of the state, and the action of the state court. The exercise of such appellate power, dependent in a great measure on the option of the subordinate court and wholly on the acquiescence of the state government and to which although some of the states will submit, yet to which other states will absolutely refuse submission, will lead to more conflict, difficulty, uncertainty and disturbance of harmony in the administration of justice than can be countervailed by any supposed benefit which can ever arise from it.

To sustain the supervising control of the federal courts over the state courts it is asserted that the government of the United States *is a national instead of a federal government; and that 86
the judicial powers of the general and the state governments are blended together as parts of the same judicial system. Mr. Hamilton in the 82d article of the Federalist, said, "Agreeably to the remark already made, the national and the state systems are to be regarded as one whole. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice and the rules of national decision!" The ground of the appeal insisted upon here is not any express provision in the constitution, but that the government of the United States is national in its character, the state courts mere auxiliaries of the courts of the United States, and the national and the state judicial systems to be regarded as parts of one and the same system, or in the language of Mr. Hamilton, "as one whole." This doctrine is not merely quoted by Chief Justice Marshall, in the case of Cohens v. Virginia, *supra*, with marked approbation, but adopted as the true exposition of the theory and basis of our government. And in the case of Martin v. Hunter's Lessee, 1 Wheat., 323, Mr. Justice Story not only adopted the same doctrine, but enlarging and amplifying on it, said, "The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by 'the people of the United States.' There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary, to extend or restrain these powers according to their own

good pleasure, and to give them a paramount and supreme authority."

This is the only ground which gives plausibility even to the claim of a supervising power in the supreme court of the United States over the state courts. If the government of the United States be a national government, and the states subordinate departments, if the judiciary of the United States and that of the several states are blended, belong to one and the same system, are but parts of "one whole," deriving their powers from the same source,
87 and *responisible to the same authority, then it may be admitted that there is force in the argument in favor of this appellate power. But if on the other hand the government of the United States be a federal government of limited and defined powers, and the states distinct, independent sovereignty is within the appropriate sphere of their powers; if the judiciary of the United States and that of the several states are separate and distinct from each other, belonging to independent and distinct judicial systems, each distinct and different in its organization from the other, deriving its power from a different source, and responsible to a different authority, then this appellate power claimed for the supreme court of the United States is wholly inconsistent with the theory and structure of our government.

This distinction is a most important one in the determination of the question under consideration. As has already been remarked appellate jurisdiction comprehends the relation of superior and subordinate tribunals. And if this appellate power over the state courts be delegated by the constitution, congress has the authority to provide all the necessary and proper remedies to carry it into full and complete execution. For the full exercise of the powers of an appellate court, there must be not only the power of reversing the judgment of the subordinate court, but the necessary control over its action. The appellate court must have the power by *supercedeas* to suspend the action of the subordinate tribunal, pending an appeal or writ of error; the power by *mandate* to require its judgments of reversal to be entered in the subordinate court and the power by *procedendo* to compel the subordinate court to proceed in the exercise of its authority under the direction of the revising power. And the very fact of the relation of superior and subordinate tribunals in the exercise of the same judicial power, furnishes just foundation for giving the superior court the further controlling power of the writ of mandamus and also the writ of prohibition. And if congress can give the supreme court of the United States supervising power over the state courts, it can confer the same power on the circuit, the district, and other inferior federal courts. The one is derived from a construction which must
88 indubitably *sustain the other. The construction, although it prescribes the line of distinction between the original and appellate jurisdiction of the supreme court, leaves the distribution of the jurisdiction of the inferior federal courts to the discretion of congress. And if the relations of the general and the state gov-

ernments be such that a supervising power can be given by congress over the courts of the latter to the supreme court of the United States, it follows that by the exercise of the same power it can be given to the inferior federal tribunals in regulating their appellate jurisdiction. So that, if Mr. Hamilton's proposition in relation to the appellate power of the supreme court be correct, his opinion above referred to in the Federalist, in relation to the appellate power which might be given to the inferior federal courts over the state courts follows as a legitimate deduction. And in the case of Martin v. Hunter, above cited, in Wheat., on page 349, Mr. Justice Story, in defending the provision of the 12th section of the United States judiciary act of 1789, for the removal of a suit before trial from the state courts to the circuit court of the United States, distinctly said, that this is the exercise of appellate and not of original jurisdiction. And on page 350, he adds, "And if the appellate power by the constitution does not include cases pending in the state courts, the right of removal, which is but a mode of exercising that power, cannot be applied to them." The same doctrine is adopted and repeated by the learned jurist, in the 3d vol. of his commentaries on the constitution, pages 609 and 610. This proceeding of the federal judiciary gives a new feature to appellate jurisdiction, heretofore understood as importing the power of retrying or revising the proceedings or decisions of a subordinate court in which judicial action had actually taken place. Under this provision of the judiciary act, the cause is required to be transferred to the federal court before there has been any decision or any action whatever taken by the state court. And this Mr. Justice Story called appellate jurisdiction and said that the right of removal cannot be exercised unless it be by appellate jurisdiction. Yet the learned commentator in the 3d vol. of his commentaries on the constitution on page 627 said:

"In reference to judicial tribunals an appellate jurisdiction therefore necessarily implies that the subject matter has been already instituted in and acted upon by *some other court 89
whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms and indeed in any form which the legislature may choose to prescribe; but still the substance must exist before the form can be applied to it. To operate at all then under the constitution of the United States it is not sufficient that there has been a decision by some officer or department of the United States; it must be by one clothed with judicial authority and acting in a judicial capacity."

This doctrine in relation to the foundation for the exercise of appellate jurisdiction will be universally recognized as correct, and how it is to be reconciled with the proceeding under the 12th section of the judiciary act, for the removal of a cause from a state court after its jurisdiction has legally and constitutionally attached, but before any judicial action has been taken in the case, is left for others to say, presuming it to be one of the instances in which extraordinary power requires extraordinary reasons to sustain it.

It appears, therefore, according to the doctrine of Mr. Justice Story, that the appellate jurisdiction of the subordinate federal courts over the state courts, has been already, in one form, actually provided for. If the federal courts can exercise a revising power over the state courts, in cases where the jurisdiction of the state tribunals is fully admitted, it must result from the subordination of the state courts to the federal tribunals, and because the government of the United States, and that of the several states, are not equal and co-ordinate governments, but because the government of the United States, is national in its form, and the states but subordinate parts of one consolidated system.

Appellate jurisdiction is not only a continuation of the exercise of the same judicial power which has been executed in the court of original jurisdiction, but it necessarily implies that the original and appellate courts are capable of participating in the exercise of the same judicial power. After the exercise of the appellate power in the adjudication of a cause, important judicial acts often remain to be done in the court of original jurisdiction. The entry of the judgment in the subordinate court, is essential; otherwise the judgment on the records of that court appearing in full force, would entitle the party to the process of the court to enforce it; and in such case, if process be issued on the judgment in the appellate court, a conflict *would arise between the ministerial officers 90
of the two courts, each protected by judicial process. But further, the subordinate court has more to do than to simply enter the judgment of the appellate court; it must conform its action to it, and carry it into full effect. It is frequently necessary in the proper exercise of the revising power, that the appellate courts simply settle some general principles or preliminary questions which govern a case, and remand it to the subordinate court with a *procedendo*, thus directing and controlling the action of the court of original jurisdiction, in the further investigation and adjudication of the case. In the case before us, suppose we should allow this motion and the supreme court of the United States should reverse our judgment, the mandate of that court to us would require us to enter upon our records, a judgment not our own, but a judgment pronounced by that court, contrary to our own judgment in the case, and which we would be commanded to carry into effect. If we should comply with the mandate by entering the judgment of reversal, and conforming our action to it, and carry it into full effect, we would perform either a ministerial or a judicial act. It would scarcely be pretended by any to be the former. There is certainly no authority for the federal court to require the performance of ministerial or executive duties by this court. Ministerial or executive duties under a department of the general government, are performed by ministerial or executive officers appointed and acting under the authority of the constitution and laws of the United States. As it could not be a ministerial, it must be a judicial act, which we would be directed to perform. Every judicial act necessarily requires the exercise of judicial power. In the

performance of this act, would we exercise the judicial power of the United States or the judicial power of the state of Ohio? It could not be the judicial power of the state. That has been fully and finally exercised in the case, by the judgment which we have already rendered. A final judgment in this court expends or exhausts its judicial power as to that case; and unless brought up again upon some motion or proceeding known to the laws of the state or some action by the supreme court of Ohio, the judicial power of the state must there finally terminate. *And it will not be pretended that there is anything in the constitution or laws of Ohio requiring of us, either the performance of any such act, or even the one now asked by the motion before us. If either could be legally done at all, it would have to be done in the exercise of the judicial power of the United States. But how are we to be enabled to exercise the judicial power of the United States, when by the express provisions of the constitution, all the judicial power of the United States is vested in one supreme court, and such inferior courts as congress shall ordain and establish, the judges of which, shall hold their offices during good behavior, and receive a fixed compensation from the general government. 91

It is claimed, however, that the government of the United States is a national government, of which the states are mere subordinate departments, so that the judicial power of the several states, and that of the United States, are blended, and must be regarded as one and the same, and consequently that the courts of each may be enabled to exercise authority by virtue of the judicial power of the other. This involves an inquiry into the true theory and nature of our system of government in regard to a matter not depending on mere speculation, but a true exposition of which is to be found by reference to the constitution itself, and the public records and history of its formation. A national government is the government of the people of a single state or nation united as a community by what is termed the social compact, and possessing complete and perfect supremacy over persons and things, so far as they can be made the lawful objects of civil government. A federal government is distinguished from a national government, by its being the government of a community of independent and sovereign states, united by compact. The thirty-ninth number of the Federalist, furnishes the following distinction between a national and federal government:

"The idea of a national government involves in it not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among the people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in general, and *partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and inde- 92

pendent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a national one, since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects."

Originally each state of the American Union was, in the language of the Declaration of Independence, "free and independent," possessing all the powers and supremacy of a separate and distinct nation of people. The constitution of the United States originated from the confederation of the states under the Articles of Confederation of 1778, the first and second articles of which were as follows:

Article 1. The style of this confederacy shall be "The United States of America."

Article 2. Each state retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in congress assembled.

It is not pretended by any, that this confederacy possessed the elements of a national government, but it is admitted to have been a simple compact between independent states for mutual defense, and some other general purposes. It is claimed by some, however, that by the constitution of the United States, the sovereignty of the people of each state was surrendered and transferred to the people of all the states in the aggregate, and that thus, the people of all the states of the Union, became consolidated into one single community or nation. The history of the formation of the constitution exposes the utter fallacy of such an idea. The convention which framed the constitution was called, not by the act or authority of the people of the several states in mass, but by a resolution of the congress, the organ of the several states under the confederacy. And it was called, not for the purpose of establishing a national government, but on the contrary, in the language of the resolution of the congress of the confederacy calling the convention, "for the sole and express purpose of revising the Articles of Confederation, and reporting to congress and the several state legislatures, such alterations and provisions therein, as shall render
93 the federal *constitution adequate to the exigencies of the government, and the preservation of the union."

The object of the convention is here most explicitly defined. It as not to establish a national government for the people of all the states, and thereby abolish the state sovereignties but solely and expressly to revise the articles of confederation between the several states, etc. With this distinctly defined object in view, the delegates to that convention were appointed, not by the authority of the people of the states in the aggregate, but by the legislatures of the several states. And the commissions from the several states to their delegates in this convention expressly limited the authority

to this definite object, for which the convention was convened. In the convention which framed the constitution the delegates voted by states, and after its formation, it was submitted to the several states and ratified, not by the whole people of the United States, but by each state acting separately and for itself as an independent sovereignty.

The formation and ratification of the constitution, therefore, was not the act of the people of the states collectively, but the act of the people of each state acting separately and independently for themselves. And the distinctly defined object with which it was done, was, not the establishment of the consolidated national government for the people of the whole United States, as one community or nation, but the simple reversion of the Articles of Confederation and the establishment of a government based on the federal compact. This is fully sustained by the views of Mr. Madison, expressed in the number of the Federalist last above quoted, in which he said:

"This assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state, the authority of the people themselves. The act, therefore, establishing the constitution will not be a national but a federal act."

And the author continues:

"That it will be a federal, and not a national act, as these terms are understood by the objectors, the act of the people as forming so many independent states, not *as forming one aggregate nation, is obvious from this single consideration, that 94
it is to result neither from the decision of a majority of the people of the Union, nor that of a majority of the states. It must result from the unanimous assent of the several states that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority in the same manner as the majority in each state must bind the minority, and the will of the majority must be determined either by a comparison of the individual votes , or by considering the will of the majority of the states, as evidence of the will of the majority of the people of the United States. Neither of these rules has been adopted. Each state, in ratifying the constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new constitution will, if established, be a federal and not a national constitution."

Those who insist on the appellate power of the supreme court of the United States in question, cannot consistently repudiate the authority of the Federalist.

The preamble to the constitution has been appealed to, in support of the doctrine, that the constitution of the United States was ordained and established by, and for, the people of the states collectively, as a distinct community or nation. This argument is founded upon a mere literal interpretation of the preamble, wholly disregarding the true authority by which the constitution was established, the source from which its powers were derived, and the true nature and objects of the powers delegated. The preamble reads, "We, the people of the United States, in order to form a more perfect union, etc., do ordain and establish this constitution of the United States of America." What is here meant by the expression, "We, the people of the United States?" It expresses the authority by which the thing was done. It means the people by whose authority the constitution was formed and ratified. It was the act of forming and ratifying the constitution which ordained and established it. It was formed by delegates appointed by the representatives of the people of the several states in their respective state legislatures; and it was ratified by the several states, through a convention of delegates in each state, elected by the people of the state, each state, in doing the same, acting for itself and by the author-
95 ity of its *people, as a separate and independent nation. The constitution, therefore, was ordained and established, not by the whole people of the United States collectively, or in mass, as a distinct community, but by the several states, the people of each acting in the name and by the authority of their state, as a distinct, independent, sovereign people. It is, therefore, incontestible, that the words of the preamble, "We, the people of the United States," mean the people of the several states of the Union, not collectively and in mass, but as the people of distinct independent states, acting by their respective separate state authorities, in forming a compact with each other, and establishing a federal government, or governments, the parties to which were distinct communities, or independent states, as contradistinguished from the people of all the states taken collectively or in mass. At the time of the formation of the constitution, the states were members of the confederacy united under the style of "The United States of America," and upon the express condition that "each state retains its sovereignty, freedom and independence." And the consideration that, under the confederation, "We, the people of the United States of America," indubitably signified the people of the several states of the Union, as "free, independent and sovereign states," coupled with the fact that the constitution was a continuation of the same Union, and a mere revision or remodeling of the confederation, is absolutely conclusive that, by the term, "The United States," is meant the several states united as independent and sovereign communities; and by the words, "We, the people of the United States," is meant the people of the several states as distinct and sovereign communities, and not the people of the whole United States collectively as a nation.

The preamble declares that the constitution was ordained and established "for the United States of America." And as "The United States" means the several states united by compact under a federal government of limited and expressly defined powers, it follows that the constitution was ordained and established for the people of the several states as distinct communities by whom it was ordained and established.

The omission to enumerate the states by name by which and for which the constitution was *ordained and established 96
makes nothing against this interpretation. It appears from the proceedings in the convention which formed the constitution that the first draft of the constitution contained an enumeration of the states by name after the word "people;" but after the adoption of the seventh and last article, providing that "the ratification of the conventions of nine states should be sufficient for the establishment of this constitution between the states so ratifying the same," it became necessary to strike out the enumeration of the states by name, which was accordingly done. See Madison's Debates, vol. 1, p. 1539.

The objects for which the constitution was ordained and established are explicity defined in the preamble. Had the object been to abolish the states as independent and sovereign communities, and establish a national government for the American people collectively, as constituting one consolidated distinct community, it would have effected a change far greater than that which was effected by the American Revolution; and that purpose would have been manifested by provisions leaving no ground for cavil or doubt. But the objects of the constitution declared in the preamble, differ very little from the purposes of the confederation as declared in the third number of the Articles of Confederation. The objects announced in the constitution are, to form "a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." These purposes are very far from indicating an intention to establish a consolidated national government. The first purpose named, is that of forming a more perfect union, thus recognizing the existing union between the several states, under the confederation, and simply proposing to render it more perfect. What union is here contemplated? The question admits of but one answer. The union between the independent and sovereign states already existing. The federal character of the government is here explicitly declared as distinguished from a consolidated national government of the American people. And when we consider the constitution as ordained and established by the people of the several states, for themselves, as distinct and *sovereign communities, the objects announced in the pre- 97
amble are plain and easy of comprehension. They were to perfect their union as distinct and sovereign communities; to establish justice among them; to insure their domestic tranquillity; to provide for their common defense and general welfare; and to se-

cure the blessings of liberty to them and their posterity as the people of several distinct communities. And the provisions in the body of the constitution, in every article, when correctly construed, fully confirm the views here expressed. Calhoun's Works vol. 1, 130 and 137.

According to the doctrine of the Federalist, however, in one part of the work, the government of the United States is partly federal and partly national in its operation, and in the source from which its powers are derived. This position, however, will not bear the test of examination. The constitution is admitted to be federal, and not national by the same work, as has been already shown. And inasmuch as the government derives all its powers from the constitution, and is organized on the basis of it, and indeed constituted by it, how the government can be national in any part, or in any sense, is not easy of comprehension. According to the theory of our institutions, sovereignty vests in the people, and government is constituted by a delegation of civil power in trust for the purposes prescribed. If the general government is to any extent, or in any sense, a national government, it must be to that extent, or in that sense, the government of the whole people of the several states collectively, or as one consolidated community; and this could not have been brought about, without the people of the several states surrendering their sovereignty, and transferring it, not to the government, but to the whole people of the states collectively. It has been said that sovereignty is a thing, which from its nature is not susceptible of division—that the sovereign power may delegate authority and prescribe limits for its exercise; but cannot surrender a portion of its sovereignty, without ceasing to be the repository of the sovereignty of a state or nation. Without stopping to inquire into the correctness of this position, it is sufficient to say, that there is no provision in the constitution of the United States, or act in its formation and adoption, which amounts
98 to anything *like a surrender of sovereignty by the people of the several states, and a transfer of it to the whole people of the states collectively, as a distinct community, or consolidated nation of people.

The particulars in which the Federalist claims the government to be partly national and partly federal, are the following: *First*, in regard to the house of representatives in congress; *second*, in regard to the executive department; and lastly, in regard to the power of amendment. As to the first, it is said, in number thirty-nine of the work, that "the house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in a legislature of a particular state; and that so far the government is national, and not federal, etc. The fallacy of this doctrine is most glaring. All the powers of the government, including those of the house of representatives, are derived from the constitution; and the powers of the constitution are delegated, not by the American people in the aggregate, as a

distinct community or nation, but by the people of the several states, as separate, independent and sovereign states. And consistently with the constitution, it is not competent to elect the members of the house of representatives by the American people, collectively, as a distinct community; on the contrary, by the express provisions of the constitution, they are required to be elected by the people of the several states, not as composing mere districts of one great commuity but as distinct and independent states. The first bill which passed congress apportioning the members of the house of representatives among the several states was vetoed by President Washington expressly on the ground that it assumed as its basis that the people of the several states composed mere election districts of one great community instead of being as in truth they are under the constitution distinct and independent parties to the compact upon which the government is founded. By the terms of the constitution, the representatives are apportioned among the several states in a mode expressly prescribed, and they are required to be elected by the people of the several states, as independent communities. They may be elected by the people of any state, either by general *ticket or by districts; so that the members of the house of representatives, be the mode of election what it may, 99 are elected as the delegates of the several states in their distinct, independent and sovereign character as members of the Union. Neither is it true, that the people of each state are represented in the house of representatives on the same principle, and in the same proportion as they are in the legislature of each state. On the contrary, it is an incontestible fact that they are represented in their respective state legislatures as mere individuals, and by election districts entirely under the control of each state, and by a ratio or proportion fixed by each state for itself, and different in different states.

As to the executive department, the argument is equally groundless. The President of the United States is elected not by the whole people of the United States in the aggregate as a distinct community or people, but by electors appointed by each state separately and for itself, "in such manner as the legislature thereof may direct;" and the electors are expressly required to meet and vote in their respective states. And in the case of a failure of an election by the electoral college, when the election devolves on the house of representatives, the votes are requred to be taken by states, the representation from each state having one vote, etc.

And as the mode prescribed for the exercise of the amending power, it is plainly and expressly derived from, and exercised under the authority of the people of the several states, acting in their original, distinct, and sovereign character, and not under the authority of the whole people of the states regarded in the aggregate, as a distinct nation. And the modification of the original creating power requiring the consent of each state to make it a party to the constitution, which provides for the amendment of the constitution by three-fourths of the states, voting as states, without regard to

population, certainly gives no national character to the government, neither is it inconsistent with the federal character of the Union, inasmuch as it is provided for by express agreement in the compact.

On the whole, it may be said, without the slightest ground for contradiction, that in the formation of the government of the
100 *United States, the whole people of the states collectively as a distinct community or nation, were wholly unknown and in no respect whatever the source of power; and also, that on no operation whatever of the general government, is the action of the people of the states in the aggregate as a nation, known or recognized in any manner or form whatever. Indeed, the people of the several states of the American union never have, at any stage of their existence, been consolidated into a single community, so as to constitute one distinct people or nation; and as such of course never could have exercised any agency or participation, either in the formation or in the administration of this system of government.

From what has been said, it must be apparent, that the government of the United States was ordained and established by the people of the several states as distinct, independent, and sovereign communities; and that while the governments of the several states derive their respective powers from the people as individuals united under the social compact in their respective states, the government of the United States derives its powers from the states as organized communities, united by federal compact.

Each state government is a government of a community of people, while that of the United States, is a government of a community of states. A state government and the United States government are operative in each state; and each has its distinct, independent sphere of action. The main objects of the authority of the general government, are the relations of the states with each other, and with foreign nations, and the common defense and welfare of federal union; leaving the internal affairs and domestic interests of the people of each state to the authority of the state government. The delegated powers appertaining to government are divided between these two governments, and each is divested of what the other possesses; each acting for itself, and by its own separate authority, the powers of each being entirely distinct and independent of the other, it follows of necessity, that the two governments are equal and co-ordinate governments in each state of the union; each paramount and supreme within the sphere of
101 its powers. The confederation *which preceded the constitution of the United States, was subordinate to the state governments, upon which, to a great extent, it was dependent. To remedy the deficiencies of the confederation, the powers delegated by the constitution were made independent of the states. So that the government of the union and that of the several states, having each distinct and independent powers, and each distinct and independent spheres of action, become equal and co-ordinate gov-

ernments. It follows as a necessary consequence, that each of the two governments being independent of the other, each must be supreme within the sphere of its operations, and neither can be subordinate to the other. So that, the judicial, as well as the legislative and executive powers of each, must of necessity be, not only entirely distinct and separate, but also independent of each other.

This view of the subject, so far as the separate, independent and co-ordinate judicial power of the two governments is involved, is fully sustained by judicial decisions in both the state and in the federal courts. In the case of Martin v. Hunter, 1 Wheat., 304 the supreme court of the United States declare the doctrine that congress cannot vest any portion of the judicial power of the United Sates in any courts except those which are ordained and established under the constitution of the United States. It is universally admitted, that while congress can impose no jurisdiction on the state courts it is equally incompetent for a state legislature to impose jurisdiction on the federal courts. It is contended further, that the supreme court of the United States is the tribunal of last resort, clothed with authority to decide all questions touching the extent of its own powers, and also, all controversies involving a conflict between the authorities of the federal and the several state governments, and that the appellate jurisdiction of the supreme court of the United States over the state courts, is necessarily incidental to, and results from this power. That the supreme court of the United States is the court of last resort to determine all cases which may be instituted under the jurisdiction of the federal courts, is not controverted; but that this *tribunal has not only absolute authority to determine the extent of its own powers, but also constituted an 102
umpire to determine all questions of conflict arising between the several states and the federal government, is denied, and will be contested so long as the people of this country are capable of preserving their government in its original character. This arbitrary power once conceded would enable the supreme court of the United States to nullify state laws, and even provisions in the state constitutions, whenever, in the opinion of that tribunal, there existed any inconsistency between them and any express or constructive authority, under the operation of the constitution, laws, or treaties of the United States. It would annihilate the balance of power between equal and co-ordinate governments, and destroy that check upon the exercise of discretionary power, designed as the great safeguard against usurpation.

It is not claimed, I believe, that this high power is derived from any specific provision of the constitution; but it is claimed to be a right incident to the supremacy of all government, to decide as to the extent of its own powers, and to use all the necessary means to enforce its own authority. However this may be applicable as an incident to a single government, vested with all the powers appertaining to government, it is clearly inapplicable to a

system where the powers are divided between two distinct and co-ordinate governments, as is the case here. The very fact that these two distinct governments in one system, are co-ordinate, necessarily implies that they are equal, and excludes the idea of superior and subordinate. If either has the exclusive right to judge of the extent of its own powers, and also of that of its co-ordinate, and enfore its decision against the authority of the other by physical power, not only would equality between them be destroyed, but one would be raised from an equal to a superior, and the other be reduced from an equal to a subordinate. And the subordinate, thus stripped of the incident appertaining to all government, to judge of the extent of its own powers with a view to their protection, would necessarily sink to the condition of a dependent. Where there is a division of power between co-ordinate departments
103 of the same government, *each designed as a check upon the other, each must be allowed to judge of the extent of its powers, and to maintain its decision against the other. Without this, there can be no division of power. To vest power in two departments, and give one of them the exclusive right to judge of the extent not only of its own powers, and how much was allotted to the other, would be no division of power at all. The one would, in effect, hold under the other. But where two governments are distinct, independent and co-ordinate, each must possess all the necessary incidental powers appertaining to government, within the sphere of its powers, and consequently both must possess the right to judge of the extent of their respective powers, with reference to each other. And no reason can be assigned why one should be allowed the exclusive right to judge as to the extent of its own powers, and enforce its decision, more than the other. It is, therefore, one of the necessary incidents to the nature of distinct, independent and co-ordinate governments under the same system, that each operate as a mutual check upon the other. And in case of conflict of authority, resort is not to be had to force; for neither has the right to force its own decision upon the other. But the appeal is to the people, the sovereign and original source of power, which acts through the ballot-box upon the legislation of the country, both state and federal, and when found necessary, can alter the constitution by amendment.

But it is insisted, that as the constitution, laws, and treaties of the United States are declared to be the supreme laws of the land, as the general government is supreme within its own sphere, this supremacy necessarily requires all questions of conflict between its powers, and those of any of the states to be determined by the authority of the federal government. But as the constitution and laws of the several states are equally supreme to the extent of their operation, and each state government equal and co-ordinate with that of the United States, the inference mentioned is wholly unwarranted. That there is no repugnancy or incompatibility in the supremacy of each of these co-ordinate powers, and that the supremacy of the general government does not destroy

the independence of the state sovereignties was explained by Mr. Hamilton, in the convention of *New York, on the occasion of the ratification of the constitution of the United States, in the following language, lucid, forcible, and conclusive: 104

"With regard to the jurisdiction of the government, so I shall certainly admit that the constitution ought to be so formed, as not to prevent the states from providing for their own existence; and I maintain that it is so formed, and that their power of providing for themselves is sufficiently established. This is conceded by one gentleman, and in the next breath, the concession is retracted. He says congress have but one exclusive right in taxation, that of duties on imports; certainly, then, their other powers are concurrent. But to take off the force of this obvious conclusion, he immediately says that the laws of the United States are supreme and that where there is one supreme, there cannot be concurrent authority; and further, that where the laws of the Union are supreme, those of the states must be subordinate, because there cannot be two supremes. This is curious sophistry. That two supreme powers cannot act together is false. They are inconsistent only when they are aimed at each other, or at one indivisible object. The laws of the United States are supreme, as to all their proper constitutional objects; the laws of the states are supreme in the same way. These supreme laws may act on different objects without clashing; or they may operate on different parts of the same common object with perfect harmony. Suppose both governments should lay a tax of a penny on a certain article, has not each an independent and uncontrollable power to collect its own tax? The meaning of the maxim, there cannot be two supremes, is simply this; Two powers cannot be supreme over each other." See Elliott's Debates, vol. 1, p. 315.

Again, Mr. Hamilton on this subject, in the 33d number of the Federalist, used the following language:

"But it is said, that the laws of the Union are to be the supreme laws of the land. What reference can be drawn from this, or what would they amount to if they were not supreme? It is evident they would amount to nothing. A law by the very meaning of the term includes supremacy. It is a rule, which those to whom it is prescribed, are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for political power and supremacy. But it will not follow from this doctrine, that acts of the larger society, which are not pursuant to its constitutional powers, but which are in evasions of the residuary authorities of the smaller societies, will

become the supreme law of the land. These will be mere acts of usurpation, and will deserve to be treated as such. Hence we
105 perceive, that the *clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth which flows immediately and necessarily from the institution of the federal government."

The doctrine that the supreme court of the United States is the tribunal constituted to determine all questions touching the extent of the powers of the state and the federal governments, and with authority to restrain the action of the sovereign power of the states by annulling state laws, and reversing the judgments of the state courts, imports an extraordinary exercise of power, for which there should exist a clear and express warrant in the constitution. The question of the existence of this power has been very frequently brought before the supreme court of the United States, and instead of meeting the question and showing an unquestionable authority for it in the constitution, that tribunal has attempted to maintain it upon various grounds, and among the rest, by a resort to an argument founded on the supposed danger of the abuse of power by the states, derogatory to the sovereign character of the states. Mr. Justice Story, in the case of Martin v. Hunter, *supra*, to maintain this alleged power, said, "The constitution has presumed (whether rightly or wrongly, we do not inquire,) that state attachments, state prejudices, state jealousies and state interests, might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice." Although our government was designed to be a government of checks and balances, to restrain the abuse of power in all its departments, this argument of the learned judge is not strictly in character with the subject of which he speaks. In the case of Cohens v. Virginia, McCulloch v. Maryland, *supra*, and several other cases, language similiar in effect has been used by the supreme court of the United States, imputing interested motives, prejudice, and passion to the state courts, as the reason for its own jurisdiction. And in the case of Gordon v. Longest, 16 Peters 98, that court adjudged that one great object of the establishment of the federal courts, and regulating their jurisdiction was to have a tribunal in each state, presumed to be free from local influence! Now, it is at least, novel that a judicial tribunal should claim jurisdiction for itself, upon
106 the ground *that other courts equally disinterested, would be subject to improper motives and influences. Where there has been judicial action by a court of competent jurisdiction, all presumptions are in favor of the correctness of the adjudication, while it remains in force, and the imputation of improper motives or influences are not to be allowed. It is essential to the supremacy of all civil government, that the passions and motives of men should not be imputed to the exercise of sovereignty. Although it is undoubtedly true that the feelings of men do enter more or less into most of the acts of sovereign power, yet it cannot be allowed for one set of men clothed with power, to allege the danger

of the abuse of power by others in the exercise of authority, as a foundation upon which to build up power for themselves. In reference to the language of the supreme court of the United States, in the case of McCulloch v. Maryland, *supra*, the court of appeals of Kentucky placed this subject in a view so forcible and strong, that I deem it proper to make the following extract from the opinion, in the case of The Commonwealth v. Morrison et al., 2 Kentucky Rep. 537.

"The power to do good is, throughout all agency, except that of absolute perfection, the power to do evil. If the power of action were denied to all who could not pervert it, Deity alone could act. But the doctrine upon which the agency of the world hangs, is the very reverse; it is that power possessed may be used subject to the responsibility of the agent for its abuse. And it is upon this principle alone that we can have any just notions of morals, and of rewards and punishments. But sovereignty has a fictitious perfection and purity, which must be taken as real, and which cannot be controverted. Of course the abuse of power cannot be imputed to a sovereign, in restraint of its legitimate energies. The maxim that the King can do no wrong, is not an idle device of royalty formed to amuse or beguile the multitude: nor is the correspondent maxim, that the voice of the people is the voice of God, the offspring of the demagogue's brain. They are both just references drawn from the most profound views of civil policy, and illustrate the position advanced in relation to the purity and perfection of sovereignty. It is not that the king in a monarchy, or the people in a democracy, can do no wrong—for we know they are men, and of course partake of the frailties inseparable from human nature; as men they err frequently and egregiously. But it is the sovereignty with which they are invested, and in which they are merged, that is incapable of error. This incapacity in the sovereign to err, is matter of necessity. There is no tribunal before which the sovereign can be arraigned, his conduct examined, his errors and delinquencies detected, those errors corrected, and he punished. Sovereignty, therefore, whether displayed in the monarch or the multitude, possesses necessarily *this putative perfection; and is of course necessarily irresponsible. Upon 107
this purity and unerring character of sovereignty, depends all the jurisdictions which are exercised in the governments throughout the world. Government could not exist upon any other hypothesis."

It seems to have been deemed necessary even to humble and degrade the sovereignty of the several states, in order to maintain the high assumptions of power claimed for the federal government.

Where is the provision of the constitution to be found, which ordains the supreme court of the United States as the only tribunal, or the tribunal of last resort, to determine all questions or controversies touching the boundary of the jurisdiction of the two governments, state and federal? The people were sparing and cautious in the powers they conferred on the general government, and particular to have them expressly and clearly defined. It is fair to

presume that so important a matter as this would not have been left to mere implication or construction, had it been the intention to confer it. It is true, the Federalist comes in as authority to sustain this assumption. In the 39th number of this work, Mr. Madison used this language: "It is true, that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government." But if nothing else, the loose opinion here expressed, of itself, is most clearly sufficient to show that this work is not to be relied on in a legal investigation; because Mr. Madison, after ten years' observation of the practical operations of the government, under the federal constitution, upon the most grave and deliberate consideration, expressed a directly opposite opinion, in his celebrated report and resolutions, adopted in the legislature of Virginia, in January, 1800, the following extract from which will be found conclusive and unanswerable on this subject:

"On this objection it might be observed, first, there may be many instances of usurped power, which the forms of the constitution would never draw within the control of the judicial department; secondly, that if the decision of the judiciary be raised above the authority of the sovereign parties to the constitution, the decisions of the other departments, not carried by the forms of the constitution before the judiciary, must be equally authoritative and final with the decisions of that department; but the proper answer to the objection is, that the resolution of the general *assembly re- 108 lates to those great and extraordinary cases in which all the forms of the constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it. The resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, but that the judicial departments also may exercise or sanction dangerous powers beyond the grant of the constitution; and consequently, that the ultimate right of the parties to the constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority as well as by another, by the judiciary as well as by the executive or legislative."

"However true, therefore, it may be, that the judicial department is, in all questions submitted to it by the form of the constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; and not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other department hold the delegated trusts. On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others in unsurped powers might subvert forever, and beyond the possible reach of any rightful remedy, the very constitution which all were instituted to preserve."

If the supreme court of the United States is constituted the tribunal of last resort, to determine all controversies touching the

extent of the powers of the two governments, it must be either by an express grant in the constitution, or by its being incidental to some express power. As there is no express grant of this kind in the constitution, I inquire to what express power in the constitution is this incidental, or in other words, in what express grant is it implied as a necessary means of executing the express power? For there can be no contingent without a principal. It will not be pretended that it is incidental to any of the legislative or any of the executive powers delegated in the first and second articles of the constitution. Can it be derived from any of the powers of the judiciary, in the third article? And if so, which one? It has been already shown, that the appellate power of the supreme court conferred in this article, manifestly extends no further than appeals from the subordinate federal courts. And as to the provision which defines the subjects of the jurisdiction of the federal judiciary it has been already shown that the jurisdiction of the federal courts is not made exclusive; and it is an undeniable fact that since the origin of the government, the concurrent jurisdiction *of the state courts over many of these subjects has been exercised 109
and universally conceded. By no rational implication, therefore, can it be deduced from this provision. Where, then, is this power to be found in the constitution? It cannot be derived from any of the miscellaneous provisions of article fourth, or the amendatory provision of article fifth. The second clause of the sixth article declares that the constitution of the United States, and the laws made in pursuance thereof, shall be the supreme law of the land, and that the judges in every state shall be bound thereby; and the next succeeding clause requires of the officers of the state governments, an oath to support the constitution, etc. There is clearly nothing here, conferring upon the supreme court of the United States the important power in question. This mere declaration of the character and operative effect of the constitution, laws, etc., of the United States, is no grant power. And it is admitted, that the constitution and laws of each state are equally the supreme law of the land within the sphere of their operation. Suppose an act passed congress, not in pursuance of the constitution of the United States. It is not required to be regarded by the state judges as the supreme law of the land. Indeed, their oath to support the constitution of the United States would require them to disregard it. But where is the provision of the constitution which makes the supreme court of the United States the exclusive arbiter, or tribunal of last resort to determine whether the laws be made pursuant to the constitution or not? If this power be necessary, and yet not delegated the constitution should be amended. A power of such grave import should not be exercised without a clear warrant for it in the constitution. It will not do to conclude that a power has been delegated by the constitution simply because we may conceive it to be highly necessary and proper when we are unable to find authority for it in the constitution.

But, it not only appears that the constitution contains no provision giving to the supreme court of the United States, any such power, but it appears from the public records, that the convention which framed the constitution, positively refused to confer
110 on *the federal government, any such supervisory power over the states. The proposition was made in the convention repeatedly, and in a great variety of forms, but in every instance, and every form in which proposed, it was finally defeated. The first project for a constitution submitted in the convention, was by Edmund Randolph, which proposed to vest this supervisory power in a national legislature. See Madison Paper, vol. 2, p. 732. This was changed in the committee of the whole, to which Mr. Randolph's proposition was referred, and a provision reported, giving to the "national judiciary, jurisdiction of all questions which involve the national peace and harmony." Same vol. 861. Charles Pinckney's draft of a constitution submitted to the convention, contained a proposition, that "the legislature of the United States should have the power to revise the laws of the several states that may be supposed to infringe the powers exclusively delegated by this constitution to congress, and to negative and annul such as do." *Ibid.* 745. On page 821 of this work, we learn that Mr. Pinckney made his proposition to vest this power in the national legislature, by motion, in committee of the whole. Pending the discussion of this proposition, Mr. Madison suggested lodging this power in the senate alone, (page 827.) Mr. Hamilton's draft of a constitution, contained a proposition, providing by express declaration that all state laws, contrary to the constitution and laws of the United States should be utterly void; and further, that the governor or president of each state, should be appointed by the general government, with a negative upon all such laws at the time of their passage. *Ibid.* 892.

When, therefore, the constitution not only contains no provision, conferring upon the federal government this supervisory power over the states, but when the proposition to confer such power was distinctly and repeatedly made in various forms in the constitution, and in every instance finally defeated, and when, on the adoption of the constitution, some of the states required an amendment to the constitution, which was agreed to, expressly providing, that all powers not delegated by the constitution, were reserved, with what fairness and sound reason, can the delegation
111 of a power be insisted *upon, so important in its import, so controlling and absorbing in its operation, and so utterly destructive of the equality and independence essential to the very existence of co-ordinate powers. It is idle to speak of the two governments as being independent and co-ordinate, of each being supreme within the sphere of its own powers, if one has the exclusive power to determine all questions touching, not only the extent of its own powers, but also the extent of the powers of the other. Our system of government was established upon the principle of a division of political power, with a view to checks and

safeguards to prevent its abuse. And it is a fair conclusion, that it was not the intenion of those who ordained and established it, to vest discretionary or arbitrary power in any department of the government. It has been the boast and pride of this country, that our system of government, rested, not like the arbitrary governments of other countries, upon physical power but on an enlightened public opinion, on the regard of the people for principle, right, and justice, a practical concession of the right, and the capacity of the people for self government. A philosophical principle was adopted, believed to be applicable to the political, as well as to the material world, that all organic action, whether of human or divine mechanism, is the result of the reciprocal action and reaction of the parts of which it consists, and capable of restricting its various powers to their appropriate spheres, and compelling the performance of their respective functions. This was accomplished by a division of political power, and calling into operation checks and safeguards against its abuse, by the mutual action and reaction of the various departments upon each other. And in regard to the most important power of government, that of the supreme power, which according to all experience, had never failed in other countries and ages, to overleap all the barriers, and restraints of human contrivance, two equal and co-ordinate governments, states and federal, were established, each equally supreme within its appropriate sphere of action; and as to the boundary which separates their powers, and limits their extent, a mutual check upon each other. This made each the protector of the powers assigned to it, and of which, it is the organ and the *representative. 112
Without this mutual check, or power of each, to restrain the other to its appropriate sphere, the stronger would finally absorb the supremacy of the weaker, and concentrate all power in itself.

That collision or conflict of these co-ordinate powers might arise, was beyond anticipation. That is an occasional incident of every division of power, whether it be that of co-ordinate departments, co-ordinate estates or classes, co-ordinate governments, or any other division of powers appertaining to government. It is one of the evils to which constitutional government based on a division of powers must be always to some extent exposed. But we have to take things as they are, with all their incidents, good or bad, as perfection is not to be found in human institutions, and the choice is between a constitutional government of limited powers, and an absolute government exposed to all the oppressions and abuses incident to uncontrollable power. In case of collision or conflict of authority between these two co-ordinate governments, neither can claim by the constitution the exclusive and arbitrary power of determination, and of enforcing its decision by physical power. If a single state had the power *sua sponta*, to nullify a law of the United States, and arrest its operation by its own act, that would destroy the independence of the federal government as an equal and co-ordinate power with that of each state. The federal government and that of the several states being each supreme

within their respective spheres of action, are clothed each with authority to enforce the execution of its own laws. But in case of conflict between authorities of the two governments in the execution of their respective powers, the controversy will ordinarily give rise to a question which would go before the judicial tribunals. If it arise in a case over which the state courts have exclusive jurisdiction, their determinaion will be final and conclusive as to the parties in the case; if in a case over which the federal courts have exclusive jurisdiction, their determination will be final. But if the question arise in a case over which the courts of the two governments have concurrent jurisdiction, the determination of the courts of that in which the jurisdiction first attached must be final and
113 conclusive *upon the parties in the case. In the case the principle settled in the state courts be wholly inconsistent and irreconcilable with that settled in the federal courts, and from this conflict of decision or otherwise a conflict of authority in the execution of the laws ensue, the adjustment of the difficulty must be transferred from the delegated trusts of civil authority to the sovereign power resting in the people of the several states. If this sovereign power, acting through the ballot box, not only upon legislation, but also upon the executive and the judicial powers of the two governments, fails to supply the requisite corrective, there remains the further remedy of amending the constitution. These are the peaceable remedies provided by the constitution. If these all fail, if notwithstanding appeals to public sentiment, remonstrance and negotiation with all proper forbearance, the federal government for example, should recklessly persist in a course of usurpation of power utterly destructive to the independence and sovereignty of the states, there could remain no course but a resort to the original rights of the people of each state as an independent community.

It has been supposed by some, that inasmuch as the supreme judicial power of the United States was controlled by great and good men, and learned experienceed jurists, there could be no danger of entrusting the determination of all controversies touching the extent of the powers of the two governments to their judgment and discretion. Although this is not strictly pertinent to the question of the competency of the power, yet it may be remarked that the highest moral obligations,—truth, justice and plighted faith, have never furnished a safe and certain barrier against the abuse of power,—that when entrusted with arbitrary power, human nature has very rarely been found proof against the shifts and devices of cupidity and ambition. No man has a higher respect, and indeed greater veneration than I have for the great and good men who have adorned the bench of the supreme court of the United States. Ohio is now and has been for many years honored with one of her most illustrious citizens on that bench, in whose integrity and elevated purity of character all have confidence. It is known full well that he would not willingly abuse any trust of civil

power, and there *is no man living to the rectitude of whose 114
intentions I would sooner trust arbitrary civil power than to him. But infallibility of judgment is not an attribute of human nature, and when we reflect on the errors into which man has been led in the exercise of arbitrary power of other ages and countries, alas! how much is there to humble man in the pride of his boasted intellectual and moral elevation.

It is urged that some authority is absolutely necessary as the supreme and final arbiter of all conflicts of power, between the federal government and the several state governments. If this be true, it is an argument in favor of an amendment of the constitution, rather than an assumption of power by the federal government. A supposed necessity will not warrant an assumption of power not to be found in the constitution. If the supreme and final arbiter to determine all questions of conflict of power between the federal state governments, be necessary, it should belong exclusively neither to the federal, nor to the state governments, but it should be an intermediate power, selected by the consent of both, and under the exclusive control of neither one. This would leave the federal and the several state governments equal and co-ordinate governments, each a salutary check upon the other, in any attempt to exercise an unwarranted power.

We humbly conceive that the independent co-ordinate authority of the several states as a check upon the general government, is a matter of great and essential importance to the safety and purity of our constitutions; and that, if the arbitrary power be conceded to the federal government to determine all controversies touching not only its own powers, but also those involving powers of the several states, it must subvert the whole theory and structure of our government, and result in a consolidated national government.

At the time of the adoption of the constitution of the United States, it was insisted by many, that it was necessary to fortify the powers of the federal government against the powers and influence of the states; that the states would form combinations against the federal government, and that the weakest point in our system of government was a tendency to dissolution. The practical operation *of the system has shown the utter fallacy of 115
this opinion. The separate and distinct interests, local attachments and rivalries between several states have counteracted all tendency to form combinations of this kind. And in almost every instance which has occurred of a conflict between the powers of a state and the federal government the contest has been a most unequal one for the state has had a struggle not only against the powers and influence of the general government, but also against a combination of the other states, uniting their power and influence with that of the general government. It is manifest that an element has entered into the operations of our system of government, not fully anticipated at the time of its formation. The vast patronage and extensive emoluments of the general government has be-

come an all-engrossing object of attention, and concentrated a power and influence which enable the federal government to bring to its aid not only organized combinations of the people, but also combinations of the greater part of the states.

It was supposed by the framers of the constitution, that the powers of the federal government would be held in check by the popular elections. The practical operation of the system, however, has demonstrated the utter fallacy of this expectation. The change of administrations and officers under the federal government, as a general thing, seems to have had but little effect, other than to bring a fresh supply of persons into power, who struggle with renewed vigor and increased recklessness for the various purposes of ambition, cupidity and aggrandizement.

The persons in the service and interest of the federal government, throughout the vast expanse of country from the Atlantic to the Pacific, upon the high seas, and in foreign countries, must exceed two hundred and fifty thousand in number; and the dependents and aspirants, who are expecting to profit by the powers of the federal government are more than five times that number. Besides this extensive power and influence of the associated wealth of the country, under the special privileges and immunities of corporations, have become, by means of the adjudications of the federal judiciary, attached to the supremacy of the federal government, by the all-controlling tie of self-interest. With such accu-
116 mulation *and concentration of interests and influence, the federal government collecting and disbursing anually in revenue of from sixty to eighty millions of dollars, with the entire control of all the military and naval forces, of all the military fortifications and munitions of war throughout the country, wields a power surpassed by but few governments in the world.

With its immense resources, vast patronage and extensive emoluments, concede to the federal government, the constructive powers to the full extent claimed for it, unchecked by the co-ordinate powers of the several states, and nothing short of a revolution, can prevent its becoming absolute.

The doctrine of the supreme court of the United States, announced in the cases of M'Culloch v. Maryland; Osborn v. The Bank of the United States; Cohens v. Virginia, *supra*, and other cases, invests congress with the discretionary power of the most extraordinary character, derived from inference and implication. It is not required that the purpose of the measures adopted as a means to carry into execution the express powers, should have this exclusively, or indeed, mainly in view. It is sufficient, according to this doctrine, to sustain the constitutionality of a measure, if the execution of an express power be a mere incident to a measure, designed to effectuate other immediate and ulterior objects however great in their consequences. For example, in the case of M'Culloch v. Maryland, *supra*, the constitutionality of the bank of the United States was sustained as among the implied powers of congress. The main object of this measure was of course, the in-

vestment of the private capital of persons in the business of banking, lending money, discounting bills, receiving money on deposit, and issuing bank notes for circulation. This of itself, it was not pretended, that congress had the power to authorize. But inasmuch as the bank could be incidentally used, as a place for the deposit and safe keeping of the money of the government, therefore, this measure most important for other purposes, was sustained as among the means selected by congress for the execution of the express powers of the government: and not only so, but the extensive investments of private property in the stock of this institution, in the several states, was declared to be withdrawn *from the sover- 117
eign power of taxation by the states, because the bank was thus incidentally used by the federal government. Under the simple power, "to establish post offices and post roads," the authority has been claimed not only to construct roads, but to make canals, and engage in a general system of internal improvements in the states. And under the power "to raise and support armies," with a view to the transportation of supplies and the munitions of war, the authority has been claimed to engage, even, in the construction of railroads in foreign countries. A less violent implication would enable the federal government to provide for a system of military espionage in every city, hamlet or neighborhood throughout the country. By such stretch of authority, by way of implication, inference, or construction, what stupendous scheme of aggrandizement, and enlargement of its powers, may not the general government embark in and sustain its constitutionality on the ground that it incidentally, or in some way aids or can be used as a means to aid in carrying into execution some of the express powers of the government, although the chief and main purpose of the measure, be an entirely different and ulterior object.

With this doctrine of constitutional construction established, concede to the federal government, the power to determine in the last resort, all controversies touching, not only the extent of its own powers, but also, the boundaries of the powers between the several states, and the federal government, and all the safeguards and limitations of the express provisions in the constitution would be easily overcome by the ingenious devices of implication and construction. The ultimate result, would be inevitable. The states would be stripped of their sovereignty and independence, and the federal government become, in effect at least, a consolidated, national government, concentrating all supremacy in itself. Civil power thus uncontrolled and absolute, in a government, so extensive in its operations, and with means and resources so vast as those of the United States, would eventuate in the long train of abuses and oppressions which have never failed to follow in the course of arbitrary civil power.

It is clear, that it was not contemplated at the time of the formation *and adoption of the constitution, that any such exorbi- 118
tant powers were to be conferred on the federal government;

and by a strict and fair construction of the constitution, no such powers can be maintained.

From the foregoing views, the following conclusions are deduced:

First—That the provision of the constitution of the United States expressly conferring appellate jurisdiction on the supreme court, does not authorize the exercise of appellate power by that tribunal, over the state courts, but extends simply to appeals from the subordinate federal courts.

Second—There is no provision in the constitution, from which a supervising power in the supreme court of the United States, over the state courts, can be derived by way of incident or implication.

Third—The supreme court of the United States, has not been constituted the exclusive tribunal of dernier resort, to determine all controversies in relation to conflicts of authority between the federal government and the several states of the American Union.

Fourth—That the state courts and the federal courts are co-ordinate tribunals, having concurrent jurisdiction in numerous cases, but neither having a supervising power over the other; and that, where the jurisdiction is concurrent, the decision of that court, or rather, of the courts of that judicial system, in which the jurisdiction first attaches, is final and conclusive as to the parties.

The supreme court of the United States, therefore, not being authorized by the constitution to exercise appellate jurisdiction over the judgments of this court, there can be no authority for the entry upon our journals sought by the motion before us. To allow the entry to be made in order to remove the cause to the supreme court of the United States for action by that tribunal, which would be in violation of the constitution which we have sworn to support, would be a dereliction of duty upon our part.

Motion overruled.

*[Superior Court of Cincinnati, Special Term, June, 1855.] 549

CHARLES ATWATER v. WILLIAM F. ROELOFSON, ET AL.

For opinion in this case, see 2 Handy, 19.
This case was affirmed by the superior court of Cincinnati, in general term. See opinion, 1 Disney, 346.

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*[Superior Court of Cincinnati, General Term, June, 1855.] 662

THE MERCHANTS' AND MANUFACTURERS' INS. CO. ET AL. v. CHARLES DUFFIELD ET AL.

For opinion in this case, see 2 Handy 122.
This case was affirmed by the supreme court. See opinion, 6 O. S., 200.

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*[Superior Court of Cincinnati, General Term, November, 1855. 747

MATILDA CAMPBELL, ADMX. v. PATRICK RODGERS ET AL.

For opinion in this case, see 2 Handy, 110.
This case was cited in Clark v. Harlan, 1 C. S. C. R., 418, 420; Lawton v. Marratta, 2 C. S. C. R, 82; Van Camp v. Aldrich, 5 Dec. R., 92, 99, s. c. 2 Am. Law. Rec. 454, 462.

Vol. V. [O. S.]

*[Superior Court of Cincinnati, General Term, January, 1856. 98

JOHN REA v. NATHANIEL SMITH ET AL.

For opinion in this case, see 2 Handy, 193.

Vol. VI. [O. S.]

*[Superior Court of Cincinnati, Special Term, December, 1857.] 493

EDWIN LUDLOW v. EDWARD HURD ET AL.

For opinion in this case, see 1 Disney, 552.

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*[Superior Court of Cincinnati, Special Term, June, 1858.] 718

JOSEPH A. JAMES v. C. H. & D. R. R. CO., ET AL.

For opinion in this case, see 2 Disney, 261.

Vol. VII. [O. S.]

*[Superior Court of Cincinnati, Special Term, June, 1858.] 427

THORNTON CHECK v. THE LITTLE MIAMI RAILROAD CO.

For opinion in this case, see 2 Disney, 237.

477 *[Hamilton Common Pleas Court.]

CHESTER BAXTER v. WM. F. AND EMILY A. ROELOFSON.

For opinion in this case, see *ante*, page 250 s. c. 5 Gaz. 110.

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716 *EQUITY—ESTOPPEL.

[Supreme Court, Cleveland District, July Term, 1860.]

HENRY HOLMES ET AL. v. THE CLEVELAND, COLUMBUS AND CINCINNATI RAILROAD ET AL.

1. The complainants claim as owners in equity, in common with others, of a parcel of land in the city of Cleveland, by boundaries designated; which land originally belonged to the stockholders of the Connecticut Land Company, which owned the entire Western Reserve; and that they and their heirs, are the representatives of such stockholders, and that the lands of the reserve were conveyed to trustees for such stockholders; that in 1836 one Thomas Lloyd fraudulently procured a deed from said trustees conveying the land claimed in this suit, and that the defendants are in possession of said lands, with notice of the trust and fraud. The
717 *prayer of the bill is, to set aside said fraudulent deed, dissolve said trust, and have a partition of said land, and account of the rents and profits thereof received by the defendants.
2. The defendants rely for a defense upon the equitable bar furnished by lapse of time, want of title in equity in the complainants, and upon a dedication of said land to the public by the Connecticut Land Company, as early as 1796, accepted immediately thereafter and ever since used in accordance with the purposes of the dedication. They deny that they are in possession under the title derived from said Lloyd, and aver that they are in possession under the authority of a statute of the state of Ohio, in pursuance of a license granted to the city of Cleveland, and using the same in a manner consistent with the original dedication.

Mr. Birchard and Mr. Mason, for complainants.

Mr. Vinton and Mr. Hitchcock, for defendants.

MCLEAN, J.

The complainants claim in this case to be the owners in equity, in common with others unknown, and too numerous to be made parties, if known, of a parcel of land in the city of Cleveland, bounded north by the dividing line between Lake Erie and Canada and the United States, east by Water street in said city, south by the north line of lot 191, and west by the Cuyahoga river, as it run in the year 1796, and by a line from its mouth parallel with the east line. They also allege that said land originally belonged to the stockholders of the Connecticut Land Company, (which owned the entire Western Reserve,) and that they, and their heirs, are the representatives of such stockholders; and that the lands of the Reserve were conveyed to mere naked trustees for the benefit of such stockholders; that on March 23, 1836, one Thomas Lloyd, fraudulently procured a deed from said trustees, conveying the land claimed in

this suit, and that defendants are in possession of said lands, under a title made from said Lloyd, with notice of the trust and fraud.

The prayer of the bill is, to set aside said fraudulent deed, dissolve said trust, and have a partition of said land, and an account of the rents and profits thereof received by the defendants.

The defendants insist, that the title to all of said land covered by the water of Lake Erie is in the public, and not in any trustee *for them; and as to the residue of said land, rely for a defence upon the equitable bar furnished by lapse of time, want of title 718 in equity in the complainants, and upon a dedication of said land to the public by the Connecticut Land Company, as early as 1796, accepted immediately thereafter, and ever since used in accordance with the purposes of the dedication. They deny that they are in possession under the title derived from said Lloyd, and aver that they are in possession under the authority of a statute of the state of Ohio, in pursuance of a license granted by the city of Cleveland, and using the same in a manner consistent with the original dedication.

The leading historical facts of this case, are believed to be accurately and succinctly stated in the defendants' brief. "The Connecticut Land Company was organized in Connecticut in 1795, and became the owner of the Connecticut Western Reserve, and issued to its stockholders certificates of stock for their respective interests therein. This title was made to the state of Connecticut by the United States, under the act of April 20, 1800, and was vested in trustees for the purpose of partition and conveyance to purchasers. The company caused all its lands east of the Cuyahoga and the Portage Path, to be surveyed into townships in the year 1796, and also selected for sale six townships including the city plot, which were immediately (except the city plot) surveyed into one hundred acre lots, and the whole put in market.

In the year 1798, by mutual arrangement between the proprietors of said land company, in pursuance of the original association, partition was made of all the company's lands surveyed as aforesaid, except the six townships and the city of Cleveland; and the legal title was secured to the stockholders in severalty. The company, by its agent, continued to control the land in said six townships and the city plot, until December, 1802, when having caused the unsold land thereon to be resurveyed, they in like manner distributed the same among their stockholders, and reserved the legal title to each, and in said partition avowedly included all that remained unsold in said township and city. In April, 1807, they, in like manner divided all their land west of the Cuyahoga and *the Portage Path. Soon after this, it was discovered that by 719 reason of omission in the surveys, a small piece of land, not connected with the city or the six townships, had been omitted, and this, called surplus land, was surveyed into lots in the city and in the six townships which had been under contract and become forfeited. Whereupon at a meeting of the stockholders of said com-

pany, held according to its constitution, at which they were fully represented, on the 4th of January, 1809, it was resolved, "that the company divide in severalty among the stockholders, all their property, consisting of notes, contracts, bonds and land, according to their plan of partition previously adopted," and that the partition made should be conclusive upon the proprietors, and "no after allowances claimed on account of any error that may have happened in cost, measure or otherwise. But said division shall be final, unless further property belonging to the company be discovered." The company thereupon proceeded to make the partition and reserve the title to the stockholders in severalty as proposed; and thereupon on the 4th of January, 1809, it was voted, "that this meeting be adjourned without day." Up to that time the company kept full records of its proceedings, but since which time there never has been a meeting either of its directors or stockholders up to the commencement of this suit.

The first plot and survey of the city of Cleveland was made in 1796, by Augustus Porter and Seth Peare, who were the authorized surveyors of the Connecticut Land Company; and who superintended the surveys of the entire Reserve, east of said Portage Path. This survey is called Peare's survey, and the original field notes and maps are in evidence. On this map was marked "Bath street," connecting Water street with the river, and bounded north by the lake, and south by lot 191, and varies in width from 80 to 200 feet.

In describing the lots east of Water street, the length of the lines above the bank only are given; but on the map they extend to the lake. In March, 1802, the trustees of said land company conveyed three of said lots, Nos. 1, 2 and 3, lying next east of Water street to Samuel Huntington, bounding them on the north by the
720 lake. This deed also recognized the lake as the north boundary. And it was also the northern *boundary of other lands, and lot 191.

On December 6, 1800, the Territorial legislature of Ohio passed an act entitled, an act to provide for the recording of town plots, and in 1801 Turpland Kirtland, being then the agent of the company, undertook to make a plot of said city, to be made, proved, and recorded, as required by that act, the effect of which would be, to vest the streets and other public grounds in trust for the purposes therein expressed.

Amos Spafford, a surveyor, made a survey of the city, which he called field notes, and minutes of survey of the outlines, lands and squares of the city, for the land company in 1796. Both Peare and Spafford's plots and surveys, Peare being the first one, have been recognized from their origin to the present, by the members of said land company, and the map of Peare was regularly recorded on the proper record for Trumbull county, by the agent of the company. In the year 1833, River street, being nearly parallel with the river, was opened and terminated at Bath street, about 140 feet distant

from the river; and thereafter the latter was used as a thoroughfare from Water street to the river and the lake.

In 1827, the United States in improving the harbor, cut a new channel for the mouth of the river running directly north from a point near the northwest corner of lot 191, and thereby left on the west side of the river, a small portion of Bath street, perhaps one-eighth of an acre. Immediately after the construction of the harbor, the accretion commenced on both sides of the river, and has continued to increase, particularly on the west side, until one-eighth of an acre has increased to seven or eight acres.

After a few years, the accretion so increased as to prevent the washing of the bank, and it ceased to cave at the intersection of Water and Bath streets, and thereupon, about the year 1830, the corporate authorities repaired said streets, and again opened the connection between them, since which time Bath street has been one of the principal throughfares of the city.

In 1840, in pursuance of authority given by its character, the city council caused the exact boundaries and fronts of all the lanes and *streets of the Cuyahoga river, below Vineyard's Lane, 721
to be surveyed and ascertained, of which survey a report was made August 4, 1841; which was accepted, and thereby the city council established the boundaries and fronts of said streets and lanes, according to said survey, which designated the entire territory between lot 191, and the lake at Bath street, and fixed its boundaries accordingly.

On December 21, 1844, the legislature of Ohio, by statute, authorized the city council to lease any portion of the streets adjacent to the lake and river needed for public use, as docks and wharves, for a term not exceeding ten years; the rents arising therefrom, to be appropriated to the repairs of the streets and of the public wharves.

February 4, 1845, a subdivision and plot of the territory called Bath street, east of the river was made, designating for public use certain streets thereon, and also certain lots by number, several of which lots were soon after leased by authority of the city council, under the limitations stated in said statute, and possession was taken by the tenants. They were used almost exclusively for the storage, sale and shipment of coal. Against these tenants suits in ejectment were commenced, in favor of Lloyd's lessee, which were defended by the city. Pending these suits, in 1849 or 1850, the railroad companies, or some of those now occupying the land east of the river in pursuance of the authority conferred by the statute under which they were incorporated, finding it necessary, in the location of their roads, to occupy said grounds, instituted the requisite proceedings for appropriating the same.

After the instrument of appropriation was filed, under the authority of the same statute, they agreed with the city upon the terms and manner of occupying the same, for railroad purposes; and also to avoid annoyance from Lloyd and his assigns, in the use of such portions of Bath street as they now require for their roads,

purchased out of the asserted claims of said Lloyd or his assigns, and since have expended over $450,000 in improvements upon said land, and in reclaiming the same from the lake by means of piling and filling, and thus the accretion has been greatly extended.

722 *The articles of association did not contemplate a permanent organization of the Connecticut Land Company, but were entered into for the better and more convenient accomplishment of certain necessary and temporary objects, which could not be effected except by a joint action of all the proprietors in some form. These necessary objects, but temporary in their performance, were the extinguishment of the Indian title, the survey of their lands and the partition of them in severalty among the proprietors.

It was the policy and intent of these articles, that this trust should continue until the partition could be had, and no longer; and they directed a survey of the whole territory within the term of two years and that the trustees should convey the whole in severalty to the purchasers and shareholders.

The parties to the articles of association, viz: the proprietors, the board of directors, and the trustees, proceeded to carry them into execution; the Indian title was extinguished, the country was surveyed, the directors sold so much of the land as they were required to sell, and in January, 1809, all things being now ready, the proprietors, at a regular meeting, made a final division in severalty of all their lands; and all outstanding claims for lands sold by the directors, and in a word, all of their common property of which they had any knowledge. The resolution directing the partition declares, that the division then made shall be conclusive upon each proprietor, and that it should be final, unless further property belonging to the company should be discovered. There is no averment in the bill, nor any attempt to prove, that the existence of the land now in dispute was then unknown to the proprietors. This resolution shows in a very pointed manner, that it was the understanding and intention of the proprietors, that the division then made, should stand as a full, complete, and final execution and accomplishment of the association, and of every and all of its objects, saving only the contingency, of the after discovery of property, then unknown to them; and that such property, if any, as was unknown, and which because it was regarded by them as worthless, or for any other cause, they did not think it worth dividing, they abandoned or left it to whoever was or might become the occupier or possessor of it.

723 *That the proprietors understood this should be a final dissolution of the company, subject alone to that one contingency, is evident from the fact that the proof shows that, prior to this time, they held regular meetings, and that no meeting of the company was ever held afterwards.

Nearly fifty years have transpired since this association was dissolved. The proof shows that a quarter of a century afterwards, the land referred to was of little or no value. None has been

imparted to it by the associates or their descendants. But a very great and permanent value has been given it, by the terminus of the canal from the Ohio river to Lake Erie, and by a large amount of money expended by the United States, and by railroad companies on this land, in improving the harbor of Cleveland, which last has caused it to be made the common termini of five important railroads, which have expended upon it more than half a million of dollars, in erecting depots, freight and passenger houses, wharves, etc., for the benefit and convenience of trade and travel.

This final action on the affairs of the Connecticut Company, must be considered as conclusive. In 1809 the town was limited, and its business prospects were small. It was deemed a proper time to close the concerns of the Connecticut Company before its affairs became complicated and its rights were misunderstood or misrepresented. It is not alleged that any part of the matters were overlooked or forgotten. Some things may have been deemed too unimportant to attract attention. Some lands, perhaps, that at that time would not pay the expense of their reclamation. These were all matters of examination and reflection, and must have been duly considered. Those only that were unknown to the party could come before them for review, unless on a charge of mistake or fraud. Everything else was settled, finally settled. This was understood and solemnly assented to. Under no other circumstance could a final adjustment be made. This was the object of the association. In no other mode could the desired object be ascertained.

There was a peculiar fitness and propriety in this company, adjusting as it did, all matters of account. Their shares were numerous, and consisted in minute pieces of property, in some instances *scarcely susceptible of division; speculation had not then got to work, and a division was not found sufficient. A general interest was felt for a rising village, and each individual was willing to contribute what he could, in reason, to its prosperity. It may be fairly presumed, that there was a disposition to give up the shreds and patches to the public, for the advancement of the general interest. This was seen in the action of the city council, and at a future period, that of the government of the United States, in the streets and harbor to adapt them to a rising commerce. But the most persuasive action was that of declaring, that they abandoned every thing known to the association at the time. And there is reason to believe, that this was done with the view of imparting to the public such commercial and other advantages as might be useful. 724

The entrance of the canal into the lake, at Cleveland, and the public works on the wharves and the water line of the lake, was at first gradually extended, and afterwards, rapidly, to meet the growing necessities of commerce.

It is not essential that a public ground intended for public use, should be formally so dedicated. It is enough if the public shall take possession of the ground, using it for public purposes, and shall continue to do so for a long term of years, the public right

will be presumed. This would depend upon a longer or shorter time, according to the circumstances of the case.

It is a well known principle of law, that every owner of property, whether personal or real, may abandon it. Chalmonally v. Clinton, 2 Jac & Walker, 59; Kinsman v. Loomis, 11 O., 479. In Corning v. Gould, 16 Wend, 543, it is observed, that "a man shall be held to intend what necessarily results from his own acts." Consequently when property is abandoned, under such circumstances as to leave no doubt of the fact, no one who has taken possession of it can be required to relinquish it. In Kirk v. King, 3 Barr, 436, an abandonment and non-claim for seven years was held sufficient.

Whether there be an abandonment is a question of fact to be determined by the circumstances of the case. Ward v. Ward,
725 *14 Eng. Com. Law and Eq., 414. And when this is done, the right is extinguished. 1 Brown's Civil and Admiralty Law, 33, 166, 237, 239, 240 and 241; 12 Ves. 264.

Where a person considered an article worthless, cast it away, he thereby divests himself of his title, and cannot complain if any other person takes possession of it. The fact of abandonment is sufficient. Goon v. Anthony, 11 Ill., 588. Taylor v. Hampton, 4 McCord, 96, 102, is a strong case of abandonment. Hartford Bridge v. East Hartford, 16 Conn., 149; Wright v. Freeman, 5 Johnson, 467; Pickett v. Dowdell, 2 Washington Rep. 115.

Some of the leading decisions on this question are Beckford v. Wade, 17 Ves., 98–9; Barry v. Ringord, 1 Cox's Chan. Rep., 145; Bergen v. Bennet, 1 Caine's Cases, 19; Prevost v. Gratz, 6 Wheat, 481. But it is unnecessary to multiply authorities on this point. It is a doctrine too well established to be controverted

When the town of Cleveland was laid out and surveyed, the property in dispute was dedicated by the Connecticut Land Company; the evidence is conclusive. It is proved by both Peare's and Spafford's maps, by the minutes of the survey of the town-plot; and that it was used from the earliest settlement of the town, both for a street and a landing. This was established by all the witnesses acquainted with the town at that early period. This fact of dedication is too plain for contradiction.

The use of Bath street by the public is proved beyond doubt from 1800 or 1801, down to the time when the travel along some part of it was interrupted by being entirely cut away by the action of the lake. Where there is an interruption to the enjoyment of a part of the street and as soon as the interruption is removed, and the public right is resumed, the cause is sufficiently explained. There is no abandonment of the right, the law works no loss to the public under such circumstances. The act complained of was an abuse which the law corrects.

But it is said that this right to Bath street was abandoned by the city of Cleveland, in laying out a street 100 feet wide, and selling or leasing the land adjoining the street. This was done under
726 *express legislative authority. This, it is supposed, the legislature had the power to do. The idea is a just one, that an

act done by authority of law, must be presumed to have been done for the benefit of the public.

The act of May 1, 1800, required town plots to be recorded, under a penalty of a thousand dollars. This was done to avoid litigation. Spafford, one of the surveyors of the company, in 1801 resurveyed the streets, alleys and public grounds of the town or city. He vacated one or two alleys made by Peare, and added the land to the adjoining lots, and also opened one new alley. Beyond this he made no change in the streets, alleys and public grounds, consequently made no change in Bath street. Spafford's survey was deposited by the company's agent, with the recorder of the county for record, and was in part recorded by him. The deposition of Mr. Cafe proves that this was done, to comply with the recording act of 1800. The minutes and field notes of the survey are found on record, but the map, it is alleged, made by Spafford is not found in the records. But this is a mistake; the testimony abundantly proves, that the authority of Spafford's survey and map has been invariably recognized.

Under the circumstances, the court will presume this map to have been recorded, if the fact were not shown. The evidence that the map was made and left for record, and was used in all cases when necessary and proper, and this after the lapse of more than half a century, by which the surveys of the town have been regulated for the above period, and on which so many important interests depend, and known too so intimately by every one, is too palpable to be doubted by any one. No court can stultify itself so as to question the fact. A mere failure of a ministerial officer to record a map, is a duty which will be presumed under far less stringent circumstances than those above referred to. Ingersoll v. Harrison, 12 O.. 512; King v. Harvey, 4 O., 52; Marbury v. Madison, 1 Cranch, 161.

The grant to Lloyd does not assert that the grantors had any title to the land conveyed; it is a naked quit-claim, to what is declared in the deed to have been an unknown and doubtful right. *The grantees from Lloyd entered into possession of the premises in their own right and behalf, and not for or in behalf of 727
the trustees of the land company, or of their *cestuis que* trust. The defendants are not estopped from showing and claiming that the legal title to Bath street had passed from the trustees to the county or corporation of Cleveland in trust to the public, before the date of their deed to Lloyd; and consequently Lloyd took no title by that conveyance. And if this be so, where is the trust relation between Lloyd and the proprietors of the reserve.

Suppose the trustees of this land, instead of selling to Lloyd, had themselves taken exclusive possession of Bath street, under claim of title, what could they do. They as the dedicators of this street could file their bill in behalf of the public to correct this abuse, but they could maintain no suit to appropriate the property to themselves on the plea that it reverted to them.

In the appropriate language of one of the counsel for the complainants, I would say, "Lloyd is not in as a purchaser from the original proprietors, those who held the beneficial interest in the land before the dedication, or those who would be entitled to it, if the dedication should be avoided. He went to trustees who had a mere naked trust in behalf of the original proprietors; and took from them a release of their trust estate. The deed which they gave would indeed pass the trust estate, it could do nothing more. Not a scintilla of beneficial interest was passed by it, and if there should be recovery in ejectment, the plaintiff would merely stand as the trustee for the original land company, to hold it as their trustee for their benefit. He has nothing but a trust. The deed itself tells the whole story of its inception and consummation."

It is said that an easement only passed by the dedication of 1796; an easement under the authority of law, remains until the law shall be changed.

It is said that a dedication, if in written terms, cannot be enlarged or altered by parol; a dedication may be made by parol, the books are full of such cases. The Pittsburgh case is an evidence of the fact, and the Cincinnati common. But where a dedication is made more than half a century, evidenced by a map and other terms
728 *of description, which have served as guides fixing the plan of the town, designating its streets, its alleys and its lots, and which maps and written papers have, by universal consent, been referred to as establishing, for more than half a century, the demarcations of the property of the town, including the streets owned by the public, the private rights of individuals can never be doubted by any court which regards the rights of property as permanently settled.

The counsel in the defence argues, that the property in controversy was dedicated to the public or abandoned, and this it is insisted, is neither good logic nor good law. The argument, as understood, was, in the alternative, and was certainly good to show, that if the property had been dedicated or abandoned, the right was not in the complainant.

The land sought to be recovered is now very valuable, and including the alluvial formation which has been added, embraces twenty acres of soil above high water, exclusive of streets and the lake shore. It is claimed as having been dedicated as Bath street of Cleveland.

The original survey of this property was a street by Seth Peare, September 16, 1795. By this survey and map, and the sales made by the proprietors between 1796 and 1800, it was claimed to have been dedicated as a street. This is shown by Peare's map and minutes and the record of the Connecticut Land Company. Happily the original of the minutes and the map have been preserved in the form they were when the Cleveland Land Company began to act upon them in selling lands in 1797. And to this day there has never been any other survey or field notes made by any one. Spafford's map made new traces of old lines, and placed more perma-

nent monuments on the ground. In Peare's map a space of lot 191, and west of Water street, and south of the water's edge of the lake shore, is left unsurveyed into lots, and is marked on the map, "Bath street."

A great number of statutes from time to time was passed to establish and regulate the streets of Cleveland, and certain lots were authorized to be leased for various purposes for the public service, and this policy seemed to have been continued for a great
*number of years, where such lots were not required for other 729
purposes.

In 1841, the council of Cleveland made an interesting report in regard to certain streets—in which they say of Bath street, that all land westerly of Water street, east of Cuyahoga and northerly of lot 191, bounded southerly by a line south 64° west, was included in Bath street. And they say, "the committee are of opinion (Anson Haysen dissenting,) that all the land lying northerly of lot 191 as subdivided and the northerly part thereof located and extended northerly to Lake Erie is included in Bath street, and is a legal highway."

In Barclay v. Howell, 6 Peters, 512, the court say, "Where a part of a strip of land adjoining a river had been used as a way, and the residue was not in a condition to be so used, without grading, etc., and the public authorities from time to time improved more and more of it, and the proprietors had made no claim for thirty years, and their agent declared when the town was laid out that it was reserved for a street: *Held*, that the jury would be warranted in finding a dedication of the whole strip, and if so dedicated the proprietor could not recover." And that an agent in laying out a town, returns a plan afterwards acted on by the principal, and while engaged in the work declares to the effect that a certain slip of ground was reserved for a street, are admissible to prove a dedication of the land to that use.

And in the case of Godfrey v. Alton, 12 Ill., 38, the court say, "When a street is laid out bordering on a navigable water, it will be presumed that it was intended to be dedicated both for a highway and a landing. The navigable water is a highway; and when in contact with this, the easement of a street or highway is granted, the very location of the latter shows that it was designed for the purpose of loading and unloading freight, and landing passengers from the water. The dedication of the banks of the water unites the two easements, each of which is essential to the full enjoyment of the other."

Every one knows that the accretions on the shores of our lakes, in most cases, rapidly increase, and that they are claimed as gener-
*ally belonging to the owner of the fee. This has long been 730
the doctrine of our courts, and it applies as well to the civil as the common law. But I am not sure that the doctrine may not have been carried too far, where the accumulations have arisen, in a considerable degree, from the improvement of the ports and landing places. In regard to a general commerce, or a more limited

one, where the expenditure is necessarily incurred by the public, it should exercise control for the protection and interest of commerce.

It may be necessary to inquire how far this alluvial formation may be followed, when the person bounded by it has been subjected to no expense, and when it may become inconvenient to the public? How shall the limit be fixed? It is indispensable that there should be a regulation, which should be just to all parties interested in it, and should protect the symmetry and convenience of the port. It would seem that where the lot of the occupant was bounded by a street which formed the water line of the shore, he was limited by the street, and could not claim beyond it. But where the street did not limit the boundary, the owner of the soil is obliged to protect his shore, and for this purpose he may claim the alluvial formation. So in regard to the common at New Orleans; it was enlarged by deposit, and to preserve the commerce of the city, the made land was protected to prevent the city from being cut off from the river.

Independently of the dedication of Bath street, extending to the line of the lake, in 1801, and the abandonment in 1809, after the surveys were completed and the Indian title was extinguished, the objection remains, that by the progress of time, the claim had become stale, and not a proper subject of relief in equity. In the case of Smith v. Clay, 3 Brown's Chan. Rep. 642, it is said by Lord Camden: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced; and,
731 *therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court.

By analogy to courts of law, chancery will apply the act of limitation. In Haven v. Annesley, 2 Schoales & Lefroy, 638, 639, the doctrine of the court is, "that in cases where the statute does not afford a direct analogy, the court will proceed according to its discretion, and this discretion will be governed by considerations of public policy, in view of the circumstances of the particular case." In a certain class of cases a court of equity, acting on its own original principles, will refuse its aid under the special circumstances of the case; and under other circumstances, will give relief in less time than required by the statute. The chancellor, under ordinary circumstances, will follow the statute. But he is not bound to do so, but will be influenced by the peculiar circumstances of each case. This doctrine is laid down in almost all the leading authorities, and especially in Beckford v. Wade, 17 Ves., 98, 99; Barry v. Ringord, 1 Cox, 145; Bergen v. Bannett, 1 Caine's Cases, 19; Prevost v. Gratz, 6 Wheat., 481; Hughes v. Edwards, 9 Wheat., 489; Miller v. McIntire, 6 Peters, 61; Pratt v. Vattier, 9 Peters. 405; Bowman v. Wathan, 1 Howard, 189.

Vigilance is required in the prosecution of claims, and it has been the policy of all governments to bar claims if not prosecuted within a limited time.

More than half a century has transpired since the affairs of the Connecticut Company were said to be finally adjusted. All claims known to the company at that time were settled, in regard to debts due and the distribution of property. Great particularity, it is said, was observed in the exactness of this adjustment. The first and second generations of this large Connecticut company have gone to their account. I now speak of the shareholders of the original company. But a small portion of them can now be living. If they had left no other record of their lives and deaths, we should have looked for them among the memorials of the dead. But the papers of this suit contain some of the names of the descendants of the shareholders, if not some of those who belonged to the company originally.

*It is a well established principle, that a mere quit-claim 732
deed, without covenants of warranty, does not estop the grantor from showing that no title passed by such deed, and that, consequently, by the principle of reciprocity, it cannot estop the grantee from denying the title of the grantor at the date of the deed. The defendants, then, are not estopped from showing and claiming that the legal title to Bath street had passed to the trustees of the county or corporation of Cleveland, in trust for the public, before the date of their deed to Lloyd, and that, consequently, Lloyd took no title by that conveyance.

In their bill, the complainants charge that the conveyance by the trustees of the Connecticut Land Company, to Lloyd, of the land now in dispute, was made by a fraudulent combination, between the parties to that deed, in violation of the trust with which the land was charged, and with the design of depriving the complainants of their rights; that Lloyd had notice of the trust, and that conveyance to him was fraudulent and void, seems to be clear.

The original shareholders never authorized the trustees to make the assignment to Lloyd, it is believed, in any form, which seems to be apparent from the deed. They incurred no responsibility, nor were they authorized to assume any. The purchaser hoped to make something out of property which resulted from the labor of others, knowing that he could lose nothing. The prospect was a prospect of gain on the one side, without loss on the other. Whether Lloyd had any interest in any original share in the company, is not known. Whether he paid anything to the trustees, is not known. The presumption, from the the face of the quit-claim deed is, that if any consideration were paid, it must have been a nominal amount only.

More than twenty-seven years had transpired since the final adjustment of all claims by this company in 1809, and it would have been forgotten, or rather it would not have been brought again into view had not the purchaser's hopes been quickened by

a speculation. He is charged with fraud in procuring from the trustees the deed. Twenty-seven years the claim remained dormant, and there is no reason why its sleep should be disturbed at this late date. Its resuscitation now can impart no vitality to the claim
733 so deliberately *abandoned in 1809, nor can it explain the dedication of Bath street in 1801; and least of all, can it excuse the staleness which now rests upon it.

Until 1842, no one took possession of the claim; but at this late period can the new claimant hope to connect it with the deliberate abandonment of 1809, when it was disclaimed by the original shareholders.

The case does not rest on the statute of limitations, in the opinion of the court, but upon those great principles of equity, which are exercised under its own rules, by a court of chancery. It is a case not fitted for technical rules and special pleading. The association was formed on liberal principles and on enlarged plans. Immense sums of money have been expended in the construction of railroad depots and other improvements in this city, whose benefits have been extended not only through Ohio, but throughout the West.

Having deliberately considered the leading facts of the case, and the law which applies to them, I am brought to the following conclusions:

1. That in 1795, the Connecticut Land Company made a large purchase in the Western Reserve, and issued to the stockholders certificates of stock for their respective interest therein, which was divided into shares; that this stock was vested in trustees, for the purpose of partition and conveyance to purchasers; that the lands were surveyed and distributed among the shareholders.

2. That the town of Cleveland was laid out, and the plot of the town was made into streets and squares, and that Bath street was laid out as the street bordering on the lake, and included the original street on the water line; that it was dedicated, as including the land to the lake on the north.

3. The articles of the association were designed as temporary, and that the surveys having been completed, the Indian title extinguished, the shares were distributed among the stockholders in 1809, and a final settlement of their affairs was made of all matters between them, and it was agreed that there should be no other adjustment of their accounts which were then known, and only those which might afterward be discovered, should be examined. None
734 *such, it is understood, have been discovered, and any matters known should be considered as abandoned.

4. The claim is alleged to be a stale one, growing out of the beginning of the present century, and will not be aided in equity.

5. The defendants have expended vast sums of money in the construction of five railroad lines and their depots, at the expense of near a million of dollars, on land made between Bath street and the lake, all of which, or nearly all of which, is now covered by

railroads, depots and other buildings, for the accommodation of commerce.

6. Under these circumstances and facts, I am compelled, by a sense of duty, to say that I do not think the claim set out in the bill is sustainable in equity in favor of Lloyd or his assignees, or in favor of the Connecticut Land Company. It is therefore dismissed with costs.

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*DEVISE—EXECUTIONS. 489

[Superior Court of Cincinnati, 1863.]

ANDREW M'MICKEN, TRUSTEE, ETC., v. THE BOARD OF DIRECTORS OF THE M'MICKEN UNIVERSITY.

1. The term "household furniture," though not susceptible of strict definition, has acquired a definite meaning, by which it is understood to include everything which may contribute to the use or convenience of the householder, or the ornament of the house, such as plate, linen, china, pictures, etc.
2. Where a testator by his will bequeathed to A. "all his library and household furniture of every description, and any other personal property not thereinafter specifically devised," and by a subsequent clause devised to B. "all his real estate and personal property, which he may acquire after the date of his will," and again to B. "all the rest and residue of his real and personal estate, not thereinbefore devised" *Held*, that a portrait of the testator, painted after the making of the will, and at the time of his death still in possession of the artist in another city, passed to A. under the devise of "household furniture."
3. By the law of Ohio "family pictures" are exempt from execution, but per STORER, J, this exemption would not extend to the private gallery of a connoisseur nor to costly pictures the subjects of which are not connected with the family in whose possession they are found.

W. B. Caldwell and M. H. Tilden for plaintiff.

T. C. Ware for defendant.

STORER, J.

This action is brought to test the ownership of a portrait of Charles McMicken, deceased, the uncle of the plaintiff, and the founder of the McMicken University.

The plaintiff claims the property as legatee of Charles McMicken, whose will was made in September, 1855. The testator died in 1857, and his will was admitted to probate in April in the same year.

Mr. McMicken was a resident of Cincinnati, but his will was executed in Philadelphia; between the making of which and his death, he had sat for his portrait to an artist of the latter city, who had finished it, though it was still in his possession at McMicken's death. It was sent afterwards to Cincinnati, and all the parties *concerned have submitted the case to us, to determine the ownership of the property. 490

The testator's family mansion, where he had long resided with one or both of the claimants, was in Cincinnati, and there

was all his furniture and household ornaments, with the exception of his portrait.

By the 8th clause of the 4th section of his will, he gave to the plaintiff "all his library and household furniture of every description, and any other personal property not thereinafter specifically devised, to be equally divided with his niece, Lizzie McMicken."

Other bequests are made to the same parties, as well as to other relatives and friends; but the great mass of his estate is given to the city of Cincinnati, "for the purpose of building, establishing, and maintaining two colleges for white boys and girls." This devise is in section 31, and the different classes of property given are particularly stated. For this purpose, by the 5th clause, "all his real estate and personal property which he may acquire after the date of his will," and, by the 9th clause, "all the rest and residue of his real and personal estate, not thereinbefore devised," is given to the city. These several clauses are those under which the parties severally claim.

The plaintiff regards the bequest of "the household furniture of every description" as broad enough to include the testator's portrait. The defendants, who represent the city, place their right upon the 5th and 9th clauses of the 31st section, already referred to.

The words "household furniture," or, as some of the older writers use the term, "household stuff," have now, we suppose, a definite meaning, and are understood by the profession to include a class of personal chattels very readily distinguished from the more general description, by which movable property may pass to a devisee or a vendee.

One of the earliest cases in the books where the question is discussed is that of Kelly v. Powlet, Ambler, 605. The point there made to the Master of the Rolls, Sir Thomas Clark, was this: Did plate pass to the legatee of the "household furniture?" In
491 *considering the question, he says, "the word household furniture has as general a meaning as possible. It is incapable of a definition. It comprises everything that contributes to the use or convenience of the householder or the ornament of the house." The term was held to be large enough to include plate, whether in use or not, provided it was in the possession of the devisor, and not intended for any other purpose than that of household use; the quantity and value to be measured by the condition and rank of the family. It was admitted by the plaintiff in this case, who is reported to have been present in court, that "pictures, whether hung up or in cases, would pass by the devise," as well as plate. This case is also reported in Dickens, 359.

Before this decision, it was held, in Bridgman v. Darr, 3 Atk., 202, that a library of books did not pass by the words household furniture, giving, as a reason, that "they were for the entertainment of the mind, and not furniture for use or ornament." The rule has also been, in some one of its phases, discussed in Franklin v. Earl

of Burlington, Prec. in Ch., 251; Nichols v. Osborne, 2 Peere Williams, 400; Le Farrant v. Spencer, 1 Vesey, Sr., 97; and Gayre, v. Gayre, 2 Vernon, 538. In Pratt v. Jackson, 2 Peere Williams, 302, the construction given by the Lord Chancellor was deemed too liberal, and on appeal to the House of Lords his decision was reversed: 3 Bro. Pa. Cas., 194.

The doctrine to be deduced from all these cases is summed up by Mr. Roper thus: "By the term household furniture, everything is included which may contribute to the use or convenience of the householder or the ornament of the house, as plate, linen, china, both useful and ornamental, and *pictures:*" Law of Legacies, 141.

The English Courts have been consistent in their construction of the words we have alluded to. We discover no exception to the principle in any of the cases, from the report in Ambler to the present time. On the contrary, we find the law stated without any reservation in Cole v. Fitzgerald, 1 Sim. & Stu., 189, which was affirmed in 3 Russell, 320. The question was again discussed in Cremorin v. Antrobus, 5 Russell, 320, where Lord Lyndhurst expressly held these words would pass to the devisee "ornamental pictures."

*Mr. Williams in his elaborate work on Executors, vol. 2, 1021, accepts the construction without any dissent on his part; 492
and Jarman, in vol. 1, 699, admits the doctrine in his text without reservation, though in a note he quotes from the report in Ambler, that "pictures hung up will pass;" while in the case to which he refers, reported both in Ambler and Dickens, it is expressly stated that the admission included "pictures not only hanging up, but those found in cases."

The meaning thus given to these devisory words is quoted with approbation by Chancellor Kent, in Bann et al. v. Winthrop, 1 Johns. Ch. Cas., 329, and by the court of appeals in Virginia, in Carnagy v. Woodcock, 2 Munford, 234.

In Ohio, we have no judicial construction of these words in any reported case, but our legislature, by several important statutory provisions, has informed us what its understanding has been of this class of personal property. By the section 43 "of the act to provide for the settlement of the estates of decedents," 1 Swan, 574, the personal representative is, in all cases, expressly required to leave with the widow, to be kept by her for life, and after her decease to be the absolute property of her children, all "family pictures." And by the 3d clause of the 1st section of an amendment to the law regulating judgments and executions, "family pictures are exempted from levy and sale."

We ought not to extend the exemption in these clauses to the private gallery of a connoisseur, nor yet to costly pictures, the subjects of which are not connected with the family in whose possession they are found. As the family Bible is specially excepted which preserves the names, the births, the marriages, and the burial of the parents and the children, so the portrait of a father or a mother may well be preserved as a living memory to a son or a

daughter, alike consecrated by human sympathy, and vindicated by the law.

By the terms of the bequest in the 8th clause of the 4th section of the testator's will, the property described, which is defined to be household furniture of every description, must necessarily embrace all similar chattels owned by the devisor at the time of his
493 *death, unless there is a subsequent clause restricting the bequest, or changing its natural meaning.

Such was the ruling of Lord Camden, in The Dean and Chapter of Christ Church v Barrow, Ambler 641. "I am clear," said he, "that the pictures added to the testator's collection, after making his will, passed by the devise to the plaintiffs, upon the principle that personal estate is ever fluctuating; and so would it be in case of a devise of all a man's personal estate generally." See also Masters v. Masters, 1 Peere Williams 424.

So in Swinburne on Wills 418: "It seems clear," says the author, "by our law and the civil law, that a devise of all a man's personal estate passes all he may die possessed of, and not only that he had at the time he made his will. If the contrary resolution should prevail, it would put one under the difficulty of making a new will every day, and create the greatest perplexity imaginable." See also Gayre v. Gayre, 2 Vernon 538; Wilde v. Holzmeyer, 5 Vesey Jr. 811.

The spirit of the 55th section of our Wills act, 2 Swan. & C. 1627, although applicable to real estate strictly, would apply, if there could be room for doubt. In England, the act of 1 Vict. c. 26, which changes the ancient rule as to after-acquired estates, expressly includes real and personal property by name.

If the devisory words we have thus examined will embrace the description of chattel in litigation, does the 5th clause of the 31st section of the testator's will limit the former bequest, explain it, or in any way modify his then expressed intention? The words relied on by the defendants' counsel are these: "All my real estate and personal property which I may acquire after the date of this my will," following the introductory language of the section, "I give, devise, and bequeath to the city of Cincinnati."

This clause, although broad enough to convey the whole after-acquired personalty, must be taken in connection with the previous devise to the plaintiff and his sister Lizzie, and be construed with all the circumstances attending the execution of the will, the nature
494 of the chattel bequeathed, as well as the general purpose the *testator designed to accomplish, before we can clearly ascertain his intention.

The words household furniture are not used in any part of the will, except in the clause which gives all such property to the plaintiff and his sister. There is no restriction upon the terms, nor yet any exception as to chattels of the same description suggested by the testator. He commences the distribution of his estate by expressions having a known legal definition, and which unquestionably were understood by the counsel who drew the will, as well as

by the devisor himself: He makes an absolute gift to his nephew and niece of all the chattels included in the class he described, without restriction or limitation, and it may well be inferred he could not have intended that the words personal property, subsequently used, should include any article of the class he had already excepted, more especially when we find he annexes to the term household furniture the words "and any other personal property not hereinafter specifically devised," thereby distinguishing his household furniture from every other denomination of his personalty. This is the settled rule of construction, where a prior clause in a will is attempted to be controlled by a subsequent one, whether in the same instrument or a codicil.

The principle is, "that technical words or words of known legal import shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise." 2 Williams on Executors 927.

The leading case of Jesson et al. v. Wright, decided by the House of Lords, and reported in 2 Bligh 56, 57, in which all the authorities were examined, establishes fully the doctrine. See also the opinion of Baron Alderson, in Lees v. Mossley, 1 Y. & Coll. Exch. Eq. Cases 589, and Denman, C. J., in Gallini v. Gallini, 5 B. & Adolph. 621. This doctrine is stated very clearly in Young and Wife v. Executors of McIntyre, 3 O. 501. "The widow," says the court, "claims upon general terms, and seeks an interpretation contrary to the evident intention. The daughter claims upon a bequest in express terms of the specific subject, and her claim comports with the whole intention."

*See also 4 O. S., 351, Thompson's Administrator v. Thompson et al. Nor is there any objection to this construction, in the 495
fact that the portrait had not yet become a part of the household goods, and was moreover in a distant city when he died. It is a matter of intention merely, to what purpose the testator designed to apply it, and there is nothing to destroy the very natural implication, that it was his purpose to place it in his family mansion, any more than there would be if he had purchased in the same city, a service of china, or of plate, or some valuable article of mahogany or rosewood.

It might well be asked, if the object of the testator was not to to make the portrait a part of his household ornaments, for what other purpose did he sit to the artist? None is intimated, much less proved.

We regard the relation the testator bore to his kinsmen of great importance in ascertaining his purposes to the various devises in his will. He was an aged man and had never been married. The plaintiff and his sister were inmates of their uncle's family; the niece living with him, and doubtless, presiding over his household. To both, he gives by the 9th clause of the same section, under which the plaintiff claims the property in controversy, the permission jointly "to occupy his dwelling-house for the period of five years free of rent,"

thereby clearly intimating, as we believe, not only that the family mansion, at his decease, but the family furniture already devised, should alike be enjoyed by the legatees.

There would seem to be a fitness in sustaining such bequest, as the possession of the one very naturally attaches to it, whatever made convenient, or ornamented the other. The object was to preserve both, that the family, having lost its head, might still be remembered in this token of his regard for the surviving members.

A painstaking, laborious man, who had gained by industry a large fortune; who had struggled in the battle of life and won pecuniary independence; having no children, was about to distribute his estate, before the law would make a division among his kinsmen. With great particularity he gives to a long list of relations and friends, some token, either in money, real estate, or personal
496 *property, of his regard. Having thus performed what he deemed to be his duty to others, he proposes to educate the poor children of Cincinnati, where he had long lived and at last died.

To establish on a magnificent scale, an institute for the moral and intellectual improvement of generations yet to come he had an ideal before him to which his mind seemed to cling with great tenacity, and he developed it in his will, with as much clearness of detail, as the outlines of such a vast plan could be understood or foreshadowed, before its parts were finally adjusted, and its workings practically understood.

With this double object in view, the remembrance of his relatives, and the establishment of a noble charity for his race, we cannot suppose he could intend the bequest to either object should be contradicted by general terms, or mere formal language.

His family furniture could not materially aid in the foundation of a great public institution, either by the sale of the property, or its introduction within its walls. It was fit only for the family mansion, and could alone be properly valued by those who could associate with it the name of their relative and friend, who in common with them participated in its daily use;—more especially so, when a family portrait becomes the evidence of former friendship, or future remembrance.

We cannot presume it could have been the intention of the deceased to bequeath the mere work of the artist to an institution to commemorate the name of its founder, when by an act of princely liberality he had already erected a monument, upon which he might well inscribe the language of the poet:

"Non omnis moriar,
Multaque pars mei vitabit Libitinam."

It will be more in harmony with the testator's spirit, and illustrate more truly the modesty with which he endows a university, by the bequest to our city of nearly half a million of dollars, for our own people to provide the portrait, or the statue, to commemorate a public benefactor. He who left them a splendid inheritance has

done enough to perpetuate his name. When the edifice shall be erected, *where the recipients of his bounty are to be educated, 497
it will then be a just tribute to his memory, that the canvas or the marble shall remind posterity of Charles McMicken.

On the whole case, we are of opinion that the plaintiffs, as devisees under the will of the testator, are entitled to the possession, and have the only title to the property they claim.

*BILLS AND NOTES. 330

[Superior Court of Cincinnati, General Term.]

†DUMONT v. WILLIAMSON.

1. The meaning and purpose of an indorsement without recourse, examined and adjudged.
2. When a note is sold in market, the vendor and vendee being upon equal terms, having each the same knowledge of the parties to the instrument, and there is no concealment or misrepresentation by the vendor, who indorses it "without recourse," he is not liable to the vendee, if the name of one of the parties is forged.
*3. He is not liable on any supposed contract growing out of his indorsement, as it is but a transfer of the note, without the usual guaranty; nor can he be held at all unless fraud, concealment, or misrepresentation is proved, or the note is given in payment of a prior indebtedness. 331

STORER, J.

This case is reserved from special term for the opinion of all the judges upon the legal questions arising on demurrer.

The plaintiff's petition states, "that on the 12th day of May, 1860, at Cincinnati, Henry Essman made his promissory note to William Wolf, or order, for $500, value received, five months after date, which note purported to be indorsed by said Wolf, and afterwards came to the hands of the defendant Williamson, who afterwards indorsed and delivered the same to the plaintiff, *but without recourse on him.*" A copy of the note is made a part of the petition, with the indorsement thus restricted and qualified. It is further alleged, "that the defendant by such indorsement thereby warranted the signature of said William Wolf was genuine and made by him, when, in truth and in fact, it was not, but the same was and is a forgery;" by reason whereof the note was of no value, the said Essman, the maker being wholly insolvent. There is also the usual averment of demand and notice, and a claim to recover the amount of the note.

The demurrer admitting all the facts properly pleaded and their legal implications, the question is directly presented for our decision, what was the legal effect of defendant's indorsement "without recourse."

We find no English cases where the point has been adjudicated, though qualified indorsements are often made in Great Britain upon bills and notes. Mr. Chitty says, in his work on Bills, p. 235, this mode of indorsing is allowed in France and America, and states the

†The judgment in this case was reversed by the supreme court. See opinion, 18 O. S., 515.

object to be "to transfer the interest in the bill to the indorsee, to enable him to sue thereon, without rendering the indorser personally liable for its payment." In ch. 6, p. 224, 225, he has placed in his text the forms of indorsement applicable to various cases, and in class four, where he describes a qualified indorsement, he illustrates his meaning by using the words "James Atkins, *sans recours*," or "James Atkins with intent only to transfer my interest and not to be subject to any liability, in case of non-acceptance or non-payment."

332 *Judge Story adopts this definition with the additional remark, that a qualified indorsement without recourse, though it saves the indorser from liability, does not restrain its negotiability: Promissory Notes, section 146; Richardson v. Lincoln, 5 Metcalf 201.

An absolute transfer by indorsement imposes upon the party making it, in contemplation of law, 1. That the instrument is genuine, as well as all the attendant signatures; 2. That the indorser has a good title to the instrument; 3. That he is competent to bind himself as indorser; 4. That the maker is able to pay the note, and will do so upon due presentment at maturity; 5. If not paid when thus presented, that upon notice to the indorser he will discharge it: Story on Promissory Notes, section 135.

It must follow, then, that when an indorsement is made and taken without recourse in the qualified form, as it appears upon the note in controversy, every liability, that would otherwise exist, is excluded, and no action can be maintained upon the defendant's transfer thus restricted.

For every practical purpose, such a restricted indorsement may be placed upon the same footing as a note payable to bearer, or transferred by delivery. In the latter case, the person making the transfer does not thereby become a party, nor does he incur the obligation or responsibility belonging to an indorser.

This doctrine was settled by Lord Holt, in Gov. and Co. Bank of England v. Newman, 1 Lord Raym. 442, and is adopted by all the late text writers.

It has been attempted, however, to create a liability, not in virtue of any contract contained in the indorsement or delivery of the instrument, but upon a legal implication that there is in every such case a warranty that the instrument is genuine, and should it prove a forgery, he who has transferred it must refund to the proper party the money he may have received.

This assumption places notes and bills on the same footing with merchandise or any other commodity that may have been the subject of sale, and requires him who may have received an equivalent for an instrument subsequently proved to be worthless, to place the party to whom it has been delivered in "*statu quo*."

Now it is not to every case, even between vendor and vendee, that the rule, thus ascertained, can apply; for an article of merchan-

dise, sold without warranty, where the buyer and seller have *equal opportunity to inspect it, and both are equally ignorant 333
of inherent defects, there can be no complaint if a defect is afterwards discovered. It is only when there is concealment, misrepresentation, or fraud, that the seller becomes responsible to the buyer.

We are not surprised at the apparent confusion which exists in the statement of the question by some modern writers upon commercial law; and in the adjudications even of courts who have followed their dicta without careful examination. The difficulty in part, is found in the fact that many of these treatises, when first published, were unpretending volumes, briefly, yet clearly, stating legal principles and referring to decisions equally brief; but edition after edition has been multiplied until the points once settled have become obscured by redundant language, announcing a former doctrine merely in a new form, and the courts have too often been content with quoting cases without tracing the principle to its origin.

They would seem to have forgotten the maxim: "*Melius est petere fontes, quam sectari rivulos.*"

And thus it is we find in the discussion of the point we are about to determine, such a variety of views; positive assertions afterwards qualified on the same page, while they impress upon the reader no definite idea of what the law is; or the statement is so broadly made, that it partakes rather of assumption than matured opinion.

We feel at liberty, therefore, to exercise our own judgment, and we think the conclusion to which we have arrived is fully sustained upon legal principles.

There is no averment in the plaintiff's petition of the manner in which he became the owner of the note, nor yet that he paid value, or gave anything as an equivalent. We may fairly presume, then, he purchased it in the ordinary way in market, no representation being made by the defendant other than the implication that legally follows his qualified indorsement. There is no fact before us which imputes unfair dealing or fraud to the indorser; his liability is claimed simply upon the ground that his assignment was a virtual warranty of the genuineness of the note.

It is then the ordinary case of the owner of a bill sending it into the market for sale, or offering it himself to a purchaser, acting meanwhile in good faith, not concealing any knowledge he *may have, proper for the buyer to know, giving no verbal 334
opinion even that the instrument is valid.

A similar case in principle is found in Fenn v. Harrison, 3 T. R., 759, where Lord Kenyon said: "It is extremely clear that if the holder of a bill of exchange sent it to market, without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he has sold it, if he did not know at the time that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter in circulation to impose upon the world instead of the current coin."

So it was held in Parker v. Kennedy, 2 Bay S. C., 392, "that a bare assignment implies no warranty, but only an agreement to permit the assignee to receive the debt to his own use." So in Cummings v. Lynn, 1 Dallas, 449, and in Robertson v. Vogle, *Id.*, 255, where Judge Shippen decided, that an indorsement at common law amounts only to an assignment of all the property in the bill or note without making the assignor responsible.

A sale of the note, therefore, as of any other commodity, imposes no liability upon the vendor, simply by the act of sale. It is a purchase by the buyer without warranty, and the rule of "*caveat emptor*" will apply.

If, however, a note is given with a restricted indorsement, in payment of a precedent debt, the better opinion is, if the instrument is afterwards ascertained to be forged, the party receiving it shall not be the loser; he is still to be remunerated for the sum originally due. The thing received having proved to be valueless, the original claim revives.

Not so where the note is disposed of by sale. "While it may be claimed," says Judge Story, Promissory Notes, section 118, "that he who transfers a note by delivery, warrants in like manner that the instrument is genuine and not forged or fictitious, unless where it is sold as other goods and effects by delivery merely, without indorsement, in which case it has been decided that the law in respect to the sale of goods is applicable, and there is no implied warranty."

So in Chitty on Bills, 246, "When a transfer by mere *delivery* is made only by way of *sale* of the bill or note, as sometimes occurs, or in exchange for other bills, or *by way of discount*, and not as a *security* for money lent, or when the assignee expressly *agrees to take it in payment, and run all risks; he has, in 335
general, no right of action against the assignor, if the bill turns out to be of no value."

This view of the question relieves it of all real difficulty, and places the liability of the indorser or assignor upon a satisfactory ground. And we thus find the law determined in the very thoroughly considered case of Baxter v. Durand, 29 Maine 434, where Judge Shepley, giving the opinion of the whole court, held that "One who sells a promissory note, by delivery, upon which the names of indorsers have been forged, is not liable upon an implied promise to refund the money received therefor, if he sold the same as property and not in payment of a precedent debt, and did not know of the forgery." The learned Chief Justice carefully examined the conflicting cases, and distinguishes very clearly the real question in controversy. He admits the authority of Jones v. Ryde, 5 Taunt., 488; Fuller v. Smith, 1 Car. and Payne 197; Cammidge v. Allenby, 6 B. & C., 373; Collyer v. Brigham, 1 Metc., 547; but very properly confines them to the case of payment for a previously subsisting debt.

This case is quoted with approbation by Judge Story, Promissory Notes, section 188, and is relied on as the leading author-

ity by Judge Eccleston, in the late case of Rienan v. Fisher, 12 Maryland 497, where the same point is directly decided, following out not only the ruling of Judge Shepley, but adopting the greater part of his argument. It is also referred to by Professor Parsons, in his late work on Bills and Notes, vol. 2, 589, 590, to support the same doctrine, which is stated in the text of his work very fully and without any reservation.

In a former part of the same volume, page 38, in a note, it is said the distinction taken in the case in Maine does not seem to have been well founded; but whether the author is responsible for this note or not we cannot say; we should rather believe his unqualified appproval of the same case, after he had composed nearly six hundred pages in addition to what he then had written, expresses his true opinion, more especially as he again reiterates the doctrine in the same volume, page 601. The case of Wheeler v. Fowle, 2 Hardy 149, decided by our late brother Spencer, does not conflict with the rule we find so well established; it was determined upon its peculiar circumstances, the whole evidence *being 336
heard, from which a representation, other than the sale and delivery of the note, might have been inferred.

We are all of opinion that the pleadings in this case present no cause by action against the defendant, upon his endorsement. There is no fraud alleged in the transfer; no prior debt existing, for which the note was taken; no representation made beyond the fact of endorsement, without which we hold there could be no recovery by the plaintiff.

The demurrer will be sustained, and the cause remanded.

NOTE. The importance ot the question involved in the foregoing case, and the waut of entire uniformity in the decisions in regard to it, seem to justify the space which we have devoted to the very able and carefully reasoned opinion of the learned judge, and we should not feel called to add anything more, if we did not consider that the tendency in regard to the subject which the case encourages was in the wrong direction.

The weight of authority still is, unquestionably, in favor of the early doctrine of the books, that one who passes a note or bill by mere delivery assumes an implied obligation, in all cases, unless there is something to show a different purpose, that the same is genuine and what it purports to be upon its face, and that he has the legal right to transfer the title to the instrument. This is nothing more than the vendor of goods, without express warranty, assumes, by implication of law.

It is distinctly affirmed in the case of Gurney v. Womersley, 28 Eng. L. & Eq., 256, s. c. 4 Ell. & Bl., 132. that the vendor of a bill of exchange, though no party to the bill, is responsible for its genuineness; and. if it turns out that the name of one of the party is forged, and the bill becomes valueless, he is liable to the vendee, as upon a failure of consideration. In this case the name of the acceptor upon whose credit the bill was discounted by the plaintiff proved to have been forged by the drawer, the defendant having procured the discount, but declined to give any guarantee in regard to the bill, but had no knowledge of the defect in the bill.

The same, or a similiar, question is discussed in Gompertz v. Bartlett, 24 Eng. L. & Eq., 156, where the bill purported to be a foreign bill, and was unstamped. It proved to have been made in London, and was therefore void, for want of a stamp. The court of Queen's Bench held, that the vendor of a bill of exchange impliedly warrants that it is of the kind and description that it purports to be on its face, and that the vendee might recover back the price of the bill, as upon a failure of consideration.

These decisions were made as late as 1854, and have never been questioned in England, as far as we know. There is no question, we think, that they are in strict analogy with other portions of the law of contracts applicable to sales of personal property and of choses in action, and that they will be maintained in England. There should therefore, as it seems to us, be some very persuasive reason to justify a departure from them and establishing a different rule in this country. The main current of American authority seems to be strong in the same direction.

It is so declared by the most approved text-writers. Mr. Justice Story, promissory notes, section 118, says: "In the next place he (the vendor 337 of a note, without express guaranty) warrants in the like manner, that the instrument is genuine, and not forged or fictitious," citing Bayley on Bills, ch. 5, section 3, p. 179, 5th ed.; Chitty on Bills, 269–271; *Id.* ch. 6, p. 244, 9th ed; *Id.* p. 364, 366; and many decisions, English and American. The law is stated in the same terms in Parsons on Notes and Bills, vol. 2, p. 37.

The learned judge in the principal case seems to infer that, because the case of Baxter v. Duren, 29 Me. 434, is referred to by these text-writers, that he may fairly count upon the weight of their testimony in favor of the soundness of that case. But Mr. Justice Story deceased many years before the date of that decision; and Professor Parsons does not attempt to settle the law upon the point, but contents himself, as most text-writers do, by giving the present state of the authority, which is sufficiently illustrated by the learned judge in the principal case. Professor Parsons did as we should have done; he gave all the decisions, and then gave his adherence to the preponderating side.

The question is examined in Cabot Bank v. Morton, 4 Gray, 156, by a learned jurist, to the weight of whose authority we have all been long accustomed to refer with unhesitating confidence. This distinguished judge states the rule much in the same terms before quoted from Mr. Justice Story: "It seems to fall under a general rule of law, that, in every sale of personal property, the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title or right to transfer it."

The rule is stated by an eminent jurist in Connecticut, Mr. Justice Ellsworth, in Terry v. Bissell, 26 Conn. 23, much in the same terms, quoting the very language of Chief Justice Shaw, as stated above.

In Thrall v. Newell, 19 V., 202, the rule is laid down in much the same terms by Judge Hall.

And in Aldrich v. Jackson, 5 R. I. Rep. 218, Chief Justice Ames says: "The vendor of a bill or note, by the very act of sale, impliedly warrants the genuineness of the signatures of the previous parties to it."

And in New York, since the early case of Markle v. Hatfield, 2 Johns. 455, it seems to have been regarded as settled, that a payment in forged paper is no payment, upon the ground of an implied warranty of genuineness. But in the late case of Ketchum v. Bank of Commerce, 19 N. Y. court of appeals, 499, it was held, by a divided court, that, if the forged paper was sold, there was no implied warranty of genuineness. This seems to be substantially the distinction upon which all the exceptional cases have attempted to stand. It is found, or the germ of it, in the early case of Ellis v. Wild, 6 Mass., 321, where merchandise was sold and a promissory note, which proved to be a forgery, taken for it. Parsons, C. J., held, in delivering the opinion of the full court, that if the note were, by the intention of the parties, sold and payment accepted in "rum," the defendant was not responsible as for an implied warranty of the genuineness of the notes. "But if the plaintiff intended to sell the rum for money, and the defendant intended to buy rum, and the payment by the notes was not a part of the original stipulation, but an accommodation to the defendant; then he has not paid for the rum, and the action is maintainable."

Now we think it fair to say, that when one exchanges rum for promissory notes of a third party, or what purports to be such, and gives no express war-
338 ranty, the implied warranty is the same on the part of the one party as of the other. And if the rum proves to be something else, as a preparation of a deadly character, of no value for any purpose, or if it proves not to

have been the property of the vendor, but of another who reclaims it, or if the note proves to be a forgery, or stolen under such circumstances that no title is conveyed by the vendor, either party will be liable to make good the loss to the other, upon the implied warranty of the thing being what it purports to be, and that the vendor had good right to sell as he did. And it is idle to attempt to escape from the question fairly presented, by asking a jury to conjecture whether it was a sale of the note, and accepting payment in rum, "for the accommodation of the purchaser," or a sale of rum, and accepting payment in the note, for like accommodation And it seems to us, that if such a distinction had been first stated, by some judge or writer, less known to fame than the distinguished Chief Justice of Massachusetts, whose word went for law in his time, it would scarcely have been taken up and acted upon by so many eminent courts as this already has been. It is, in fact, however much it may have been indorsed, nothing more than a refinement, too nice for common apprehension.

But it is proper to say that this whole doctrine of the existence of any such distinction being maintainable is entirely repudiated in a very recent case in Massachusetts, Merriam v. Wolcott, 3 Allen 258. And we cannot, more to our own mind, express the want of foundation for any such distinction, than by quoting the language of the very able and learned judge, Mr. Justice Chapman, who gave the opinion of the court in the case last cited: "There are two cases which state a distinction in regard to this implied warranty that is not recognized in the other cases," citing Ellis v. Wild, *supra*, and Baxter v. Duren, *supra*, to which may now be added Fisher v. Lieman, 13 Md. 497, and the principal case. Mr. Justice Chapman continues: "If this is the law of this commonwea th, then the plaintiff cannot recover * *; but it is difficult to see any valid reason for such a distinction. Whether the purchaser pays cash or discharges a debt in payment for the forged paper, the injury is the same to him. There is in both cases a failure of consideration, growing out of a mistake of facts. The actual contract and the implied understanding as to the genuineness of the note is in both cases the same. And we think that the authorities, which hold the seller to an implied warranty, in such case, that the note is genuine, are in conformity with the principles of sound reason and justice, and with the understanding of the parties in making such a contract;" citing the earlier cases of Cabot Bank v. Morton, *supra*, and Lobdell v. Baker, 1 Met. 193, as having already virtually overruled Ellis v. Wild.

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*NATIONAL BANKS—TAXATION. 526

[Superior Court of Cincinnati.]

*ISAAC W. PARKER ET AL. v. STEPHEN W. SIEBERN, AUDITOR, AND OLIVER W. NIXON, TREASURER OF HAMILTON CO.

JAMES A. FRAZIER ET AL. v. THE SAME.

Tax upon the Owners of Shares of National Banks.—There is no valid objection to a state tax upon the owners of shares of stock in national banks, in common with other property in the state. And in estimating the value of such shares for purposes of taxation under state laws, it is not requisite to deduct that portion of the capital or property of such banks which is invested in United States stocks. The tax in such cases is an assessment upon the person of the owner, with regard to property, and in no sense a tax upon the bank or its capital.

The petitions in these cases were filed in the superior court of Cincinnati in December 1865, stating that plaintiffs on and before

*The judgment in this case was reversed by the supreme court. See opinion, 16 O. S., 615. The latter case was distinguished in Lee v. Sturges, 46 O. S., 153, 170, 171. Cited in Sebastian v. Ohio Candle Co., 27 O. S., 459, 463; State Railroad Tax Cases, 2 Otto, (U. S), 575, 617.

10th April, 1865, were an association for carrying on the business of banking, under an act of congress, approved June 3, 1864, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," and had complied with all the requisitions of said act, and were entitled to all benefits and privileges which it secured. That the first named association, with a capital of $304,000 paid in, divided into five thousand shares, had invested, according to the provisions of said act of congress, $299,150 in bonds and securities of the United States, exempt from state taxation, and that its other personal property did not exceed $60,000.

That the other association with a capital of $1,000,000, divided into ten thousand shares, had invested, according to the provisions of said act of congress, in bonds and securities of the United States, exempt from state taxation, of its capital the sum of $600,000, and otherwise in the course of business the sum of $1,439,050, and that the residue of its personal property, which might be subject to taxation under state authority, did not exceed $300,000. That the auditor of Hamilton county had assessed each shareholder in said associations, upon the duplicate of said county for taxation, the amount of his shares at their par value, without reference to the property of the association, which they claim that the shares represent. That the treasurer of Hamilton county is about to collect the tax assessed on said shares, viz.,
527 *2 29-100 per cent. on the amounts thereof. That neither the act of the general assembly of the state of Ohio, passed 5th April, 1859, entitled "An act for the assessment and taxation of property in this state, and for levying taxes thereon, according to its true value in money," nor the act amendatory thereto, passed 8th April 1865, under which said assessments are made, nor any act of the general assembly of Ohio, did or could give authority to make said assessments or collect the same.

They claim to be allowed an exemption upon their shares in proportion thereof, to the bonds and securities of the United States held by the associations, instead of said shares being taxed at their par value, irrespective of the bonds and securities of the United States held by the associations.

They claim that the shares of banks organized under the authority of the state of Ohio are not taxed or required to be listed for taxation, and that individuals engaged in the business of banking, other than issuing notes for circulation, and otherwise employing moneyed capital, in listing their property for taxation, claim and are allowed an exemption as to the bonds and securities of the United States held by them, and that, therefore, the assessment on their shares will operate as an assessment of taxes under the state authority, at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state of Ohio.

They pray for an injunction against the county auditor and county treasurer to restrain them from assessing or collecting said taxes. To which petition the defendants demurred.

The cases were, at the January term 1866, reserved to the court in general term, for the opinion of all the judges upon the questions arising upon the demurrer.

Aaron F. Perry and William T. Gholson, for plaintiffs.

Wm. T. Scarborough, Joshua H. Bates, and George Hoadley, for defendants.

STORER, J.

The questions presented by the pleadings lie within a narrow compass. There need be no discussion of merely constitutional powers, for every point that would seem by possibility to be involved, has not only been settled by the highest judicial *authority, 528
but whether applied to the general government or individual states, must be a necessary incident of sovereignty. We may dismiss, therefore, any argument to sustain the right to impose a tax, as well as to forbid the imposition.

However there may be a disposition at the present day with some tribunals, to announce *ex cathedra* what has been so long and so willingly approved by the profession, as if the foundations of our organic law had not yet been profoundly explored, and in the effort to enlighten, pages of mere axioms are read from the bench, we cannot perceive that the conclusions to which Marshall arrived, more than forty years ago, are made clearer or more consistent with sound reason by any modern jurist. We are content to follow so pure and just a man *haud passibus æquis*.

Assuming, then, that all bonds and other securities issued by the general government are not the subject of state taxation, our inquiry is reduced to a single point: Can the shares of individual banks be taxed?

The power to tax is given in express terms by the forty-first section of the act to provide a national currency; but the same power would exist if the provision referred to had not been embodied in the act.

In all discussions where the taxing power of the state has been questioned, we find no claim asserted that the shares of individuals in the United States Bank were protected, because the capital and the business of that institution could not be assessed for state purposes. Judge Marshall, in McCullough v. The State of Maryland, 4 Wheat. 436, in announcing the unanimous opinion of the court declaring the law of Maryland imposing a tax on the bank to be unconstitutional and void, says, "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank in common with the other real property within the states, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."

And Mr. Pinckney, the leading counsel for the bank, in his closing argument, admitted, "That the stock in the bank belonging to citizens of Maryland still continued liable to state taxation,

as a portion of the individual property in common with all the other
529 property of the state. The establishment of the bank, so *far from withdrawing anything from the state taxation, brings something into it which the state may tax."

An examination of the cases in which the supreme court of the United States has from time to time considered these questions, will furnish no authority against the position which was maintained in the court of South Carolina in Bulow and Others v. The City Council of Charleston, 1 Nott & McCord, 527, and in Berry and Others v. The Tax Collectors, 2 Bailey, 634. No appeal seems to have been taken by the bank to the ruling which imposed a tax upon the shareholders; but, on the contrary, the action of the state authority was not only submitted to, but virtually sustained by the acquiescence of those immediately interested.

There can be no doubt, from the law organizing national banks, as well as from various decisions upon questions analogous to the present, that a tax may be levied upon the shares held by individual shareholders.

But how the tax shall be assessed, and in what manner collected, presents another subject for consideration.

It cannot be doubted that the tax upon banking institutions must be equal, so far as it respects the percentage levied. No distinction can be permitted, or favor shown, to the domestic over the foreign corporation. This we consider to be the true exposition of the second section of the twelfth article of the constitution of Ohio, which declares "that laws shall be passed taxing by a uniform rate all moneys, credits, investments in bonds, bank stock, joint stock companies, or otherwise," and our supreme court, in City of Zanesville v. Richards, 5 O. S., 589, decided that this provision "requires a uniform rate per cent. to be levied upon all property according to its true value in money."

The tax must not only be uniform, but assessed alike upon the same property, whether owned by residents or non-residents.

It is admitted that the county auditor, in May last, having applied to the proper officers of the bank, obtained the names of the shareholders in these institutions, and the number of shares owned by each; that each share was assessed at its nominal value and placed on the grand levy for taxation.

This, it is claimed, was done under the fourth section of the
530 amendatory law of April 6, 1865, which requires "all shares *of stock in any national bank located within the state, whether held or owned by residents or non-residents, should be listed for taxation, and taxed in the city or county in which the bank is located."

This would seem to be in harmony with the power already given by the forty-first section of the act establishing the national banks; indeed, it is in strict conformity, unless the assessment is invalid upon other grounds.

It is not pretended that the per centum of tax levied is greater than that paid by other moneyed institutions in the state; but it

would seem rather, if any discrimination existed, it was largely in favor of national banks. Thus the state institutions are assessed upon their capital stock, undivided profits, and all other means not forming part of their capital; while the national banks are not taxed as such but the shares of individuals only, irrespective of all profits earned, are assessed. No authority is assumed by the state to tax the capital of these institutions, as it is composed altogether of United States bonds, which are exempted by law.

It is said by counsel, if the shares in the state banks are not taxed, there is no propriety in taxing the shares in the national banks. This supposed incongruity is readily explained when we are assured the tax imposed on the stockholders of the latter institution is not equal to that which is borne by those who hold shares in the former, and, therefore, there is no inequality in the burden. The apparent difference is in the mode. Besides, it is not true that the assessment of this tax can only be made when similar property, by the same designation, is subjected to taxation held by individuals in state institutions. No such condition is required by the statute, and we cannot see that any sound reason exists to forbid the levy.

An ingenious, but as we apprehend, an erroneous view has been presented in the argument, which, if sustained, would virtually place the shares of stock and the capital within the protection of the law which withholds the latter from taxation. It assumes that the stock originally subscribed and the original interests of the shareholders are identical; that the value of the shares depends upon the full enjoyment of all the privileges attached to the national banks by their organization, and the power, therefore, to impose a burden upon the owner of shares *must necessarily affect 531
the corporation itself, lessen the immunity it claims to possess, and thus indirectly assess the capital.

It is argued further that this right to tax, if admitted, would lead to oppression, as it will be discretionary with the state how far it shall extend, and if allowed would endanger if not destroy the franchise.

These objections cannot, we are satisfied, be sustained by the facts before us, nor can we fairly anticipate any ground of future difficulty. We are not to believe the legislature will act a dishonorable part in so important a matter, where the interests of the state are immediately involved, or disobey a provision of the constitution which prohibits the imagined wrong. This argument at best is "*ab inconvenienti*," and can only be resorted to when all others have failed. We must never presume power not delegated will be usurped; if it should be, the judiciary would at once restrain the assumption.

But the shares in these national institutions are not a part of the capital. A deposit is made with the treasury department in United States bonds, to the amount of the stock subscribed, and bills representing currency are issued to the bank. It is on this circulating medium thus received, as well as on their deposits, dis-

counted notes and bills, that the profits of the shares accrue. It is then but the levy of a percentage upon the means which produce these profits that is claimed by the state.

If, however, they are freed from the general burden on the hypothesis urged by counsel, an individual has but to invest his whole estate, however large, in these institutions, while the government, which immediately protects his property, and allows him to vindicate his rights in her tribunals, can derive no benefit from his estate; in reality he will bear no part of the public burdens.

Nor do we think the objection that the shares are not assessed at their real value can be sustained, as the auditor has placed them upon the duplicate, at the sum they stand credited on the books of the bank, as prescribed by the 12th section of the act which gave these institutions their corporate existence. Such a construction of the statute would necessarily confer very extensive power, and lead to great uncertainty in the mode of taxation, besides furnishing a standard to determine values in these days of stock gambling, not by any fixed rate, but rather by the caprice of speculators.

532 *It is not alleged that the shares are valued too high, and we presume it could not with any truth be so affirmed, nor are any data assumed by which a more accurate and impartial assessment could be made. True it is, several theories are suggested by which supposed injustice might be avoided, but we must view the questions before us in their practical applications; we ought not even to imagine wrong to exist until the facts proved in the case will necessarily lead to such a conclusion.

As taxation is an essential attribute of sovereignty, all property is liable to be assessed for public purposes. If any exception exists, the reservation from the general burden is jealously guarded. There can be no implication where the exception is required to be expressly made.

The proposition that the shares in these banks are so identified with their capital that they in reality represent it, has been fully considered in the case of The City of Utica v Churchill and others, decided a short time since by the supreme court of New York, and which was affirmed on error by the supreme court of the United States at their late session, that we do not feel required to discuss the question anew. We fully accord with the opinion of the majority of the court in the latter case, and that of Judge Selden in the former.

In thus deciding, we are satisfied we do nothing to impair the authority of the general government, or lessen, in the least degree, our solemn obligation as a judicial tribunal to uphold the law, while we sustain in its full integrity our national credit. Our first duty, we admit, is to preserve the Union, but we must not, in our devotion to the national unity, forget that it is composed of individual states.

NOTE. The foregoing opinion of Mr. Justice STORER is upon a subject of very great interest to the several states, since exempting all the bank stock in the country from all state taxation, even as a source of income,

in common with other sources of income, in addition to all National stocks, will reduce the range of state taxation, in many districts, within very narrow limits. It will extend scarcely beyond the land and goods and chattels in possession. This is, indeed, no reason why it should not be exempted, if the fair construction of the national constitution requires it. But it affords good cause for careful consideration before taking a step so essentially limiting the range of state taxation.

The case, so far as any impediment to levying the tax arises from the conflict between national and state sovereignty, must turn upon the same *questions as that of Bank of Commerce v. New York City, 2 Black 620, 533
and the case of Bank Tax, 2 Wallace U. S. 200. And the only earlier cases, in the Supreme Court of the United States, bearing directly upon the same question, are McCullough v. State of Maryland, 4 Wheat. 316, and Weston v. The City Council of Charleston, 2 Peters. 449. The case of Osborne v. The Bank of the United States, 9 Wheat. 738, being regarded as almost identical with McCullough v. State of Maryland.

It is scarcely necessary to say that as the powers and functions of the national government have become very much extended since those early decisions in regard to taxation were made, it is but natural, perhaps, that the constructions and decisions of the supreme court should have correspondingly changed.

At the time of the discussion of the case of McCullough v. Maryland, at the February term 1819, after argument by the ablest counsel, perhaps, which the republic has ever produced, Mr. Webster, Mr. Wirt, and Mr. Pinckney, for the United States; and Mr. Hopkinson, Mr. Jones and Mr. Martin, for the state of Maryland; and, after mature consideration by the court of last resort, embracing among its members many of the ablest and wisest judges who have ever adorned any judicial tribunal; men cotemporary with and sustaining the most intimate relations toward the framers of the national constitution, and within comparatively a few years of its adoption; under these favoring accidents for obtaining thorough and correct views of its import and fair construction, no pretense was put forth, even by way of argument or illustration, verging in the remotest degree towards the exemption of the shareowners of the bank from liability to state taxation. But it was expressly conceded in the argument and assumed by the court, in giving their opinion and judgment, that this exemption did "not extend to a tax paid by the real property of the bank, in common with other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state." The tax there held invalid was a stamp-tax imposed upon the issues of the bank, amounting to one per cent. upon its entire circulation, unless the bank should pay fifteen thousand dollars annually, in advance, to the treasurer of the state, as a bonus or royalty upon the privilege of exercising banking powers within the state. Chief Justice Marshall, in conclusion, puts the decision expressly and exclusively upon the ground that "this is a tax on the operations of the bank, and is, consequently, on the operation of an instrument employed by the government of the Union to carry its powers into execution."

And in Osborne v. The Bank of the United States, 9 Wheat, 738, where the whole ground is again reviewed by the court, the question arose upon an assessment made directly upon the bank, and which the treasurer of the state of Ohio was proceeding to collect, by distress, upon the deposits in the bank, and the court declare that "the bank is not considered as a private corporation, whose principal object is trade and individual profit, but as a public corporation, created for public and national purposes." "The whole opinion of the court in the case of McCullough v. The State of Maryland," said the learned judge, "is founded on and sustained by the idea that the bank is an instrument which is necessary and proper for carrying into effect the powers vested in the government of the United States." The entire argument of this distinguished luminary of American constitutional law, in this case and that of *McCullough v. Maryland, extending over more than fifty pages, 534
upon all the questions involved, is made to turn exclusively upon the idea of the distinction between a specific tax upon the bank itself and its

operations and a general one upon its property or shares in common with other similar property in the state; the former being susceptible of being so extended and enlarged, if its validity is maintained, as to annihilate the bank as one of the indispensable instruments of the national government.

And this point is perhaps still more distinctly brought out in the discussions upon the case of Weston v. The City Council of Charleston, 2 Peters 449, both in the state court and the national tribunal of last resort. Judge Huger, of the constitutional court of South Carolina, who, with two other judges, dissented from the decision of the state court maintaining the tax, in a very able opinion, maintains that the tax in that case is a tax *eo nomine*, and specifically upon the United States stocks. And the case is placed by Chief Justice Marshall and the majority of the national court upon the same ground; while the dissenting opinion of Mr. Justice Thompson, in that court, is put upon the ground that the tax, in that case was really nothing more than a tax upon the owner of the stock, on account of the income derivable from it. This shows how well agreed the different members of the court at that time were upon the principles upon which the cases, up to that time, had proceeded. There was not, at that time, supposed to be any objection to a state tax upon income, because it was derived from a loan to the national government, provided this income were taxed only in common with income from other sources. But the objection to a specific tax upon any of the instruments of the national government was, in its very nature, susceptible of an indefinite increase at the will of the states, so as in effect to extinguish the action of that government, if allowed.

But now that the results of national development have shown the convenience of multiplying national governmental functions, the same court hold, that no citizen or state corporation, within any of the states, can be taxed for income derived from any of the instruments of the national government, and especially from its public stocks. It seems to us that this principle, carried to its legitimate results, will render state taxation very unequal, and that it is not in any just sense required by the necessities of the national government. The court in the case of Bank of Commerce v. New York City, 2 Black 620, where this principle is first established, seem to place the decision mainly upon the ground that it will be impracticable for the national courts to protect the instruments of the national government from destructive taxation unless they go the whole length of declaring United States stock exempt from the jurisdiction of the states, as a source of taxation, either directly or indirectly; that if the owners of the stock are allowed to be taxed for the income derived from it, the same evil consequences, except in a less degree, will follow, as if the tax were imposed upon the stock itself. This conjectural result seems to us merely imaginary, and, like all arguments *ab inconvenienti*, more specious than sound.

There is no principle better established than that a state may tax its inhabitants for income derived from the stocks of foreign corporations, or the public stocks of other states or countries. And this power of taxation exists wholly independent of any jurisdiction over the corporations or the stock itself. It is a merely personal tax, like a poll-tax. There is no limit to the right of personal taxation. It may be made to depend upon a thousand incidents almost; upon oc-
535 cupation, or *age, or property; and, in the latter case, it is wholly unimportant whether the property, so far as personalty is concerned, is within the jurisdiction of the state or not. Personal property is a mere incident of the person. It has always seemed to us, therefore, that the state should not be restricted in imposing an income tax upon its inhabitants, so as not to embrace income derived from loans to the national government, as well as from all other sources. It has always appeared to us that any such restriction was an entire departure from the first principles upon which the exemption from taxation of certain instruments of the national government were based, and at the same time the adoption of a principle of exemption from taxation which while it resulted from extreme over caution on the one hand, evinced a kind of disregard to the consequent embarrassments produced upon the other hand, which exhibited a degree of one-sidedness in the action of the national tribune of last resort in painful contrast with the cautious and deli-

cate circumspection exhibited by the court in its earlier discriminations in favor of exclusive national sovereignty and of the consequent curtailment of the sovereignty of the states, which it is the more alarming to perceive just at a time when the harmonious action of the state and national governments is liable at any moment to be irretrievably disturbed. But we understand also, and rejoice to remember, that all this apprehension on our part may proceed from wrong bias or want of full comprehension of the difficulties and dangers lurking under the form of taxation by way of income. To us it seems very certain that no danger could come from that mode of state taxation, and that the denial of it will be more likely to produce a revolution in the very framework of the government, than any other principle yet sanctioned by that court. We have felt the more disappointment at the advance of that tribunal in that direction, from the entire confidence which we feel in its wisdom and purity, and from our extreme gratification at some of its other recent decisions, which evinced such an abiding firmness and far seeing comprehension in the discovery and maintenance of the just principles of liberty and justice.

We have presented the foregoing views in order to justify the suggestion that as these national banking associations are allowed to be formed, as part of the scheme "to provide a national currency, and for the circulation and redemption thereof," as among the *agencies and instruments* "necessary and proper for carrying into effect the powers vested in the government of the United States" by the constitution; and as, according to the argument of the court upon that point in McCullough v. Maryland, *supra*, they could only be justified upon that ground, we do not well comprehend why it may not be as consistent, to exempt the owners of shares in such banks from all state taxation, on the ground of income derived therefrom, as in the case of the former United States Bank, or of the public stocks of the nation. But for the decisions in the more recent cases in the supreme court, already alluded to, we should have supposed the decision in the principal case most unquestionable; and we still trust the supreme court will find some good way to distinguish this case from that of Bank of Commerce v. New York City, *supra*, which does not readily occur to us, short of ruling these national banks "unnecessary" for governmental purposes, and, by consequence, unconstitutional; or if they cannot find any good way of escape in this direction, that they may be induced to retrace their steps towards the old foundations.

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*WATER CRAFT LAW. 599

[Superior Court of Cincinnati.]

MOSELEY V. SCOTT ET AL., OWNERS OF THE STEAMBOAT "PRIMA DONNA."

1. By the maritime law, seamen must be cured of diseases incurred during their employment, when not produced by their own fault, at the expense of the ship.
2. The statutes of the United States do not change the rule thus existing, except in the requirement of a medicine-chest on board the vessel, and then there must be proper directions for the administration of the remedies, or a suitable person to prescribe them. The expense of food and nursing are still to be borne by the vessel.
3. The sailor engaged on board a steamboat on the Western rivers is entitled to the same privileges as merchant seamen on foreign voyages.
4. The remedy in every proper case is not confined to the admiralty, but may be pursued in the state courts.

S. & R. Mathews, for plaintiff.

Lincoln, Smith & Warnock, for defendants.

STORER, J.

This case is reserved from special term upon the questions arising upon the demurrer to plaintiff's petition. The plaintiff alleges "that the defendants were the owners of the steamboat Prima Donna, navigating the waters of the rivers Ohio and Cumberland, the boat being duly enrolled and licensed for this purpose under the laws of the United States; that in the month of February, 1864, the plaintiff shipped on board the boat at the request and upon the employment of the defendants as cabin boy at the agreed wages of twenty dollars per month for a trip or voyage to Nashville, in the state of Tennessee, and back; that during the voyage the plaintiff became and was sick with the small-pox to such a degree that he was not able to attend to his duty and was compelled to take his bed on the boat and there remain while she was proceeding from Clarksville, Tennessee, to Nashville, and thence to Evansville, in the state of Indiana, of all which the master and officers of the boat had full notice. That by reason of the premises it became the duty of the master and officers to furnish the plaintiff during his confinement, for the cure of his disease, sufficient medicine and medical attendance, nursing, nourishment, lodging, bed and bedding, but they neglected their duty in this behalf, and did not provide and furnish for the plaintiff what was required for
600 his comfort and cure as *before stated, by reason whereof, and by and through the mere neglect, carelessness, and default of the master and officers of the boat in the premises, the hands, feet, and legs of the plaintiff while he was on board sick as aforesaid, became and were frozen, so that the nails of his fingers came off, and it became necessary to amputate both his feet; that in consequence thereof he was confined in the hospital in Evansville, Indiana, for seven months, suffering great pain, and is forever incapacitated from earning his living by his labor, for all which he claims damages."

To this petition a general demurrer is filed:

The defendants' counsel have taken exception to the mode in which the plaintiff's cause of action is stated, assuming the allegations are not made with sufficient certainty, as well as informally averred. These questions furnish the ground for a motion to make the pleadings more definite, and cannot under the 88th section of our Code be considered in the form they are now presented. Where no specific cause of demurrer is set forth, the only matter for the court to decide is, whether upon the case stated a sufficient cause of action appears.

It is claimed by the defendants' counsel in argument:

First— That the case made by the petition involves the ordinary relation of master and servant only, consequently no obligation is imposed on the employer to provide medical aid under the contract of hiring, or medicine in case of the employee's illness.

Second—If the rule thus stated is not applicable, the plaintiff does not bring himself within the laws of the United States regulating the duties of merchant seamen, or those which apply to ships and shipping on foreign voyages.

Third—If the plaintiff may claim the benefit of these laws, the jurisdiction to afford relief is in the admiralty only.

It is argued that, at common law as well as by the practice of the English courts, there is no obligation on the master to pay for medical aid and the other necessary expenses of his servants' sickness; but this rule, though apparently settled by authority, has been doubted by eminent jurists, and will admit in a proper case of a thorough examination of the grounds upon which it rests.

Prior to the case of Scarman v. Castell, 1 Esp. N. P. C. 270, it was said by Lord Alvanley in Wennall v. Adney, 3 B. & P. 241, "there is no authority in the law of England to be found *which warrants the position assumed by Lord Kenyon when 601
he decided in a former case 'that an apothecary might recover from a master the amount of a bill for medicine and attendance furnished to and bestowed upon his servant while in the master's house,' and although it was held 'his Lordship's opinion was not an hasty one, but formed upon reflection,' it was nevertheless overruled." Lord Eldon, in Simmons v. Willmott, 3 Esp. 93, and Chief Justice Mansfield, in Newby v. Wiltshire, 2 Esp. 739, were much inclined to sustain the opinion of Lord Kenyon, but with him were overruled in Wennall v. Adney. Since then the current of decision is in harmony with the rule announced by his Lordship. We find it so stated in Sellon v. Norman, 4 C. &. P. 81, Cooper v. Phillips, *Id.* 581; though we are not able to appreciate the very nice distinction drawn by Judge Taunton between the nurse who became sick while attending her mistress's child, and the servant girl who iujured her limb, both being in service at the time: See also Regina v. Smith, 8 C. & P. 153. But it is said by Mr. Smith in his treatise upon Master and Servant, page 120, "It is believed, however, no case has yet occurred in which the case has arisen in an action by a servant against his master who had agreed to supply the servant with necessary food, whether the master in such a case is bound by his contract to furnish physic to his servant in case of illness. When the question shall arise, the decision must depend upon the exact nature of the contract entered into." The English rule is recognized in Clark et al. v. Waterman, 7 Vermont 76, and by Chancellor Kent, 2 Com.

We have referred to the cases on this branch of the argument, to show that there can be no just analogy between the ordinary hiring of a domestic servant who performs as in England agricultural or menial work only, and one who like the plaintiff has been employed on board a steamboat navigating the waters of the West. The difference in the mode of service, its nature and its perils, distinguish it very clearly from all other vocations except that which is required in the ordinary navigation of maritime vessels. We are

not at liberty, therefore, if we would, to regard the rule claimed by the defendants as applicable to the plaintiff's action.

It is further claimed that the laws of the United States defining the duties of "merchant seamen," as well as the liabilities of owners of vessels navigating the ocean, must determine the right
602 *of the mariner to indemnity; in other words, no right exists independent of these enactments.

We do not so understand these statutes, either in their letter or spirit. When they were enacted the right of the seaman already existed, not merely to his ordinary wages, but to all appropriate relief in the admiralty on the general principles of maritime law, and they were auxiliary merely to the existing remedies as they recognized a present right. Thus we find by the ancient marine ordinances, "if a man fall sick during the voyage, or is hurt in the performance of his duty, he is to be cured at the expense of the ship." We use the language of Lord Tenderden, in his work on Shipping, chap. 34, page 258. So it is said by Molloy, vol. 2, chap. 3, section 5: "If the seaman do become ill in the service of the ship he is to be provided for at the charge of the ship;" and in Emerigon, in his treatise on Insurance, Meredith Ed. chap. 12, section 41, under the head "Illness of Marines," it is stated without reservation that, "the sailor who falls sick during the voyage shall be cured at the expense of the vessel," and "sentence," he remarks, "was entered in the French admiralty in 1750, admitting the charge for expenses of illness, in which were comprised the fees of the physician and surgeon, and the wages of a nurse." On this point there would seem to be no doubt by the early authorities; but the whole subject was examined most thoroughly by Judge Story, in Harden v. Gordon, 2 Mason 543, who exhausted all the learning his profound investigation could reach, or his untiring industry could gather from the past history of the law. He held, "by the general principles of law seamen are entitled to be healed at the expense of the ship; the claim for such a provision in contemplation of law being a part of the contract for wages, and a material ingredient in the compensation for the labor and services of the seamen." "I have not been able," he says, "to detect a single instance in which the maritime laws of any country throw upon seamen disabled or taken sick in the service of the ship without their own fault the expenses of their cure; this is certainly the law of France, Denmark, Sweden, the Hanse Towns, Russia and Holland."

The same question arose in the case of The Brig George, 1 Sumner 152, in which the law was again fully recognized, and the mate of a vessel was allowed to charge the ship with the
603 *expenses of his cure when attacked with the yellow fever; and again, in Reed et al. v. Canfield, *Id.* 195, a seaman whose feet were frozen while in the service of the ship, was held entitled to be cured at the ship's expense. See also Nevitt v. Clarke et al., Olcott's Rep. 306, where Judge Betts decides the same point, and 1 Abbott Adm. Rep. 344, where the same judge reaffirmed the principle; and so in Ware's Rep. 1, case of The Nimrod, and the case

of The Brig Forest, *Id.* 420, in which the learned judge, as he always does, examines the doctrine from its origin, and fully coincides with Judge Story. See also, Browne v. Taber, Sprague 457; Browne v. Overton, *Id.* 462, 3 Kent Com. 341.

These adjudications were not made upon the remedy given by statute, but placed upon the principle that the laws of the United States relating to merchant seamen are but in affirmance of a right already conferred by the maritime law.

There are some exceptions, however, to the general application of this rule. Thus, by the Act of Congress of July 20, 1790, Brightly 614, "the vessel is exempted from the charge for medical advice for a sick seaman, provided there is on board a medicine chest with suitable directions for administering the remedies," but this requirement does not discharge the vessel from the expense of nursing and lodging, nor from the expense of medical advice when there is no one on board competent to administer the medicine: Lamson v. Wescott, 1 Sumner 595; Harden v. Gordon, already quoted; The Forest, Ware 420.

How far this provision of the statute may apply in the present case, must depend on the proof offered on trial; it cannot be regarded here as the demurrer forbids the idea that the officers of the boat had performed their duty, putting in issue only the liability of the owners upon the case made in the petition.

If the rule is thus fully established as to foreign voyages when merchant seamen, as they are denominated in the statute, are employed, may it not be extended to embrace the same class who are engaged in the coasting trade; and does not such trade include the navigation of the western rivers and lakes?

This proposition at once presents an inquiry both important and interesting to all who are engaged in our internal commerce as owners, officers, or crews of steam-vessels.

In Smith v. The Sloop Pekin, Gilpin 20, Judge Hopkinson overruled a plea in admiralty where a seaman employed on a *voyage between parts of adjoining states, and on the tide water of a river or bay, libelled the vessel for his wages, when 604
it was sought to dismiss the suit on the ground the court had no jurisdiction; and Judge Sprague, in the case of Derby et al. v. Henry, 21 Law Reporter 473, sustained a suit *in rem* for wages against a vessel of thirty-five tons burthen, engaged in transporting lumber between Quincy and Boston, the distance of a few miles only; and in Knight v. Parsons, Sprague 279, it was held that fishermen on mackerel voyages in licensed and enrolled vessels are to be cured at the ship's expense, and the rule applicable to hired seamen on foreign voyages, embraced them also.

By the law of February 20, 1845, Congress invested the District Courts of the United States with very extended powers, conferring jurisdiction in admiralty "in all matters of contract and tort arising in or upon or concerning steamboats or other vessels of twenty tons burthen and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce

and navigation between ports and places in different states and territories upon the lakes and navigable waters connecting the same, as are possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in commerce and navigation on the high seas or tide waters within the admiralty and maritime jurisdiction of the United States."

That jurisdiction before the passage of this law was confined to those waters where the tide ebbed and flowed, and was denied by the courts except in that class of cases: Steamboat Orleans v. Phœbus, 11 Peters 175; Waring v. Clark, 5 Howard, 441.

This law came under consideration in 12 Howard 450, in the case of The Genesee Chief, and its constitutionality was fully sustained on the ground that the ebb and flow of the tide did not determine admiralty and maritime jurisdiction, but the lakes and navigable waters were within the scope of that jurisdiction as known and understood in the United States when the Constitution was adopted.

But it was doubtful whether the navigable rivers of the west were embraced within the terms of the law; and the same court, in Owners of Steamboat Wetumpka v. Steamboat Magnolia, 20 Howard 296, held that the district court of Alabama had competent admiralty jurisdiction by the Judiciary Act of 1789, thereby giving their proper character to the vast channels of internal
605 *commerce, navigable not only for vessels of "ten or twelve tons burthen," but for those of equal capacity with ocean ships. See also the case of The Propeller Commerce, 1 Black 574.

The legislation of congress does not stop here; it has required all steamboats to be enrolled and licensed as in the case of coasting vessels; it compels all seamen employed in their navigation to pay into the treasury twenty cents for each month of their service as hospital money, securing thereby the privilege of being cared for as merchant seamen are in the marine hospitals of the government, where any exist, if not, to be cured at the government's expense. By a series of acts beginning in 1812, and from thence continued to the present time, the lading and navigation of boats on the rivers of the United States are specially regulated, the duties of the officers and crews clearly defined, and heavy penalties imposed for their disobedience or neglect.

As early as 1812, by the statute admitting Louisiana into the Union, it was declared "that all the shores and waters of the Ohio river, and the several rivers and creeks entering into the same, as well as all the shores and waters of the Mississippi, and its heads, were made a part of the district of the Mississippi, and surveyors of customs were appointed for various ports on these rivers, among which was Cincinnati:" Brightly 586, secs. 19 and 20; and by a subsequent law of 1831, merchandise may be imported from foreign countries directly to these interior ports, the owner giving bond at the port of delivery for the duties.

If then it can, as we believe, be properly maintained, that for all practical purposes, both as to right and remedy, seamen navi-

gating our great rivers and lakes are to be regarded as merchant seamen, another question arises, have we jurisdiction over the case before us, or is it to be referred to the admiralty exclusively? In all the statutes conferring jurisdiction on the admiralty courts, the congress of the United States has been careful to confine the authority, where it is exclusively given, to suits *in rem*, and not *in personam;* it is so in the law of 1845, and expressly stated in the law of 1790, regulating merchant seamen; both these enactments reserve to the seaman the right to sue in the common law courts, and this is the construction given by the United States' courts: New Jersey Steam Nav. Co. v. Merchants' Bank, 6 Howard 390; Ashbrook v. Golden Gate, Newberry 296; indeed, the numerous decisions we find in the reports of the state courts, *where the rights of seaman are directly litigated with the owners of the 606
vessel, remove all doubt as to their concurrent jurisdiction with the admiralty tribunals. A contrary construction of the law would invest the admiralty with exclusive power over every question touching maritime rights; every claim under a policy of marine insurance, bills of lading, charter-party, and bottomry, would belong alone to that tribunal, and but a small portion of commercial law be left for the adjudication of the common law courts.

The argument of defendants' counsel has extended over a wide field, and is attempted to be sustained by many illustrations, which, though ingeniously put, do not produce conviction.

We have been told the language of the law prescribing the duties of merchant seamen is, that none are regarded as such except every requirement is fulfilled; *ex. gratia*, there must be shipping articles signed before the precise limit of the voyage is ascertained, and the consent of the sailor given to the relation he has assumed, which is in fact to submit to all the penalties thereby imposed before the ship leaves her port. These, and many other provisos, demanded for the safety of the seaman, as well as the proper discharge of his duties, are declaratory rather than arbitrary in their language. We cannot believe the absence of either precludes the enforcement of any right secured by the maritime law to those who navigate the seas. We suppose the shipping-paper is but the evidence, and the best evidence, of the contract between the owners and master and the seaman; if no such paper exists, the agreement, as in other cases, must be proved by parol, though it may subject all parties to inconvenience, and produce difficulty in establishing their several rights. In the case of The Trial, 1 Blatch & Howland 94, Judge Betts held that the right of the seaman did not depend on the shipping articles, and he was not obliged to call for them to establish his claim to wages. And Judge Hopkinson, in Janson et al. v. The Russian Ship Heinrich, Crabbe, 226, decided, "when a sailor enters upon a voyage without signing shipping articles, an implied contract is presumed that he has shipped for the voyage, and he is bound accordingly."

In a similar manner the other objections urged by counsel may be readily disposed of, and the real question which after all is

involved in this controversy decided—Are not the seamen on the western waters, who assist in the navigation of enrolled and
607 *licensed vessels, under the acts of congress, on every just principle to sustain the same relation to the master and owner as a mariner on a merchant ship engaged in a foreign voyage?

Neither upon authority nor any principle of justice do we understand such a distinction can be properly assumed, much less vindicated. The term foreign voyage, when the law of 1790 was passed, had, we are satisfied, a meaning limited by the then existing condition of things. Our commerce, with the exception of the few vessels engaged in the coasting trade, was principally with Europe and the West Indies. The inland seas of the West were not as well known to our people, either geographically or commercially, as the Mediterranean, the Baltic, or the Euxine; each lake was literally a "*mare clausum.*" The sources of the Mississippi and Missouri had not yet been explored, and were as unknown as those of the Nile, while the navigation of the Ohio and her tributaries was confined to canoes, with the occasional passage of a batteau or a flat-boat.

But in the progress of events this immense basin, whose waters flow into the Atlantic, has unfolded its treasures, and demanded the facilities adapted to its vast resources. Produce must be transported thousands of miles, and the wants of trade supplied; in accomplishing which more degrees of latitude are traversed than are found between New York and London, while the distance between many foreign ports and our own, especially in the British provinces and the West India Islands, is not to be measured by an ordinary voyage from Pittsburgh to New Orleans.

The millions of products, and the necessities of trade, not only now demand the largest facilities for transportation throughout and beyond our valley, but all the securities for those who take part in the work of locomotion which are granted by the maritime law, should be allowed to the largest extent and with the greatest liberality. Though it is said there are many circumstances attending a foreign voyage which give a peculiar character to the employment of the mariner who engages to perform it, such as the variety of climate, peril of the seas, and a removal from the direct protection of the government, we cannot but believe the duties devolving on the crew of a steamer on our rivers, when fully considered, are equally important; and the dangers to be encountered as imminent as are met in an ocean voyage. There is the same diversity of
608 climate, the same contingencies of tempest, *flood and collision, the same responsibility as carriers, and the same obligation to labor for the safety of the vessel and cargo, in case of accident.

We confess, that from whatever point of view we consider the question, we are strengthened in our conviction that the western sailor is to every legal intent a merchant seaman, and is privileged to demand the same immunities. We might refer not merely to the physical condition of the West, which has made the extension of admiralty jurisdiction a commercial necessity, to explain our views

of the question now in controversy, and we think, without apology for any imagined departure from the points discussed, we may allude to the fact that the last four years have exhibited what has already become historical, that the steamboats upon our rivers and lakes have been the nurseries of thousands of brave men who have manned our naval vessels, and sustained with honor the flag of their country; nor ought we to forget that during the same period, these same rivers have floated a larger armed fleet than is sustained by any European government, England and France excepted. There is then a fitness that any real or technical distinction between the ocean and our western rivers, between fresh water and salt water, whether streams flow on continuously or rise and ebb as the sea, should no longer be permitted to exist. The progress of events has removed all reason for any such diversity, and we cannot find any legal principle is violated by extending all the privileges of the statute we have referred to, to our inland navigation. Vessels have already left our ports for foreign countries laden with our own products, and merchandise is directly imported here from every part of Europe, and we may well predict that ere long we shall have ports of entry practically from which there will be a direct communication with every part of the globe. With these views of the future we may well ignore the past, and apply the proper rule for present duty. The case stated in the petition meets every requirement of the maritime law, or the usages of commerce to constitute a right of action. A seaman within the full protection of the law becomes suddenly ill while on board a steamboat, where he had contracted to serve for the voyage, and up to the time of his illness performed his duty; the owners of the boat, the master and his officers, were bound to furnish medicine, nursing, and medical aid suitable to the treatment of his disease, but he is neglected. In mid-winter, *as he alleges, while on board the vessel, and legally under 609
their care and protection, his limbs are frozen, the nails fall from his fingers, and his feet are afterwards amputated to save his life. All these facts are admitted by the demurrer, and, until they are disproved, establish a clear right to recover. It is to be hoped, when the real state of fact is proved, the case may assume a different aspect. On the pleadings the demurrer will be overruled, and the cause remanded, with leave to answer.

733 *RAILROADS—RECEIVERS.

[Superior Court of Cincinnati, General Term, 1866.]

OHIO AND MISSISSIPPI RAILROAD CO. v. INDIANAPOLIS AND CINCINNATI RAILROAD CO.

1. A receiver appointed by the circuit court of the United States for the Southern district of Ohio, to take possession of a railroad and its effects, may sue in this court, upon a contract made by that corporation in the corporate name of the railroad, without disclosing in the petition his own name as receiver.
2. A foreign corporation, having no charter from the state of Ohio, authorizing it to construct and operate a railroad in this state, cannot, by a transfer of a portion of a railroad already constructed in the state by legal authority, acquire a right to use and operate such railroad within this state.
3. The plaintiffs, being authorized to construct and operate a railroad from Cincinnati to Vincennes, and the defendants, being authorized to construct and operate a railroad from Indianapolis to Lawrenceburg, of a different gauge, entered into a contract whereby the defendants, in consideration of being allowed to lay a third rail on the road from Lawrenceburg to Cincinnati, and of the agreement of the plaintiffs to furnish motive power for hauling the cars of the defendants on that part of the road, agreed, among other things, to lend to the plaintiffs $30,000, for the purpose of erecting a depot for the plaintiffs in Cincinnati; to erect a depot at a cost of $15,000, on lands of the plaintiffs in Cincinnati, to become the property of the plaintiffs at the expiration of the contract; to form no connections at or beyond Lawrenceburg prejudicial to the plaintiffs; and to give the plaintiffs exclusive control of the employees of the defendants while on the road of the plaintiffs: *Held*, on the constructon of the charters of the plaintiffs and defendants, that such contract was beyond the competency of the contracting parties and was void.
4. The contract also provided that the defendants should have the use of a depot and certain grounds in Cincinnati, for unloading goods and lumber, for thirty years. *Held*, that this created an easement in the land, and was, in connection with the laying and keeping up the third rail, in substance a lease, which the plaintiffs had no authority to make, and that it being for more than three years, was also invalid under the Statute of Frauds, for the want of legal acknowledgement: *Held*, also, that the defendants having as a foreign corporation no right to accept a lease of a railroad in Ohio, the plaintiffs could not have had a specific performance of the agreement, the remedies of the parties not being mutual.

T. G. Mitchell, C. D. Coffin, and W. M. Evarts, for the plaintiffs.

M. E. Curwen, Thomas A. Hendricks, George E. Pugh, and V. Worthington, for the defendants.

STORER, J.

A preliminary question is raised, which directly involves the right of the plaintiffs to maintain this action. It is admitted by
734 the pleadings, that certain proceedings have been *had in the circuit court of the United States for the Southern district of Ohio, wherein the creditors of the plaintiffs filed their bill in equity, and a receiver was appointed to take possession of all the property of the plaintiffs, subject to the order of the court; that possession

was accordingly taken, and is now held by the receiver under his appointment. It is alleged, "that this action is not prosecuted by the receiver, nor by order of the court or any of the judges thereof."

We suppose, as it is distinctly averred in the replication, that the order of the court was in fact made authorizing this action to be brought; we need only consider the point in whose name it should be prosecuted.

As the objection, if properly taken, may be readily obviated by the proper amendment under our code of practice, it is in reality but a very formal one; but we are satisfied the plaintiffs were the proper parties to institute this litigation, and in no aspect in which the case appears to us need the receiver to have been joined as a party defendant. If there should be a recovery by the plaintiffs, it will be by their corporate name, and the receiver, upon proper application to this court, would be allowed to control the process and collect the amount due, to carry out more fully the purposes of his appointment. But we can find no case in practice where a receiver, not especially authorized to do so by statute, has ever been permitted to bring an action in his own name, either to recover possession of property or to reduce a chose in action to judgment.

Before such an officer can bring or even defend an ejectment, he must have obtained the leave of court to do so, for he was but their servant, subject to their control, and deriving all his power from the tribunals who appointed him: 2 Maddox Ch. 243; Jeremy's Eq. 252; 2 Story's Eq. Jur., section 833.

Hence, when it became necessary for the receiver to sue, the name of the original party in interest was always used: Green v. Winter, 1 Johns. Ch. Rep. 61; Parker v. Browning, 8 Paige 388.

Chief Justice Sharkey, in Freeman v. Winchester 10 Smedes & Marshall 580, says: "No case can be found in which a receiver has been permitted to sue, except at law, in an action of ejectment, on leave first granted for that purpose. He is but an officer of the court appointed to hold a fund pending litigation or *infancy. 735
If he can sue at all it must be in the name of the party having the legal right; the authority to sue does not convert that which was before purely legal into an equitable right."

The result is, the order appointing the receiver does not change the character of the parties to the contract; it gives merely the power to protect the interests of all parties in the property, or fund in controversy. We are satisfied, therefore, the plaintiffs are the proper parties to prosecute the suit before us.

There is in reality but one question we are asked to decide—could the parties, plaintiffs or defendants, in virtue of their several corporate powers, bind each other by the contract made by their agents on the 2d day of October, 1856?

The plaintiffs were incorporated by the legislature of Indiana to construct a railroad from Vincennees to Lawrenceburg, in that state, and afterwards, by a statute of this state, the corporate body

created by the state of Indiana was authorized to lay out and construct a railroad from Lawrenceburg to Cincinnati, with the same powers conferred on railroad companies by the laws of Ohio; and by an amended act the plaintiffs were recognized as a corporation then existing.

Whether the legislative action of Ohio created *de facto* a new corporation or not, or whether under the power thus conferred a corporation has ever been organized, is not a question now to be considered. We may assume, however, that permission was thereby granted to the plaintiffs to extend their road to Cincinnati upon the same conditions, and with the same restrictions pertaining to other corporations of a similar kind, then in existence within this state; and for all practical purposes, the plaintiffs, who claim its benefits, must be regarded as another corporation, distinct from and independent of the body incorporated by the state of Indiana.

We are met, then, at the threshold of the case, with the question: Had the plaintiffs, at the time the contract of October 2, 1856, was entered into, any corporate power to lease their road, in whole or in part, to a foreign corporation?

It is very certain the defendants had no authority, as an Indiana corporation, to operate their road from Lawrenceburg to Cincinnati. They could not have appropriated the right of way, for they possessed no franchise that would impart any right of eminent domain. If, then, they could not directly claim the
736 *privileges of an Ohio corporation, the same being opposed to the sovereignty of the state, can it be said they could effect the same object by the transfer to them of a portion of the plaintiffs' road, which must necessarily attach to it, if permitted at all, the protection of their franchise also?

The plaintiffs were authorized to construct a railway to be used solely by them, for their own purposes, subject to the supervision of the state by subsequent legislation; and for all omissions of corporate duty or commissions of wrong to the writ of *quo warranto*, and such other process as the court might deem proper to control corporate action. Hence, it must follow, the immunity conferred was exclusively for their benefit; it could not be imparted to others, for the necessary result would be, if one foreign corporation might purchase the right to use the railway, the same privilege may be granted to as many more as the road could accommodate; the lessees in the meanwhile not being responsible to the state or amenable to its process. If such an arrangement was made, there would be no mutuality between the parties, as the foreign corporation could not be held to comply with its conditions, nor yet compel the plaintiffs to perform them on their part; for it must be granted the foreign corporation is confined to the corporate powers granted by the state which creates it, and can claim nothing more: Bank of Augusta v. Earle, 13 Peters, 589; Ohio and Mississippi Railroad v. Wheeler, 1 Black, 29.

The law applicable to this class of corporations is very clearly stated by Mr. Hodges, in his work on Railways, p. 63: "The great principle which governs all those cases is this, that a railway company is a corporation established for a particular purpose, and the directors have no power to bind the corporation by entering into contracts for purposes foreign to those for which the corporation was established; such contracts are *ultra vires* and illegal."

By the statute 8 and 9 Vict. ch. 20, section 87, special permission is given to one company to contract with another company for the right of passage over their track; and if, without legislative authority, an agreement is made transferring the power of one company to the other, equity will not lend its aid to carry it into effect: Great Northern Railway Company v. Eastern Counties Railway, 9 Hare 306.

So, in Winch v. Birkenhead, Lancashire and Chester Railway, *13 E. L. & Eq. 516, several companies had agreed to run over the track of the Birkenhead Road until an Act of Parliament 737 could be obtained authorizing a lease. It was held the contract was not within the power of the companies to make. The same point had been before decided in East Anglian Railway v. Eastern Counties Railway, 7 E. L. & Eq. 506: Redfield on Railways, ch. 24, section 1, p. 418; Pierce on Railroads 395, 397.

We do not find the courts in the United States have varied the rule, as in every case we have examined legislative leave had been given before the lease was made: 17 Barbour 601, 602; 6 Cushing 384; Redfield on Railways 418.

What then is the legal effect of the contract between the parties? It is to secure to the defendants the use of the plaintiffs' roadway for thirty years, on certain conditions, which are the equivalent for what otherwise would be denominated an annual rental:

First—The defendants are permitted to lay down, at their own expense, upon the plaintiffs' structure, an additional rail, to remain there subject to all appropriate repairs by the defendants, to be used by them for the entire term.

Second—The cars of the defendants are to be run over the road, and it is admitted have been drawn by the defendants' locomotives, under charge of their conductors, and with certain deductions, at their expense, the right to do so being co-extensive with the term already stated.

If the plaintiffs had merely engaged to be carriers of all the freight and passengers brought by the defendants to Lawrenceburg, from thence to Cincinnati, and receive therefor a fair equivalent, there would be no difficulty in giving such a construction to the agreement as would create a personal obligation only between the parties; but in order to give it this effect, and secure to the defendants its full benefit, they must not only enjoy, but be protected in the enjoyment of what is in reality the easement growing out of, and dependent upon, the occupation of the plaintiffs' railway, for the entire period of the contract, uncontrolled by the plaintiffs so long as the conditio s the defendants were bound to perform are

properly fulfilled. If the plaintiffs are not bound to permit the defendants to use their road, the defendants cannot be required to perform their part of the agreement; and *if they do, the right 738
to occupy is connected directly with the realty, and is in effect a lease of the railway.

But the privilege intended to be imparted does not stop with the use of the railway and its various attachments, for the period referred to, but it secures to the defendants the right to occupy sufficient ground on the premises of the plaintiffs in Cincinnati, upon which the defendants are to erect a freight depot, with the additional use of another portion, where the defendants can place their lumber, besides the occupation in common with the plaintiffs of their general passenger depot, and all these are to continue during the existence of the agreement.

In 9 Hare 312, it was held, by Vice-Chancellor Turner, that an agreement by one railroad to give to another the power to run over its road for a time, dependent upon certain conditions, although it was declared it should not operate as a lease, or an agreement for a lease, "it was, nevertheless, in substance, either the one or the other." So in Winch v. The Birkenhead, Lancashire, and Chester Junction Railway Co., 5 De Gex & Smale, 562, it was said by Vice-Chancellor Parker that an agreement, similar in its terms, was in the nature of a lease; and the same point was determined in Clay v. Rufford, *Id.* 769, and again in Beman v. Rufford, 1 Simon N. S. 550, by Lord Cranworth.

Chancellor Walworth, in Pitkin v. The Long Island Railroad Co., 2 Barbour, Chancery Reports 222, held that an agreement made by a railroad company with the owner of land adjoining the railroad, "to establish and maintain a permanent turnout track and stopping-place at a particular point in the neighborhood of his property, and to stop there with the freight trains and passenger cars of the company," was, in substance, the grant of an easement or servitude, and required the proper instrument to be executed to take the agreement without the Statute of Frauds. This case was afterwards fully approved, and the principle sustained in Day v. New York Central Railroad Co., 31 Barbour 554.

We are satisfied, therefore, from a careful examination of the contract between these parties, that it was an agreement for a lease to continue for thirty years; that the privilege granted was, in law, an easement for the whole period, and not a mere license to enter upon and use the plaintiffs' road, determinable at *their option. 739
That no power was given by the state of Ohio to the plaintiffs to lease their road, or transfer, in whole or in part, their franchise; and it necessarily follows that no right was conferred upon the defendants, the agreement claimed to have imparted it being simply void.

We are equally satisfied that the defendants had no authority to enter into this agreement; none can fairly be inferred from the various statutes of Indiana conferring corporate power, and none ought to be implied, except upon very clear expressions of legisla-

tive intention. Although there are cases when directors of such a company as this may have imperfectly performed their duties in relation to a subject within their corporate ability, yet, if the stockholders have been benefited, and, moreover, permitted the act to pass without objection, they will not, and ought not to be allowed to question the mode in which the act was done. If the charter, for instance, required the corporate seal to be attached to the agreement, and yet a contract by parol has been executed, the matter of which was clearly within the corporate power, the rule adopted in Bank of Columbia v. Patterson, 7 Cranch, 297, may well apply. It is, then, but simple justice, and no legal principle is really violated. But where a body of individuals is vested by law with power only to engage in a special business, any attempt on the part of such a corporation to change the object of their association, or undertake new and distinct pursuits from those described in their organic law, such assumptions are *ipso facto* illegal, and whenever brought to the notice of the courts by third persons, or the parties themselves to the contract, will not be sustained. In such cases there is no estoppel, for there is no legal competency in the contracting parties; and the affirmance, or disaffirmance, of their acts, by matter *in pais*, or by corporate resolutions, can give no validity to that which never legally existed. If a corporation could be estopped from setting up its want of authority to enter into contracts made by its agents, its power might be indefinitely enlarged, and what it was not permitted to do by its charter would become obligatory by its acquiescence. In other words, the effect of such a rule would be to authorize corporate officers to supply all deficiencies in power already granted, with ability to add new powers as the occasion might require, and thus save *the necessity of asking legislative aid to amend or modify their charter. 740

The principle we have thus indicated is so well established, that to sustain it would seem to require no quotation of authorities. It results from the very nature of the relations corporate bodies sustain to the power that creates them, and is nothing more than the same rule we are bound to apply to individuals. When their contracts are against law, or public policy, or good morals, they cannot be sustained on the ground of estoppel, admission, or acquiescence; but whenever such contracts are sought to be enforced, if it is manifest by the pleadings, or in the evidence, that such or similar infirmities exist, there is but one course for us to pursue, "*in pari delicto melior est conditio defendentis:*" Coleman v. Eastern Counties Railway Co., 10 Beavan, 1; Macgregor v. Deal and Dover Railway Co., 16 Eng. L. & Eq., 180; West London Railway Co. v. London and North-Western Railway Co., 18 *Id.*, 468; Mayor of Norwich v. Norfolk Railway Co., 30 *Id.*, 120; Shrewsbury and Birmingham Railway Co. v. North-Western Railway Co. and Shropshire Union Railways and Canal Co., 6 House of Lords Cases, 138; Earnest v. Nicholls, *Id.*, 408; Harrison v. Great Northern Railway Co., 11 Common Bench, 815; Straus v. Eagle Insurance Co., 5 O. S., 59; Marietta Railroad v. Elliot, 10 *Id.*, 61; Atkinson v. Marietta

Railroad Co., 15 *Id.*, 23; Dodge v. Worley, 18 How., 331; Pearce v. M. and I. Railroad, 21 *Id.*, 443; O. M. Railroad v. Wheeler, 1 Black, 29.

These cases, when carefully considered, not only decide that the corporation itself cannot claim relief when the agreement it has entered into is beyond its delegated powers, but establishes without reservation the rule that, like natural persons, it must place its right to recover upon the power conferred by its charter. Whenever it transcends it, and by no just construction the authority claimed can be found in the organic law, the corporate body is practically without a charter, and is but a voluntary association of individuals.

Let us now inquire to what extent the agreement between these parties was obligatory on the defendants. The defendants are an Indiana corporation. We have examined the act incorporating them, and its several amendments, and find no special powers granted to the corporators that are not common to such *com-
741 panies generally. If, then, we apply the principles we have already stated to the contract made by the defendants, we must hold:

1. That the Indianapolis and Cincinnati Railroad Company had no power to operate a road east of Lawrenceburg to Cincinnati; and having no corporate power from the state of Ohio to construct a new railway, or to enter her jurisdiction as a foreign corporation, it could not use a railway already established between these termini, or contract to pay a stipulated sum for the privilege.

2. The defendants had no power to loan $30,000 to a foreign corporation for the purpose of erecting a passenger depot without the state from which they derive their charter.

3. That the defendants had no power to stipulate with the plaintiffs that they would erect a freight depot, at a cost of $15,000, in Cincinnati, to become the property of the plaintiffs when the agreement should expire.

4. That it had no power to permit the plaintiffs to use the cars of the Indianapolis Company without compensation, a privilege not contemplated in its charter.

5. That it had no power to give the exclusive control over its employees and agents to the plaintiffs.

6. That it had no power to agree that, for thirty years, it would form no new connection at or beyond Lawrenceburg, or to discriminate in the tariff of prices in favor of Lawrenceburg as against Cincinnati.

There are other stipulations, which, in their spirit, must be included in the result to which we have arrived, but we need not specially refer to them.

Any of these conditions, if not yet performed, we believe a court of equity, on the application of a stockholder, would have restrained the defendants from carrying into effect, as each one of them was beyond the power of the corporation to make; and the assent, even, of the stockholders at the time, or their subsequent

acquiescence, could not change the principle. We have already said, if the authority does not exist independent of the assent of the stockholders, their concurrence does not confer it.

This doctrine is well discussed and determined in East Anglian Railway v. Eastern Counties Railway, 11 Common Bench 815, which has an important application to the general power of railway *corporations and is a practical resume of the previous cases upon the subject, both at law and in equity, decided in the English courts. See, also, Coleman v. Eastern Counties Railway, 4 Railway Cases 382. 742

The several grounds we have stated, upon which we hold the agreement between these parties was beyond their corporate power, are so palpable that the propositions, when once fairly expressed, need no argument to sustain them. It is but the assumption of unauthorized power that could claim to expend corporate funds, without the territory where the road is located, for an object disconnected with the purpose for which the body was organized, and never within the original contemplation of the stockholders; building warehouses and leasing depots in Ohio, surrendering all control over the rolling stock of the company, substituting the agents and employees of another company for their own, while willingly incurring all liability for their negligence in managing and conducting the trains that pass over a foreign railway, contracting to advance a large sum for the erection of a passenger depot, restraining the corporation and those who may manage it, for thirty years, not to make new connections or avail itself of another route, however convenient or eligible, binding itself for the same period not to determine the price of freight or the fare of passengers without consulting with and having the consent of the plaintiffs, nor yet to extend the road then in existence, to the west of Indianapolis, or in any direction that should be prejudicial to the Ohio and Mississippi Railroad Company. When these conditions stand out in the agreement itself with so much prominence, and must be performed, else the defendants have no right reserved to them, it would seem no ground was left upon which we could justly sustain the plaintiff's claim to recover.

And in thus holding we but affirm the ruling in The Shrewsbury and Birmingham Railroad Company v. London, etc., 4 De G. & McNaughton, 120; 6 House of Lords Cases 133; 1 De G. & McN. 732; Stuart v. London and North Western Railway Company.

We are satisfied, also, the contract referred to is inoperative, because there is no mutuality in its provisions. The defendants could not have enforced it by legal means, if the plaintiffs should have declined to perform their covenants; for no chancellor, we believe, would lend his aid to give existence to that which was *void by its very terms, not only as assuming to be obligatory on the parties, when it is clearly beyond corporate power, but opposed to sound policy—a party claiming to enter as a foreign cor- 743

poration, and to enjoy the privileges of a legal organization, without the consent of state authority.

It has been suggested in the argument, that the defendants, in availing themselves of their legal right of defence, are obnoxious to just censure; but with the motives of parties we do not interfere when called on to administer the law. Questions of taste may be left to the casuist. In the examination of the case before us, we think, if a retort were permitted, the plaintiffs and defendants occupy a common ground. They can only settle what is the true standard of courtesy.

We find a contract submitted to us which, if both parties had asked us to enforce, the law, as we understand it, would forbid us to adjudicate upon, except to leave those who had obligated themselves to their own moral sense. We could not have added by our decree new powers, or given vitality to that which never had legal life.

On the hypothesis, even, that the parties may have had the corporate power to contract, we cannot aid the plaintiffs, for we could not, if the action was reversed, have aided the defendants. On the ground we have assumed, the agreement is for a lease to continue thirty years. It is not a lease executed, because the forms of the statute requiring acknowledgment and record have not been complied with, and part performance cannot avail in the position the parties are now placed in. The case of Richardson v. Bates, 8 O. S., 257, is decisive of the question. As the defendants could not, if compelled to leave the plaintiffs' railway, have been aided by a court of law in being reinstated in the enjoyment of the easement, so neither can the plaintiffs maintain an action for rent, if the defendants have left the premises, when there was no contract subsisting which would have legally required them to remain. It is the simple case of a tenant for more than three years, who is under a parol lease; his term is limited by the statute, and, when it expired, the contract is at an end.

There is a class of cases where a contract is divisible, and some of its conditions are legal and some illegal. If the covenants can be separated, those which are valid may be upheld, and those that are not, rejected. But this is not such a case. The whole con-
744 *sideration moving to the defendants is, in effect, the right to use and occupy the plaintiffs' railway, and the stipulations to be performed as an equivalent by the defendants cannot be enforced, unless the easement granted is legally secured, and the power to grant it was given by the plaintiffs' charter. If the consideration in this respect fails, the agreement is of no value. But the conditions to be performed by the defendants must all be performed, if the agreement is valid, before they could require the plaintiffs to fulfill their covenants. It would be no answer to a prayer for a specific performance, if it should appear the defendants were unable or unwilling to comply with all or any of the stipulations they had entered into. All are essential to the privilege imparted, and no court would select any one from the whole,

and reject the rest. In this respect the contract may be said to be "*in solido.*"

Other questions were argued at the bar, which we do not think necessary now to decide; they were technical only, and did not affect the real questions involved. On the whole case, we have come to the conclusion the plaintiffs cannot recover upon the agreement they have submitted for our construction.

How far the issues of fact, which are yet to be tried, will be affected by the decision we now make, will be left to the judge in special term, who will be called on to try them.

The demurrer to the answer of the defendants will, therefore, be overruled.

We cannot dismiss the case without tendering our thanks to all the counsel, who so ably investigated and argued the questions we have been called on to decide. They have greatly relieved our labors, and enabled us more readily to arrive at the conclusions we have announced.

NOTE.—We can see no good ground to question the soundness of the foregoing opinion; but it seems to us, that the case exhibits in a strong light, the embarrassments constantly resulting from having railway corporations restrained in their corporate functions to the limits of state lines. It would certainly seem that there is far more necessity and propriety in having all the railway corporations in the country possess a national character, than there is in giving the same character to all the banks of the country, which has been already practically effected, by means of discriminating taxation. There is every reason to regard railways as national institutions, in almost every sense, in which they possess a public character, or perform public service, with the single exception of intercommunication, which is mainly of local and state concern.

1. As one of the wonderful advancements of military operations in modern times, by which railways have wrought a complete change in the conduct of war *and have become an indispensable necessity, they are entirely of a national character, so much so as to exclude all state control in times of war or civil commotion. 745

2. In regard to postal communication, which has been regarded as exclusively of a national character, since the early and palmy days of the Persian monarchy, where public posts are said to have originated, railways must also be regarded as an indispensable necessity. For if we admit the right of state control over all, or any considerable portion of the railways in the country, it will place all postal communication at the mercy and good will of state authority, which any one must see is wholly inadmissible.

We have discussed the rights of railway corporations in regard to acquiring land and other prerogative rights in adjoining states, without the action of the legislature, in a case in Vermont, many years since, when we came to the conclusion that no such prerogative rights could be acquired out of the state of the charter, except by legislative act: State v. B. C. & Al. Railway, 21 Vt. R., 433. This will not preclude such corporations from acquiring the title of land out of the state, by voluntary contract, or entering into any other contract, of the ordinary character of contracts between natural persons; but it will not justify taking land compulsorily, or operating a railway and taking tolls, etc.

I. F. R.

26 *DEEDS.

[Superior Court of Cincinnati, General Term.]

†SARAH S. THOMPSON v. ADDISON S. THOMPSON ET AL.

1. Neither at the common law, nor by the statutes of Ohio, can a conveyance of real estate be sustained unless there is a valuable or good consideration named in the deed.
2. A pecuniary consideration is essential to uphold a deed of bargain and sale. The consideration of love and affection is sufficient to uphold a covenant to stand seized to uses.
3. In the latter case, the grantee must be of the blood of the grantor; consanguinity, not affinity, is the rule. Thus, a deed to a son-in-law for the love the grantor bears to the grantee and his wife, there being no grant to the wife, is not sufficient to sustain the conveyance.
4. Conveyances of real estate in Ohio partake of the nature of feoffment, bargain and sale, and covenants to stand seized to uses. The usual form embodies parts of all these assurances, but neither controls, absolutely, the grant.

*STORER, J.

27 This case is reserved from special term for our decision on the following questions:

First—Whether the deed of Robert Jones to McCalla Thompson, copied in the petition, is supported by any sufficient consideration, there being none in fact shown except such as is stated in that deed?

Second—It being made to appear that Robert Jones has conveyed the premises in question, in fee simple, to the plaintiff by deed executed since the death of McCalla Thompson, and his only child, is said Jones a competent witness in the case for the plaintiff to prove that the deed to McCalla Thompson was executed and delivered to him by mistake, in that it was, in reality, intended to be executed and delivered to the plaintiff?

To understand the application of these questions, we have referred to the pleadings and testimony taken in the cause, and find the following facts alleged and proved:

The plaintiff is the daughter of Robert Jones, and intermarried with McCalla Thompson in November 1848; before this event took place her father had avowed his intention to convey to her certain real property in Cincinnati, and, after the marriage had been consummated, again expressed the same purpose, in a note, which is found in the case. To complete this object, on the 28th of September 1850 he executed a deed to McCalla Thompson, which was prepared by the grantee himself, by which, after reciting "that, whereas the said Thompson having theretofore intermarried with the plaintiff, the daughter of said Robert Jones, and for, and in

†This case was reversed by the supreme court. See opinions, 17 O. S., 649 and 18 O. S, 73. The latter case was cited and approved in Hubbell v. Hubbell, 22 O. S., 208, 221.

consideration of, the premises, and the natural love and affection which said Jones has and entertains for his daughter and said Thompson, and for the purpose of advancing the said Thompson in life, said Jones bargains, sells, and conveys to said McCalla Thompson the property now in controversy, and which is particular y described, to have and to hold the same with its appurtenances, rights, and privileges, unto said Thompson, his heirs and assigns, for ever," there are no covenants in the deed, not even those which are found in the ordinary quit claim conveyance.

In January 1850 a son was born of the marriage, and in November 1852 McCalla Thompson, the husband, deceased, leaving this child to survive him, who died in November, 1863. Meanwhile the property has been in the possession of the plaintiff, *through her father, who has controlled it for her use. The brothers and sisters of McCalla Thompson now claim they are 28
invested with the title as heirs at law of the deceased son of the plaintiff and her husband, the Statute of Descents in Ohio thus regulating the descent, if the deed from Robert Jones to the plaintiff's husband vested the estate in the grantee.

To quiet the plaintiff's possession, establish her right to the estate, and to declare the conveyance from her father to her husband to have been made for her benefit, as well as for general relief, this petition is filed against the defendants, who represent, as they allege, their nephew's estate; it further appears, that the plaintiff's father, finding the deed he had made to his son-in-law did not conform to his intention, expressed before, and at the time of, its execution, in January last prepared another deed, which he executed in due form, conveying all his right, interest, and estate in the premises to the plaintiff, to hold to her and her heirs forever.

The defendants deny by answer the allegation in the petition, that the deed from the plaintiff's father to her husband was intended to operate for her benefit, but, on the contrary, for the sole use of the grantee.

We have carefully considered the facts presented by the record, and heard the arguments of counsel upon one of the questions reserved. That question is, what estate, if any, did McCalla Thompson acquire by the conveyance from the plaintiff's father, and what was the legal effect of the instrument, claimed to have been a deed, by which the property is assumed to have been granted to his son-in-law? We have confined ourselves solely to the consideration of that question, as our answer to it is decisive of the case.

At common law, it is clear, the deed referred to could not be sustained as a bargain and sale, no pecuniary, or other valuable, consideration being recited in the instrument as passing from the grantee to the grantor, or proved to have been paid by evidence *aliunde*. The reason of the rule is, that a sale *ex vi termini* supposes the transfer of a right for money—the very name of the assurance imports a *quid pro quo:* Mildmay's Case, 1 Coke 176; Sharington v. Crofton, Plowden 303. These cases are referred to

in all subsequent decisions by the English courts as settling the law, and have been sustained without reservation.

29 *In the United States the same rule is adopted, and we find no exception to its operation in any reported case. On the contrary, the courts of Massachusetts, New York, Pennsylvania, Maryland, North Carolina, and Kentucky, have expressly recognized it, holding the deed to be void where no such consideration is described or proved.

Nor would the deed before us have been sustained as containing words which might operate as a covenant to stand seized to uses, as no sufficient consideration, such as blood, or marriage, is alleged.

The conveyance is to the son-in-law, for the love and affection the grantor bears to his daughter and her husband, and there is no estate conveyed to her.

Hence it appears to us, looking through very many cases, both ancient and modern, decided by the English courts, that this conveyance would not be there upheld upon any common-law principle, or under the Statute of Uses.

There is no doubt that consanguinity, not affinity, blood relationship, not that existing by marriage merely, may well support a covenant to stand seized; but the parties must sustain the relation of father and child or grandchild, brother and sister, or nephew and niece.

We cannot find a case in the English books where a son-in-law has been held to be within the rule, either to take for his own benefit, or to uphold the estate for another. The ancient law upon the subject was very fully reviewed, and the authorities from Lord Paget's Case, 1 Leonard 195, critically examined in Huesman and Others v. Sebring and Others, 16 Johnson 515, and the conclusion at which the court arrived was that we have indicated.

We find the same result expressly stated by Baron Comyns in his Digest, vol. 2, tit. Covenants, G., sections 3, 4, 6.

See, also, Sanders on Uses, vol. 2, pp. 97, 98, 99.

In the United States we discover a few dicta only, not a single decision which contravenes the established law upon this point.

The case of Bell v. Scammon, 15, N. H. 381, is an instance, and the ruling in Gale v. Colburn, 18 Pick. 401, would seem to give color to a different rule; but neither, when properly examined, in any essential degree, can be said to change the ancient doctrine.

30 *We conclude, therefore, that, at common law, as well as by the decisions of the courts in our own country, the deed from Jones to his son-in-law passed no estate, but, in reality, was inoperative and void.

But it has been argued, that the conveyance may be sustained as a feoffment, and, as such a transfer of the estate required no consideration to be paid by the grantee, but took effect only by livery of seizin, we are at liberty to uphold the deed before us upon the same principle.

Before the Statute of Frauds title to real property might pass by livery only, no instrument in writing being necessary; but since the statute a deed is necessary, and the same ceremonial of livery was requisite until the Act of 7 & 8 Vict. ch. 71, which requires only a legal seizen in the grantor.

Hence, it is clear that in England, practically speaking, there is now no other mode of transfer than by bargain and sale, lease and release, and covenant to stand seized.

If the deed has the proper words of grant, and contains a sufficient consideration, it may operate in either mode to secure the estate granted to the donee.

In Ohio we have no alienations by deed of feoffment.

Titles were never intended to be conveyed by such an instrument, though many of the words of grant it contained are still used in our common assurances.

It was held in Lindsley's Lessee v. Coats, 1 O. 245, 246, that "in no instance have the ancient common-law modes of conveyance, as such, been adopted in this state, and long anterior to the settlement of this country they had given way to the comparatively modern mode of assurance by lease and release bargain and sale."

By the Territorial Ordinance of 1787 it is provided, that "until the governor and judges shall adopt laws, real estate may be conveyed by lease and release, bargain and sale, signed, sealed, and delivered by the grantor, being of full age, and attested by two witnesses;" in pursuance of the power thus granted, in 1795 they adopted the Pennsylvania statute, which directed the manner of executing deeds, as well as their proof, acknowledgement, and record, and the Territorial Legislature afterwards enacted the statute of January 20th, 1802, to effect the same purpose. The provisions of both these laws were *substantially re-enacted in February 1805, and since that time there never has been, we are satisfied, any other opinion, either of the courts, or the legal profession, than that we have stated. 31

In the case to which we have already referred to it is said, "it evidently was not the intention of congress merely to legalize those modes of conveyance which are mentioned in the ordinance, leaving it at the option of owners of real estate, upon the sale of their lands, to convey the same by the common-law mode of feoffment with livery of seizin, but to provide that every conventional transfer of real property should be evidenced by deed." This decision was affirmed in Lessee of Bently's Heirs v. Deforest, 2 O. 222, and again in Cressinger v. Lessee of Welch, 15 O. 192, where Hitchcock, J., says: "In this country, and especially in this state, the mode of conveyance by feoffment is not adopted. Lands here are conveyed by bargain and sale, and deeds of other description."

"The conveyance by feoffment with livery of seizin," says Chancellor Kent, 4 Com. 548, "has long since become obsolete in England, and though it has been in the United States a lawful mode of conveyance, it has not been used in practice. Our conveyances have been either under the Statute of Uses, or short deeds

of conveyance in the nature of the ancient feoffment, and made effectual by being recorded, without the ceremony of livery."

We are not permitted, then, to regard the conveyance in the case before us as a deed of feoffment to be sustained upon any of the principles which apply to that ancient mode of transfer. We must consider it only upon the grounds we have already alluded to, either as a bargain and sale, or a covenant to stand seized; we cannot sustain it on the first, as no valuable consideration for the conveyance is averred in the deed, or provided *aliunde*, nor can we up hold it on the last, on the assumption of love and affection, as the grantee was not of the blood of the grantor, but, in legal contemplation, a stranger.

It follows, then, the deed from Jones to his son-in-law, McCalla Thompson, is simply void. No estate, therefore, passed to him, and his heirs inherited nothing at his death.

This ruling disposes of the other question as to the admissibility of the grantor as a witness. Our decision renders it unnecessary to consider this point.

32 *As Mrs Thompson now holds the legal estate by deed from her father, and is in possession of the property, her title will be quieted, and a decree may be entered for that purpose, agreeably to the prayer of the petitioner.

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100 ## *ATTACHMENT.

[Superior Court of Cincinnati, General Term, 1866.]

S. E. AMSINCK ET AL v. WILLIAM HARRIS.

1. An order of attachment, issued by the clerk of this court, on an insufficient affidavit, is in effect "*coram non judice*," and therefore void, for the want of jurisdiction.
2. Where such an order is dismissed, or vacated by the court, the rule applicable to other judicial proceedings, where courts will not take jurisdiction, applies.
3. Therefore the dismissal of the order does not prevent a subsequent arrest for the same cause of action; the maxim '*bis vexari*" does not apply. A proceeding instituted where no jurisdiction exists, being void, it cannot be held to forbid another proceeding, neither as a bar or in abatement.

Caldwell & Forrest, for plaintiffs.

Gholson & Challen, for defendant.

*STORER, J.

101 This is a motion reserved from special term on the application of defendant, to dismiss an order of arrest, on the ground that the defendant had been once in custody for the same cause.

The facts appearing in the case are these:

On the 31st day of March last, the plaintiff commenced his action in the court against the defendant to recover $14,000, which he

claimed to be due to him for the price of merchandise sold; on the same day a summons was served upon the defendant to appear. An order for the arrest of the defendant was issued at the same time by the clerk of the court, on an affidavit filed by the plaintiff's agent claiming under the Code the right to arrest the defendant for various fraudulent acts. On this order the defendant was taken into custody by the sheriff, and an application was subsequently made to one of our colleagues in special term to vacate the order, on the ground that the affidavit upon which the order issued did not conform to the requisitions of the code; the motion was overruled, and the question as to the sufficiency of the affidavit was taken to the general term upon error, where it was finally decided that the affidavit was insufficient to authorize the arrest, and the ruling in special term being thereupon reversed, the order of arrest was vacated and the defendant discharged from custody.

After this the plaintiff filed another affidavit with the clerk, whereupon a second order of arrest was issued and the defendant taken into custody by the sheriff, after which an application was made by his counsel to a judge in special term to vacate the last order of arrest, on the ground that he could not be arrested a second time for the same cause, or in the same action; upon this motion, after argument, the questions involved were reserved for our opinion in general term.

The question to be decided is, therefore, this—can the last order of arrest be sustained?

The principle underlying the rule which is claimed to prohibit a second arrest, "*nemo debet bis vexari pro eadem causa*," applies equally to prevent the pending of two actions for the same cause, at the same time, as well as the commencement of another action after the first shall have been fully determined, and especially *pro- 102
tects a party when the plea of former conviction, or former acquittal, is interposed in a criminal proceeding.

It has its foundation among the oldest maxims of the common law, which has been incorporated, in its letter or spirit, into the constitutions of all the states of the union.

No one shall be twice put in jeopardy for the same offense, is the germ from which, both in civil and criminal tribunals, from time to time, have sprung up the different modifications and applications of the ancient rule. To understand the true reason of the rule, it is proper to examine and ascertain definitely the meaning of the terms "twice in jeopardy."

It was formerly held in many of the states, that a party once indicted for a crime could not be charged a second time for the same offense, though there had been no trial upon the merits, as where the jury were discharged for disagreement, or the indictment was quashed, or the judgment arrested; but it is now held, we believe, in all the courts, that nothing short of an actual conviction or acquittal is a bar to a subsequent prosecution; and the same rule is observed in the trial of civil actions, without any exception; no

judgment but a final one upon the merits can avail to defeat a second action.

Hence pleas to the jurisdiction, in abatement, as well as all dilatory pleas, as they determine nothing but the right of the court to try, or the propriety of process, cannot be considered as putting a party in jeopardy, within the reason of the principle to which we have alluded.

Chief Justice Kent, in The People v. Olcott, 2 Johns. Cases 301, and Judge Spencer, in giving the opinion of the court in the celebrated case of The People v. Goodwin, 18 Johns. 200, have exhausted the law on the subject.

Since these decisions were made very many cases have arisen, both in England and in our own country, in which the courts have explained more fully the application of the rule we have discussed, with its various modifications.

They are very carefully collected by Mr. Wharton in the second volume of his excellent work on American Criminal Law, under the title of "Once in Jeopardy," sections 572-591, and furnish an interesting topic for legal examination.

In order to sustain the plea of former acquittal, or conviction, the court who tried the case must have had jurisdiction, else
103 *there has been no final determination of the matter litigated: Rex v. Bowman, 6 Carrington and Payne 337; Com. v. Peters, 12 Metcalf 387; Marston v. Jenness, 11 N. H. 156; McCann's Case, 14 Grattan 570.

If such is the law in relation to criminal offences, where life or limb may be in peril, we may readily trace the analogy of the principle to civil remedies.

In England from a very early day the subject of arrests, and discharge on common bail, has claimed very great attention where the courts have been asked to grant or restrain process.

There has not been until the reign of the present Queen any statutory provision defining the remedy, the right to arrest being always regulated by the circumstances of the case, and the discretion of the judges, who have always exercised in the special case their sound discretion. There never was, nor is there now, a general rule that is merely arbitrary without exception or limitation.

The cases referred to by counsel, when carefully examined, fully establish the fact, that even in those exceptional cases, where it would appear a second arrest was not consistent with the usual practice, it must be evident there is a disposition to harass and vex, rather than the honest pursuit of a legal right.

We find in the New York cases quoted in argument no well-established rule, but, rather, an hypothesis assumed, or proposed; not what we should respect as the exposition of a legal principle, while a series of decisions by the courts of that state have announced a rule, which, if it is sound, disposes without difficulty of any embarrassment there which *nisi prius* adjudications, and *obiter dicta*, may on first examination appear to have created.

Thus in Matter of Faulkner, 6 Hill 601, it was held by Judge Bronson that the affidavit for process always gives jurisdiction to the court to grant it. In Broadhead v. McConnell, 3 Barb. 175, it was expressly decided, that if the warrant of arrest is issued without the proof required by statute, the warrant is void, no jurisdiction having attached to the officer who issued it.

The precise question came before our superior court in Spice and Son v. Steinruck, 14 O. S., 221. "The authorities cited," say the court, "and a just and proper regard for personal liberty, constrain us to hold, that where a creditor seeks to arrest his debtor under section 20 of the Justices' Code, he must comply *with 104
all the conditions thereby prescribed, and must, therefore, state in his affidavit, among other things, 'the facts claimed to justify belief in the existence' of the fraudulent act and intention set forth as a ground for the order. That until this is done, the justice has no legal authority to issue such order, and that an arrest under an order unsupported by such an affidavit, will be held void in whatever form the question may arise."

We must conclude, then, that the first order of arrest issued in this action was inoperative and void, conferring no right upon the officer to arrest, and, of course, none upon the tribunal who granted it. Being a void process, it was equivalent to no process, and though it may have been the instrument by which the defendant was deprived for a time of his liberty, the right of the plaintiff in the action was never adjudicated. The decision of the court, therefore, in vacating the order, was simply a denial of jurisdiction on their part, and could not avail to protect the defendant in any subsequent litigation, or to deny to the plaintiff another order of arrest.

Neither in the letter nor the spirit of the rule, "that no one shall be twice vexed in the same action," do we think the defendant can demand its application on this motion.

He has been legally arrested but once; the first arrest was absolutely void.

The motion, therefore, to vacate the order before us must be overruled.

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*ELECTIONS. 88

[Hamilton District Court, 1867.]

Brinkerhoff, Murdock, Cox and Force, JJ.

STATE OF OHIO EX REL., EPHRAIM T. BROWN v. JOHN RITT AND ANTHONY SHONTEN.

Under the Ohio statute, passed May 3, 1852, 'to regulate the election of state and county officers" (3 Curwen's Revised Statutes 1920), after the polls of an election have been once opened "between the hours of six and ten in the morning" in pursuance thereto, they cannot be "closed" for any purpose until six o'clock in the afternoon, without rendering the election illegal and void.

INFORMATION in the nature of a *quo warranto*.

This was a proceeding to contest the legal right of the defendant, John Ritt, to exercise the office of mayor of the village of Mount Airy in the county of Hamilton. It appeared that the relator and the said John Ritt were opposing candidates for said office at the election held on the first Monday of April, 1867. Ritt re-
89 ceived a majority of the votes cast, and the certificate of *the election was afterwards issued to him by the recorder of the village.

The relator filed an information in the nature of a *quo warranto*, claiming that the election was void by reason of certain irregularities and misconduct on the part of the judges in conducting it, and that, therefore, the old mayor, the defendant Shonter, continued in office. The matter relied on as vitiating the election was the fact that the officers of the election, after the polls had been regularly opened, between the hours of 6 and 10 o'clock A. M., left the place of voting at about half past 11 o'clock, A. M., taking with them the ballot-box, and returning with it at about half past 1 o'clock P. M., when the voting was resumed. The answer of the defendant, Ritt, on this point was as follows: "The polls of said election were opened between the hours of 6 and 10 o'clock in the morning and closed at 6 o'clock in the afternoon of the same day, that is, the first Monday of April aforesaid. This defendant admits that the judges and clerks of said election left the place of voting about the usual time for dinner in that neighborhood, and were absent therefrom about one hour, and that meanwhile they deposited the the ballot-box in a place of security; but he avers that this was done with the consent and upon the advice of the relator, Ephraim T. Brown, who was then and there a candidate for the office of mayor as aforesaid, and with the consent likewise of all the voters then and there assembled. He denies that said ballot-box was then or at any time during the hours of the election as above stated, out of the custody or possession of the judges; or that by reason of the matters alleged in the information, or any of them, any qualified voter of the village of Mount Airy was prevented from voting or failed to vote on said day and at said election."

There was no misconduct of the judges of the election proved or pretended except that by the consent of all persons present, candidates and electors, they closed the ballot-box, deposited it in a place of safe keeping, and went away to dinner, at about half past 11 o'clock, remaining absent from one to two hours. It did not appear that any elector had been prevented from voting, or that any injury to any one was caused or intended. There was no dispute (after the court had decided in his favor a question upon the Naturalization
90 Act of April, 1802, section 4) that John *Ritt had received a majority of all the votes cast, and unless the election itself was totally void, had been elected.

George E. Pugh, on behalf of Ritt, did not deny that the action of the judges was irregular, but contended that on *quo warranto* the question, after passing behind the certificate of election, was only which of the claimants had, in fact, the highest number of legal

votes. And he insisted that inasmuch as the defendant had proved affirmatively that neither the relator nor any one else had suffered any disadvantage, a mere mistake of duty on the part of the judges could not avoid the election.

Mr. Hoefer rose to address the court on behalf of the defendant Shonter, the former mayor, but the court intimated that it was not necessary to offer any argument on that side.

Mr. Crapsey, on behalf of the relator, said that under this intimation of the court, he would not offer any remarks.

BRINKERHOFF, J.

It was correctly stated by Mr. Pugh, as a universal law governing all elections, that, throwing aside mere forms, the only question is, who has received the most legal votes? The point as to the want of the signatures of the judges to the papers touched a mere matter of form. The object was only to authenticate the paper, and it was competent to authenticate by other means, as it was by the oath of the recorder. So also, as to the administration of an oath to the judges. They were sworn as a matter of fact, and acted as judges *de facto*.

It was beyond dispute, however, that for about the space of two hours, the judges and clerk of election left the polls and took the ballot-box away, returning afterwards and resuming the election. There is no pretence that the ballot-box was tampered with, but that the judges rather acted in ignorance of what their duties were.

The court is of opinion that such conduct on the part of the judges goes to the substance of the election, and renders it void in toto. The statute prescribes that the polls shall be opened at a given hour in the morning and closed at a given hour in the *afternoon. It was the express design of the legislature that 91
all the time between these hours the polls should be kept open for the convenience of any elector who may choose to present his ballot. The court does not agree with counsel that it lies on the party contesting the election to show affirmatively that the closing the polls influenced the result. The law gives the elector the privilege of consulting his own convenience as to what hour of the day he will visit the polls, and it is a fair presumption that if the polls were temporarily closed for dinner, as was proved, a portion of the electors were deprived of that privilege. The writ was, therefore, well brought against Mr. Ritt, who claimed the majority, but the same state of facts also excludes Mr. Brown, the relator, from the office of mayor.

MURDOCK, COX, and FORCE, JJ., concurred.

NOTE—In the case of The Penn District Election, 2 Pars. (Penna.) 533, where the polls, through mistake of the law by the election officers, were closed at 8 o'clock, instead of 10, in the evening, as required by law, the election was held void. The court laid down no definite rule as to how much of a variation was necessary to make the election void; but Parsons, J., was of opinion that if an election was closed an hour, or even half an hour, before the time fixed by law it should be set aside, unless it appeared, from an ex-

amination of the number of votes compared with the tally-lists, that the number left out could not by possibility change the result.

And where the polls were kept open after the proper hour, if enough votes were cast to change the result, the election must be set aside. A legal voter cannot be interrogated as to whom he voted for, although he voted after the proper time of closing the polls; and therefore the court cannot go into any examination of the votes; it is enough if the votes improperly received could by possibility change the result: Locust Ward Case, 4 Penna. Law J. 341.

In Illinois, however, a different rule was laid down, that to make the election void it must be shown that votes were cast after the proper hour for closing the polls which changed the result It is not enough that the votes thus received, if all of one kind, would change the result: the court will not presume one way or the other, and proof must be made of which side the votes thus cast were for: Piatt v. The People, 29 Ills. 54.

But an election will not be set aside because the polls were closed at the hour specified by the Act of Assembly, though a number of legal voters who were present and intending to vote were thereby prevented: Clark's Case, 2 Pars. (Penna.) 525. J. T. M.

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628 *MARINE INSURANCE.

[Superior Court of Cincinnati, General Term, 1868.]

Storer, Fox and Taft, JJ.

CHARLES K. BAKER v. THE CENTRAL INSURANCE COMPANY.

1. When a steamer is insured, while navigating the Western rivers, against the usual risks, there is a warranty implied that the subject insured is a vessel of this description, and will continue to be so during the existence of the policy.
2. If the owners subsequently transfer the machinery and wheels of the boat they insured to another vessel, with the intention to abandon the hull for all purposes of navigation, the hull is no longer at the risk of the underwriter.

Lincoln, Smith & Warnock, for plaintiff in error.

Tilden, Stevenson & Tilden, for defendants,

STORER, J.

The plaintiff was insured by the defendants on five-sixteenths of the steamer Sioux City, valued at $5,000, against the perils of the river or fire, by a policy issued on the 6th of March, 1865, the risk to continue until March 12th, 1866. Permission was given to navigate the Ohio and Mississippi rivers and their tributaries, excepting the Arkansas and Red rivers, and the premium agreed on was paid, or secured to be paid.

When the risk was taken it is admitted the boat was engaged in navigating the Western waters, but it is alleged she was lost on the 16th of December, 1865, while lying at St. Louis; being then crushed and afterwards sunk by the ice.

This action was brought by the assured for the loss, and the case submitted to one of the judges in special Term, upon the pleadings and evidence. The defendants, in their answer, admit-

ted the loss of the boat, and the contract of insurance, but denied their liability, upon the facts which are more fully stated in the testimony.

It appears that while the boat was at the wharf, in the early part of November, her machinery, boilers, and wheels were taken off and placed upon another hull owned by the insured, to which they are permanently adjusted. They were, as the plaintiff testified, "transferred to the steamer Admiral to supply her with an outfit, as the owners of the Sioux City had deemed it desirable to build a lighter draught boat, more suitable to the trade, and transfer her machinery and outfit into it; disposing of the hull and cabin of the Sioux City on the best terms they could."

*With this evidence before him, the judge decided that, 629
under the terms of the policy, the plaintiff could not recover. He held that the description of the vessel, "the steamer Sioux City," was a warranty that she was properly equipped and provided with machinery, at the time the risk was taken, which warranty, in legal contemplation, continued until the time had expired for which the policy was issued; that when the machinery and wheels were transferred to another boat, and had become part of her outfit, the original hull to which they had been attached, having been virtually abandoned, the contract of insurance was at an end.

To this ruling the plaintiff excepted, and having filed his petition in error, now asks that the judgment in Special Term be reversed.

The question before us may be resolved into a single proposition, and that is this: Do the words "steamer Sioux City," the vessel then navigating the Western waters, import an express warranty that she then is, and will continue to be until the time of loss, a steamer or a craft propelled by steam?

There can be no just criticism on the words of description used in the policy to change their ordinary signification; they cannot be said to convey a different meaning than the term "steamboat," although until the last twenty years that name was universally given to such vessels. No particular form of words, we suppose is required to constitute an express warranty; but it is admitted that it is necessary they should be inserted in the body of the policy, and must be such as clearly to indicate the intention of the parties: 1 Arnould, section 379.

In 1 Condy's Marshall 314, it is said that "not only the name, but also the species of the vessel ought truly to be described; for, although the word ship, in its general signification, comprehends every different species of vessel, both great and small, which navigate the seas, yet in a policy of insurance the word ship is used in contradistinction to other vessels, and means a vessel with three masts, and generally of large dimensions; and in such case an underwriter would have the right to say he understood the policy to be on a ship, and that he could not have assured a sloop or brig." (See also Meredith's Emerigon ch. 2, section 7; ch. 6 section 3).

The definition of a warranty in a policy of insurance given eighty years ago by Lord Mansfield, in De Hahn v. Hartly, 1 T. R. 345, has been followed by Park, Marshall, Arnould, *Phillips, Parsons, and Duer, and is admitted to be the undisputed law. His lordship decided "that a warranty in such an instrument was a condition of contingency, and unless that be performed there is no contract." "It is perfectly immaterial," he says, "for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it is literally complied with." "It is in the nature of a condition precedent; either affirmative, as where the insured undertakes for the truth of some positive allegation; or promissory, when the insured undertakes to perform some executory stipulation:" 1 Marshall on Insurance 347.

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"Whenever, then, the warranty exists, whether the thing to be done is essential to the security of the ship or not, or whether the loss happens or does not happen on account of the breach of the warranty, still the insured has no remedy. He has not performed his part of the contract, and if he did not mean to perform it he ought not to have bound himself by such a condition:" Park on Insurance 318. "Express warranties include those stipulations which, by the agreement of the parties, are introduced into the policy; as that the property is neutral; that the vessel has a certain national character—English, French, or American; that she is, in time of war, to sail with convoy; that she has an armament of a certain number of guns, or is manned by so many seamen. In all these cases the contract must be literally fulfilled, for it is said the very meaning of a warranty is to preclude all question whether it has been substantially complied with or not; if it is affirmative, it must be literally true; if promissory, it must be strictly performed:" 1 Marshall 348. We find no limitation to the rule thus stated, in any reported case in our courts, whether Federal or state, nor in any American writer on the subject of insurance.

It is claimed by the plaintiff, if the terms used in the policy may be regarded as an express warranty, that it is not a continuing stipulation that, at the time of loss, the vessel must be the same she was represented to be when the risk was taken. Indeed it is said by counsel, that while any portion of the subject insured remains, it is still covered.

If this was true, the machinery would still be insured if the vessel was abandoned or broken up; for, if the mere hull and cabin are covered, notwithstanding, for all the purpose of navigation, the steamer no longer exists; there can be no good reason why her propelling power—her wheels and other appurtenances—would not come under the same rule.

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But this view of the contract we are satisfied cannot be sustained on any legal principle; for whenever the description of the subject insured no longer existed, there must necessarily be an end to the contract.

The risk was taken originally, not upon the hull of a vessel, but upon the vessel fitted out, let it be a ship or a steamboat; and

whenever either ceases to retain the specific character, either by the removal of the masts, rigging, sails, and furniture of the one, or the machinery of the other, the policy cannot longer be said to attach; if it did, the underwriter would be bound by a risk to which he never gave his assent. He might be willing to insure the contemplated vessel ready for navigation, when he would not have given a policy on the hull, and, as he might have refused such a risk in the first instance, he ought not, when the original character of the thing insured is entirely changed, to be charged with a liability he never contemplated, or could reasonably be supposed to have assumed.

It was well remarked by Lord Eldon, in the Newcastle Fire Insurance Company v. Macnamara et al., 3 Dow 362–365, "that if there is a warranty, it is part of the contract that the matter is such as it is represented to be.

"Therefore, the materiality or immateriality signifies nothing; the only question is—what is the building *de facto* I have insured?"

In Sellim et al., v. Thornton, 3 Ellis & Black. 868, reported also in 26 E. L. & Eq. 238, Lord Campbell held, "that when a two-story brick building, described in the policy as used for a dwelling-house and store, was insured for a year, it amounted to a warranty that the insured would not do anything to make the condition of the premises vary from the description; and if, during the risk, the insured added another story, and the property was afterwards burned, there was a breach of the warranty by the addition to the premises and the underwriters were discharged."

"The description," said his lordship, "is evidently the basis of the contract, and is furnished to the underwriter to enable him to determine whether he will agree to take the risk at all, and if he does take it, what premium he shall demand.

*"With respect to maritime policies, if there is a warranty of neutrality, or any other matter which continues of importance till the risk determines, whether the policy be for a voyage or for a time certain, such warranty is continuous; and if broken, the underwriter is released." See also Taylor v. N. W. Ins. Co., 2 Curtis C. C. U. S., 612; Calvert v. Ham. Mut. Ins. Co., 1 Allen, 308; Fowler v. Ætna Ins. Co., 6 Cowen, 673; Wood, etc., v. Hartford Fire Ins. Co., 13 Conn., 544; Sheldon v. Hartford Fire Ins. Co., 21 Conn. 19. 632

We do not deny that in case of accident, or when a vessel is in port for repairs, the machinery, in whole or in part, may be removed from the vessel for that purpose, to be replaced within a reasonable time. This was settled in Polly v. Royal Exchange Co, 1 Burr. 341, and this exception to the general rule may well be said to prove its existence.

We have been referred by counsel to various cases which he claims furnish analogies by which we may fairly construe the contract between the parties to include the loss of the hull by ice, but we

find none of them to deny the principle upon which the law of warranty is founded; but, on the contrary, sustain the view we have taken. They are quoted, we suppose, to prove that in a proper case we may look to the fact whether the omission to do an act that might have been done, has produced the loss; but it is very clear that whatever may be the rule where a representation only has been made, the increase or diminution of the risk has nothing to do with an express warranty; in the latter case, *ita scripta est* determines the rights of the parties. We would remind counsel that the case cited of Hood v. Manhattan Insurance Co., 2 Duer, 181, was some years since reversed by a unanimous decision of the Court of Appeals, 1 Kernan, 532.

We conclude the defendants are not liable on this policy to indemnify the plaintiff for the loss of the hull and cabin of his boat. The whole testimony proves the subject insured no longer existed when a material part had been taken away; and the opinion of the witness as to what constituted a steamboat, or what efforts were made to prevent the accident, cannot be regarded as affecting the settled law of insurance. Their opinions are as various as the cases in which they are presented, and are effectually disposed of by the ruling of our supreme court, in Hartford Protection Insurance Co. v. Harmer, 2 O. S., *452; nor do we
633 think, because a vessel described as a steamboat in the process of building, while yet on the stocks, and known as such to both the insurers and insured, may be covered by a policy when such a description is used, that any such construction can be permitted when the vessel is already navigating our rivers by steam.

It would seem to be a singular coincidence that the steamer Admiral, to which the machinery and appurtenances taken from the Sioux City were removed, was lost by the ice at the same time the remains of the latter vessel were destroyed.

There cannot be, nor is there claimed to be, any pretence to recover for the loss of that machinery, though it was once covered by the policy; and a like rule should be applied to the loss of the hull.

The plaintiff has been unfortunate, but his remedy against the defendant was gone when his vessel ceased to be a steamer. There is a clause in the policy by which it is convenanted that the steamer should, during the continuance of the risk, be sufficiently "found in tackle and appurtenances." This was urged by the counsel of defendants in his argument, but we suppose it is but the statement of what the law would require without any express stipulation.

It was the necessary result of the express warranty that the vessel was a steamboat.

On the whole case we find no error in the judgment of the court at special term, and it is therefore affirmed.

FOX and TAFT, JJ., concurred.

*JOINT TRESPASSERS. 270

[Superior Court of Cincinnati, Special Term, 1869.]

BAILEY v. BERRY ET AL.

1. Joint trespassers may be sued together, or any of them separately, and the non-joinder of the others is no defence.
2. A release to one of several joint trespassers will discharge all; but it must be a technical release, not merely a covenent not to sue, or other instrument amounting to a release by implication merely.
3. Where plaintiff sued joint trespassers and then made an agreement with a portion of them to withdraw the suit as to them for a certain sum of money, and in pursuance of this agreement made an entry on the record that he was unwilling further to prosecute his action against the parties named, and as to them the action was dismissed: *Held*, that the others were not discharged, but they were entitled to have the jury instructed, in making up their verdict to deduct the amount received already by plaintiff from the amount of damages sustained by him.

This was a case reserved from special term upon the pleadings and the evidence contained in the bill of exceptions.

In February 1860, the plaintiff filed his petition against J. Q. A. Foster and fifteen other persons, for an alleged trespass upon his property, in Campbell county, Ky., and in March, in the same year, by leave, filed his amended petition, claiming damages for the injury described in the former pleading.

Five of the defendants, B. Taylor, Hallam, Piner, Root, and Winston, filed demurrers to the petition, which, after argument, were overruled.

On the 16th of June 1862, Charles Air answered with a general denial of the allegations of the petition.

While the action was pending, an entry was made upon the minutes by the plaintiff, that he would not further prosecute his claim against four of the defendants, James Taylor, Jr., Barry Taylor, John Taylor, and James R. Hallam, as to whom the action was dismissed.

Subsequent to this, Berry, Winston, Root, and Air filed answers, *to portions of which the plaintiff demurred, and his demurrer 271
was afterward overruled. In March 1866, the plaintiff, by leave, filed an amended petition, in which he set forth that in October 1859, at Newport, Ky., he was the owner and in possession of several printing presses, and divers articles attached to his printing establishment, including a large quantity of type, of the value of ten thousand dollars, which the defendants had unlawfully taken and converted to their own use, for which sum he asked judgment. To this last amended petition the defendants Winston, Berry, Air, and Root severally answered, denying the matters alleged against them generally, and setting up, as a bar to the action against them, "that since its commencement the plaintiff had, in consideration of $1,500, paid to him by J. R. Hallam, Barry Taylor, and James Taylor, Jr., who were originally their co-defendants in the action, settled, released, and discharged said defendants, from whom said sum was

received, from any and all liability for the wrong and injury committed by them, and, as they were all joint trespassers, the release of those parties discharged all the wrongdoers." To this last allegation in their answer the plaintiff replies by a denial of the whole statement.

On these pleadings the case was tried before a jury. The evidence, which is fully contained in the bill of exceptions, was submitted to the jury, and a verdict rendered in favor of the plaintiff for $2,556 against all of the defendants remaining on the record.

To establish the fact of the release alleged in the answer, written and oral testimony was heard, which was uncontradicted, but the effect of which, the judge, who tried the cause, held to be a legal question only, and directed that a verdict should be rendered upon the whole evidence offered to establish the plaintiff's right to recover, as well as that of the defendants to oppose it, subject however, to the opinion of the court, on the law arising upon the alleged release.

The defendants afterwards severally moved for a new trial.

Stallo and Kittredge, for plaintiff.

Jordans and Jackson, for defendants.

STORER, J.

The important question for us to consider, as the counsel upon
272 both sides admit, is, what was the effect of the entry *by which four of the defendants were dismissed from the action; does it apply only to those named, or does it extend to all the defendants?

The entry is, in substance, this: "The plaintiff comes and makes to the court known that he is unwilling further to prosecute this action against the parties described, and thereupon they are adjudged to go hence without day, and as to them the action is dismissed, at their proportion of the costs then accrued."

It cannot be claimed that this dismissal, which is equivalent only to a judgment of *nol. pros.* at the common law, can operate either for or against the other defendants. No such effect would be produced even in a criminal case. This was held in Rex v. Sergeant, 12 Mod., 320, and is now the settled law.

We find in the early case of Parker v. Lawrence, decided in the reign of James I., Hobart 70, that the court were of opinion that a *nol. pros.* as to one or more joint trespassers, before judgment, would discharge the action. But in the next reign the case just quoted was overruled, and the court held that a discontinuance as to one defendant was a mere agreement to relinquish the action as to him only, and he alone could take advantage of it, the plaintiff being still at liberty to proceed against the other defendants: Walsh v. Bishop, Cro. Car., 243.

Since this decision the current of the law has been uniform upon the point. We find it settled in Noke v. Ingham, 1 Wilson, 90; Dale v. Eyre, *Id.*, 306; Cooper v. Tiffin, 3 T. R., 511; Mitchell v. Milbank, 6 T. R., 200.

The cases are carefully collected and approved by Sergeant Williams in his note to Salmon v. Smith, 1 Saunders, 206, note 2,

and establish fully the rule we have indicated, that a *nol. pros.* dismissal or discontinuance as to one defendant, before judgment, does not enure to the benefit of the others. And thus it is when an infant or a married woman are jointly sued with another, a plaintiff may enter a *nol. pros.* as to the minor or the *feme covert*, without affecting the liability of the other party to the suit: Pell v. Pell, 20 Johns., 126; Woodward v. Newhall, 1 Pickering, 500.

The principle which governs all these decisions implies that the party injured by co-trespassers, or who is the creditor of co-debtors, may sue either one of the individuals against whom the action may be brought; he is not bound to prosecute all, and, although a plea in abatement is permitted in case of the non-joinder of debtors, 273 *the privilege does not extend to tort-feasors, all are regarded as principals, and neither the omission to sue all, nor, if all are sued, the dismissal of one of them from the suit, can be pleaded by the other parties in bar.

From a very early period it has been held that the absolute release of one joint trespasser from his liability, discharges all who may have participated in the act; such is the language in Co. Litt. section 376, and contemporaneous cases of Cocke v. Jenner, Hob. 66, and Hitchcock v. Thornland, 3 Leonard 122. All united to produce the injury, there was a common purpose to be accomplished by the result, and there could be no severance of the liability. Hence, if there was a remission of his liability to one, it became the privilege of all. These decisions have since been followed by the English and American courts, wherever the state of facts warranted their application, and we need not refer to the numerous adjudications which have sustained the principle. In Ellis v. Bitzer, 2 O. 89, it is fully admitted.

But the release pleaded, as a discharge for all, that has been given to one only, must be a technical release, under seal, expressly stating the cause of action to be discharged, with all conditions or exceptions: Fitch v. Sutton, 5 East 232; Rowley v. Stoddard, 7 Johns. 207; Dezeng v. Baily, 9 Wend. 336; Shaw v. Pratt, 22 Pick. 305; Mason v. Jouetts' Adm'r., 2 Dana 107; Miller v. Fenton, 11 Paige 18; Hoffman v. Dunlap, 1 Barb. 185; Crawford v. Millspaugh, 13 Johns. 87; Seymour v. Minturn, 17 *Id.* 169; Couch v. Mills, 21 Wend. 425; Jackson v. Stackhouse, 1 Cowen 122.

So strictly are these technicalities adhered to, that no release is allowed by implication; it must be the immediate legal result of the terms of the instrument which contains the stipulation; hence it is that a covenent not to sue, or to assert a claim, or in any manner to hold liable one joint debtor or trespasser, though it operates between the immediate parties does not extend to the others.

Thus, in the early case of Hitchcock v. Thornland, already referred to, where it was admitted a release to one would discharge all, the distinction we have stated was recognized by Atkinson, J.; and in Lacy v. Kynaston, 1 Lord Raym. 689, reported also in 12

Mod. 548, where the question came directly before the judges, it
274 was held that a covenant not to sue was personal to the *cov-
enantee only, and could not be set up by other parties. In those cases it was well observed, that such a covenant operated as a release between the parties themselves, to avoid circuity of action, but could not extend further, "as if A. and B, be jointly and severally bound to C. in a sum certain, and C. covenants with B. not to sue him. That shall not be a release but a covenant only, because he covenants only not to sue B., but does not covenant not to sue A., against whom he still has his remedy." Late in the last century the case of Dean v. Newhall, 8 T. R., 168, was determined by Lord Kenyon, where the defendant pleaded that his principal, with whom he was jointly bound, having been, as he claimed, released by an agreement under seal, which obligated the plaintiff not to sue him, and if he did, the agreement thus made "should be a sufficient release and discharge to all intents and purposes, both at law and in equity to and for the debtor, his executors, etc." It was argued that this agreement was a release of the right of action against principal and surety, but, in reply, the case we have cited from Raymond was referred to, and his Lordship, in giving the opinion of the whole court, said: "The case of Lacy v. Kynaston removes all difficulty on this subject, and is a direct authority for the plaintiff. I had only been doubting in my own mind on the strict law of the case, for that the honesty and justice of it are with the plaintiff, cannot be doubted. Even if the defendant had succeeded here, a court of equity would have given the plaintiff full relief. But I am glad to find, by the case cited, that we are fully warranted in deciding for the plaintiff on legal grounds." Since the determination of this case, there is not, we believe, a single reported decision, opposed to the principle it affirms, to be found in the English courts, and we might quote cases *ad libitum* to the same point, if there could be a doubt of the correctness or our statement: Farrell v. Forest, 2 Saund. 48, note 1.

In the American courts the same rule is adhered to without exception: MeLellan v. Cumberland Bank, 24 Maine 566; McAllister v. Sprague, 34 *Id.* 296; Walker v. McCollough, 4 Greenl. 421; Tuckerman v. Newhall, 17 Mass. 581; Shaw v. Pratt, 22 Pick. 305; Smith v. Bartholomew, 1 Metc. 276; Brown v. Marsh, 7 Vt. 327; Durell v. Wendell, 8 N. H. 369; Snow v. Chandler, 10 *Id.* 92; Crane Adm'r. v. Alling, 3 Green N. J. 423; Catskill Bank v. Messenger, 9 Cowen 38; Rowley v. Stoddard, 7
275 *Johns. 207; Couch v. Mills, 21 Wend. 424; Bronson v. Fitzhugh, 1 Hill 185; Frink v. Green, 5 Barb. 455.

The courts, in the examination of the numerous decided cases, have been required to give a construction to every conceivable stipulation inserted in the agreements which have been pleaded as releases of liability, and have invariably pursued the same course in yielding nothing to mere implication, wherever words of release are found in the instrument. The intention of the parties is alone

regarded, holding the established legal maxim, that where a particular purpose is to be accomplished, and language which expresses it is clear and certain, no general words subsequently used in the same agreement shall extend the meaning of the parties: Thorpe v. Thorpe, 1 Lord Raym., 235.

Dallas, C. J., in Solly v. Forbes, 2 Brod. & Bing. 46, having examined the leading cases, observes, as courts look at the intention of the parties, in modern times more than formerly, rather than the strict letter, not suffering the latter to defeat the former, held that general words of release even, could not be operative to enlarge a previous statement which defined the particular object for which the agreement was made. The same principle is found in Turpenny v. Young, 5 Dowl. & Ry. 262, and is referred to and affirmed in Thompson v. Lach, 3 M., G. & Scott 551. See also North v. Wakefield, 13 Ad. & E. 540.

On similar grounds, it was held, in McAllister v. Sprague, 34 Maine 297, where a receipt had been given by a creditor to one of his joint debtors, which recited that the debtor had paid a certain sum in full of his half of the debt, due jointly by him and another, and which was to be his discharge in full for debt and costs, but no discharge of the co-debtor. It was decided that this could not be pleaded as a release by the other judgment-debtor, the intention of the parties being that his liability should still remain. See also Durell v. Wendell, 8 N. H. 369.

Having thus ascertained what is now the established rule in deciding the question raised by the defendant, let us now examine the facts, as they are found proved in the bill of exceptions, and to which there is no contradiction.

Before we proceed, however, it is proper to consider how far the entry on record, by which the defendants Taylor and Hallam were dismissed from the suit, can be explained or enlarged by parol evidence. The purpose is plainly stated, and as to the parties *named therein, it was a legal discharge from the pending proceedings, but how far it was a bar to a subsequent action is not now a question, as counsel admit it would be barred by the statute. As the only written evidence of an arrangement between the plaintiff and these parties, is the record made at the time, and without which it would be difficult to say how these parties could avail themselves of the alleged benefit they had secured, it would seem to be inconsistent with the established rule of evidence to permit any explanation where there is neither ambiguity in the terms used, or the purpose intended to be accomplished. *276

But to give the testimony its full weight, the result of a careful analysis of the whole is this: During the pendency of this suit, the counsel of both parties met the father, (Col. Taylor,) of two of the then defendants, and with Hallam, another, the plaintiff also being present, when it was agreed that fifteen hundred dollars should be paid, and these defendants dismissed or released from the action, reserving to the plaintiff his right to proceed against the other defend-

ants. The money was paid by Col. Taylor, and the entry referred to made accordingly.

If then, we apply the doctrine already stated, where written instruments, pleaded as releases, have been construed by the courts, we cannot perceive that the arrangement made by the plaintiff with the defendants, is without the rule.

To give it all the weight to which it is justly entitled, it must be determined upon the same principles which control every similar case, however formal may be the evidence to establish the facts.

The result of our investigation has led us all to conclude that neither the entry on the record dismissing three of the defendants from the action, nor the arrangement made with the parties, which preceded that entry, and on which the agreement to dismiss was founded, can be regarded as a discharge in law of the defendants who still remain on the record.

First—Because they are not technical releases in writing sealed by the proper party.

Second—That if they could be construed as implying an agreement not to sue, they can avail only to the defendants with whom they were made, and cannot operate for the benefit of the defendants who set up the facts in discharge of the plaintiff's action against them.

277 **Third*—That the entry referred to dismisses the defendants only from the action, without reference to their co-defendants. It was the privilege of the plaintiff to have entered a *nol. pros.* or discontinuance as to any one or more of the defendants, and the dismissal in the case before us but produces the same result.

The plaintiff might have sued either of the defendants, or all, and as it would be no ground of defence that other parties were not joined, it must follow, the remaining defendants in the suit have no cause of complaint.

Fourth—That the intention of the parties, as expressed when the arrangement was made and proved by the witnesses, must be taken to qualify the agreement, and thus establish its true character, and we believe it was merely to decline to prosecute further the defendants who were dismissed, and nothing more.

Neither do the facts we have alluded to prove an accord and satisfaction, as it must be admitted, if they did, it would have the same effect as a technical release, nor do they contain the ordinary elements of what the law regards as necessary to constitute such a bar. We have been specially referred to the case of Ellis v. Bitzer, already quoted to change or greatly modify the rule we have stated, but it does not, we think, conflict with the leading principle which we suppose governs all similar cases. The courts do not there assume any new rule of interpretation, or attempt to extend the operation of that which has hitherto been received, and acted on in the trial of causes, and we find nothing inconsistent therefore, with the conclusion to which we have arrived.

Nor do we doubt, although there may be found individual judgments against joint trespassers, the plaintiff can have but one

satisfaction; he must elect which of the judgments he will enforce, on the same principle, where there may be different findings by the same verdict when all the trespassers are sued, the successful party must choose "*de melioribus damnis*"—he cannot claim to collect all. It follows, then if the damages are satisfied in part, by payment, or compromise with some of the defendants, the plaintiff may still proceed against those who remain on the record, and we hold it was the duty of the judge who tried the cause at special term, to have instructed the jury, as he did, to deduct in their finding whatever sum the plaintiff has already received on account of his alleged injuries, from the parties who were afterwards dismissed. This was the just application of the *rule that there cannot be a double remuneration for the same wrong. 278

This is very distinctly stated by Judge Upham in Snow v. Chandler, 10 N. H., 95. It is, he says, that "the sum paid was not received in satisfaction of the damages, but only in part satisfaction, and the fact that it was coupled with an engagement not to sue, does not alter the case. But to the extent of the amount paid, the defendant may avail himself of the arrangement." See also Merchants' Bank v. Curtis, 37 Barb., 320.

We have thus traced the principle, familiar as it is, that determines this case to its source, and followed down the course of decisions to the present time. not that there was any novelty in the rule, but that we might satisfactorily determine what in reality was a legal bar to this action, and although the examination of the numerous cases, both ancient and modern, has convinced us that the old maxim, "*Melius est petere fontes, quam sectari rivulos*," has not always been regarded by the courts, we find no difficulty in arriving at the result we have reached. Not only upon the law as we hold it to be, but on the facts proved, we are all of opinion that the motion for a new trial should be overruled, and judgment entered on the verdict.

NOTE—The foregoing opinion embodies the law so thoroughly, and is upon a question of so much practical importance, that we are glad of an opportunity to present it to the profession. The case turns altogether upon the effect of the *retraxit* or *nol. pros.* as to a portion of the defendants. The facts seem to be, that the plaintiff accepted $1,500 of a portion of the defendants, and discontinued the suit against them, under an agreement that they should be no further prosecuted for the trespass, *but that the plaintiff should be at liberty to proceed against the other defendants.* Upon this state of facts the judge at the trial charged the jury, that the transaction did not amount to a bar of the action; but that the amount received must be considered in making up the damages against the other defendants. This seems to us both legal and equitable. It is a creditable illustration and application of the rule, that it is the duty of courts so to construe the contracts of parties as to effect their intention, if practicable.

It was a mere question, to reduce it to its simplest elements, whether what passed between the plaintiff, and the defendants let out of the action, amounted to a release of the *cause of action*, or a covenant *not to sue* these defendants. If the contract had been in writing, it might have been so drawn, through the inexperience of the draughtsman, or possibly through mere inattention, that the court must of necessity treat it as a release. If that is so, the court have no alternative but to say the contract is so defective as to render it impossible for the court to carry into

effect the intention of the parties. But so long as it remains in oral evidence it is always easy to escape so disastrous a result.
279 *The case may always be referred to the jury, and they will never experience any difficulty in finding that the parties used such terms as, on the whole, to express their obvious intent. And that, in the present case, is entirely unquestionable. It is as certain that the plaintiff did not intend to release the cause of action, as that he did intend no further to prosecute the defendants let out of the action. There must, then, be very clear proof of the use of terms, which do, of necessity, release the cause of action, to induce the court to give them that effect, where there is not the slightest doubt, on the whole case such was not the real purpose. We should always feel more or less compassion for any judge who felt himself so effectually hampered by forms as to be driven into any such absurd consequence. The opinion seems to us creditable, both in form and substance. And we rejoice at this obvious tendency of modern Common law jurisprudence to reach obviously just results, which is the great excellence of an unwritten system of law over one that is cramped into written forms. The one is temporal and imperfect, the other eternal and complete, if wisely and fairly administered. I. F. R.

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82 *LIFE INSURANCE—AGENCY.

[Cuyahoga Common Pleas Court, 1870.]

JACOB MYERS, ET AL. v. KNICKERBOCKER LIFE INSURANCE CO.

1. A general agency for a life insurance company is like any other agency, revocable at the will of either party, subject to the claim of the other party for such damages as the contract may entitle him to.
2. Where the contract of appointment does not give the agent an *exclusive* right to represent the company, the latter may appoint other agents, but the appointment of another agent in the same place, whose operations materially lessen the advantages of the contract to the first agent, is a breach of the contract by the company, and the agent may terminate it, or have an action for damages.
3. The abandonment by the agent of a substantial part of his principal's business, is a good ground of terminating his agency, but if the principal assents to such abandonment, the authority of the agent as to the rest of the business continues.
4. An insurance agent, by his contract, was to solicit new insurances, and to collect premiums on renewals of former ones. On the new ones, and on the renewals so long as they should be collected by him, and paid to the company without other expense to it, he was to have certain specified commissions. *Held*, that his abandonment of soliciting new insurances would be good ground for the company to terminate his agency for both purposes; but if the company failed to discharge him for such cause, and he continued with its assent to collect the renewal premiums, then his right to commissions thereon continued; and if the company subsequently refused, without other good cause, to allow him to collect renewals, he would be entitled to damages.

This was an action for breach of contract, in depriving plaintiffs of the collection of certain renewal premiums on insurances which they had obtained as agents for defendants, under the following letter of appointment:

MESSRS. JACOB & JAMES H. MYERS, Galion, O.:

GENTLEMEN: The directors of this company are pleased to appoint you their general agents to obtain insurance for them in the state of Ohio. For

your services as such general agents, the company will allow you the following commissions: On all first premiums collected by you, seventeen per cent. besides the policy fee; on the renewals of your business, seven per cent., so long as they are collected by you and paid to the company without other and further expense to them. And after the death of Jacob Myers, the renewals to be collected by James H. Myers, and the same commissions to be paid to him so long as they are collected without further charge to the company.

You will please observe, in particular, the instructions addressed to you on the third page opposite.

I am, yours truly,
ERASTUS LYMAN, *President.*

*The other facts sufficiently appear in the charge of the court. 83

E. Sowers and W. H. Gaylord, for plaintiffs.

W. C. McFarland and Geo. Willey, for defendant.

PRENTISS, J., charged the jury as follows:

This action, gentlemen, is brought to recover for the value of what are called renewals of certain insurances effected by the plaintiffs, in the company of the defendant, or rather the plaintiff's commissions on such renewals. The plaintiff's claim is predicated upon a contract made between them and the defendant, by which the plaintiffs were appointed general agents of the defendant "to obtain" insurance for the defendant "in the state of Ohio."

The plaintiffs state in their petition, the contract, by the terms of which they were to receive as compensation for their services, as such general agents of the defendant, on all first premiums collected by them, seventeen per cent., and on all renewal premiums seven per cent., so long as they were collected by the plaintiffs, or paid to defendant without other and further expense to the defendant than plaintiffs' commissions. These commissions were subsequently increased by the defendant to twenty per cent. on the first premiums, and to ten per cent. on the renewal premiums. They further state that accompanying the letter of appointment were certain instructions as to the manner in which the duties of the plaintiffs were to be performed, and which constituted a part of the terms and conditions of the contract. They state that they accepted this appointment and entered upon and faithfully discharged the duties of their agency until on or about the first of July, 1867, at which time the defendant, without good cause, refused to allow them to collect, and forbade their collecting the renewals on insurances they had procured for defendant, though they were at all times ready and willing to collect them. They state that in the discharge of their duties they procured three hundred and thirty-eight policies of insurance in the company of the defendant; that the amount insured by these policies was three hundred and seventy thousand dollars, and the annual renewal premiums on these policies were thirty seven thousand dollars, and claim that by reason of the defendant's *refusal to allow them to collect, and forbidding their collection of the renewal premiums, they have sustained damages to the amount of thirteen thousand dollars, for which, with interest upon that sum from the first of July, 1867, they ask judgment against the defendant. 84

The defendant, in its answer, admits the appointment of the plaintiffs as general agents of the defendant, and their acceptance of that appointment, and at the close of the answer the defendant denies everything stated in the petition which is not previously admitted in the answer; in substance, the answer denies all other allegations and statements of the petitioners. The answer further states that the agency of the plaintiffs was terminated with the plaintiffs with their consent, given in their letter of September 18, 1867, for certain reasons which which are set forth in the answer. And these reasons for the termination of the plaintiff's agency stated in the answer are:

First—That the plaintiffs employed, as medical examiners, persons whom they knew had no proper amount of medical knowledge and skill to fit them for the performance of the duties of medical examiners.

Second—That the plaintiffs refused and neglected to make returns of their transactions as general agents of the defendant, as they were required to do by the 8th article of the instructions appended to the letter of appointment.

Third—That the plaintiffs refused and neglected to remit moneys collected by them to the defendant.

Fourth—That the plaintiffs refused to account for the number and amount of policies and renewal certificates in their hands, and return to the defendant.

Fifth—That the plaintiffs allowed bills of account against the defendant, not specially authorized by the defendant in writing, and returned and paid such bills out of defendant's money in their hands, and neglected to send defendant vouchers for money expended by them, either with or without the authority of the defendant.

Sixth—That while the plaintiffs were acting as the defendant's general agents, they wrote the defendant certain insulting and disagreeable letters, and letters threatening to work for other
85 *insurance companies, and took the agency of the Connecticut Mutual Life insurance Company, and procured insurance for that company, and endeavored to persuade and did persuade persons who were insured in the defendant's company to change their insurances into the Connecticut Mutual.

Seventh—That the plaintiffs' reports to defendant were irregular as to form and time, incomplete, incorrect, and at times entirely unintelligible; that they kept their accounts with the defendant, and with policy-holders, in so incorrect and unintelligible a manner, that they could not be understood or explained.

Eighth—That the plaintiffs received from the defendant a large number of policies and notes, a list of which is appended to the answer, which they have never accounted for.

Ninth—That the plaintiff, contrary to instructions, and the ordinary and usual way of doing such business, placed in the hands of applicants for insurance, a great number of policies, without re-

ceiving from them the premiums of insurance at the time of the delivery to them of these policies.

These are the grounds of complaint which the defendant claims existed against the plaintiffs at the time when the removal of the plaintiffs from their agency was made—that removal, however, being made with the consent of the plaintiffs themselves. They further, in their answer, state certain counterclaims, or claims existing in favor of the defendant, and against the plaintiffs, growing out of the same transactions, or connected with them—out of which grows the claim of the plaintiffs. The first counter-claim is for three thousand dollars, money collected by plaintiffs for defendant, while plaintiffs were acting as general agents for defendant, and which they have not paid over to the defendant. The second counter-claim is for two thousand dollars damages for unfaithfulness of plaintiffs, as previously stated in the answer (being the same unfaithfulness which I have spoken of), and by reason of false representations of the plaintiffs, that the defendant was an unreliable and insolvent company, these false representations being made for the purpose of persuading, and by which persons holding insurances in the company of the defendant *were* persuaded to drop those insurances, and insure in the Connecticut Mutual Life Insurance *Company. The third counter-claim is for the amount 86
of five notes, given by the plaintiffs to the defendant, for fifty dollars each, payable as stated in the answer, with interest from the several dates, copies of which, as you will see, are contained in the answer. On all counter claims the defendant claims to recover the amount of five thousand three hundred dollars with interest from the several dates stated in the answer.

There is an additional counter-claim—a claim made by the defendant, which is a counter-claim, although not styled as such in the answer. This claim is for certain policies of insurance which were by the defendant put into the hands of the plaintiffs, and which had not been accounted for by the plaintiffs to the defendant, and which it asks that the plaintiffs may be compelled to account for in this action.

The reply of the plaintiffs to the answer of the defendant denies the several statements contained in the answer: puts in issue, perhaps, all the statements which are made material except the statements of the counter-claims. It does not deny, entirely, the first counter-claim of three thousand dollars for money alleged to be in the hands of the plaintiffs, belonging to the defendants. It admits a liability on that counter-claim to the extent of about six hundred dollars, and denies any liability on that counter claim, to an amount beyond that sum. What I have denominated the third counter-claim, that is the claim upon the five promissory notes, is not at all denied by the reply, and whatever is not denied of those counter-claims by the reply, is admitted, unless there is substantially a statement in the petition, which is in contradiction of the statements of the counter-claim. The reply does not deny the second counter-claim at all. That counter-claim I have already

said to you, is for damages, which the defendant says it has sustained by reason of the want of fidelity of the plaintiffs, in the discharge of their duties as general agents of the defendants, and by reason of certain false representations that were made in respect to the solvency and responsibility of the defendant's company, by which, persons were persuaded to change insurances which they had previously effected in the defendant's company, into the Connecticut Mutual Life Insurance Company. There *is, however, the statement in the petition, which to some extent is a denial of the statements contained in this counter-claim, that the plaintiffs were faithful in the discharge of their duties. So much of the counter-claim, to which I have referred, as avers a want of fidelity in the plaintiffs, is substantially a denial of the statement in the petition, *of fidelity* on the part of the plaintiffs.

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The object of this action is not to recover damages for any improper or unauthorized removal of the plaintiffs, by the defendant, from their agency, nor is any such fact alleged in the petition, but its object is to recover the value to the plaintiffs, of their commissions on renewals of policies effected by them, for the defendant, on the ground that the defendant refused to allow them to collect these renewals and receive their commissions upon them.

There is nothing in this contract which required the plaintiffs to continue in this agency any longer than they pleased to continue; or the defendant to continue them in it any longer than it pleased to continue them. The plaintiffs might, therefore, abandon the agency at any time, and at any time the defendant might discharge them from it, subject, however, to any rights or liabilities which might exist in favor of, or against either, at the time of such abandonment or discharge. Nor is there anything in the contract which would prevent the defendant appointing other general agents in the state of Ohio. There is no restriction in it of the defendant's powers in this respect, or any grant of the exclusive right of the plaintiffs to the agency of the *whole state*.

From the character and subject-matter of this contract, and the nature of the relations which it created between the parties to it, it is manifest that entire good faith should be required of the parties in the execution of it.

The defendant had the right to prescribe the terms and conditions of the appointment of its agents, and rules for their government in the discharge of the duties of their agency, and an acceptance of the agency was an acceptance of such terms, conditions and rules, and both parties are bound to their observance in good faith.

*Now while the defendant might appoint other general agents in the state, not being restricted by the contract in that respect, yet good faith on the part of the defendant would require that it should not appoint other general agents to occupy ground previously occupied by the plaintiffs, and so materially and injuriously interfere with the interests of the plaintiffs under the contract. But the mere appointment of another general agent to

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operate in territory previously occupied by the plaintiffs, would not injure the plaintiffs so as to furnish grounds of complaint to them, or be a breach by defendant of its part of the contract, unless and until such agent had so acted under his appointment and within such territory as to deprive the plaintiffs of, or materially or substantially lessen the benefits, advantages and profits of the plaintiffs under their contract.

If the plaintiffs procured insurance in the defendant's company as general agents, as it is conceded they did, by so doing they would become entitled to commissions on the first premiums, and would, *prima facie*, acquire the right to commissions on the premiums on the renewals of those policies, so long as they should be collected by the plaintiffs, or paid to the defendant without other or further expense to the defendant than plaintiffs' commissions. And if the plaintiffs were at all times ready and willing to collect such renewal premiums without such other or further expense to the defendant, and the defendant refused without any good cause to permit them to collect, and withheld from them the necessary means and facilities for collecting such premiums, the plaintiffs would be entitled to recover from the defendant the value of their commissions on such preimums, whatever you may, from the testimony, find to be that value.

To enable the plaintiffs to recover, then, there must have been—

1. Insurance effected by the plaintiffs in the company of the defendant on which there were renewals.

2. Readiness and willingness on the part of the plaintiffs to collect those renewals without further or other expense to the defendant, than their commissions for such collection.

3. Refusal by the defendant, without good cause, to allow the plaintiffs to collect these renewal premiums.

*That there were insurances effected by the plaintiffs on which there were renewals, seems to be undisputed. Were the 89
plaintiffs at all times willing and ready to collect these renewals without further expense to the defendant than their commissions? The plaintiffs claim that they have proven they were. The defendant claims to have proven that they were not; that so long as the plaintiffs were ready and willing to collect these renewals, it sent them the renewals for that purpose, and they did collect them and received their commissions on them; and this was the case with all the renewals prior to the renewals of September, 1867; and before these renewals were to be collected the plaintiffs abandoned their agency, and by reason of such abandonment of their agency, from that time they were not willing and ready to collect these renewals, and the defendant was not, after that time, bound to furnish them with the renewals for collection.

If the plaintiffs, without good cause, furnished them by the defendant therefor, voluntarily abandoned the entire agency, the agency, so far as the collection of renewals was concerned, as well as the agency so far as the procuring of new insurances was con-

cerned, then the plaintiffs, from the time of such abandonment, were not ready and willing to collect these renewals, and the defendant was not bound to furnish them to the plaintiffs for that purpose, and the plaintiffs cannot recover that which they claim in this action. But the voluntary abandonment by the plaintiffs of the agency so far as related to the procurement of new insurances, would authorize and justify the defendant in removing them from the agency for collecting the renewals. But if the defendant did not—I mean after said voluntary abandonment of a part of the agency (that part which related to the effecting insurance)—did not so remove the plaintiffs for such cause—their abandonment of that part of the agency which related to the procurement of new insurances—and the plaintiffs still continued, with the defendant's assent, to collect the renewals, they being still ready and willing to collect them, such an abandonment of a part of the agency would not be a forfeiture of their right to collect the renewals, and would not, of itself, prevent their recovery in this action.

90 *And it is upon this ground precisely, that the agent may, with the consent of his principal, abandon a part of the duties which pertain to him to perform by virtue of his contract of agency; and may, with the assent of his principal, continue to perform all other duties pertaining to his agency. But if the agent says to the principal, "I will not perform a part of these duties, I will only go on and perform another part of them," that will afford good ground for the principal to discharge the agent from the performance of any duties, as such, for if it would not, the agent might of himself, of his own motion, of his own mere will, change the contract between the parties, into a contract of a different character from that which they intended to make, and did make, but if the principal assents to the agent continuing as agent for the performance of part of the duties, then the principal cannot after such assent, claim the abandonment by the agent, of the performance of a part of the duties as a defence to any claim which the agent may make, for the performance of so much of the duties, as, with the assent of the principal, he did perform.

Did the defendant without good cause, refuse to allow the plaintiffs to collect these renewals? That is what is averred in the petition, and upon that subject, of course, there is a denial in the answer.

The plaintiffs assert that they faithfully performed the duties of their agency. The defendant says they did not, and in its answer sets out many particulars in which it claims they were unfaithful to the defendant, as their general agents, and which they say furnished good cause to the defendant for terminating the plaintiffs' agency, and withdrawing the renewals from them, and for which it was in fact terminated, and the renewals withdrawn from them, and with the consent of the plaintiffs.

The plaintiffs were bound, undoubtedly, in good faith to execute and discharge the duties of their agency, in substantial conformity with its terms and conditions, and the instructions, which

were a part of the contract, except so far as they were changed or waived with the assent of the defendant.

Now whatever may have been the original terms and conditions of this contract, it was entirely competent for the parties *to the contract at any time to change or waive a performance 91
in conformity with its terms and conditions. A failure in this respect, on the part of the plaintiffs, in the performance of their duties in good faith; gross misconduct in them, and gross neglect of duty would be gross misconduct, would be a forfeiture of the plaintiffs' right under the contract, and would justify the defendant in removing the plaintiffs from their agency, and withholding from them the renewals for collection. The plaintiffs were not necessarily bound to devote their whole time and attention to the business of their agency, nor were they bound not to accept the agency of any other business, the discharge of the duties of which would not essentially or materially interfere with the business of the defendant, or conflict with its interests. Good faith, however, required of them while acting as the general agents of the defendant, that they should devote so much of their time and attention as was reasonably necessary to a faithful discharge of their duties. They had no right to neglect its interests to the injury of the defendant, nor had they a right to take the agency of any other business which would necessarily come in conflict with, and the execution of which did in fact, come in conflict with and injuriously affect, the interests of the defendant. The selection as medical examiners of persons known by the plaintiffs as unfit and unsuitable persons for the performance of those duties; the unwarrantable and unjustifiable refusal and neglect to make returns and remittances, and to account for policies and renewal certificates; the endeavoring to persuade and the persuading of persons who had taken policies in the defendant's company to give up those policies and take policies in other companies; the keeping of false books of account, or keeping their accounts purposely in such a manner as to deceive the defendant, or prevent its knowing the true condition of the business in their hands; the knowingly making of false representations as to the solvency or ability of the defendant, or as to any other matters prejudicial to the business or interests of the defendant; the unjustifiable retaining in their hands money of the defendant which they ought to have paid over to it; each and all of these acts, if done by the defendants, and especially if done with the *intent and 92
purpose of injuring the defendant, would be in violation of their duty, and would be such misconduct in the plaintiffs as would justify the defendant, unless the defendant assented to or waived them after the commission of them, to dismiss the plaintiffs from their agency and withdraw from them the collection of the renewals, and would be a forfeiture of the plaintiffs' right to the collection of the renewals and their commissions on such collections.

If the plaintiffs did not, voluntarily, abandon their agency, as I have before stated, in the manner and under the circumstances I

have already stated to the jury, and the defendant did not have good cause for its refusal to allow the plaintiffs to collect the renewals, and did refuse to allow them to collect the renewals the plaintiffs are entitled to recover the value of their commissions on such renewals after such refusal

But if the plaintiffs did so voluntarily abandon their agency, or the defendant did have good cause for its refusal to allow them to collect these renewals, then the plaintiffs cannot recover.

Now upon the facts of this case, gentlemen, I have nothing to say, as those facts are for your disposition alone. I have stated to you what I suppose to be the rules of law properly applicable to what are claimed to be the facts in the case, by the parties to this action. If the plaintiffs are entitled to recover, they are entitled to the value of their commissions on the renewals of insurance effected by them in defendant's company. It is the value of the plaintiffs' commissions on these renewals which is to be recovered, and you are to get at their value as best you can, upon the testimony in the case. It is, from the nature of the plaintiffs' claim, somewhat difficult to estimate correctly this value. This value depends so much upon contingencies, that to some extent it must be conjectural. The termination of the life of the insured, or his refusal or neglect to continue his insurance, would put an end to the renewals, and when either of these will happen is beyond human knowledge. But insurance companies have some rules by which these events are approximately ascertained, and base the estimates of value upon these rules. But whatever may be the rules upon which
93 *these estimates are based, if you can find from the testimony in this case, what was the actual value of the plaintiffs' commissions upon these renewals, you should return that value, irrespective of any estimates based upon these rules, and you may resort to the estimates based upon these rules where the other testimony fails, or in aid of the entire testimony; giving to such estimates, and all the testimony in the case, such weight and influence as you think it ought reasonably to have.

If you find for the plaintiffs on their claim, you will ascertain the damages by computing the proper interest upon them from the time when their claim should have been paid to the first day of the present term of this court; and then you will proceed to the ascertainment of what is due from the plaintiffs to the defendant upon the claims asserted in its answer; and this, however, you are required to do, whether you find for or against the plaintiffs on their claim.

I have said to you that the first counter-claim of the defendant is for three thousand dollars, money collected by the plaintiffs while acting as the agents of the company, which was not paid over to the defendant. This counter-claim embraces money only. You will ascertain how much money is due on this counter-claim. The plaintiffs admit, as they say, about six hundred dollars due from the plaintiffs to the defendant on this contract. The admission does not bind anybody but the plaintiffs. They have no effect or influ-

ence upon this claim of the plaintiffs beyond this: that to the extent to which it is admitted there is money due upon this claim by these plaintiffs to the defendant, to that extent you must return a verdict in favor of the defendant and against the plaintiffs; but the whole claim beyond that is open to the testimony to prove, and you are to find from all the testimony in the case, if you can, how much money there was, at the time of the commencement of this suit, in the hands of these plaintiffs belonging to this defendant. For that amount, whatever it be, the defendant should be allowed a verdict against the plaintiffs, whether the plaintiffs are entitled to a verdict for their claims against the defendant or not.

The third counter-claim, I have said to you, is founded upon five promissory notes, about which there is no controversy. As *this is a just claim in favor of the defendant and against the plaintiffs, you are to compute the interest upon these notes according to the terms of the notes, if they provide when the interest shall commence, and if they do not provide when the interest shall be payable upon them, you are to compute the interest from the day when those notes became due. 94

The second counter-claim is for damages due to the defendant by reason of the unfaithfulness of the plaintiffs in the discharge of their duties in the agency of the defendant, and by reason of their false representations made for the purpose of, and which did, in fact, induce persons holding insurances in defendant's company to drop those insurances and take new insurances in the Connecticut Mutual.

To allow anything on the first branch of this counter-claim, you must find that the plaintiffs were unfaithful in the discharge of their duties as agents of the defendant, and that some damage resulted, directly and immediately, to the defendant therefrom. The proof should show some specific damage, and that the unfaithfulness of the plaintiffs produced it—that is, you must be able to put your hand or finger upon some feature, in which the defendant has sustained damage by reason of the want of fidelity in the discharge of their duties, and whatever that damage may be should be allowed to the defendant.

To allow damages on the second branch of this counter-claim you must find that false representations were made, and that they had the effect of persuading, and did persuade persons to drop their insurance in the defendant's company and take insurances in the Connecticut Mutual, and whatever was the value to the defendant of insurances so lost to the defendant, may be allowed to the defendant as damages. The defendant, however, should be able to satisfy you that they so lost insurances and what was the value of the insurances so lost by them. They should be able specifically to show you that the persons would have continued their insurances in the defendant's company, had it not been for these representations made by the plaintiffs to them.

There is still another claim made, as I have told you, by the defendant in its answer, not called a counter-claim, but which is,

95 *in fact, a counter claim in its nature. This claim is for policies and notes in the hands of the plaintiffs not accounted for, a list of which you will find appended to the defendant's answer, and which the defendant asks that the plaintiffs in this case may be compelled to account for.

Under and by virtue of one of the articles of instructions, policies and notes sent by the defendant to plaintiffs were to be charged to plaintiffs and to be accounted for by them to the company. This provision of the articles of instructions gave defendant the right to charge to plaintiffs the policies and notes which were sent to them —that is, as I understand it, the first premiums on those policies and the amount of the notes. If the policies or notes, or any of them contained in this list, were sent to the plaintiffs, they would properly stand charged with them, and to relieve themselves from the charge, the plaintiffs must show that they have accounted for those policies and those notes, either by returning them to the defendant unpaid (the notes unpaid, of course), before or at this trial, or in some other manner, or show, so far as the policies are concerned, that they never were delivered and never took effect as contracts of insurance. Unless they so account for them, the jury should charge the plaintiffs with them. You will ascertain, then, what is due from the plaintiffs on these claims, asserted by the defendant against the plaintiffs in its answer, computing the proper interest, on whatever you shall find to be due, to the first day of the present term of this court. Should you find in favor of the plaintiffs in their claim (and in consequence of a part of the claim of the defendant not being denied by the reply, you must necessarily find in favor of the defendants on some of these counter-claims), you will strike a balance between the claims of the parties and return a verdict in favor of the party in whose favor you find the balance to be, for the amount of that balance. If, however, you should find nothing due the plaintiffs upon their claim, you will nevertheless return a verdict in favor of the defendant for the amount of its claim, as you shall find it to be against the plaintiffs.

The jury returned a verdict in behalf of the insurance company, and against the plaintiffs, for $1,958.23.

*HUSBAND AND WIFE. 690

[Superior Court of Montgomery County.]

†HENRY WESTERMAN V. ELIZABETH WESTERMAN, ET AL.

1. The statutes of Ohio, in relation to the property of married women, have in effect put such property, during coverture, in the position of property limited by a deed of trust to the sole and separate use of the wife, and where there is no express trust, the husband will be treated as a trustee.
2. The husband's curtesy is not entirely, and in all cases destroyed, but exists as an estate contingent upon circumstances prescribed by the statutes.
3. Therefore, the common law rule that a secret conveyance of her realty by a woman under contemplation of marriage, is fraudulent and void against the husband, is not entirely destroyed by the statutes.
4. A woman just before marriage conveyed land to her children by a former marriage. The land was not fully paid for by her at the time of the conveyance, and her grantor subsequently obtained judgment against her and her husband for the balance of the purchase money, which the husband was compelled to pay. *Held*, 1. That the husband having paid the judgment out of his own money, was entitled to be subrogated to the vendor's lien against the land, and could enforce the repayment of his money by sale of the land. 2. That the conveyance to the children was fraudulent as to the husband, and must be set aside.

This was a petition in equity by complainant, Henry Westerman, against his wife, Elizabeth, and John and Joseph O'Neil.

The petition charged, that before the marriage of Henry Westerman to Elizabeth O'Neil, which took place September 16, 1867, Elizabeth had purchased a tract of land of one Roop, and was indebted to him therefor at the time of marriage in the sum of $540; that pending the treaty of marriage, and while in contemplation of marriage with Henry, without his knowledge, and for the purpose of defrauding him, she conveyed said land without valuable consideration to her children by a former marriage, John and Joseph O'Neil, and that Henry remained ignorant of this conveyance until after the marriage; that after the marriage Roop sued and obtained judgment against Henry and Elizabeth, his wife, on said indebtedness, and caused an execution to issue and be levied on the property of Henry Westerman, and that to save his property from sale on execution, Henry paid the judgment. The petition also averred that Elizabeth had, ever since the marriage, been the owner in her own separate right, of other real and personal property and choses in action. Petitioner prayed that the conveyance *to John and Joseph O'Neil might be set aside as fraudulent, 691
and that said real estate so conveyed might be sold to pay said debt.

†This case was affirmed by the supreme court. See opinion, 25 O. S., 500. The latter case was followed in John v. Bridgman, 27 O. S., 22, 43; Howard v. Brower, 37 O. S., 402, 409. Cited in Rouse v. Chappell, 26 O. S., 306, 309; Gormley v. Potter, 29 O. S., 597, 599; Alexander v. Morgan, 31 O. S., 546, 549; Peters v. McWilliams, 36 O. S., 155, 162; McVeigh v. Ritenour, 40 O. S., 107, 108; Bloomingdale v. Stein, 42 O. S., 168, 172; Stayner v. Bower, 42 O. S., 314, 317. Distinguished in Lafferty v. Shinn, 38 O. S., 46, 49; McCall v. Pixley, 48 O. S., 379, 389.

The defendant, Elizabeth Westerman, demurred to the petition.

C. L. Vallandigham for plaintiff.

Craighead & Munger for defendants.

JORDAN, J.

The first question to be considered is, whether Henry is entitled to have said land sold to pay said debt, and secondly, whether the conveyance shall be set aside?

In determining this first question, it is necessary to consider the change our statutes have wrought, in the relation that husband and wife sustain to each other in regard to property.

By the common law marriage merged the wife in her husband, and invested him immediately with all the money and personal property of which she was possessed, and with the right to reduce to possession, and become the owner of all her personal property, and choses in action of which she was not possessed, and also with the usufruct of her real estate during life, and curtesy after her death, and he became liable for her debts contracted before marriage.

If, however, the property was limited to the sole and separate use of the wife, by the deed or devise under which she held title, and no trustee were appointed, the husband became the trustee for the wife.

The reason assigned by the common law judges why the wife's property vests in the husband by marriage is, because by marriage she becomes one with him, and loses her personal identity. And the reason assigned why he becomes liable for her debts is, because having lost the means of payment, by her property vesting in her husband, she might be imprisoned for the debt, and unless the husband was made liable for the debt, and also liable to imprisonment, he might suffer her to remain imprisoned, while he held her property, which, otherwise, would have served to effect her release, and by making him also liable, a guaranty of her release was secured. It
692 is not placed on the*principle that he has received her property, for he became liable whether he acquired property by the marriage or not.

Our statutes have wrought great changes in the marital relation. Imprisonment for debt has been abolished, except in cases of fraud. The statute of 1861 and the amendment thereof of 1866, exclude the husband from all right to the wife's property and choses in action, except curtesy, specifically provide that the wife's property shall be her sole and separate property and under her own control, and shall be liable for the payment of her debts contracted before marriage. Yet, notwithstanding, the husband is excluded from all participation in his wife's property, and she retains it as her separate property, and her debts before marriage are made a charge upon it, and she cannot be embarrassed by imprisonment—in fact, although all the reasons that made the husband liable for the debts of the wife incurred before marriage have disappeared, yet, the husband remains liable to an action for such debts.

The statute of Pennsylvania, of 1848, which is similar to our statutes of 1861 and 1866, goes one step further, and exempts the husband from all liability for such debts of his wife, contracted before marriage, while our statute still leaves him liable. The effect of this statute is to limit all the wife's property to her sole and separate use, with all the incidents of property limited to her sole and separate use by deed or devise before its passage. Such was held to be the effect of the Pennsylvania Statute 1848, in Bear v. Bear, 33 Penn. St., 525.

This court has repeatedly so held in requiring actions to be brought by a married woman by her next friend, under the section of the code which requires actions concerning her separate estate to be so brought.

One of the incidents of a separate estate in the wife is a trustee to hold the legal title in trust for her, while she retained the sole control of it: Reeve Domestic Relations, 162; Tyler on Infancy and Coverture, 431. And where no trustee was appointed, equity would consider the husband her trustee: Tyler on Infancy and Coverture, 441; Story on Equity, 1380. The necessity for a trustee existed in the fact that by marrying the wife lost her identity in the husband: Tyler on Infancy and Coverture, 435. And courts of equity *required him to hold the legal title thus cast upon him in trust for her. 693

Now, with these changes in the law, we find Roop holds a claim against Elizabeth O'Neil for $540, for purchase money of a tract of land sold her in 1865. This claim was secured to him by a vendor's lien. Until this purchase money was paid, she held the legal title to the land in trust for Roop. With this indebtedness and this encumbrance on her land, she marries Henry Westerman in 1867, by which the legal title to all her real and personal property and choses in action, is vested in him in trust to hold for her sole and separate use charged with this debt, and she remains personally liable to a judgment therefor. By this marriage, Henry Westerman is also made liable for this debt. The law does not transfer the indebtedness to him for his liability ceases on the termination of the marital relation. His executor is not liable. The law simply makes him collaterally liable—arbitrarily, and for a purpose, and upon a principle that is now without any foundation: Reeves' Domestic Relations, 68. Under legal compulsion he pays the debt—uses *his* money to pay the purchase money of her land. Or assuming the legal title to have vested in John and Joseph O'Neil by voluntary gift from Elizabeth, being grantees without consideration, they take it charged with the vendor's lien, and with the liability the statute imposes upon her property to pay her debts, and they hold it in trust for that purpose.

The payment by the husband, under such circumstances, does not raise a presumption, or rather repels the presumption that it was a gift. And to say that the husband shall pay this debt simply because his marriage made him collaterally liable out of his own funds, and thereby rid the land of the incumbrance, pay the purchase

money of the land and have the title vest in John and Joseph O'Neil, without any redress, would be inequitable and unjust. I think that standing in the relation of trustee holding technically the legal title in trust for her, and having paid a lien on her land now in the hands of purchasers without consideration, land made previously liable by the statute for the payment of the debt, and having by this payment used his own money to pay for land, the title *of which
694 vested in others, equity subrogates him to the rights that Roop had and charges the land in the hands of John and Joseph, the present holders of the legal title, for the payment of this debt. And to the extent that the title in John and Joseph may interfere with the sale of the land for that purpose the conveyance should be set aside.

It is settled, I think, beyond question, that a conveyance of her property by the wife before marriage, pending a treaty of marriage, and in contemplation of marriage, and especially if done fraudulently as averred in this petition, ought to be set aside. The husband's curtesy was such an interest as to make it a fraud upon him to convey it away. The statute of 1869 is relied upon as taking away any interest the husband had in this property after his wife's death. I think the husband's curtesy was such a vested interest as to bring it within the rule in State ex rel. Huston v. Commissioners of Perry Co., 5 O. S., 497; but whether it does or does not, I find the statute deprives the husband of curtesy only on condition that she dies, leaving children by a former marriage. This may never occur. If her children die before she does, then he has curtesy, and in the light of this statute he has a contingent curtesy in this land. I have examined the authorities referred to by counsel, but I find nothing to interfere with this conclusion. The demurrer is overruled.

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466 *DEVISE.

[Meigs Common Pleas Court, 1871.]

WILLIAMSON V. HALL ET AL.

1. By way of executory bequest personal property may be limited over after the determination of a life interest, in like manner and to the same extent as real estate.
2. A. by his will directed that his wife should "hold and have the use of all my property, both real and personal, during her natural life, to raise and school my children with, and at her decease an equal division to be made between my children; that is to say, * * * my daughters shall have the movable property, to be divided between them:" *Held*, 1. That the will created an express trust of the personal as well as the real property, for the maintenance and education of the children. 2. That the title to the personal estate was in the widow for life, with remainder to the daughters.
3. The widow having converted the personalty, and invested the proceeds in real estate in her own name in fee simple, it was *held* that in equity it must be treated as if she had taken the title to herself for life, with remainder to the daughters.

This was a petition in the nature of a bill in equity for the partition and distribution of the estate of John Hall, who died in 1824.

The second clause of his will was as follows:

"I will that my beloved wife, Sarah Hall, do hold and have the use *of all my property, both real and personal, during her 467
natural life, to raise and school my children with, and at her decease an equal division to be made between my children; that is to say, my six sons (naming them) do have and hold forever the 300 acres of land that I now hold in Meigs county, Lebanon township, to be equally divided between them; and that my six daughters (naming them) shall have the movable property, to be divided between them."

He then provided that on the final partition and distribution of his estate, such contribution should be made by one class to the other as would render the shares of equal value.

Shortly after the probate of the will, the widow, who was nominated executrix, converted the personal estate, or a part of it, and invested the proceeds, with the ready money left by the testator, the amount of which was not definitely shown, in real estate, taking the title in her own name.

The personal property not sold by the widow had long since disappeared—"perished in the using;" but at her death she was possessed of a personal estate of the value of $1,500. The real estate purchased by her was of the value of $10,000, and that left by the testator $20,000.

Cartwright and Russell, for plaintiff.

Nash, Lasley, and Myers, for defendants.

GUTHRIE, J.

Some of the parties having sold and assigned their interests as heirs at law of Sarah Hall in her estate, the question arising in the case is, whether she held the title to the real estate purchased by her, and the personal property which she left, in her own right, or as trustees for her daughters?

The case has been very fully argued, and if the citations made are not here specifically referred to, it is because the multitude of the cases (which, as long ago as 1813, Chief Justice Kent pronounced to be overwhelming and confounding) renders it impossible.

By the clause of his will above recited, John Hall created three distinct classes of rights and interests in his personal estate. The use of it is given to his widow for life, with a limitation over to his daughters. The law is now well settled that, by way of executory bequest, personal property may be limited over after the determination of a life interest, in like manner and to the same extent as real estate: Moffat v. Strong, 10 Johns., 12; Field v. Hitchcock, 17 Pick., 122; Rathbone v. Dyckman et al, 3 Paige, 9; Westcott v. Cady, 5 Johns. Ch., 334; Loring v. Loring, 100 Mass., 340. But in addition to the two estates or interests thus created, the testator

proceeds to charge the whole of his estate, both real and personal, in the hands of the tenant for life, with a trust for the benefit of all his children. The language of the will is clear. The tenant for life has the use of the property "to raise and school my children with." The case is plainly distinguishable from that class of cases where the testator, in making a devise, indicates the general purpose and object of his bounty, but submits the particulars of time, person, amount, and the like, to the discretion of the first taker; and also from that class where the language used is merely expressive of the motive operating on the testator's mind.

468 *A number of cases of this class are cited in Rich v. Rogers et al., 14 Gray, 174. The words "trusting that she will act justly and properly to and by all our children;" "at the same time trusting she will from the love she bears to me and to our dear children, so husband and take care of what property there may be, for their good;" "and the residue and remainder of said dividends to my brother Arthur Benson, to enable him to assist such of the children of my deceased brother Francis Benson as he, the said Arthur Benson, shall find deserving of encouragement;" "I give the above devise to my wife, that she may support herself and her children according to her discretion, and for that purpose;" have been held not to create a trust in favor of the children mentioned in the several cases.

But the words "also the use of all my property for the benefit of herself and unmarried children, that they may be comfortably provided for as long as my wife Martha may remain in this life," with remainder over to the children, were held to create a trust. And Loring v. Loring et al., by the words, "I give to my wife my personal property for her benefit and support, and the support of my son, whilst she remains unmarried;" it was held the widow took the personal property in trust during her widowhood, the income of one-half of it to go to the support of the son. The case at bar manifestly belongs to this latter class. The language employed is substantially the same as that used in the two cases last cited. The widow is invested with a life estate, and the devise is immediately followed by words which indicate not a vague, general, indefinite purpose; but express one that is specific and determinate. The testator specifically points to his children as the objects of his bounty; and their education and maintenance during minority as what he intended to provide for. Nothing is left to the discretion of the tenant for life. The use of the property is given "to raise and school my children with." Thus both on authority, and by the unmistakable import of the words, the children are made the beneficiaries of this use, and are invested with the right to their support and education out of the income of their father's estate.

Again, the language of the clause is equally as definite as to the estate for life and remainder over. The words are the same for the realty and personalty. The latter is limited to the daughters. The bequest to the wife is not the *property* in the personal estate, but merely the *use* of it during her life. Had the testator contemplated

that the absolute title to the personalty should vest in her, the word "use" could not have occurred in this connection. A purpose to give property to one absolutely, is so distinct and variant from a purpose to simply invest him with a right to use it for a limited time, as render it highly improbable, nay, almost impossible, that one should be mistaken for the other; or that words should be used which express one, when the other is intended.

Mrs. Hall, therefore, when she converted the personalty into real estate, sustained toward it a twofold relation. She was the trustee of an express trust for the maintenance and education of the children, and also a tenant for life with remainder to the daughters; she was trustee of an implied trust: Lewin on Trustees, p. 140, note 1; *Id.*, p. 167, *et seq.*; and by taking the title to herself she became the trustee of a constructive trust, of which the daughters are the beneficiaries: *Id.*, p. 217, *et seq.*

The children having long ago arrived at majority, the express trust has, for anything that appears in the case, been fully discharged. This fact does not, however, enlarge the estate originally vested in her. That is fixed by the will; and by the discharge of the trust it is relieved of a burden, but not enlarged.

Here, then, is a constructive trust, as to which Judge Redfield, in his work on Wills, vol. 3 p. 522, sums up the law in the following clear and explicit language: "However slight or precarious the interest, so long as one holds possession of an estate or property in any fiduciary relation, he cannot deal with it for his own advantage, in any manner or to any extent." Mrs. Hall, therefore, could not convert the personalty into realty for her own advantage; could not convert her life estate in the personalty into a fee simple in real estate, and thus cut off the daughters of John Hall from the provision he had made for them. Equity, regarding that as having been done which ought to have been done, will treat this real estate precisely as though she had taken a conveyance of the legal title to herself for life, with remainder to the daughters.

With respect to the personal estate left by Mrs. Hall at her death, the fact would seem to be that it is the accumulation of the long term during which she has had the use of the real estate. No part of it is traced to the personalty left by the testator; and the income of the real estate must have been greatly in excess of her expenses after the children arrived at maturity. She will therefore be held as the absolute owner of this personalty, and a decree entered accordingly.

576 *MORTGAGES—EQUITY.

[Summit Common Pleas Court, 1871.]

JOHN R. PENN, TRUSTEE v. THE ATLANTIC AND GREAT WESTERN RAILWAY CO. ET AL.

1. A court of equity has power to decree a foreclosure of a junior mortgage and a sale of the mortgaged property thereunder subject to the outstanding lien of a senior mortgage.
2. The 374 section of the Code of Civil Proceedings of Ohio does not interfere with the exercise of such power.
3. The right in equity to redeem the mortgaged property belongs to every person who has a legal or equitable lien on the same, provided he comes in as privy in estate with the mortgagor.
4. Where a junior incumbrancer pays the amount due on a prior incumbrance, he is entitled to be subrogated to the rights of such prior incumbrance as against the mortgagor.
5. But where the interest only upon the debt secured by the prior mortgage is due, and the same is paid by a subsequent mortgagee, his lien upon the mortgaged property, which results from such payment, will be postponed to the payment of the residue of the prior mortgage debt.

Morrison R. Waite, William W. MacFarland and Sherlock J. Andrews, for the plaintiff.

Rufus P. Ranney and Otis & Adams, for the first mortgage trustees.

Wm. H. Upson for himself.

The opinion of the court was delivered by

BOYNTON, J.

Previous to 1865 the Atlantic and Great Western Railroad Company of Ohio was a corporation—the owner of a railroad running from Dayton, Ohio, to the western line of Pennsylvania. The Atlantic and Great Western Railroad of Pennsylvania was a corporation—the owner of a railroad running from the eastern terminus of the first mentioned railroad to the eastern line of Pennsylvania.
577 The *Atlantic and Great Western Railroad Company of New York was a corporation whose road ran from the eastern terminus of said Pennsylvania Railroad to Salamanca, in the state of New York. The Buffalo extension of the Atlantic and Great Western Railroad Company was a corporation—the owner of a railroad running from Salamanca to Buffalo, in the state of New York. In September, 1865, these four companies, in pursuance of the laws of the several states under which they were respectively incorporated, and by agreement among themselves, consolidated into one corporation under the corporate name of the Atlantic and Great Western Railway Company; and thereupon all the rights, privileges and franchises of each of the original corporations, all the property, real, personal and mixed, and all debts due and owing on whatever account, as well as stock subscriptions and other things in action and possession belonging to each, were transferred to and vested in the Atlantic and Great Western Railway Company, the new corpora-

tion. On the other hand, all rights of creditors, all liens upon the property of the merged companies existing at the time of the consolidation, remained in full force and attached to the new one in which they were thus merged. The latter, therefore, succeeded to the franchises and became charged with the obligations and duties of the former and of each of them.

On the first day of July, 1855, the Atlantic and Great Western Railroad Company, of Ohio, executed to Azariah C. Flagg and Charles J. Steadman, trustees, a mortgage deed of all its property, real, personal and mixed, acquired and to be acquired, to secure the payment of bonds then issued by said company, of which there are now outstanding in the hands of *bona fide* holders the sum of $3,740,800, on which there are warrants of interest now due and payable, amounting to $1,524,965.30. The principal of these bonds does not by their terms mature until October 1, 1876.

On the first day of July, 1863, the same company executed to the defendant, William H. Upson, as trustee, a second mortgage deed of his property acquired and to be acquired, subject to the prior one to Flagg and Steadman, to secure the *payment of 578
bonds then issued by the same company, of which there are now outstanding in the hands of *bona fide* holders the amount of $2,409,000, on which interest coupons are now due and unpaid, amounting to $1,093,345.89. The principal of the last-named bonds does not mature until July 1st, 1883.

After the consolidation, and on the 5th day of October, 1865, the Atlantic and Great Western Railway Company, the new corporation, executed the series of bonds stated in the amendment petition, and to secure the payment thereof, executed to the plaintiff, as trustee, a mortgage deed of all their property, real, personal and mixed, or acquired and to be acquired, but subject to the special priority of liens created by the mortgages executed by the original companies prior to the consolidation.

Of the bonds secured by this mortgage to the plaintiff there has been issued the aggregate amount of $18,435,000, which are now outstanding in the hands of *bona fide* holders, and on which there are coupons for interest now due and payable, amounting to $7,354,144.03.

The principal of these latter bonds does not mature until October 15, 1890.

After the granting clause in the first mortgage of the Atlantic and Great Western Railroad Company of Ohio, there follows this language: "To have and to hold the said premises and every part thereof unto the said Azariah C. Flagg and Charles J. Steadman, their successors in said trust and assigns, that is to say, in case the said company shall fail to pay the principal, or any part thereof, or any of the interest, or any of said bonds at the time when the same may become due and payable according to the tenor thereof when demanded, then, after sixty days from each default, upon the request of the holder of such bond, the said Azariah C. Flagg and Charles J. Steadman, their successors in said trust or assigns,

may enter into and take possession of all or any part of said premises and property, and as the attorneys in fact or agents of said company by themselves or their agents or substitutes duly constituted, have, use, and employ the same, making from time to time all needful repairs, alterations and
579 *additions thereto, and after deducting the expenses of such use, repairs, alterations, and additions, apply the proceeds thereof to the payment of the principal and interest of all said bonds remaining unpaid; or, the said Azariah C. Flagg and Charles J. Steadman, their successors in said trust or assigns, at his or their discretion, may or on the written request of at least the holders of one-half of the bonds then unpaid, shall cause the said premises and property, or so much thereof as shall be necessary to pay and discharge the principal and interest of all such of said bonds as may then be unpaid, to be sold at public auction in the city of New York, or the city of Dayton, or Cincinnati, Ohio, giving at least ninety days' notice of time, place and terms of sale, by publishing the same in the newspapers of good circulation in each of the cities of New York, Philadelphia, Dayton and Cincinnati, and apply so much of the proceeds as may be necessary to the payment of the principal and interest of said bonds remaining unpaid."

Each and all of said corporations are largely insolvent. The trustees in the first mortgage of the Atlantic & Great Western Railroad Company of Ohio ask to have the property covered by their mortgage sold and the proceeds applied to the payment of the principal and interest of the bonds secured by such mortgage, claiming in the first place that the principal thereof is due and payable by virtue of the above recited provisions of their mortgage, default having been made of the payment of the overdue interest within sixty days from its maturity, and secondly, that if such principal is not due, the 374th section of the Code of Civil Procedure of Ohio requires, in actions for the foreclosure of a mortgage, the whole mortgaged property to be sold, the priorities of lien determined and the fund arising from the sale distributed accordingly. The trustee in the second mortgage of the last named company, defendant, and the said plaintiff, severally deny that the principal of the bonds secured by said first mortgage of that company is due and payable, and the plaintiff claims the right—a claim conceded by the second mortgage trustee—to redeem the property under the first and second mortgages, by paying the amount now due thereon, and the
580 further right of subrogation to the rights of each of said *mortgagees against the mortgagor, subject to the prior mortgages. In view of these facts and the claims of the parties, what are their respective rights? It will be observed by recurring to the facts above stated, that there are $6,149,800 of principal on the first and second mortgage bonds not yet due, $3,740,800 maturing October 1, 1876, and $2,409,000 July 1, 1883, unless this principal has become due by reason of the nonpayment of the overdue interest. If the court has discretionary power to order the whole property to be sold and the fund distributed among the lien holders, the first mort-

gage trustees being willing to receive the debt secured by their mortgage, even though it be held to be not due; or, if it has like discretionary power to order it sold, subject to the lien of the prior mortgages, such discretion should be so exercised as to enable the parties to realize the greatest sum for the property, while at the same time the rights of each are fully protected. And here the fact should not be overlooked that the property to be sold is a railroad of nearly two hundred and fifty miles in length, in this state, with all its equipments and appurtenances. This vast property is worth many millions of dollars, and consequently those able to purchase it must be few in number. The larger the sum to be paid at once the more limited the number of bidders. To my mind there is little doubt that a much larger sum will be realized for this property if sold subject to the lien for the payment of the bonds as they mature, than if sold under an order requiring its whole value to be paid on the day of sale.

By a sale subject to the incumbrances the more remote bondholders will be better protected, inasmuch as their chances of receiving a portion or all their debts will be improved.

Can such a sale be ordered consistently with the due observance of the legal and equitable rights of all the parties?

The claim of the first mortgagee, that the principal of the bonds secured by that mortgage is due by the terms of the instrument itself, inasmuch as there has been default of payment of the interest, is sought to be supported by the following authorities: Noyes v. Clark, 7 Paige 179, Noonan v. Lee, *2 Black 499; 28 Barb. 29, 37; *Id.* 60, 44; *Id.* 336; 4 Taunt. 227; 5 Barn. & Adol. 40. 581

These authorities hold that if there be an express condition in a mortgage, that upon default of payment of the interest as it matures, or an instalment of the principal, the whole debt shall become due, such a condition is valid; that the courts will not interfere to relieve the mortgagor from payment of the principal, but will enforce the condition according to its terms. These authorities are not, however, in point.

The terms of this first mortgage of the Atlantic and Great Western Railroad Company of Ohio do not make the principal due on non-payment of the interest as it matures. They authorize the trustees, in case the company shall fail to pay the principal or any part thereof, or any of the interest on any of said bonds at the time when the same may become due and payable according to the tenor thereof when demanded, and after sixty days from such default, on request of any bondholder, to take possession of and operate said railroad; and after deducting expenses, etc., to apply the remainder of the earnings to the payment of principal and interest of all unpaid bonds; or they are authorized to sell the property on giving ninety days' notice, and apply the proceeds of the sale in the same manner.

The mortgage nowhere declares that the principal shall become due upon default of payment of the interest. Power to sell at pub-

lic auction and apply the proceeds to all unpaid bonds does not change the time when the principal of the bonds is to become payable so as to authorize an action on the bond or a proceeding to foreclose the mortgage in equity. The case on this point is identical in principle with that of Holden v. Gilbert, 7 Paige 208. It was there held on a similar clause in a mortgage that it was only intended to authorize a statute foreclosure in case of the non-payment of the instalments within the time prescribed, and the right to retain the principal and interest of the whole debt in case the instalment and costs were not paid before the sale, but that a mere neglect to pay the instalment within the time prescribed did not make the whole debt due and payable.

582 *In the case now before us a third mortgagee is seeking to redeem the first and second mortgages. And it would seem to be well settled that the right in equity to redeem belongs to every person who has a legal or equitable lien on the mortgaged property, provided he comes in as privy in estate with the mortgagor. Washburn Real Prop., vol. 2, 3d Ed. 162; Gage v. Brewster, 31 New York 222; Brainard v. Cooper, 10 New York 356; Moore v. Beasom, 44 N. H. 218; The Western Insurance Co. v. The Eagle Fire Insurance Co., 1 Paige 284. The right to redeem any number of successive mortgages may be mortgaged anew and each new mortgagee succeeds to the rights of the mortgagor. Hilliard on Mortgages, vol. 1 p. 299; Norton v. Warner *et al.*, 3 Edw. Ch. 107.

On a petition to foreclose by the last mortgagee he will be permitted to redeem all prior mortgages and to sell the whole premises to refund to himself the redemption money and to satisfy his own mortgage. The Western Insurance Co. v. The Eagle Fire Insurance Co., 1 Paige 284; Bell v. The Mayor, 10 Paige 49; Vander Kemp v. Shelton, 11 Paige 39; Moore v. Beasom, 44 N. H. 218; Norton v. Warner *et al.*, 3 Edw. Ch. 107.

It certainly is a right which the mortgagor has, to pay the debt secured by a mortgage on his property, and thereby redeem the property from sale; and if he fails to do so, he to whom the right to redeem was last conveyed by mortgage succeeds to that right by paying off all prior incumbrances. And it is equally well settled that where a subsequent incumbrancer pays the debt secured by a prior mortgage, he is entitled to be substituted in equity to the rights of the owner of such prior mortgage against the mortgagor. Norris v. Moulton, 34 N. H. 392; Merritt v. Hosmere, 11 Gray 276; Knowles v. Rablin, 20 Iowa 101; Cheesebrough v. Milliard, 1 John Ch. 409; Garwood v. Eldridge, 1 Green Ch. 151; Lyman v. Leittle, 15 Verm. 576; Washburn Real Prop. vol. 2, 198. This right of subrogation results to the junior incumbrancer in virtue of his relation to the mortgaged property. His mortgage conveyed to him the right to pay former incumbrances and thereby to strengthen his own security; and

583 *when he pays off the senior incumbrances, equity clothes him with all the rights of him to whose claim he succeeds, and treats him as the equitable assignee thereof. Moore v. Beasom, 44

N. H., 218; Aiken v. Gale, 37 N. H., 505. But the subsequent creditor can be subrogated to such rights only by full payment of the debt. Dixon on Subrogation 122. But this is when the whole debt is due, for if the subsequent mortgagee cannot redeem where the debt is paid in instalments until the last instalment becomes due, his right of redemption would in many cases be greatly impaired, if not destroyed. The owner of the debt can foreclose when the first instalment becomes due, and to pay such instalment he can sell the property. And it is certainly correct in principle to hold that, when the right to foreclose the equity of redemption accrues, the right to redeem the premises for such foreclosure attaches on paying the sum due, for the non-payment of which foreclosure is sought. The junior incumbrancer must be permitted to step in and redeem the premises, when the senior incumbrancer has the right to have them sold, if not redeemed. But such subrogation cannot take place to the prejudice of the senior mortgagee. Butler v. Elliott, 15 Cowen, 187; Dixon on Subrogation 116. In other words, payment ought not to place the prior mortgagee in a worse situation than if payment were made by the mortgagor, and therefore where an instalment of principal or interest of the debt secured by the first mortgage is due and the same is paid by a subsequent mortgagee, his lien on the mortgaged property, which results from such payment, will be postponed to the payment of the residue of the first mortgage debt. But when the amount so due is paid together with costs where the action in foreclosure has been instituted, the right of the prior mortgagee to a sale of the mortgaged property ceases, and the most he can claim is the right to apply to the court for an order of sale to satisfy future instalments when and as they become due, in the event they are not then paid. Lansing v. Capron, 1 John. Ch., 617; Holden v. Gilbert, 7 Paige, 211. The most material question in the case, and the one most elaborately argued by counsel, is: Has the court power, in view of section 374 of the Code of Civil Procedure *of Ohio, to decree a sale of the mortgaged property under a junior mortgage, subject to the outstanding lien of a senior mortgage? Independent of the statute, that a court of equity has this power would seem to be beyond question. The Western Insurance Co. v. The Eagle Fire Insurance Co., 1 Paige, 284; Holford v Spafford, 10 Paige, 43; Vanderkempt v. Shelton, 11 Paige, 28; Wells v. Chapman, 4 Send. Ch., 312; Cox v. Wheeler, 7 Paige, 257; Roll v. Smally, 2 Halst. Ch., 464; The Gihon v. Bellville & Co., 3 Halst. Ch., 531. 584

If the courts of this state have not now such power, it is because of the 374th section of the code, which declares that, "in the foreclosure of a mortgage, a sale of the mortgaged premises shall in all cases be ordered."

It is claimed on the one hand that the term "mortgaged premises" means the land, the thing, the entire ownership of everybody in the property included in the descriptive words of the mortgage; and upon the other, that the term means only the amount or

quantum of interest covered and conveyed by the particular mortgage.

Did the legislature intend by this section to take from a court of equity the power before possessed, to decree the foreclosure of a mortgagor's equity, under junior incumbrances, and leave the rights of superior lien-holders upon the property intact?

I think it did so intend.

In England there are two general methods of foreclosing an equity of redemption by bill, one termed a *strict foreclosure*, whereby the mortgagee succeeds to the absolute ownership of the estate, unless the mortgagor pays the mortgage debt within some time named by the court, usually six months; the other method is by a sale of the property mortgaged.

These two methods of foreclosure have prevailed, and to some extent now prevail, in many of the states of this Union. Benedict v. Gilman, 4 Paige, 58; Brainard v. Cooper, 10 New York, 359; Dradley v. Chester Valley Railroad Company, 36 Penn. St., 150; Goodman v. White, 26 Conn., 317; Den. v. Farrris, 1 Dutch., 633.

The effect of a strict foreclosure being to extinguish the equity
585 of redemption and vest in the mortgagee the full *ownership, and an indefeasible title to the property for no other considerations than the debt secured by the mortgage, great hardship oftentimes resulted to the mortgagor. Cases would not infrequently arise where the mortgagor, being unable, from straitened pecuniary circumstances, to pay the mortgage debt within the time fixed by the decree, would be compelled to part with his property for much less than its real value. In such cases his pecuniary necessities became a source of profit to his creditor. And the legislature, to relieve the mortgagor debtor from consequences so inequitable, which may have grown out of a condition of poverty, provided that the property in all cases should be sold, the debt paid, and the surplus of the proceeds of sale paid over to him to whom it justly belonged. That a sale of the property mortgaged instead of a strict foreclosure should in all cases be ordered, is all, in my opinion, that was intended by this provision of the code of Ohio. To give to the language of section 374 any other construction than this would be to create a conflict between that section and sections 458 and 459 of the same code. Section 458 provides, that when a judgment debtor has not personal or real property subject to levy on execution sufficient to satisfy the judgment, any equitable interest which he may have in real estate as mortgagor, mortgagee or otherwise, shall be subject to the payment of such judgment by action; and section 459 provides that upon the ascertainment of such equitable interest the same shall be sold, the sale to be conducted in all respects as a sale upon execution at law. The equitable interest must first be ascertained and defined by the court, then appraised and sold for not less than two-thirds of its appraised value. Coe v. The C. P. and I. R. R. Co., 10 O. S., 372.

These two sections give to the judgment creditor the right to subject an equity in real estate to the payment of his debt, and this

equity may be sold subject to the rights and liens of all others in and upon the property, whether legal or equitable. Now, can it be said that the legislature intended to give to a judgment creditor who has no lien upon the property, until declared by the court, the right to sell an equitable interest, subject to the right or liens of others, and to *withhold such right from a mortgage creditor? If the second mortgagee sue at law and recover a judgment upon his debt 586
and make that judgment the basis of an equitable action to reach and subject his mortgagor's in erest in the mortgaged property, it is not doubted that he would be entitled to the effectual aid of the court under the power conferred by section 458.

If he will ignore his mortgage liens and proceed as upon a debt unsecured, he may cause the interest of the mortgagor in the very property covered by his mortgage to be sold subject to the lien of the first or any other mortgage. In such case he becomes a judgment creditor, and notwithstanding he may so proceed and sell, it is claimed, if he seeks to enforce in equity the lien of his mortgage, a lien created by the express contract of the parties the right to sell subject to the lien of the mortgage is lost. Let us see how this doctrine would work in practice?

A mortgages his farm to B to secure a loan for twenty years; he then executes a second mortgage to C to secure a loan for six months. At the expiration of the six months C proceeds to foreclose his mortgage, making B and A parties defendant. B refuses to receive his debt until the expiration of the time for which his money was loaned. The court orders the interest of the three parties, A, B and C, to be sold, conveying to the purchaser a clear title to the property. The result must follow that B's interest in the fund realized from the sale must be invested by the court and safely watched and protected for a period of more than nineteen years. You cannot compel him to receive his money before it is due. To do so would be not merely to impair the obligation of his contract. It would annul and terminate it.

There is no doubt that as between the parties to the mortage a second mortgage is a conveyance of the land, and whenever the estate of the first mortgagee is divested, by the payment of this debt or otherwise, the second mortgage operates fully as a conveyance of the whole estate. But so long as the first mortgage is subsisting the second mortgagee as between himself and the first mortgagee, acquires only his mortgagor's equitable right of redemption. Goodman v. *White, 26 Conn., 320. But it is further insisted, in support of the construction claimed by the first mortgagees, that section 458 re- 587
quires the mortgaged premises to be appraised and sold for not less than two-thirds of such appraised value, and that the rule is established in this state, that where appraisement of real estate is required, the appraisers must return the money value of the land. This rule relates to sales upon executions at law. In Baird et al. v. Kentland et al., 8 O., 21, where the interest of a mortgagor was levied upon, the court held that the entire estate in the land must

be appraised, and that there was no authority to appraise the mortgagor's equity of redemption.

The statute provided "that if execution be levied upon land and tenements, the officer levying such execution shall cause an inquest of three disinterested freeholders" and "administer to them an oath to appraise the land, and said freeholders shall return to said officer an estimate of the real value in money of said estate." The word "estate" in the latter clause was held to mean the same as "land" in the former. But in the Lessee of Joseph Canby v. Foster, 12 O., 79, it is held that the freehold of an husband in his wife's lands may be sold on execution. LANE, C. J., says: "The interest of the husband is a legal estate; it is a freehold during the joint lives of himself and wife, with a freehold in remainder to himself for life, as tenant by the curtesy and a remainder to the wife and her heirs in fee. It is a certain and determinate interest, whose value may be easily ascertained by reference to well known rules, it is in every sense his land within the meaning of the statute."

And in speaking of lands incumbered by mortgages he says: "As no true, perfect authoritive binding estimate of the value of the incumbrance can be taken by the appraisers, the law forbids the inquiry and admits of no sale except as of incumbered property. The effect of this rule is to *throw into chancery* sales of mortgaged lands, except where the purchaser is willing to encounter the risk of the burden."

Here it will be seen the sense of the word "land" is limited. Any legal estate, whether it be fee simple, an estate for life, or a mere possessory interest may be sold on execution. *Scott v. Douglass, 7 O., 228; Miner v. Wallace, 10 O., 403. But an equitable interest in real estate cannot be levied upon. Haynes v. Parker, 5 O. S., 253. The law has never permitted it. Executions follow judgments at law. The appraisers are not a proper tribunal to determine the extent of the equitable interest of a debtor in real estate. This is the business of the court. But where such interest is ascertained, and its limits defined by the court, it is as easy of valuation as an estate for life or years. The statute expressly authorizes an equitable interest of a decedent's estate to be appraised and sold. S. and C., 589. But in proceedings in foreclosure they are the "mortgaged premises" that are required to be appraised. No matter whether the mortgagor has a legal or equitable title. If the owner of an estate for years mortgages it, upon foreclosure, the mortgaged property to be appraised is the estate for years. If the purchaser of a parcel of land by contract, upon which he has paid but one-half of the purchase price, mortgages his interest in such lands, upon foreclosure, the mortgaged premises are his equitable interest, and not the whole lands. And if an equity of redemption is conveyed by mortgage, such equity constitutes the mortgaged property.

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A decree may be entered, finding that the plaintiff is entitled to redeem the premises from sale under the first and second mortgages, by paying the amount due thereon and ordering that, unless

the mortgagor pay the amount due on said third mortgage within thirty days, said premises be sold thereunder, subject to the lien of said prior incumbrances, and that to the extent of the amount paid to redeem by said plaintiff he be subrogated to the rights of the prior mortgagees.

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[*Superior Court of Cincinnati, General Term, April, 1884.] 648

HERMAN H. HOFFMAN ET AL. v. LEE H. BROOKS ET AL.

For opinion in this case, see 6 Dec. R., 1215; s. c. 12 Am. Law Record, 747.

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MORTGAGES—ACKNOWLEDGMENTS.

[Cuyahoga District Court, March, 1881.]

FERDINAND DOERNER v. MARIA BERNADINA NIEBERDING.

1. Where an officer, before whom a mortgage executed by husband and wife for the incumbrance of the wife's estate in land, was acknowledged, omits by mistake to certify the separate examination of the wife, such mistake may, under the act of April 17, 1857 (S. & C. 694), be corrected.
2. Where there is no consideration for a conveyance of real estate, other than a pre-existing debt of the vendor, and the vendee is not induced thereby to change his condition in any manner, he cannot be regarded a purchaser for value, and, therefore, is not entitled to protection against prior liens offered in equity to *bona fide* purchasers, although he had no notice of such liens.
3. As between the parties a mortgage when corrected by a decree of court will take effect as a lien from the date of the delivery to the recorder; to intervening *bona fide* parties it will take effect only from the time of the correction, but as between the mortgagee and a subsequent vendee who has taken the property for no other consideration than a pre-existing debt, and has in no manner altered his condition by reason of the conveyance, the mortgage will take effect from the time of its delivery to the recorder.
4. To constitute a separate examination of a married woman as to a deed given by her and her husband, it is sufficient if the officer takes such means as will enable him to ascertain the fact that the wife is acting voluntarily, and that the act is not the result of the influence of the husband. Anything which secures such an examination, will be a substantial compliance with the statute. The policy of the statute does not require the officer to go into another room or into the street. The statute

is sufficiently complied with when the officer has satisfied himself that it is her own free will uncontrolled, and if the officer accomplish this not in the hearing, though in the presence of the husband, it will be a sufficient compliance with the statute.

LEMMON, J.

This action was brought in the court of common pleas by a petition which alleges that, in the year 1875, a mortgage was made by Maria Bernadina Nieberding and Henry Nieberding to secure the payment of the purchase money of premises on which the mortgage was given, and that this mortgage had been deposited with the recorder of the county a day or two after it was executed, and had been properly recorded, etc. The petition also states that the mortgage was executed and delivered in due form with this exception, that the notary public before whom the acknowledgement was made, by inadvertence and mistake, neglected and omitted to certify that he examined Maria Bernadina Nieberding separate and apart from her husband, and that she was still satisfied with the instrument. And the petition alleges that this examination in fact took place, and then proceeds to aver that nothing has been paid on the mortgage, and that the whole amount remains due and unpaid, to the extent of about $600. The petition further states that afterward, in 1877, Maria Bernadina Nieberding and husband joined in a conveyance of this property to one Robert J. Clements, and states that this conveyance was made by combining and conspiring to cheat and defraud the creditors of Henry Nieberding, the husband of Maria B. Nieberding, and was made with notice of this prior mortgage. It also states that that conveyance was made to Clements with the agreement that he should pay off and discharge this prior mortgage to Doerner, and that this agreement was in part consideration of the conveyance to him. The petition also alleges that one Steverding was given a mortgage on the same property, on the same day the conveyance was made to Robert J. Clements. The petition asks that these persons be made parties, and that it be declared that they took their lien subject to, and with notice of, the prior mortgage of plaintiff, and for general relief. To this petition an answer is made by Maria B. Nieberding, Robert J. Clements, and Steverding. Clements only having appealed, his answer is the only one to be considered on this hearing. Clements denies that he had notice or knowledge of the mortgage, denies all notice of any lien of plaintiff, denies all fraud and conspiracy charged, denies all the allegations in regard to his assuming to pay the amount due in this prior mortgage; in short all of the allegation as to him in issue. Upon the trial of this case in the court of common pleas a judgment was entered sustaining the answer of Robert J. Clements, finding all the allegations of his answer true and declares him to be the owner of the property, and declares the mortgage of Steverding to be subsequent to the deed of Clements and therefore void, and declares the mortgage of plaintiff to be void, and dismissed the position of plaintiff and the cross-petition of Steverding with costs. To this decree an appeal was taken by the plaintiff, Ferdinand

Doerner, and this brings up to this court the issue between the plaintiff and Robert J. Clements. The case was tried here upon that issue, and upon the trial of the case two propositions were made and litigated:

First—Maria Bernadina Nieberding, the wife, to whom Ferdinand Doerner had conveyed this property, at the same time of the deed executed the mortgage, and there was testimony given tending to show that she was examined separate and apart from her husband, and testimony tending to show that she was not examined separate and apart from her husband, and testimony tending to show that nothing was paid by Clements for the property; that it was conveyed to Clements in security for and payment of a prior existing indebtedness from Henry Nieberding to Clements. Now, upon this issue, to which our attention was directed by the proof, we find from the testimony of the parties, and the witnesses who have been introduced, that there was a separate examination of Maria Bernadina Nieberding. It is true that she testified that she did not remember whether there was an examination. She remembers seeing the notary public; remembers a conversation with him; does not remember any of this conversation, yet she says if she had not signed the mortgage she would not have got the deed. This was true. It was one occurrence—the giving of the deed and the giving back of a mortgage to secure the payment of the purchase money. She refuses to deny that there was such a separate examination. She says: "I do not know;" "I do not remember." This cannot certainly be held as evidence upon which this court can rely to defeat the direct testimony of the notary public. Henry Nieberding swore in his deposition that he was there all the time, and no such examination of his wife took place, and that she was not informed of the contents of the mortgage deed, and did not express herself satisfied. There was testimony upon the trial showing that Henry Neiberding was a portion of the time in the office of the notary, but that Nieberding and Doerner went out for some purpose, leaving their wives in the office, and were absent for some time. Henry Nieberding has testified to that which he cannot know, as to whether his wife was examined separate or apart from her husband. There was a circumstance in regard to this deposition. The same paper containing his deposition contains the deposition of the wife. In her deposition she swears quite as positively as her husband. It was taken by the attorney, Thomas Graves, and its language all indicates the work of the attorney. The same work is continued in the deposition of Henry. Remembering her testimony on the stand, how completely it breaks away from her testimony in the deposition. We think the testimony of the defendant is no sufficient traverse of the testimony of the notary F. W. Ruhtz. He was candid and left an impression that he was testifying truthfully. The question is raised as to whether there was this separate examination, it was such a separate examination as comes within the policy of the statute. He does not claim that he took her into another room, or out of the office, or away from

the presence of persons in the room. He says he went to the back part of the office and sat on a lounge, and there held this conversation; that there he informed her of the contents of the instrument, and asked her if she was still satisfied with the mortgage, and she said she was; and then made this certificate, and explains why this part was made. He says there was a man in the office who knew more about conveyances than he; that this man, Judge Johnson, had been formerly probate judge, and he informed Ruhtz that since the property was conveyed by Doerner to Mrs. Neiberding, it was not necessary that the dower clause be filed, and inasmuch as the property was conveyed to her, we think there was reason for this having been talked about. He says he does not know why he left that part of the certificate blank or erased; he has no recollection; doubtless it was done by inadvertence. The question as to whether this was such a separate examination, having occurred in the same office, in one sense in the presence of the husband—was that a separate examination within the meaning of the statute? We believe the policy of the statute is carried out, provided such means are taken as to enable the officer, away from and out of the hearing of the husband, to ascertain the fact that the wife is acting voluntarily; that her act is not the result of the influence of the husband. Whatever the act, anything which secures such an examination, that satisfies the court that she was so far removed from his influence as to respond freely and voluntarily in saying she was satisfied with the signing, shows a separate examination, and was a substantial compliance with the statute. We think, if we held differently from this, it would hazard many conveyances in Ohio. The policy of the statute does not require the officer to go into another room or into the street. The statute is sufficiently satisfied when the officer has satisfied himself by proper steps that it is her free will uncontrolled. This will be satisfactory, and if he does that by any means—holds the conversation not in the hearing though in the presence of the husband, that is a sufficient compliance with the statute. Applying these principles to this case, we find there was a separate examination of the wife; and that being so, it brings us to this: That the mortgage from Maria Bernadina Nieberding and Henry Nieberding to Ferdinand Doerner must be corrected according to the prayer of the petition. It is said that when this mortgage is corrected it will have effect from the time it was delivered as between the parties, but as to intervening parties, it will have virtue only from the time it was corrected; that the record of a mortgage defectively executed is not constructive notice of the claim of the mortgage and that they must show notice of fact, and that, there was no notice in the case. To this view it is replied, that while this is true as to persons who are *bona fide* purchasers, and persons who acquire liens by judgments, it is not true as to a party who obtains the conveyance without paying anything for it. He is to be distinguished from a party who paid for it and a party who takes a conveyance in securing a pre-existing debt; who parts with nothing, does not change his relations

or surrender any securities. Now, we think the authorities on this point (as it was conceded in the argument) strongly favor this opinion. And when the debt is paid by taking the conveyance, he releases or parts with something, some right; and thereby he gets in a worse position on the faith of this title; that as to such person the rule would indicate that that would be as good a consideration as the payment of the debt, we think the weight of authority sustains this position. Now what are the facts in this case? It is manifest that when we find the separate examination to have been made in fact, the burden is thrown on the defendant, Clements, to show that he was a *bona fide* purchaser, and cannot oppose the equity of Doerner until he shows himself to have been a *bona fide* purchaser. The burden is upon him to show he parted with something; the burden is upon him to show when it is prior in time that he has parted with something; that he is placed in a worse position as against this corrected mortgage. But no evidence was offered upon this subject. In argument we were asked to presume, that inasmuch as the conveyance was made, and that inasmuch as the deed of conveyance of the property to Clements mentioned that so many dollars were given and received, that this receipt in the deed, this acknowledgment of payment amounted to *prima facie* proof, so as to throw the burden of proving it was not *bona fide*, on the other party. We do not think this is law. The deed is binding as to the parties and privies. We do not think it was *prima facie* as to other parties. We do not think it was evidence at all as to them. We do not think that these parties, if the allegations of the petition were true as to conspiracy against the plaintiff, could draw papers and thereby make testimony that would bind the plaintiff. It would result that parties conspiring, by making papers, would be manufacturing evidence against the party they intended to defraud. We think as to Doerner, the recital in the deed as to Maria Bernadina Nieberding and Henry Nieberding, are not evidence; they are the merest hearsay; they are neither conclusive nor *prima facie*. It results, then, that there is no evidence on the part of Clements showing or tending to show what became of his account which he held against Henry Nieberding, or tending to show what had been done with it. He puts the papers in the hands of his attorney, Graves. Graves was not brought on the stand—his deposition was not taken. Graves was the attorney of Clements in taking the deed. Nothing was shown on the part of Clements—and he is the man to show—nothing to show what was done or that he had parted with anything. We think the burden being on Clements to show that he was a *bona fide* purchaser and has parted with something and there being absolutely nothing to show the facts, the finding must be against him. We hold, accordingly, the mortgage of Maria Bernadina Nieberding and Henry Nieberding to plaintiff, Ferdinand Doerner must be corrected, that he has the first lien on the property, and that when this mortgage shall be paid the balance shall be paid over to the defendant, Robert J.

Clements, who holds now, subject to this mortgage, the fee simple of the premises. Other very interesting questions have been argued not necessary to be considered, as to vendor's lien and counsel advanced some interesting and intricate questions upon the subject. We direct a sale of the property, and that this mortgage and first lien thereby created be first paid to the paintiff, Ferdinand Doerner, and that the balance be paid over to the defendant, Robert J. Clements.

Peter Zucker and Wilson & Sykora, attorneys for plaintiff.

Hord, Dawley & Hord, attorneys for Clements, defendant.

EQUITY—RELIGIOUS SOCIETY.

[Lucas Common Pleas Court.]

TRINITY CHURCH, ETC., V. WARDENS AND VESTRYMEN ETC.

A court of equity cannot inquire into the validity of an election of wardens and vestrymen of a church organized under the laws of this state, or try their title to the offices, and if the election be found to be illegal, or such officers otherwise ineligible, enjoin them from exercising the duties or enjoying the franchises of the office, and thus eventually oust them therefrom.

DOYLE, J.

The petition alleges that the church was incorporated February 28, 1842, under the name of the Wardens and Vestry of Trinity Church and has continued as an organization since with officers chosen under the laws of the State of Ohio, and the constitution and canons of the Protestant Episcopal Church of the Diocese of Ohio, and the Protestant Episcopal church of America, with which it is in canonical union.

The petition then proceeds to allege that the plaintiffs are members and contributors of the church, that property has been acquired devoted to education and worship according to the rites and ceremonies of the Episcopal church. That an election was held on the 18th of April, 1881, for wardens and vestrymen; and it then proceeds to allege certain facts, by which it is claimed the election of the defendants as wardens and vestrymen was illegal, that they have assumed to act and are acting as such, and are exercising the functions of such offices, and using the corporate name of wardens and vestry of Trinity church.

It then alleges certain acts of the defendants which are alleged to be unlawful and which will be noticed hereafter, and prays that the defendants may be restrained from interfering with the management of the property and temporalities of the church; from interfering with the rector; from using the corporate name and from exercising the power and duties of wardens and vestrymen.

A preliminary injunction was allowed upon the filing of this petition, which expires with the decision now to be rendered, and the question is whether we shall continue it in force, or whether a

demurrer which has been filed to this petition should be sustained.

The petition may be divided into two parts. First, that relating to the election, and, second, that which it is claimed constitutes ground for relief against defendants to restrain certain acts therein, which are said to be unlawful and in violation of the trust reposed in the officers or trustees of this corporation.

First, as to the legality of the election. Upon this branch of the case the points of difference btween the parties arise upon the following propositions:

1. Can the court of equity, in a case like the present one, inquire into the validity of the election by which the defendants claim to hold their offices, or try their title to the offices; and if the election be found to be illegal, or the defendants otherwise ineligible, enjoin them from exercising the duties or enjoying the franchises of the office, and thus effectually oust them therefrom?

2. If the court can thus inquire and adjudge, what should its answer be to this question: "Does it lie within the power of this church under the laws of the state of Ohio, to elect wardens and vestrymen, unless at the meeting called for that purpose there is present a majority of members of the church entitled to vote, and hence is an election valid where it appears that but 90 votes were cast out of a membership of 240?" The answer to this question depends upon the construction of the statutes of Ohio on this subject.

3. Where the canons of the Episcopal church, with which Trinity church is in canonical union, provide that "in electing a vestry no persons shall be entitled to vote unless at the time of voting they are adherents of the Protestant Episcopal church, and at least 21 years of age, and have for at least six months preceding rented a pew or a portion of a pew, or by subscription or otherwise have contributed regularly for the same space of time to the support of the parish; nor shall any person vote in a parish of which they are not *bona fide* members." And as there is no other provision of the canon expressly conferring the right to vote, on these classes, is it in the power of Trinity church, or is it in conflict with the above canon to pass the following rule:

"The right to vote at an election of wardens and vestry of Trinity church shall be limited to persons, without regard to sex, who are adherents to the Protestant Episcopal church, at least 21 years of age, *bona fide* members of the parish, and who have for at least six months prior to the election been pew holders, and if non-communicants at a rental of not less than $5 per annum."

There are other questions in the case incidentally connected with these, but whose importance would only be seen after determining these one way.

If the first matter in dispute should be decided in favor of the defendants—that is, if the answer should be a negative, it would render it wholly unnecessary to investigate either of the others.

Invoking here the very familiar rule that equity will not intervene at the suit of any one, who has for the grievance complained of,

an adequate remedy at law, we are led to first inquire whether there is such remedy.

Section 6760, Revised Statutes, provides that a civil election may be brought in the name of the state. First, against a person who usurps, intrudes into, or unlawfully holds or exercises, a public office, civil or military, or a franchise within this state, or an office in a corporation created by the authority of this state.

The statute then proceeds to regulate the mode of proceeding, who may bring the action, the enforcement of the judgment of the court, the allowance of an injunction pending the proceedings, and section 6791, provides that nothing in this chapter contained is intended to restrain any court from enforcing the performance of trusts for charitable purposes, at the relation of the prosecuting attorney of the proper county, or from enforcing trusts, or restraining abuses in other corporations at the suit of a person injured.

The proceedings in *quo warranto* are intended to try the title of persons claiming the office. Neither the law nor anything we have seen in the government of this church, contemplates that there shall be no officer entrusted with the management of its affairs, and certainly it is not contemplated that the court, through any of its officers or agencies shall attempt to run or manage a church organization, except where and to the extent that it is necessary to enforce or preserve a trust. It may be remarked here that these plaintiffs, while alleging that the defendants are not legally elected do allege that the defendants are in fact in office, exercising the control as officers, and wholly fail to allege or show that any other persons claim the offices or have any right whatever to them.

Hence a judgment of ouster in this case would leave the corporation without legal control until a legal election could be held, unless, indeed, the allegation that there was not a legal election, or such finding by the court, would amount in law to establishing the right of the old officers to hold over; and in that case such old officers would have a clear right to remedy by *quo warranto*, or if entitled to equitable relief to sue for it in their own names.

I find the general rule of law to be stated in High on Injunctions, section 1235, and other text books about as follows:

Courts of equity do not entertain jurisdiction over corporate elections for the purpose of determining questions pertaining to the right or title to corporate offices, since such questions are properly cognizable only in courts of law, the appropriate remedy being by proceedings at law, in the nature of a *quo warranto*. Nor is the fact that relief is claimed upon the ground of fraud sufficient to warrant a departure from the rule, or to justify a court of equity, in such case in granting relief by injunction.

Indeed the only ground upon which the jurisdiction of equity in regard to corporate elections can be properly based, is the protection of the property rights of the shareholders, and it is believed that the limit to the exercise of the jurisdiction is found in such measure of preventive relief, as will prevent injury to those property rights, without extending it to questions of title to corporate

offices, the determination of which is to be sought in legal rather than an equitable forum.

In Hullman v. Honcomp et al., 5 O. S., 242, our supreme court, Bartley, J. decide, that "the legality of the election of the complainants as trustees of the German Catholic St. Peter's Cemetery Association of Cincinnati, at the election held by the association in February 1850, and the right of the defendants to exercise the powers and conduct the affairs of the association, cannot be judicially tested by bill in chancery, but such cause falls appropriately within the jurisdiction of proceedings at law by *quo warranto*.

And I find it asserted pretty uniformly that even pending the litigation at law to try the title to the office, equity will not practically oust the incumbents by an injunction restraining them from performing the duties. In such cases the court is governed by the principle that it is better that an officer *de facto* should discharge the duties of an office than that they should not be discharged at all. Equity contents itself in such cases with preventing any unlawful or improper acts on the part of the incumbent.

State v. Jarrett 17 M. 309 2 Abb. Pr. N. S., 289; 74 N. C. 103 cited. Watts Actions, v. 3 p. 772. High on Injunctions, section 1315.

Upon the other hand, and upon this principle, officers *de facto* and in possession are frequently entitled to protection in the performance of their official duties, from forcible interference pending an action by parties claiming to be officers *de jure* to try the title, and such protection in no manner determines the question of title, but merely goes to the protection of the incumbents against the interference of claimants out of possession, whose title is not yet established. See High on Injunctions, section 1315.

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Indeed the case in the 5 O. S., 242, as well states the law as any other I have seen. In that case the court entertained the bill because there were matters alleged, connected with the trust property, which gave it jurisdiction; but having determined that the plaintiffs were not upon final hearing, entitled to the equitable relief prayed for, independently of the question of validity of the election, they refused to retain the bill for that purpose, but dismissed it altogether. And so here if the matters alleged, independently of the question of the title to the office, be insufficient, to give this court jurisdiction we will not retain the petition for the purpose of determining that question, but would dismiss it.

It is undoubtedly true as a branch of this jurisdiction that where property is conveyed to trustees for the use of a religious association upon the condition of its being forever used as a place of worship in accordance with the forms and doctrines of a particular church, such doctrinal points may be proper subjects of investigation by the court in determining whether such a perversion of the trust exists as to warrant an injunction.

But where such investigation is not necessary for the protection and enforcement of the trust, the court will not institute any inquiries into doctrinal or polemical questions.

Let us examine the petition then and see whether it contains facts, independent of this title to the office, which give us jurisdiction; and, if so, whether this question is incidentally connected with it, so that we can investigate and determine that also. The allegations of this petition which are independent of, and do not relate to the election of the defendants or the legality of their claim to the offices which they hold, are, after reciting the incorporation of the church and the accumulation by it of property for use in education and religious purposes, as follows:

1. That the defendants, since they have undertaken to act as wardens and vestrymen of the church, have taken into their custody all the property, real and personal, and the temporalities of the church and assumed to manage and control them.

2. They have in an arbitrary and unwarranted manner interfered with the rector of the parish in the performance of his clerical duties.

3. They have endeavored to compel the rector to resign, who is desired to be retained in the rectorship by a large majority of the members of the church.

4. And to prevent the practice of any rite or ceremony or the inculcation of any doctrine except as the defendants might dictate.

These four constitute all the charges against the defendants after their election as wardens and vestrymen and which charges it is claimed give a court of equity jurisdiction to restrain the defendants, and jurisdiction of the whole matter so that as ancillary to the relief which these matters entitle plaintiffs to, the court may in this proceeding try the title of the defendants to, and finally oust them from their offices.

It is further alleged in the petition that by reason of this unlawful conduct of the defendants Trinity church is divided into factions the value of its property is depreciated, a division of the congregation is threatened, the revenues of the church have been diminished, a large number of pews upon which the church depends for the payment of its current expenses remain unrented, whereby danger is imminent of the sale and sacrifice of church property to pay outstanding debts, secured by a mortgage thereon, and irreparable injury is likely to be done to the plaintiffs and their interests in said church property.

These latter allegations are not of distinct acts of the defendants, but of the damage which has resulted or is likely to result from the acts already charged, and, independently of the questions of the legality of the election, is all that there is to entitle the plaintiffs to relief from a court of equity.

We cannot take judicial notice of the canons or constitutions of the Episcopal church nor of the rules or by-laws of this church, except as they are set out in the petition, with sufficient definiteness to understand them. The only canon set forth in the peti-

tion relates solely to the qualification of voters, and is unimportant except in connection with that subject.

Take the first charge made in the petition that the defendants have, as wardens and vestrymen, taken into their custody the church property. What is there anywhere in the petition, outside of the legality of the election, to show that they are not entitled to such control? I do not find anything. It seems to be admitted in argument that a legally elected board would be entitled to such control; and, as the petition alleges that the wardens and vestrymen are the trustees of the church, it would probably follow as a matter of law that they would be the legal custodians of the church property.

Take the second charge, that the defendants have in an arbitrary and unwarranted manner interfered with the rector of the parish in the performance of his clerical duties. Leave out of view for the present the words "arbitrary and unwarranted" and what is there in the petition to show this court, affirmatively, that the wardens and vestry of this church have not the right under the constitution or canons of the Episcopal Church of the Diocese, or under the rules or by-laws of this particular church organization, to interfere with the rector in his clerical duties, or that he is not, in the performance of those duties, subject to the wardens and vestry? I do not find anything alleged, and I cannot know whether anything exists unless it is alleged.

The charge that they have in an arbitrary and unwarranted manner so interfered, adds nothing whatever, in my judgment to the charge. It is the conclusion of law of the plaintiffs; the facts, the specific acts, which are claimed to be arbitrary and unwarranted are not alleged. These plaintiffs might deem these acts wholly arbitrary which, viewed by the court, in the light of law, would appear entirely legal and warranted.

So with the third charge, that they have endeavored to compel the rector to resign. For aught that appears they have the right to compel him to resign. There is no legal inference arising from the fact that a majority of the members of a corporate body desire to keep a particular person in its employment, that the trustees, legally elected, may not compel such employee to resign, or may not discharge him. If there is any law of the church in this subject it is not averred here. The only other affirmative allegation, the fourth, alleges that the defendants seek to prevent the practice of any rite or ceremony, or the inculcation of any doctrine except as the defendants might dictate. If the wardens and vestry should attempt to dictate doctrines or rites or ceremonies which according to the creed or belief of this church, were schismatic or heretical, complaint might well be made of such by those adhering to the faith of the church who were interested in this incorporation, because here might be involved a perversion of the trust property from the purposes of the trust. Whether here in the civil courts or to the church authorities in the first instance, it is not necessary

now to determine, although, under the allegation of the petition, I think they might come here; but there is no such charge here. What rites, ceremonies or doctrines the defendants have dictated, we are not informed. For aught that appears, they may have been in strict accord with the canons and rubrics of the church, and the faith professed and taught by the church. If they do so accord, then no member of the church can complain. If they do not, before this court can advise or control, they must at least be distinctly averred, and the valuation be clearly made to appear.

Upon none of these charges can we get any aid from the law of the state creating the corporation.

The act incorporating the wardens and vestry of the church, passed February 28, 1842, (39 O. L., 62) provided that they should be entitled to all rights, privileges and immunities granted by, and shall be subject to all the restrictions of the act of March 5, 1836, in relation to incorporated religious societies. And that act (Curwin's Statutes page 235) provides that such society when incorporated, may elect such officers and make such rules as may be necessary and expedient for its own government and the management of its own affairs.

So that whatever power, control or jurisdiction the wardens and vestry have, depends upon the rules and regulations made for the government of the church, either by itself or by the church with which it may be in canonical union. None of these are here set forth, except the one relating to the qualifications of voters at the corporate elections.

Now, I take it that unless these acts of the officers of the church are shown to be illegal, and in violation of the trust reposed in the officers or *ultra vires*, so as to give a court of equity jurisdiction upon the general ground of the case of equity over all classes of trusts, the court cannot interfere at the suit of a small number of the members, even though it appears that the result of such acts is to divide the church into factions, to depreciate the value of its property, to divide its congregation, to reduce its revenues or empty a portion of its pews, any more than, at the suit of any member of any other corporation, can it restrain the control and management of its trustees or directors, which are not shown to be illegal or *ultra vires*, for the manifest reason that every one of these misfortunes may follow from the legal acts of the trustees and from their refusal at the will of a minority or even a majority of the members to act in violation of their trust or in an unlawful and unwarranted manner. Of course I will not be misunderstood here. I am expressing no opinion as to the legality or propriety of any of their acts. I have no opinion on the subject but am unable simply from the allegations in the petition to which I alone can look to say they are illegal or improper, so as to give me, sitting as a chancellor, the right to interfere with or restrain them. In the view I take of this case I agree, in the main, with the propositions of law argued by counsel for these plaintiffs, but am unable to see that the facts alleged bring the case at bar within those

principles which he contends for. It is urged, however, that another ground of equitable jurisdiction over this class of property trusts, is that where dissensions have grown up, which are irreconcilable, and which divide the congregation and membership, equity will interfere to preserve the property and temporalities of the church. Just what remedy equity will apply I am not quite able to discover from any thing which has been urged on argument. I know of no case which so holds, and of no principle which is as broad as that claimed, but if there were, there is no allegation here to bring the case within it. It is said Trinity church is divided into factions, but we are not told what are the factions, how extensive, upon what question they are at difference, whether of doctrine, church government, who shall hold the offices, or whether anything more exists than is very common in church organizations, a difference of opinion upon matters, as to which they have legal right to strive within themselves for the mastery, or which are properly cognizable in the ecclesiastical body of which the church is a member, by whatever form of judiciary it may establish.

In this class of cases, where the matter complained of involves no violation of trust, no diversion of the trust property, the rule of action which would govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a prepondering weight of authority, is to leave questions of discipline, or of faith, or ecclesiastical rule, custom or law to the properly constituted church judiciaries, whether of the individual church, where it is an independent organization or of the general organization with which it is in connection in the matter of ecclesiastical government, and that the legal tribunals should accept such decisions, when made, as binding upon them. 13 Wallace 679, 1 Speers Eq. 87, 45 Missouri 183, High on Injunctions, section 310.

I am firm in the conviction that it would be a calamity to this, or any other church, to have the precedent established for it, that an appeal to the civil courts could be made whenever differences should arise between its members, and that we ought not to establish such precedent, unless the law clearly demands it of us. We think it does not.

It seems to me, therefore, that we have no power to grant the relief demanded here. That the only real question involved in this petition is the validity of this election. That question I cannot examine. It was very ably argued, and is a very interesting one. I do not express any opinion upon it, but in accordance with the view as already expressed I must sustain the demurrer.

NATIONAL BANKS—INTEREST AND USURY.

[Cuyahoga Common Pleas Court, October Term, 1881.]

JOHN HUNTINGTON v. MARIN KREJCI, SECOND NATIONAL BANK OF CLEVELAND, OHIO, ET AL.

1. The statutes of Ohio upon the subject of usury do not affect National banks.
2. The remedies given by the act of congress known as the National Currency Act for the taking of illegal interest are exclusive.
3. Where illegal interest has been received by a National bank upon the discount of negotiable paper, the bank can recover only the face of the note without interest. So far as interest has been paid, it cannot be set off or deducted, but must be sued for as a penalty; but what has not been paid cannot be recovered.

This case was heard by the court upon the issues made between defendant, Krejci, and the Second National Bank of Cleveland, Ohio. The opinion states the case.

McMath, Weed & Dellenbaugh, for the Second National Bank.

Wilson & Sykora, for Krejci.

WILLIAMSON, J.

The issues made in this case between the defendant, Krejci, and the Second National Bank, of Cleveland, require a construction of the act of congress, known as the National Currency Act. It appears that some years ago Krejci borrowed of the Second National Bank the sum of $3,975. The original loan has been renewed from time to time, and new notes given upon which interest was paid at the rate of nine per cent. per annum, a rate in excess of that allowed by law. The interest thus paid amounts to $851.02. The question presented is whether or not this amount is to be applied as a payment upon the principal of the note.

"In relation to usury, and the rights and liabilities of the parties participating in the offense, congress has assumed to make provision, and the provision so made must be regarded as exclusive. In this respect, the act of congress prescribes the only rule, and over it the legislative power of the state has no control." Higley v. First National Bank, 26 O. S., 75.

The act of congress, after limiting the rate of interest to be taken, declares:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of the debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the

same; provided such action is commenced within two years from the time the usurious transaction occurred."

In Higley v. First National Bank, *supra*, it was held that the knowingly taking or receiving by a National Bank, of a rate of interest greater than that allowed by law upon a loan of money, does not entitle the person paying the same, to have it applied as a payment of so much of the principal in an action brought to recover the principal debt more than two years after such payment was made. In that case the court of common pleas deducted from the amount sued for by the bank, twice the amount of the usurious interest paid within two years before filing the answer; but the bank did not assign this as error, and the supreme court therefore said that whether the rebatement was properly allowed was not a question before them. The reasoning of the court, however, indicates that it was not regarded as a proper allowance. Counsel for Krejci, however, contend that such an allowance was approved in Bank of Cadiz v. Slemmons, 34 O. S., 142. But a careful examination of that case shows that the effect of a payment of usurious interest was not considered. The defendants had not paid interest, but it was computed and carried into the note, and the court decided that payments made on a note embracing illegal interest would be applied in payment of the principal, and if a note was renewed, the illegal interest on both notes would be disallowed.

But if this decision were as contended, I think it would be inconsistent with Barnett v. Muncie National Bank, 98 U. S., 555, which I should be obliged to follow. In a suit on a bill of exchange, it was claimed as a first defense that more than the amount of the bill had been paid as usurious interest on a large number of notes, which were arranged in series for the purpose of evasion, but in reality represented a continuous loan varying in amount and all paid but the bill in suit. The second defense was that a certain amount had been paid as usurious interest upon the series of which the bill in suit was the last renewal, and this should be applied as a payment. The third defense was substantially a repetition of the first, but ended with a prayer for the recovery of double the amount of interest paid as a penalty. The supreme court held that demurrers to the first and third defenses were properly sustained. The second defense was evidently like the claim made here by Krejci, and the demurrer to it was overruled in the circuit court, but whether properly so or not was not decided by the supreme court. In passing upon the other demurrer, however, the court say:

"Two categories are thus defined, and the consequences denounced:

"1. Where illegal interest has been knowingly stipulated for but not paid, then only the sum lent, without interest can be recovered.

"2. Where such illegal interest has been paid, then twice the amount so paid can be recovered, in a penal action of debt, or suit in the nature of such action against the offending bank, brought by

the persons paying the same or their legal representatives * * * In the first defense, the payment of the usurious interest is distinctly averred, and it is sought to apply it by way of offset or payment to the bill of exchange in suit. In our analysis of the statute we have seen that this could not be done. Nothing more need be said upon the subject." The third defense was held fatally defective for the reason. Under the rules thus announced, it is clear that the illegal interest paid by Krejci cannot be applied in reduction of the principal of his notes.

But it is clear, also, I think, that the bank can recover only the face of the notes, without interest. If unaffected by an illegal contract, the notes would "carry with" them interest from the date of maturity; but as illegal interest was knowingly taken, all interest after maturity, as well as before, is forfeited. In other words, the interest-bearing power of the note is destroyed. So far as interest has been paid, it cannot be set off or deducted, but must be sued for as a penalty; but what has not been paid cannot be recovered. This is in accordance with the decision in the circuit court of the Western district of Pennsylvania in First National Bank v. Slauffe, 1 Fed. Rep., 187. After quoting from Barnett v. National Bank, McKennon, J., says:

"It is thus declared that the effect of a mere stipulation for illegal interest by a National bank is to deprive it of the right to recover more than 'the sum lent, without interest;' but surely, the receiving of illegal interest in furtherance of a stipulation to that effect cannot place the bank upon any better footing. It will undoubtedly preclude the recovery by the debtor of the penalty for an usurious payment by way of set-off against his debt, but it cannot invest the creditor with a right to recover what the law declared he shall forfeit by reason of his unlawful agreement."

In this case, therefore, the bank is entitled to recover the exact sum lent, $3,975.

BILLS AND NOTES—ELECTION.

[Cuyahoga Common Pleas Court.]

SECOND NATIONAL BANK OF CLEVELAND, OHIO, v. DAVID MORRISON ET AL.

1. The taking by an endorsee of an accommodation negotiable promissory note, with full notice that the note was a mere gift, does not prevent the endorsee for value before maturity from taking a good title.
2. The endorser of accommodation paper lends his credit without any constraint as to the manner of its use.
3. The endorser of a note before utterance is a joint maker thereof in the absence of an agreement with the endorsee limiting his liability.
4. The doctrine of election only applies to cases where the plaintiff seeks to enforce the same right that the plaintiff is attempting to put in execution in another action which is then pending.

5. The plaintiff cannot be compelled to first exhaust the security which it holds from the principal, but it has a right to proceed against both at the same time, and to make the best it can of both. The remedy of the surety is to pay the debt, and he will then be subrogated to and may enforce all collateral security held by the bank for the payment of the debt.

This case was heard by the court upon a demurrer to Morrison's answer to the plaintiff's petition. The opinion states the case.

McMath, Weed & Dellenbaugh for the Second National Bank.
Willson & Sykora, for David Morrison.

HAMILTON, J.

This case was brought by the bank as endorsee of a negotiable promissory note made by Martin Krejci and endorsed in blank by David Morrison and J. W. Sykora. Morrison alone answers, averring that he endorsed the note as an accommodation endorser and surety for Krejci and Sykora without consideration and that the plaintiff was well aware of and knew that there was no consideration for his signing the note at the time Sykora endorsed and delivered it to the plaintiff. To this answer the plaintiff demurs, upon the ground that it does not state facts sufficient to constitute a defense.

What is the form of the exact contract in suit in the case at bar? In form, it is a negotiable promissory note. Its legal effect is an unqualified agreement on the part of the maker to pay to the payee or any endorsee of the instrument a sum certain on a day certain; while it is also a conditional promise on the part of the endorsers to the endorsee to pay the full face of the note upon default of the maker and due notice to themselves. The contract, therefore is one which may lawfully exist between these parties. It is the exact contract which exists between the parties as to every note discounted by a bank in the usual and ordinary course of business. No claim is made that the bank did not pay a valuable consideration for it, or that any fraud was practiced upon any party or that it has been paid, or that under the form of a legitimate contract was hidden any usurious artifice or scheme, so that the contract itself has no stain of excessive interest, of fraud or illegality. Clearly it is a well settled principle of law that Morrison, by endorsing said note before its delivery to the bank, for the accommodation of his co-defendants, loaned them his credit without any constraint as to the manner of its use. The want of consideration, and the further fact that Morrison was an accommodation endorser or surety, does not affect the rights of the bank as an endorsee, though taking it with notice. Thatcher v. West River National Bank, 19 Mich., 196; Fulweiler v. Hughes, 17 Pa. St., 448.

In the case at bar, Morrison endorsd said note at the time of the execution thereof, and the law presumes it to have been made for the same consideration as the note itself, and a part of the contract thereby expressed. Good v. Martin, 95 U. S. 90.

It is well settled principle of law in Ohio that an endorser before the utterance of the note is a joint maker. In this case it is distinctly averred in plaintiff's petition (and not denied in Morrison's answer) that he endorsed said note at the time of its inception, and that subsequently it was transferred to the bank in the usual and ordinary course of doing business.

Morrison also avers in his answer to plaintiff's petition that "said plaintiff" at the time of the reception of said note by it, had and held and still has and holds, a note of $7,000 secured by mortgage upon the property of said Martin Krejci as collateral security to the note described in plaintiff's petition." He also avers the insolvency of his two co-defendants, and prays that the plaintiff may be required first to exhaust its remedy against Krejci in an action now pending to foreclose said mortgage for $7,000 before obtaining judgment in the case at bar. True or false, the pendency of an action to enforce the payment of said mortgage will not prevent this plaintiff from obtaining the fullest measure of justice. The plaintiff cannot be compelled to elect as to which remedy it will pursue for the reason that the doctrine of election only applies to cases where the plaintiff seeks to enforce against the defendant the same right that the plaintiff is attempting to put in execution in an action which is then pending; as, where an action for an account is pending, and the plaintiff files a bill for an account. It is put upon this ground: As the parties are the same, and the relief is the same, the second suit is merely for vexation and annoyance, and consequently will not be entertained by the court.

In Lord v. The Ocean Bank, 20 Pa. St., 384, the opinion of the court was delivered by the famous Chief-Justice, Jeremiah S. Black, who said: "The fact that the holder had other collateral security for the same debt, more than sufficient to cover it, from which, however, the debt had not been realized, is not a ground of defense on the part of the maker." In the case at the bar the plaintiff is not seeking to put in execution the same remedy to recover its claim, and there is no reason why it may not, in good conscience, have recourse to all the means of reparation at its command which the courts of this country will give, and after ascertaining the extent of the relief which will be granted, then make its election and enforce the judgment or decree of this court, which it may be advised metes out to it the fullest measure of justice. Notwithstanding the fact that a mortgagee has a double security, he has a right to proceed against both at the same time, and to make the best he can of both. It would be a strange anomaly not to allow the bank to pursue all of its remedies till it has obtained satisfaction of its debt. If Morrison is compelled to pay this plaintiff's claim, he will be subrogated to all of the legal and equitable rights of the bank. The auxiliary equity, known as the doctrine of subrogation, will enable Morrison to reap the benefit of any securities which the bank holds against Krejci, and by the use of which he may thus be made whole. Equity will not interfere with the rights of the bank to enforce payment out of any

of its securities, and therefore equity will substitute Morrison to the rights of the bank against other securities which it now holds. Bispham's Principles of Equity, sections 335 to 342, both inclusive.

It is settled by a long continued and unvarying current of authorities that the bank cannot be compelled, before proceeding to enforce the payment of the note sued upon in this case, to first exhaust the security which it holds from the principal for the payment of the debt. Clearly, it is equally well settled that Morrsion's remedy is to pay the debt, and he will then be subrogated to, and may enforce all collateral security held by the bank to secure to payment of the note upon which this action is predicated.

The demurrer, therefore, must be sustained.

HOMICIDE—EVIDENCE—INSANE.

[Henry Common Pleas Court.]

STATE OF OHIO v. PETER D. COLE.

The law presumes every person to be of sane mind until the contrary is shown, and, therefore the burden of proving that a person accused of having committed a homicide was insane at the time he committed it, rests with him, and he must satisfy the jury by a fair preponderance of testimony.

MOORE, J.

The defense of insanity as set up in this case on the part of the defendant is an affirmative one. The law presumes every person to be of sane mind until the contrary is shown, hence the burden of proving the defendant insane rests with him and he must satisfy you by a fair preponderance of testimony that at the time he committed the offense charged in the indictment he was of unsound mind, and to the extent that will hereafter be explained to you.

It is claimed on part of the defense that at the time the defendant shot and killed John Harmon he was unconscious for the instant, by an irresistible impulse which, without power on his part to resist, compelled or prompted him to do the act.

The doctrine that a criminal act may be excused upon the motion of an irresistible impulse to commit it when the offender has the ability to discover his legal and moral duty in respect to it has no place in the law: and there is no form of insanity known to the law as a shield for an act otherwise criminal, in which the faculties are so disordered or deranged that a man, although he sees the moral quality of his act as wrong, is unable to control them and is urged by some mysterious pressure to the commission of the act, the consequences of which he anticipates and knows. To recognize such a principle, life, property, and rights of persons would be insecure, and every man who, by brooding over his own wrongs,

real, or imaginary, shall work himself up to an irresistible impulse to avenge himself, can, with impunity, become his own judge and jury in his own case for the redress of his own injuries.

Therefore, if the defendant at the time he shot and killed John Harmon, had knowledge enough to know that he was firing a pistol, that he was shooting Harmon, and thereby doing an act injurious or likely to be injurious to Harmon, and that the act was a wrongful one, he cannot assert an irresistible impulse arising from any cause whatever, as an excuse for the crime.

In determining this question of insanity, you will inquire if the defendant was a free agent in forming the purpose to kill John Harmon. Was he, at the time the act was committed, capable of judging if that act was right or wrong, and did he know it was an offense against the law? If you say he did not, you should acquit; if he did, he is guilty of one of the degrees of homicide to which I have called your attention.

I have said to you and you will bear in mind that the law presumes every man of mature years to be sane, that is, to have mind sufficient to form a criminal purpose, to deliberate and premeditate upon the acts which malice, anger, hatred, revenge or other evil disposition might impel him to perpetrate. To defeat this presumption of sanity which meets the defense of insanity, at the very threshold, the mental aberration relied on by the defendant must be affirmatively established, by positive, or circumstantial proof.

It is not sufficient that evidence is offered tending to prove a cause that might produce insanity. There must be proof to satisfy you that actual insanity did exist at the time of the commission of the offense. It is not sufficient if the proof barely shows that such a state of mind was possible—nor is it sufficient if it merely shows it to have been probable.

The proof must be such as to overrule the legal presumption of sanity—it must satisfy you that the defendant was insane. It would be unsafe to let loose upon society great offenders upon mere theory, hypothesis, or conjecture. A rule that would produce such a result would endanger community, by creating a means of escape from criminal justice, which the artful and experienced would not fail to embrace.

The defense of insanity is not uncommon; it is a defense often attempted to be made in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts and render hopeless all other means of avoiding punishment. While then, the plea of insanity is to be regarded as a not less full and complete, as it is a powerful defense, when satisfactorily established, and while you should guard against inflicting the penalty of crime against the unfortunate maniac, you should be equally careful that you do not suffer an ingenious counterfeit of the malady to furnish protection to the guilty.

You will, therefore carefully distinguish between acts done under the influence of a diseased mind and those which originate from or rest in anger, hatred ill-will or other evil, or depraved

passion, disposition, propensity or condition. Acts done under the influence of the latter cannot be excused in law under any circumstances. In solving this question of insanity, do not let your minds rest in theory, hypothesis or speculation, but endeavor to test it by the facts as they appear to you, applied with a careful and intelligent judgment. Carefully consider and weigh all the testimony in the case touching the question, to the end, that you may arrive at the truth as it in fact existed, divested of speculation or conjecture.

Then, if upon the whole the defendant has satisfied you by a fair preponderance of the testimony that he was, at the time he committed the offense charged, insane, and to the extent of being unable to determine that the act he was doing was right or wrong, or that it was an offense against law, or his relation to the act committed and against whom it was directed, your verdict will be one of acquittal. If he failed to satisfy you, you will hold him responsible for his acts as one that is sane.

The evidence of insanity as usually produced in cases of this kind consists in delusions, hallucinations, or illusions, as the manifestations of the diseased mind. No such evidence is here offered. Neither have you to any extent the opinion of either experts or non-experts as is usually produced to establish insanity. So you are left to determine from such facts as are offered of the defendant being at times more silent and down-hearted in appearance, with similiar conditions to determine the question.

You have also the evidence offered by the state upon these same appearances and conditions. Inquire if he was about his usual and ordinary employment; was there or had there been anything unusual in his conversation; did he provide for himself and family in the usual and ordinary way.

Look, gentlemen, carefully and considerately to all these things, and then ask yourselves if you are satisfied by a fair proponderance of the testimony that at the time the defendant shot and killed John Harmon he was insane and to the extent that I have said to you it must exist to make him irresponsible. If you so find you must acquit, if not he must be held responsible for his acts. I have said in your hearing and now repeat to you, that the defendant had no right in law to take it on himself to avenge his own wrongs, whether real or imaginary; and whatever improper relations may have existed between the deceased and the wife of the defendant, it furnishes no excuse or justification to the defendant for the act of killing for which he is charged.

If he was wronged the law furnished him a remedy. If such claim were permitted to prevail and such a rule of law established, there would be no protection to society. The most atrocious criminals would under it be permitted to escape, by setting up the plea that they had been first wronged.

If you permit any such claim to control your action in this case you will not only have violated your sworn duty, but will be doing a great injustice to the state and the people of your country.

HARBORING A THIEF.

[Belmont Common Pleas Court, March 21, 1882.]

STATE OF OHIO v. GEORGE W. DOUGLASS.

In order to sustain an indictment charging the defendant with harboring one F. W., a thief, the state must prove that defendant did harbor and conceal F. W., and that F. W. was at that time liable to arrest, indictment and punishment for the crime of larceny; and that defendant must, at the time, have known that F. W. was such thief and subject to arrest, and that defendant with such knowledge concealed or harbored said F. W. for the purpose, and with the intent to prevent his arrest and punishment for the crime.

KELLY, J.

The defendant was indicted under section 6979 of the Revised Statutes of Ohio. The indictment alleged substantially that, on or about the 10th day of August, 1881, one Frederick Wheatley robbed the store of Wheatley & Outland, of the village of Boston, Belmont county, Ohio, and stole therefrom goods, specified in the indictment, to the value of $101.27; and that afterwards, on or about the 2d day of September, 1881, the defendant, George W. Douglass, harbored and concealed the said Frederick Wheatley, knowing him to be a thief, and knowing him to be guilty of the larceny charged in the indictment.

The evidence showed that the thief was a brother of the senior member of the firm of Wheatley & Outland, and a second cousin of the defendant. It was shown that a robbery had been committed, as charged in the indictment, and testimony was given, pointing, strongly to Frederick Wheatley as the guilty person. It was proven that on the 2d of September, Wheatley was arrested at defendant's house upon a charge of having previously committed some crime in the state of Illinois; and testimony was given tending to show that the defendant, when asked as to Wheatley's whereabouts by the officers who went to the house to make the arrest, at first denied Wheatley's being there, but afterwards, when assured that the officers would search the premises, induced Wheatley to come out and deliver himself up. It was further shown that, upon a search-warrant subsequently issued, goods of Wheatley & Outland to the value of about $2.50 were found concealed in defendant's house.

The court charged the jury as follows:

In order to maintain the indictment, it is essential that the state prove: First. That said Fred Wheatley was, at the time of the act charged against the defendant, a thief—that is, that he (said Wheatley), had recently before that time stolen the personal goods of another (namely of Wheatley and Outland, the owners named in the indictment), of the value of $35, or over and that Fred Wheatley was, at that time, liable to arrest, indictment and punishment for the crime of larceny. If said Fred Wheatley stole

the goods of another, and was guilty of larceny—that is, if he took and carried away the goods of another without consent of the owner and without claim or color of right, with intent to deprive the owner of them, and to appropriate them to his own use,—and the goods were of the value of $35 and upwards, then said Wheatley was a thief within the meaning of the statute.

Second. The defendant must, at the time, have known that Fred Wheatley was such thief, and that he was subject to, and in danger of arrest and punishment for said crime of larceny named in the indictment, namely, the goods of Wheatley & Outland.

Third. That the defendant with such knowledge, concealed or harbored said Fred Wheatley for the purpose and with the intent to prevent his arrest and punishment for the crime.

Defendant is presumed to be innocent until his guilt is proved beyond a reasonable doubt, and each and all of the ingredients of the crime charged against him must be so proved before he can be convicted.

If the evidence proves that a larceny was committed at the store of Wheatley & Outland, and proves that Fred Wheatley was in possession of the stolen goods soon after the larceny such possession is to be considered by the jury in connection with other evidence of the conduct of said Fred Wheatley, in relation to said goods, for the purpose of ascertaining whether such possession was an innocent or guilty possession. It is said that possession of goods stolen, recently after the theft, affords a strong presumption of guilt; but there is no rule of law that such possession is, of itself, sufficient proof of guilt. It is for the jury to determine the effect of such possession, upon a consideration of all the testimony in the case.

If Fred Wheatley stole only a part of the goods named in the indictment, and not the whole; or if the goods stolen were of less value than $35, then he could not be convicted of grand larceny, and the defendant in this case cannot be convicted, even if proved in other respects guilty. But if a quantity of goods were stolen from Wheatley & Outland by one act of burglary and larceny, as alleged, and part of these goods were soon afterward found in possession of Fred Wheatley, the fact of such possession of a part will be considered by the jury as evidence tending to prove that Fred Wheatley stole the whole of the goods.

You will carefully examine all the testimony in the case, and decide whether each and all of the essential, as before stated, of the crime have been proved.

Did the defendant harbor and conceal Fred Wheatley—did defendant knowingly and intentionally give him shelter, refuge, concealment or protection from detection or arrest? Was Fred Wheatley, at the time, a thief, subject to arrest for having stolen said property of Wheatley and Outland worth $35 and more, and did defendant at the time know that Fred Wheatley was such thief and guilty of that larceny? If all this had been proved so as to remove all

reasonable doubt, it is your duty to find a verdict of guilty. If not so proved your verdict must be not guilty.

JUDGE ST. CLAIR KELLY, on the bench.

A. H. Mitchell, prosecuting attorney, for the state.

S. W. Emerson, W. S. Kennon and R. E. Chambers, for the defense.

Verdict of not guilty.

DOWER—ALLOWANCE—HOMESTEAD.

[Erie Probate Court.]

IN RE THE ESTATE OF RICHARD MARTIN, DECEASED.

The only rights a widow has in the estate of her deceased husband, are the statutory allowances, her year's support, her distributive share of his personalty, the use of the mansion house for a year, a homestead as prescribed in section 5437, if it can be had, and her dower interest in his realty; that she then as a widow would be entitled to the benefits arising from her own property to be derived from sections 5435–40. Further that if the homestead was charged with liens which precluded the assignment of a homestead in the manner prescribed by section 5437–38, the widow would not be entitled to anything in lieu of it.

Motion by widow for allowance of $300 in lieu of homestead.

The facts in this case are as follows:

Richard Martin died intestate Sept. 17, 1880, leaving Kate Martin his widow, Maud Martin a minor daughter and several other heirs, all of full age. W. H. H. Sherman was appointed administrator Sept. 25, 1880; inventory and appraisement was duly made and returned; the legal statutory allowances were made for the widow, and an allowance of $450 was made for the support of the widow and minor child for one year, and the same has been paid. On the 7th day of February, 1881 the administrator instituted proceedings for the sale of the real estate of the decedent for the payment of his debts; in due time the prayer of the petition was granted, and the administrator ordered to sell sufficient to pay the debts of the estate.

The administrator under this order sold the homestead consisting of about 54 acres, the same having been occupied by the decedent and his family as a homestead at the time of his death. These premises were charged with liens which precluded the assignment of dower by metes and bounds free of dower.

This sale was made on the 13th day of May, confirmed and a deed ordered on the 20th day of May, 1882; and the widow consented to take and was paid in money the value of her dower interest in the amount remaining after the payment of mortgage liens. The premises were sold for $3,824.80, and after payment of preferred liens, dower and costs, there remains about $1,000 of the proceeds of the sale, and the widow on the 17th of June, 1882,

files herein her motion asking that she may be allowed the sum of $500 out of the proceeds of said sale in lieu of a homestead.

The claim of the plaintiffs herein is based upon section 5440 Revised Statutes which provides that: "When a homestead is charged with liens, some of which as against the head of the family, or the wife, preclude the allowance of a homestead to either of them, and other of such liens do not preclude such allowance, and a sale of such homestead is had, then, after the payment, out of the proceeds of such sale, of the liens so precluding such allowance, the balance, not exceeding five hundred dollars shall be awarded to the head of the family or the wife, as the case may be, in lieu of such homestead, upon his or her application, in person, or by agent or attorney."

It is further claimed by the plaintiff that under section 5435, Revised Statutes she is the head of the family and as such entitled to a homestead exemption. This section provides that: "Husband and wife living together, a widow or widower living with an unmarried daughter, or an unmarried minor son, may hold exempt from sale, on judgment or order, a family homestead not exceeding one thousand dollars in value; and the husband, or, in case of his refusal, the wife, shall have the right to make the demand therefor; but neither can make such demand if the other has a homestead."

The rights of the parties in interest in this case have not been made perfectly clear by the statutes referred to, nor by any precedents that have been established by decision of the higher courts, that I have been able to find, and it seems to be necessary to interpret this and other parts of the statutes relating to homesteads as they apply to the particular case on hearing. It would seem that section 5435 was designed particularly for the families of judgment debtors, and to preserve for them a home, and that any such debtor might assert this claim whether the debtor was the head of a family, or a widow or widower with unmarried daughter or minor son, as against the claim of their creditors, on judgment or order against their own property, and in accordance with section 5440 might claim the $500 out of the proceeds of such a sale if the homestead could not be set off by metes and bounds, and from the particular manner in which these sections are drawn I am led to think they apply only to judgment and debtors, and their own property. I am still further confirmed in this opinion from the fact that the statutes make special provision for a widow and her minor children section 6038, Revised Statutes exempting for their benefit all articles necessary for housekeeping furniture, books, wearing apparel, one cow or money to buy one with, and further section 4188 Revised Statutes gives her the use of the mansion house for one year and provides section 6040-41 for an allowance for the support of the widow for one year; an allowance which is usually a very liberal one. The widow is further entitled to her dower in all the realty a right from which she can-

not be debarred, but by her own act and in which she is fully protected as against the creditors of her deceased husband.

But the statutes go further and make a provision especially for such a case as this one section 5437-38(a provision that would be entirely unnecessary if the statutes upon which this claim is based were applicable and give the right of homestead exemption tc a widow). It is in these sections provided that, "on petition of executors or administrators to sell to pay the debts, the lands of a decedent who has left a widow and a minor child unmarried and composing part of the decedent's family at the time of his death, the appraiser shall proceed to set apart a homestead as provided in the next section etc." Section 5438 provides that "on application of the debtor, his wife, agent, or attorney" (and I presume in this case the widow) "at any time before sale, the officer, executing any suit founded on judgment or order shall cause the appraiser to set off by metes and bounds a homestead not exceeding $1,000 in value" etc.

Under this provision the family get the use of the homestead for a limited period, until the minor was either married, dead, or of age, and under the present law, 79 O. L., 107, during the life time of the widow or unmarried minor, and the decisions are positive that at the expiration of this time the property reverts to the heirs. I believe the only right to such homestead is given by the two sections referred to, and can only be given to widows upon demand before sale, and in the manner prescribed therein.

That the only rights a widow has in the estate of her deceased husband, are the statutory allowances, her year's support, her distributive share of his personalty, the use of the mansion house for a year, a homestead as prescribed in section 5437 if it can be had, and her dower interest in his realty; that she then as a widow would be entitled to the benefits arising from her own property to be derived from section 5435-40. Further that if the homestead was charged with liens which precluded the assignment of a homestead in the manner prescribed by section 5437-38 she would not be entitled to anything in lieu of it. It cannot be claimed that a widow would be entitled to the benefits to be derived from the provisions of both of the sections referred to 5435 and 5437 and it would seem that the latter was enacted expressly to provide for cases not covered by the former, and that the claim of a widow to a homestead out of her husband's estate, depends upon that section alone.

The decision referred to by counsel in the case of Taylor, et al. v. Thorn, Admr., 29 O. S., 569, although not just such a case as this, covers points that are applicable to this case, and confirms the opinion of this court in the interpretation of section 5435.

Now had it been possible under section 5437-38 to have assigned to the widow of Richard Martin a homestead not exceeding in value $1,000 out of the premises sold, it would have been unquestionably their right to have had it so assigned. Owing to certain mortgage liens this could not be done, and the widow loses this right.

She has had all her statutory rights, her $450 for one year's support, her dower interest in this property sold and there not having been a possibiliity of assigning her by metes and bounds the homestead of $,1000, the court is of the opinion that she cannot require it by any other method or means, than those specially presented by the statutes; that her homestead claim is of very different character and not so valuable as that claimed under the section of the statutes upon which the motion is based, this being the use only for a period of years, and in the case of a judgment debtor the $500 becoming absolutely her property; that the widow having received her dower has been paid all her interest in this property and that she is entitled to $500 exemption in lieu of a homestead.

Motion overruled.

HUSBAND AND WIFE—MORTGAGE--DOWER.

[Wilmington Common Pleas Court].

ISABELLA C. BALDWIN v. J. M. JACKS ET AL.

Where a husband executes a mortgage upon his lands in which his wife joins, releasing her right of dower, and afterwards the husband makes an assignment for benefit of creditors, and the assignee without any special proceedings in probate court, and without making the assignor's wife a party thereto, sold said lands for a sum more than sufficient to pay the mortgages in which the wife joined. The husband having died, his wife filed her petition for dower: *Held*, that the mortgage debt in law having been paid by the proceeds of the husband's estate, the wife is entitled to dower in the whole of the premises. and this right cannot be cut off by any proceedings in the probate court to which she was not a party.

On the 8th day of January A. D. 1870, C. P. Baldwin made an asignment to R. E. Doan for the benefit of his creditors, in which he assigned 319 acres of land besides a small amount of personal property, on which land there were two mortgages in which Isabella C. Baldwin, his wife, joined, releasing her right of dower on the 19th day of August, A. D. 1871. R. E. Doan as such assignee, without any special proceedings in the probate court, and without making Mrs. Baldwin a party thereto, sold said lands and tenements for a sum more than sufficient to pay the liens of the mortgages, in which the wife joined. The sale was confirmed and deeds made to the several purchasers, and affirmed on October 12, 1880. C. P. Baldwin died, leaving the plaintiff, Isabella C. Baldwin, his widow, who files her petition for dower, to which the defendants file their answer, alleging as a defense substantially the facts just stated, to which plaintiff by her counsel demurred.

DOAN, J.

When is a widow to be endowed out of the surplus?

First. When she has joined her husband in the execution and delivery of mortage to the mortgagee.

Second. When the mortgage has been foreclosed and she is party to the proceedings in foreclcosure.

Third. When the premises mortgaged have been sold upon a proceeding in foreclosure on the mortgage.

Fourth. In such cases if it appear that the property sells for more than enough to pay the mortgage debts, leaving a surplus, and the husband dies before a final distribution, leaving the surplus or a part thereof under the control of the chancellor, then and in that event she is to be endowed out of the surplus. Bank v. Hinton, 21 O. S., 509; Taylor v. Fowler, 18 O., 568.

When can a widow redeem?

First. When there has been a proceeding to foreclose the mortgage in which she joined in the execution and delivery thereof, and a sale had on said proceedings in foreclosure, she not being made a party to said proceedings, then in equity, she is entitled to redeem. McArthur v. Franklin, 15 O. S., 485; McArthur v. Franklin, 16 O. S., 193.

When can a widow not redeem?

First. When she joined her husband in the mortgage, and the mortgaged premises are, without proceedings in foreclosure upon the mortgage, sold by an assignee in insolvency, and the wife not a party thereto, now having notice of such proceeding and the mortgage debt and the interest being paid out of the proceeds of such sale, then the debt being paid out of her husband's estate. The mortgage is then extinguished and there can be no equity of redemption—nothing to redeem, her husband having assigned his equity of redemption to his assignee, who did not proceed to and foreclose the mortgages, but sold her husband's estate divested of all "liens on the same for all debts" due by her husband (the assignor), and paid the debt to the acceptance of the mortgage, which in law extinguished the lien by mortgage, this right for payment followed the fund in the hands of the assignee, who sold the husband's estate only. What could the wife redeem? How was she or the mortgagee prejudiced by such payment? Ketchum v. Shaw, 28 O. S., 506.

Therefore it will be observed that the test as deducted from all the authorities adduced on the right to her equity of redemption, varies itself to whether the proceedings to sell the premises mortgaged was upon the mortgage, and whether the wife was a party to the proceeding. If upon the mortgage, and she not a party having her day in court, then she may redeem. Whilst if the proceeding to sell, not on the mortgage, and debt paid, there is nothing to redeem. This seems reasonable, for suppose the mortgagee should prosecute an action at law upon the note only, which is secured in fact by the mortgage, and recover a judgment, cause an execution to issue thereon and sell the lands mortgaged; on such execution, sale reported and confirmed, and mortgage debt paid, the wife not a party to suit, what and how could she redeem? There is nothing to redeem.

What is the effect of the wife joining her husband in the mortgage?

Answer. It is a mere security. The mortgage given by Baldwin and wife does not show that the release of the wife was designed to be absolute conditional. The mortgage is conditional as to both, the conveyance of his state by the husband, and the release of her dower, by the wife. McArthur v. Franklin, 15 O. S., 508; McArthur v. Franklin, 16 O. S., 202.

The effect of the wife joining in the mortgage bars her right of dower as between her and the mortgagee, and those claiming under him with or without foreclosure of the mortgage. McArthur v. Franklin, 16 O. S., 200.

What is the estate of the husband after condition broken?

After condition broken, the inheritance must be either in the mortgagor or mortgagee, and whichever is seized of the inheritance, the wife of that one is entited to dower. It cannot be the wife of the mortgagee, because he is not seized of the estate of inheritance, and after condition broken, the right of seisin continues in the mortgagor and the right of his wife to dower continued subject to her mortgage until the same is foreclosed in a suit to which she is a party and a sale had thereon and confirmed. McArthur v. Franklin, 16 O. S., 206.

After condition broken, C. P. Baldwin made an assignment for the benefit of his creditors, what did he assign? All his estate and interest in and to the 319 acres of land then owned by him. Did the husband's deed of assignment convey the wife's inchoate right of dower? Answer No.

"Neither the probate court nor the assignee had the power under the act regulating assignments to cause the inchoate dower interest of the wife in the property mortgaged to be extinguished by a sale to which she did not consent."

And again to the same point.

Dower inchoate is not an estate, but it is nevertheless a right or interest in land, of which a wife may not be deprived, except by proceedings to which she was made a party. McArthur v. Franklin, 15 O. S., 485; McArthur v. Franklin, 16 O. S., 193; Ketchum v. Shaw, 28 O. S., 506.

The assignee cannot certainly sell anything belonging to the wife. Nothing of the kind has been transferred to him. The interest of the husband transferred to him is just and distinct from the interests of the wife which is not conveyed, as in the case of tenants in common. It would not be contended that if one tenant in common, had assigned in insolvency his interests, that that of the other could be sold under any possible order of the probate court. (Same authority.)

What was the effect of the sale by the assignee? He as we have seen could only sell the interest of his assignor, not of the wife.

How is her right to dower to be forever barred? By her contract (of mortgage) she can only be barred of that right, in case the

property pledged was appropriated to the payment of the debt for which it was pledged. Taylor v. Fowler, 18 O., 570.

How appropriated, for that is significant? In the case just cited the supreme court proceed and say: "There is but one way by which it could be regularly appropriated and this was by a judicial proceeding upon the mortgage itself."

Then in view of the law in Ohio repeatedly announced, how stands the purchase, at an assignee's sale?

First. He acquired only the title of the assignor discharged of all liens by the assignor unless the proceeding was upon the mortgage itself and the wife a party thereto, and if she is a party and the proceeding is in a court having jurisdiction, the wife's right of dower is barred as to the land with the right to be the equitably endowed in any surplus provided the husband dies before final distribution. But in the case at bar the proceeding to sell was not upon the mortgage itself nor was Mrs. Baldwin a party or consenting to the sale. Therefore her right of dower was not barred.

Second. The proceedings by the assignee to sell was not a foreclosure. She is not required to redeem or to offer to redeem before demanding assignment of dower.

In neither of the answers is it averred in specific terms that at the time of the sale by the assignee that the proceeds of the sale was not sufficient, if it had been applied upon the mortgages to have discharged the mortgage debt, in fact, in the case of Jacks, it appears that by the answer of Jacks that there was a sufficient sum, whilst in the answer of Tufts in his case we have the aggregated amount of sale, and afterwards in same answer it appears incidentally that the mortgages amounted on day of sale, $7,475.-84. That is more than the lands sold for. But was that the amount unpaid? It is not averred. Following is an averment that $3,111.57 is still remaining in the hands of the assignee, and praying that the widow's dower be computed out of that sum. That claim could not be granted. Why? Because in law this sum is not the proceeds of the sale of the wife's interest or any part thereof, but is the proceeds of the husband's estate assigned.

SUBROGATION.

I assume therefore in law that the proceedings of the assignee to sell, and selling is not a defective proceeding, and that the statute on the rights of subrogation does not apply. In equity let us see at all events the purchaser can but occupy the position of the mortgagee who is the only one entitled to claim anything against the wife as it is only for his benefit that her release of dower was made. His debt being paid, his interest ceases in the wife's property and the purchaser's claim is like the mortgagee's and of like extent. It cannot certainly be claimed that the assignee can convey any higher or better right than the husband, who conveyed to him. This proposition need not be argued—it is established by its statement. It is just as clear that the husband could not have

alone conveyed the equity of redemption so as to bar his wife's dower. The assignee, then, cannot do it. It therefore follows that the mortgage debt in law having been paid by the proceeds of the husband's estate, the wife is entitled to dower in the whole of the premises, and this right cannot be cut off by any proceeding in the probate court to which she was not a party.

The demurrer to the several answers will be sustained and a decree entered in favor of plaintiff, entitling her to dower in the whole of the premises, if parties desire, leave will be given them to amend answer by September 1, 1882, which is accordingly ordered.

L. H. Baldwin and C. B. Dwiggins, attorneys for plaintiff.
Quinby & Swaim, attorneys for J. M. Jacks, defendant.
Hayes & Martin, attorneys for William Tufts, defendant.
A. N. Williams, attorney for James Irvin, defendant.

EXECUTORS.

[Ross District Court, August Term, 1882.]

Evans, Bingham and Louden, JJ.

CATHARINE SLAGLE, ET AL. V. ASSIGNEES OF FRANKLIN SLAGLE, AN INSOLVENT DEBTOR.

The naming of any person executor in a will does not operate as a discharge of any just claim which the testator had against such executor; but he shall be liable for the same as for so much money in his hands at the time such debt becomes due.

If the debt owed by the executor to the testator was evidenced by a promissory note not due at the time he qualified as such executor, upon its maturity the note was extinguished; if the note was past due at the time he so qualified, then upon his qualification as executor, the note was extinguished; and no action will lie upon it.

And where such a note was drawn for a higher rate of interest than allowed by law, the amount for which the executor is properly chargeable in the settlement of his accounts, is the unpaid principal augmented by interest at a rate of six per cent. per annum calculated to the time the note became extinguished as above stated. And he is chargeable with said amount as of that date.

Upon the settlement of an account by an executor or administrator a former account may be opened, by leave of the court, as to matters of substance as well as of form.

Where the executor was indebted to the estate on a note bearing interest at ten per cent. per annum, made by him to the testator and without payment in fact of the note, charged himself with the amount of the note to that date, including the usury,

in an account filed long after the maturity of the note, which account was settled and a large balance found to be in the hands of the executor, upon the filing of a subsequent account by the executor, the court had authority, on his application, to open the former account and correct the same by deducting the said usury therein contained.

Where an executor, in violation of duty, has used and squandered the funds of the estate, and subsequent to the settlement of a partial account, makes an assignment for the benefit of creditors, and then files his final account as executor in the probate court, the assignee may, on leave given, appear in said court, and ask the correction of errors and mistakes in the accounts of said executor, and may appeal from the order of said court.

ADMINISTRATORS.

[Ross District Court, August Term, 1882.]

Evans, Bingham and Louden, JJ.

JOHN C. ENTREKIN, ADM. DE BONIS NON V. ASSIGNEE OF HENRY E. SLAGLE.

The only action which an administrator *de bonis non* can bring to recover an unpaid balance found by the probate court to be due, on the settlement of an account filed by the former administrator, is upon the bond of the latter, and therefore no action can be maintained by the administrator *de bonis non* against the former administrator's assignee in insolvency, to compel an allowance of a claim founded upon the balance in the hands of the former administrator on settlement of his accounts in the probate court.

MORTGAGES—PARTIES.

[Ross District Court, August Term, 1882.]

Evans, Bingham and Louden, JJ.

JONATHAN J. THROCKMORTON, GUARDIAN V. FRANKLIN SLAGLE'S ASSIGNEE ET AL.

In an action to foreclose a mortgage, where the assignee in insolvency of the mortgagor is a party defendant, the court of common pleas, on motion of the mortgagor, may if the land mortgaged is probably insufficient to satisfy the mortgage debt, appoint a receiver to collect the rents and profits during the pendency of the action, or the court in its discretion may refuse to appoint a receiver and may order the assignee to collect the same and to keep an account of them separately, and on final distribution may order the assignee to pay the same to the mortgagor.

MUNICIPAL CORPORATIONS—ESTOPPEL.

[Ross District Court, April Term, 1882.]

Evans, Bingham and Louden, JJ.

THE INCORPORATED VILLAGE OF ADELPHI v. OWEN D. SWINHART ET AL.

Where a municipal corporation without authority of law makes a loan of money and takes a note and mortgage executed by the borrower and his wife to secure its payment, in an action on the note and mortgage, the mortgagors are estopped from setting up the want of power on the part of the corporation to make the loan.

LARCENY—HUSBAND AND WIFE.

[Cuyahoga Common Pleas Court.]

STATE V. DANIEL PARKER.

It is not larceny in the eyes of the law for a husband to appropriate property belonging to his wife.

In the Cuyahoga county common pleas criminal court, Judge J. M. Jones delivered the opinion given below in the case of the State v. Daniel Parker, indicted for stealing money and jewelry from his wife, Mary Parker. The couple, though living separately, had not been divorced at the time the property was taken, and J. H. Rhodes, Esq., who was assigned by the court to defend the prisoner, made the point that the unity of the marriage relation is such that it is impossible for a husband to commit larceny of his wife's property or a wife of her husband's property. The decision in the case is one of unusual interest.

JONES, J.

The defendant in this case is under indictment in this court on the charge of grand larceny in stealing and converting to his own use in June last, money and jewelry to the value of about six hundred dollars, alleged to be the separate property of one Mary Parker, who it is conceded was then and there the wife of said defendant, Daniel Parker, who was then living apart from him, and a suit for damages was then pending between them. It is unquestionably true that under the common law and in the absence of statutes providing for and regulating the separate estates of married women, that no indictment could have been maintained against either a husband or wife for the larceny or embezzlement of the goods and chattels belonging to the other. This doctrine was distinctly announced in England more than two hundred years ago, and has been consistently and uniformly maintained since then. Said Sir Matthew Hale, "The wife cannot commit felony of the

goods of her husband, for they are one person in law." Hale's Pleas of C. 514. In Hawkes' Pleas of the Crown, chapter 32, section 33, the law is stated a follows: "It is certain that a *femme covert* may be guilty thereof by stealing the goods of a stranger, but not by stealing her husband's, because a husband and wife are considered as but one person in law, and the husband by endowing his wife at the marriage with all of his earthly goods gives her a kind of interest in them." And in a comparatively recent English case it was held that a wife could not be convicted of a crine of receiving stolen goods from her husband; and all the five judges on appeal concurred in this principle and agreed in setting aside against her. 14, Eng. L. and Eq., 580.

This exemption of either from the crime of larceny in regard to the goods of the other has been chiefly placed on the ground of the legal unity of husband and wife by virtue of the marriage relation and is distinctly sustained in numerous well approved authorities. See 2d Bishop on Cr. law, 855; 2d Bishop on law of M. W., 152-3; 8th Coxe C. C., 184; Leigh and C., 511; 48th Indiana, 197; Wharton Cr. L., Section 1802; 6 Cowan, 572; 1st Eng. L. and Eq., 542; 26th Eng. L., 570.

And upon this principle of the legal unity of the husband and wife, so as to be but one person in law, the husband cannot by any common law conveyance, give or grant any legal estate directly to the wife either in possession, reversion or remainder, though such gifts may be upheld in equity. Tyler on Infancy and C., section 357; 1 Bishop on M. W. section 35; 16 O. S. 493; 14 Barber 531. The soundness of the doctrine, laid down by some of the authorities, to-wit: That one of the reasons why a wife cannot commit larceny of the goods of her husband, is because she has been endowed of his earthly goods may well be questioned and has been questioned for the reason that marriage gives her no distinct title to her husband's goods, no control on them, no rights to their separate possession, no power over them except as his agent, and he might sell or dispose of them, or bequeath them, in any way he pleases.

But it is claimed that in the case at bar the law is wholly changed or modified by reason of the statute of the State of Ohio creating, providing for and defining the separate estate of married women.

Section 3109 of the Revised Statutes of 1880, provides "that the personal property, including rights in action, belonging to a woman at her marriage, as coming to her during her coverture, by gift, bequest, or inheritance, or by purchase with her separate money or means, or due in the wages of her separate labor or growing out of any violation of her personal rights, shall together with all income, increase and profit therefrom be and remain her separate property and under her sole control and shall not be liable to be taken by any process of law for the debts of her husband."

It seems to me that while the ancient law in respect to the property relation of the husband and wife had by reason of this

statute undergone a great and radical change, the marital relation in its essential nature and the doctrine of the legal unity of the parties by reason of that relation remains wholly undisturbed; the marital obligations of a party are the same, the promises of each are binding as before, the husband is still liable to support, protect and maintain his wife, she is entitled to dower in his estate, and he to curtesy in hers, he is still liable as before the statute to respond for any torts, such as assaults, slanders, libels, etc., which she may be guilty of; and no one would claim for a moment that the statute authorizing her to hold the wages of her separate labor, would entitle her to charge her husband for her services in doing her household duties.

Chief Justice Lowry, of Pennsylvania, in discussing the effect of a similiar statute of that state which declared that a woman's property shall continue hers " as fully after marriage as before," and "shall be owned, used and enjoyed by her, as her own separate property" says "as the only object of the statute was to afford a protection to the estate of a married woman, we may assume that it was not intended that she should so fully own her separate property as to impair the intimacy and unity of the marriage relation; it was not intended to declare that her property should be separate, that her husband could be guilty of larceny or be liable in trespass or trover for breaking a dish or a chair or in using either without her consent. 12 Casey, 410.

Judge Lawrence, of Illinois, in discussing a similar statute says, "supposing a house and furniture are owned by a wife as her separate property, can she forbid the husband the use of such portion of it as she may choose, allowing him to occupy only a particular chair or to take from the shelves of the library a book only on her permission? This would be all very absurd and we know the legislature had no idea of enacting a law to be thus interpreted." 44th Ill. 58.

And Mr. Wells in his valuable "Treatise on the Separate Property of Women" page 104 says after discussing the question in regard to various separate property statutes "I suppose it may be safely assumed that the husband and wife are not so far rendered 'twain' by these statutes as to be capable of stealing from each other whatever civil remedies are provided to protect their rights respectively as between themselves."

This doctrine is discussed and approved in the 2 vols. "Bishop's Laws of Married Women" sections 152-3-4 he says; "One point which seems to be admitted is that the husband cannot commit larceny of the wife's separate statutory estate; also it was never known or dreamed of where the common law prevailed that a husband or wife could be sued in trespass for a wrong done to the personal or real estate of the other and the rules by which such consequential effects are given to statutes would not seem to require such an effect to follow the statutes under consideration."

In Illinois under a statute regarding the wife's separate property not materially different from ours it was decided "that the act

has not so far destroyed the relation of husband and wife as to render either guilty of larceny by converting the property of the other. Whatever is the civil liability it is not larceny." 51 Ill., 165.

This question also came into consideration but was not fully decided in the following cases. 43 Texas; 70 Indiana, 317.

But I have not been able to find any case under any of the statutes relating to the separate estate of married women which holds distinctly that a husband may be guilty of larceny in regard thereto. And I cannot perceive that the separate property of the wife is now essentially different from the estate the husband held before the enactment of these statutes, or now holds in regard to his own property, nor any good reason, if she could not be liable for larceny or embezzlement of his goods before the enactment of these statutes, why he can be held so liable in respect to her property since.

And in this case at bar I hold that it makes no difference in law, that they were living separate and apart at the time of the transaction, the legal relation still existed with all its results, and whatever of moral turpitude was manifested in this case by defendant, the offense, to-wit: stealing the goods of another was not perpetrated and the indictment in this case cannot be maintained.

The indictment was nollied and the defendant discharged.

C. M. Stone, and Alexander Haddon, represented the state.

J. H. Rhodes, was counsel for the defense.

MUNICIPAL BONDS—ESTOPPEL—EVIDENCE.

[Champaign Common Pleas Court.]

SULLIVAN V. THE CITY OF URBANA.

1. When a bond purporting to be the bond of a city fails to recite any ordinance authorizing its issue, it is not commercial paper.
2. When such a bond has been fraudulently issued by the city clerk, without authority, and no ordinance has been passed authorizing its issue, and the bond contains no recital to that effect, the bond is void in the hands of an innocent purchaser.
3. The city is not estopped from defending against an interest coupon on such bond by reason of having paid prior coupons.
4. The court finds that it was not proven that the money for the bond had been received by the city.

WRIGHT, J.

The action in this case is founded upon three interest warrants or coupons, numbered 4, 5 and 6, attached and belonging to an Urbana city bond, a copy of which is attached to and made a part of the petition. A copy of said bond and one coupon (all being alike) is as follows:

BOND.

$500.00 EIGHT PER CENT. BOND. No. 5.

THE STATE OF OHIO, CHAMPAIGN COUNTY; }
THE CITY OF URBANA. }

The council of the incorporated city of Urbana, Ohio, do hereby acknowledge to owe or bearer five hundred dollars, payable at the treasurer's office of said city on the first day of April, 1888, with interest thereon at the rate of eight per cent. per annum, payable semi-annually, on the first days of April and October on the presentation of the proper interest warrants at said treasurer's office; and for the payment of the said principal sum and of the interest thereon, the faith of said city is hereby pledged with sufficient taxes to be levied on all the taxable property of said city.

In testimony whereof, the council of the city of Urbana have caused this certificate to be signed by the president of the city council, and attested by the city clerk, and his seal attached this first day of May, 1878.

B. F. DIXON,
President of City Council.

{ City Clerk, City } Attest: L. C. HOVEY,
{ of Urbana, O. } City Clerk.

INTEREST WARRANT.

Interest Warrant No. 4. On the first day of April, 1880, the treasurer of the city of Urbana, Ohio, will pay the bearer twenty dollars for interest in bond No. 5.

Urbana O. May 1, 1878.

L. C. HOVEY,
City Clerk.

The petition then avers that the plaintiff purchased said bond and coupons in the due course of trade for a full and valuable consideration, without the knowledge of any defense thereto; that said city of Urbana received the money for which said bond was sold, and has regularly paid said warrants on said bond as they respectively matured up to the first day of April, 1880, and has ever since the date of said bond levied and collected taxes for the payment of said interest warrants, and many other similar bonds that said interest warrants Nos. 4, 5 and 6 were duly presented for payment, and the same was refused, and that $60 and interest, etc. are due thereon, for which judgment is asked.

Without demurring thereto defendant answered, admitting its corporate capacity, the plaintiff's ownership, the demand and nonpayment, and denies each and every other allegation.

The second defense was "that the alleged execution, issue and putting in circulation by the defendant, or by its authority, of the said bonds and coupons, is not true, etc.," but this defense on motion, was stricken from the answer by his honor Judge Warnock, because the same was put in issue by the general denial.

The third defense consisted in averring that the alleged bond and coupons were without any consideration inuring to the defendant, and without its consent, falsely and fraudulently made and put in circulation by one L. C. Hovey. The answer prays for a surrender and cancellation of said bond, and coupons, and other proper relief.

The plaintiff by reply denies all the averments of the third defense; and further, that defendant received and kept the proceeds and benefits of said bond and has regularly paid as they matured all of said interest warrants as they respectively matured up to April, 1880, and has, ever since the date of said bond, levied and collected taxes for the payment of such interest warrants on said bonds, and similar bonds, and by the officers and agents of said city has, ever since the date of said bond, etc., represented to the public that they were all legal, valid and binding, etc., and during all said time said bond and coupons, and many other similar ones, were publicly sold in the market and always passed as valid, all of which said city and the inhabitants thereof and tax payers and officers well knew and sanctioned and approved, and during said time said city and its officers brought and sold said bonds and represented them as valid, and never attempted to enjoin the issuing of said bond, or the payment of the interest thereon.

The parties waived a jury and agreed to submit all issues of act to the court.

Thereupon the plaintiff offered the deposition of L. C. Hovey and sundry witnesses to sustain the averments of his petition, to all of which defendant by counsel objected, and also objected to the giving of any evidence in support of the petition or any averment thereof, on the ground that "the same was insufficient in law."

This objection was overruled, and I am now asked to review this decision.

The defect in the petition complained of is stated by the defendant to be the want of an averment of the purpose for which and under what ordinance issued, as provided by section 664 of Municipal Code of 1869, and subsequent amendments. That the lack of such an averment unless supplied by recitals in the bond, a copy of which is made a part of the petition, it is so defective as to make out no cause of action. In support of this I am referred to Knox Co. v. Aspinwall, 21 How., 539; Treadwell v. Commissioners, 11 O. S., 183, and Hopper v. Town of Covington, 6 Bull., 307.

It is sufficient to say of the first two authorities named that the points decided came up on the evidence and not on a demurrer on petition.

The Town of Covington case decided by Judge Gresham, 6 Law Bull., 730 *supra*., seems to present this point squarely. But the reason given in that case for sustaining the demurrer to the petition was that the bond sued on contained no recitals of the pre-requisite steps being taken, as required by statute, and hence was not commercial paper. From this I infer, that under the rules

of practice governing that court the instrument sued upon must either show upon its face that it is commercial paper or if so deficient it must be supplied by averment.

By section 5086 of our Revised Statutes, it is provided that a petition containing a copy of an instrument for the unconditional payment of money is only sufficient without further averment other than there is a sum due etc., thereon; and this is the rule whether the paper is what is denominated commercial paper or not.

It certainly will not be denied but that the bond sued upon in this case is an "instrument for the unconditional payment of money only," upon its face. I am therefore still of the opinion that the petition makes out a *prima facie* case.

The issues raised by the pleadings are these:

First—That the bonds and coupons were falsely and fraudulently issued by one L. C. Hovey, without authority of the defendant.

Second—Estoppel, or ratification by the defendant.

Let us examine these in their order.

1. First then, were the bond and coupons executed and issued by the authority of the defendant? There is no ordinance or resolution of council upon the town records authorizing it. From October 4, 1875, up to and including June 3, 1878, there are but two entries upon the records with reference to bonds and these are as follows, to-wit:

"May 22 1876. The finance committee recommended the reissue of bonds sufficient to cover the amount redeemed March and April of the present year, not to exceed $12,000, for which no provision was made to redeem. On motion the recommendation was adopted."

"June 3, 1878. Upon motion the finance committee was authorized to re-issue $6,500 bonds of the city now past due."

The bond in suit was issued May 1, 1878, over a month previous to the adoption of the last motion, viz: June 3, 1878 and the evidence fails to show that it was included and is a part of the $6,500. But it does show that the bonds for the $6,500 were sold by John Helps, chairman of the finance committee, and the proceeds placed in the treasury by him. Plaintiff's bond was not one of these.

But plaintiff contends that there is no statute or law requiring the council of a municipal corporation, as a condition precedent, to pass either resolution or ordinance before it can issue bonds; and refers to Municipal Code of 1869, and amendments thereof, in volumes 67 and 70 O. L., pages 85 and 5 respectively, and the Municipal Code of 1878.

The Municipal Code of 1878 was adopted May 14 of that year, thirteen days after this bond was issued.

The law in force at the time the bond was issued is found in volume 73 O. L., page 125, section 97, wherein it is provided that "no contract, agreement or obligation shall be entered into, except by an ordinance or resolution of the council, or any appropriation of money for any purpose be made except by an ordinance; and

the power of authority to make a contract, agreement or obligation to bind the corporation, or to make an appropriation shall not be delegated. And every contract, agreement or obligation, and every appropriation of money made contrary to the provisions of this section shall be void as against the corporation, but binding on the person or persons making it."

This provision of the statutes was incorporated in Code of 1878, 75 O. S., 200 and 201, and Revised Statutes, section 1693 with some additions.

It is suggested by counsel for plaintiff, however, that this section is merely directory, and not mandatory. But this law makes all obligations void, not provided for by ordinance or resolution of council, and how it can be maintained that such statute is directory only, the court is unable to discern, when it comes squarely within the test conceded by plaintiff's counsel, viz: that "a statute is mandatory when the failure to comply with its provisions renders the act void."

It is, therefore, in the opinion of the court, essential to the validity of a municipal bond that it be issued upon the authority of an ordinance or resolution lawfully passed.

Whether it is necessary to have record evidence alone, to prove the lawful adoption of an ordinance or resolution, it is not necessary to decide, as there is no evidence showing that an ordinance was actually passed as provided by law, authorizing the bond in suit, and by inadvertence was not placed on the record. The defense that the bond and coupons were issued without lawful authority is in my judgment made out by the defense. Waiving, for the present, the question of want of power, and considering only irregularities and deficiencies in the exercise or execution of it, brings us to the consideration of the questions whether the defendant is estopped from denying the validity of the bond by any act of its agents, or whether it has ratified the obligation and thereby made it valid

1. The plaintiff contends "that a municipal corporation, when it assumes to contract with private parties, takes upon itself the legal liabilities of a private corporation and must be amenable to those rules which the commercial world has prescribed and which the courts have reduced to an inflexible code," and cites, Vol. 2 of Coler on Municipal Bonds, page 132, in support of the proposition; from which it is argued that the defendant is bound by the acts of its agents Hovey and Dixon, as clerk and president of the council, who it is claimed, signed the bond as such.

This proposition involves the question whether the clerk or president of council were the officers designated to execute the bonds of the city. There is no statute nor ordinance making such provision; but it is claimed that such has been the usage for more than ten years next previous to May 1, 1878, and that especially the city is estopped from denying such authority, by the recitals in the bond, wherein it is declared, "In testimony whereof, the Council of the City of Urbana, have caused this certificate to be

signed by the President of the City Council and attested by the City Clerk and his seal attached this first day of May, 1878."

It will be borne in mind that one of the issues raised by the pleadings is whether or not these officers were agents of the city to execute its bond in this case; and to contend that an agency may be exclusively established by the declaration of the agent himself is simply absurd. If that were the rule, then any scoundrel would be able to fix the liability upon any one he saw fit by simply declaring or reciting in a written instrument that he is the agent of such person. Where the agency is admitted or established then an act or declaration of the agent within the scope of the agency may bind the principal.

The proposition that the agency in this case may be established by proof of usage for a considerable period of time, is supported by some show of reason and if against a person or private corporation is supported by some authorities. But the doctrine may well be doubted, as applicable to *quasi* corporations. But conceding that proof of usage is sufficient (in favor at least of an innocent purchaser) that these officers had general power to execute the bonds of the city; the question still remains: Is their act conclusive in favor of such innocent holder? In other words did the act of the clerk and president in executing plaintiff's bond, having a general authority to sign bonds, make the one sued upon commercial paper? If so, then plaintiff ought to recover, if no other reason exists, for he had no actual knowledge of any defense on behalf the city.

One supreme court, that of Pennsylvania, has held that municipal bonds are not (even with all necessary recitals therein), commercial paper. See Diamond v. Lawrence County, 37 Penn. St., 358.

But in that case the learned judge, delivering the opinion of the court, says: "We will not treat these bonds as negotiable securities. On this ground we stand alone. All the courts American and English are against us, etc."

What then is requisite to make municipal bonds commercial paper?

Upon this question the authorities are not in harmony. The Federal courts have been establishing rules in almost all phases of the question from 21 Howard to 102 U. S. viz:

Knox County v. Aspinwall, 21 Howard, 539; Bissell v. Jeffersonville, 24 *Id.* 299; Mercer County v. Hackett, 1 Wall., 83; Meyer v. City of Muscatine, *Id.*, 393; Supervisors v. Schenck, 5 Wall., 772; Pendleton County v. Amny, 13 Wall., 297. Town of Coloma v. Eaves, 92 U. S., 484; County of Daviess v. Hudiekoper, 98 U. S., 98; Buchanan v. Litchfield, 102 U. S., 278; Ogden v. County of Daviess, 102 U. S., 634.

In the first named case, Knox county v. Aspinwall, *supra.*, the court seems to establish two rules; first, that the mere issue of the bonds containing a recital that they were issued under or in pursuance of a legislative act, was a sufficient basis for an assumption by

the purchaser that the conditions on which the municipality was authorized to issue them had been complied with without any further recitals that the pre-requisites or conditions had been complied with. Second, that where the latter recitals were contained in bonds and were sustained by the record, they were commercial paper.

The court were not called upon in this case to go to the extent of the first proposition named, for the bonds were issued upon a finding of the board of commissioners, that the pre-requisites had been complied with.

In no case since has the supreme court of the United States gone to the extent of the first proposition, in this case, but has distinctly held in Buchanan v. Litchfield, *supra*, that recitals of compliance with the conditions precedent are necessary to protect innocent purchasers, and hold that the language of the recitals in Knox County v. Aspinwall, to-wit: "in pursuance of the statute," which prescribed the conditions precedent to any subscription, are equivalent to reciting that the pre-requisite had been complied with. Also in County of Moultrie v. Savings Bank, 92 U. S., 631, the language used in the recitals was, "in conformity to the provisions of the statute," naming it, which was held sufficient.

From this it will be seen, that the supreme court of the United States has held in all cases that bonds, to be commercial paper must have recitals therein, that pre-requisites or conditions imposed by the statute have been complied with.

The bond of plaintiff in the suit at bar has no recitals whatever, of the law under which, the purpose for which, or under what ordinance issued, or that any conditions imposed by law had been complied with. If our statute conferred power upon the city to issue bonds under any or all circumstances they might deem proper, without any limitation or condition whatever, there might be some reason for claiming that the bond in suit is good in the hands of the plaintiff. But municipalities in Ohio are limited by both constitutional and statutory laws. Art. 13, section 6 of constitution of Ohio. Sections 1552, 1693, 1676, 1712, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2708, 2709, 2710, and 2711, Revised Statutes of Ohio.

And this, notwithstanding the claim of plaintiff's counsel, that section 663 of Laws of Ohio, volume 67, page 85, by using the words therein, "or other public use," gives unlimited authority. Section 663, referred to, provides that, "loans may also be made by any municipal corporation in anticipation of the revenues to be derived from any tax authorized by this act for public improvements, or other public use."—The power to issue bonds is expressly confined in this section to "any tax authorized by this act for public improvements, or other public use," the latter clause meaning any public use like or similar to improvements for which the tax is authorized by the act. Instead, therefore, of conferring unlimited power, the section expressly limits it. But while the rule adopted by the Federal courts is supported by the weight of

authorities, both in England and America, including perhaps, Ohio, yet the doctrine has been much qualified by other courts, and by New York state and Pennsylvania, entirely repudiated. See Cagwin v. Town of Hancock,84 N. Y. 532. Diamon v. Lawrence Co., 37 Penn. state 358, *supra*.

In the former case the statute provided that before a town could issue bonds to a railroad company the consent of a "majority of the taxpayers of such town, assessed and appearing upon the assessment roll acknowledged as conveyances for real estate, are required to be owning or representing more than one-half of the taxable property of the town, must be obtained." That such pre-requisites have been complied with "shall be proved by the affidavit, in writing, of one of the assessors of the town," etc. This affidavit had been made and filed, as required by law, and the bonds so recited. But the court held that the town might, as against an innocent purchaser, show that in fact the affidavit was untrue, it being only *prima facie* evidence. The court suggested though, that if the statute had made such affidavit conclusive evidence, a different rule would prevail.

The New York court of appeals distinguished it from Bank of Rome v. Village of Rome, 19 N. Y., 20.

The latter deciding that where commissioners, before negotiating or transferring any of the bonds, "shall make and subscribe a certificate in writing that $500,000 of the stock of the R. R. Company has been subscribed by other parties than the city," such certificate cannot be impeached as against an innocent holder of the bonds for value. As to this case it was said in 84 N. Y. 532, *supra*., "that while the distinction between the two cases is not very broad, yet there is a distinction which deprives that case of its character as a controlling authority in this. There the subscription to the stock has been regularly authorized. There was nothing more for the village or its taxpayers to do. Whatever else remained was committed to the commissioners. In this they acted as the agents of the village."

Commissioners of Knox County v. Nichols, 14 O. S., 260, is squarely in point with Bank of Rome v. Rome, 19 N. Y. 20, *supra*.

In Treadwell v. Commissioners, etc., 11 O. S., 183 (Judge Gholson delivering the opinion of the court), the decision in Knox county v. Aspinwall *supra*, is criticised and limited.

This suit upon a county bond issued to the Dayton and Michigan Railroad Company, in which it was recited: "This bond is issued in part payment of a subscription of one hundred thousand dollars, by said county of Hancock, to the capital stock of the Dayton and Michigan Railroad Company, chartered March 5, 1851, and an act to authorize the commissioners of Clark county to subscribe stock in railroad companies, passed March 8, 1850."

The answer among other things, set up as a defense "that the railroad has never been made or located through or in the county as required by the statute, authorizing the bonds to be issued, but

before the bonds were issued it was permanently located and partly made so as not to touch the county, and has since been finished so as not to touch the same."

The court held:

"The board of commissioners of a county is a *quasi* corporation, and that a grant of powers to such corporation must be strictly construed and when acting under special power must act strictly on the conditions under which it is given."

"As to the second ground of estoppel, and in support of which the case of Aspinwall v. The Commissioners of Knox County, 21 How., 539, has been cited, it may be observed that one point of that case is not presented by the pleadings in this case. We have not here, as was presented in that case, a record of the action of the board of county commissioners. We need not, therefore, now inquire whether the description of such a board as given in the opinion in that case, applies in this state, nor whether it was competent for the board of commissioners of Hancock county, under the special power conferred, to determine, by finding conclusive in any collateral proceeding the facts essential to give them authority to act. To the mere facts of the putting the bonds in circulation, and the recital in them of the authority under which they were issued, we are not prepared to give the conclusive effect which is claimed in this case."

In the case of The State *ex rel.* Robertson v. Board of Education of Perrysburg Tp., 27 O. S., 96, Judge Wright, in delivering the opinion of the court says: "The bonds were issued by board of education under the provisions of the law of March 13, 1868, 65 O. L., 24, which gives power to issue such bonds upon the conditions therein prescribed. Upon the face of the obligations, they are stated to be under the said act and the act supplementary to an act passed March 18, 1864."

In addition to the recitals named the board had made a finding under the act that conditions precedent had been performed; and the court held them valid in the hands of an innocent purchaser for value.

The principal in this case was affirmed in State v. Commissioners, 37 O. S., 526. The latter case arose under the two-mile road improvement law.

The bonds recited that they were issued "in pursuance of, and according to" the acts, etc., naming them; and the board of commissioners of Fayette county had found that a majority of the land owners to be affected, had signed the petition, and had made such a finding a part of their record.

The county in defending against the collection of the bonds offered to prove that a majority in fact of the land owners had not signed the petition, notwithstanding the finding of the board to the contrary. This the court held they could not be permitted to do against an innocent purchaser for value. In no case have I been able to find that the court has held a bond valid with recitals alone, and where the person or board authorized to determine that the

pre-requisites have been complied with, has not acted in the matter, and determined the question. In all cases cited the bonds containing recitals of such finding, and the board or other authority empowered to make it, had in fact done so. The case at bar fails in both particulars.

As our law limits the powers of municipalities in the issue of bonds, and requires, by section 2703, that: "All bonds issued under the authority of this chapter shall express upon their face the purpose for which they were issued, and under what ordinance." I am of the opinion that such bonds are not commercial paper, unless, not only such recitals are made in the bonds, but also that an ordinance had been lawfully passed for the purpose. For if the recitals alone were sufficient, dishonest or corrupt officials as clerks and presidents of councils, might, by making false recitals, almost, if not entirely, bury a city with bonded indebtedness. In the case at bar, however, it is not necessary to go to this extent, for there are neither recitals nor an ordinance to make it commercial paper. The case of De Voss v. Richmond, 7 Am. Law Reg. 539, is not in conflict with this conclusion.

The city in this case had issued a registered bond to one Asa Otis, a citizen of Massachusetts, for $2,300. During the rebellion a confederate court had declared a forfeiture of the bond and ordered a receiver to sell it, which was done, and a new bond issued to the purchaser of the city. Under an ordinance of the city it was the duty of the auditor in issuing such new bond and in all subsequent issues thereof to transferees, to recite on its face that it was issued in obedience to a decree of the court, on acount of certain other bonds confiscated by the decree. This was done on the bond issued to the first purchaser, but not on the one issue to De Voss, nor to his vendor. The power of the city of Richmond to borrow money and issue bonds therefor was at the time unlimited.

Upon this condition of things, I think the decision of the court was correct, and that the power to issue bonds by the city, being unlimited, it could properly be treated as to its agent's acts, as a mere "trading corporation."

2. The second ground of estoppel claimed is that the city received and kept the proceeds and benefits of said bond. This is controverted by the defendant, both as to the fact and the law.

There is no evidence that the city received the money arising from the sale of the bond, save that of L. C. Hovey, who is certainly not entitled to much credibility.

He says this bond was issued by him to himself in place of a bond he held against the city. But when he got the original bond, at what time, and for what purpose it was issued, he is unable to tell anything about. His memory in that respect is remarkably deficient.

It is sufficient for me to say I don't believe his statement. He issued his bond as he did doubtless many others to get money for his own use. But suppose he tells the truth about it. Does the

mere fact that the city received the proceeds of the bond validate it? Plaintiff cites the following authorities in support of the affirmative of this question viz: Meyers v. Muscatine 1 Wall. 384; Rogers v. Burlington 3 Wall., 667; Pendleton Co. v. Amny, 13 Wall., 305; Barret v. County Court, 44 Mo., 199; Smead v. Union Township, O. S., 394.

In the latter, 8 O. S., 394, the estoppel was placed upon the ground that the tax payers had, without protest or interference, suffered an election to take place which authorized the subscription to be made, and suffered the trustees to issue the bonds although not strictly in conformity to law, and that the trustees had anually levied taxes to pay the interest, and had paid the same. And the court say "Under these circumstances it is, that the township, while retaining the price and proceeds of the bonds, propose to set up the defense that the law had not in all respects been strictly complied with." The estoppel was not therefore grounded upon the receiving and retaining of proceeds of the bonds, but such a fact was a good moral reason for not hesitating to enforce a legal estoppel.

The 1 Wall. 384, and 3 Wall., 305 do not touch the point; and the 44 Mo. 199, I have not been able to obtain. Even if the Missouri case goes to the extent claimed it is in conflict with Buchanan v. Litchfield, 102 U. S., 278. In this case Justice Harlan, delivering the unanimous opinion of the court, where it was admitted the city received the proceeds of the sale of bonds, says: "The defense is characterized as fraudulent and dishonest. Waiving all considerations of the case, in its moral aspects, it is only necessary to say, that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases."

And then intimates that it might be recovered as money had and received. In this case, as in the case at bar, the suit was for interest upon the bonds of the city, which were void, hence no recovery in that form of action, could be had. See also Louisiana v. Wood, 102 U. S., 294. But 13 Wall., 297, is said to hold a different doctrine. Let us see.

In this case the county authorities had received the stock of the company, in exchange for its bonds, had held the stock for seventeen years, and participated in the meetings of such stockholders. An estoppel was enforced against the county by only five of the judges, three dissenting, Justice Nelson being detained at home by sickness. I would, however, prefer to follow the rule laid down in Buchanan v. Litchfield upon this point, in case of a conflict, if it arose upon the evidence in the case at bar.

3. The third ground of estoppel claimed is, "that the city's officers and the taxpayers thereof, knew that this bond and coupons, and many other similar ones, were publicly sold in the market, and always passed as valid, and sanctioned and approved them, and bought and sold them, and never attempted to enjoin their issue or the payment thereof." The evidence shows that

some of the officers of the city and some of its inhabitants knew such bonds were in existence, and bought and sold some of the series of which the one in suit was a part; but no one, save Dixon and Hovey, knew of them at the time they were issued, and Hovey, only knew of their fraudulent character, until the fall of 1879, when his frauds were first discovered. How any one could enjoin the issue of these bonds, or object to the payment of interest thereon, under such circumstances, is utterly incomprehensible. There can be no express ratification under such a state of facts. And to create a liability on the ground of negligence or implied ratification it must be shown that the purchaser was misled by it, and thereby induced to part with his money.

In case of Supervisors v. Schenck, 5 Wall., 72, the facts were that a vote in aid of a subscription to a railroad was ordered by the "county court," under a repealed law, whereas it should have been ordered by the "board of supervisors," of the county. The law in everything else was strictly complied with, and for nine years taxes had been levied and the interest paid by the county authorities upon said bonds, before any defense was set up that the bonds were void. The court sustained their validity.

So also in State *ex rel.* Garret v. Vanhorne, 7 O S., 327; State *ex rel.* Smead v. Marion Tp., 8 O. S., 394, and Shoemaker v. Goshen Tp., 14 O. S., 569, an election had been held and the bonds issued in pursuance of an affirmative vote. In all these cases and similar ones, the court properly presumed that the voters, as well as the boards who authorized the issue of the bonds, had full knowledge of all the circumstances prior to and at the time of their issue.

In order to work an estoppel *in pais* the acts and declarations of the party to be bound must be wilful, that is, with knowledge of the facts, or intent to deceive the other party.

McAfferty v. Converse Lessee, 7 O. S., 90; Nye & Co. v. Denny, 18 O. S., 254; Commonwealth v. Moltz, 10 Penn., 531; Copeland v. Copeland, 28 Me., 525. And Tilghman v. West, 8 Ired., 183.

It is conceded that the city may become liable by reason of its *laches;* but in such case the injury, if any, must have arisen directly from it, and been the sole cause of it, for if plaintiff's negligence contributed to cause the injury he cannot recover.

4. The fourth ground relied upon by the plaintiff is more in the nature of a plea of ratification than estoppel. It is, "that the defendant has regularly paid as they matured, all of said interest warrants up to April, 1880, and since the date of said bond, levied and collected taxes for such purpose."

The evidence fails to show that any taxes were levied specially for the purpose of paying interest upon this bond or any of its series. It shows impliedly that the funds used for paying the two coupons were raised by a levy but such levy was made doubtless to raise funds to pay the accruing interest upon all the bonds of the city some of which were genuine and valid. And to make this

defense of ratification good the plaintiff by a preponderance of evidence must show that defendant knew at the time such levy was made and the coupons paid that the bond in suit or its series was illegally issued, or that the plaintiff in the purchase of the bond relied upon its being valid by reason of the fact that the city had paid interest upon it.

There is a failure of evidence to establish either. Express ratification includes not only knowledge of deficiencies, but intention to make valid; whereas to constitute implied ratification, there must be a neglect for a considerable period of time to take advantage of irregularities or infirmities the knowledge of which is either possessed, or from the circumstances will be presumed to have been acquired.

There is no evidence at all showing knowledge, upon the part of the defendant, nor does the lapse of time and other circumstances raise a presumption of such knowledge against it, to bring it within the definition. But it is finally contended by plaintiff, "that even if the bond was fraudulently issued by Hovey, its clerk, that, as between him and the city, the latter ought to stand the loss, because by making him its agent to execute, issue and negotiate its bonds, it thereby said to the public that he was entitled to credit in that behalf." It is conceded to be the rule, that, as between two innocent parties, he who puts it into the power of a third person to commit a fraud must stand the loss, if a fraud is committed. But this rule only applies to persons, and private or trading corporations, or where an officer or board have unlimited power to issue bonds, or delegate such power. Concede for the purpose of argument, that the city by its usage, as between it and innocent third parties, had empowered its city clerk and president of council to execute its bonds, and the clerk to negotiate them, and was guilty of *laches* in not watching him, and the records to detect frauds or irregularities in the execution, issue and negotiation of such bonds, and that plaintiff relied upon this condition of things when he purchased the bond in suit, he would still be unable to recover, for not pursuing a further investigation. Why? Because he is bound at his peril to know what is provided by the statute in relation to the powers and duty of the city in the issuing and negotiation of its bonds.

This doctrine is well settled. See Ogden v. County of Daviess 102 U. S., 634.

This rule then required him to know of the provisions of section 97, vol. 73, O. L., 125, *supra* viz: that "no obligation shall be entered into except by an ordinance;" that such power "shall not be delegated," and "every obligation, etc., made contrary to these provisions shall be void, as against the corporation, but binding on the person making it." And that by the provisions of section 2703 R. S. (the former law being the same) that "all bonds issued under the authority of this chapter shall express upon their face the purpose for which and the ordinance under which they were issued."

Had he performed this imperative duty, he would have ascertained first, there was no recital in the bond of the purpose for which and the ordinance under which it was issued. Finding this out, he next was required to see if an ordinance had been passed authorizing its issue. An inspection of the records would have at once disclosed that no ordinance had been passed. The clerk's want of authority would then have become apparent, and the plaintiff would, at once, have refused to purchase a void bond. Is there any reason or law, then, that would protect a purchaser under such circumstances? Certainly not, however negligent the taxpayers of the city or its officers may have been. An obligation of the city void when issued, remains void in the hands of all persons who may purchase it thereafter, however innocent of any knowledge of defects, and although the city may have received the proceeds and paid interest upon the bond. Louisiana v. Wood, 102 U. S., 294; Marsh v. Fulton Co., 10 Wall., 676; Medill v. Collier, 16 O. S., 612; Anthony v. Jasper, 101 U. S., 693.

While it is true that this rule may work a great hardship to the holders of such bonds, and that the city in the aggregate can better afford to stand the loss than them, yet we must remember, that the purchaser's own negligence contributed mostly to his loss. A verdict and judgment for the defendant.

MUNICIPAL CORPORATIONS—SIDEWALKS—DAMAGES.

[Clark Common Pleas Court.]

WALKER V. CITY OF SPRINGFIELD.

1. An excavation in a sidewalk in a populous city, of such dimensions and in such a part of it as that foot passengers fall into it, they may suffer great harm, left at night without guard, protection or light is a nuisance.
2. An agreement which is enforceable by an action at law requires for its creation at least two parties.
3. The plaintiff should be satisfied for all actual damages he has sustained by reason of his injuries, in the loss of business, his health, his time, and the amount of his expenditures necessarily incurred in consequence of such injuries.

OPINION OF ARBITRATORS.

This action was begun in the court of common pleas of Clark county and by agreement of the parties was submitted to the arbitration of the undersigned. We have this day filed our award. In view of the nature of the case we think that all persons interested should be informed as to the grounds upon which our decision is founded.

The question submitted for our determination arises on the plaintiff's petition and defendant's answer and the reply thereto.

In his petition, the plaintiff alleges in substance that the defendant is a city of the second class and as such has control of the

streets and sidewalks within its limits and is charged with the duty of keeping the same open and in repair and free from nuisance; that on Limestone Street, in said city, a great many people daily pass; that in the year 1879, when John W. Bookwalter was the owner of a lot abutting on the south side of High and the west side of Limestone street, and in September of that year an excavation, six feet deep, five feet wide and fifteen feet long, was made on and across the sidewalk on Limestone Street, in front of said lot; that such pit was a defect and a nuisance, endangering the lives and safety of persons passing along and upon said pavement; that the defendant, with the knowledge of said defect and nuisance allowed the same to remain wholly unguarded and uncovered, and omitted to furnish any signals to warn travelers and passersby of such dangerous condition of said sidewalk from September until the nineteenth of December; that about seven o'clock of the night of that day the plaintiff, in passing along said sidewalk, without fault on his part, and being ignorant of said defect and pit, fell into the same, whereby his left foot and ankle were broken and bruised, his left side and hip were injured, three fingers of his left hand were broken, his right arm crushed, and permanent internal injuires inflicted; that such hurt caused him great suffering, compelled him to incur large expense for medical aid and nursing, and disabled him of the use of his right hand in writing and from practicing the law, in which he was engaged, and from which he derived an income of about $3,000 yearly. He further alleges that his claim for damages on account of the injuries was duly filed on the —— day of May, 1880, with the clerk of the city and that the city council refused to settle the same. He prays for $25,000 damages.

The city, in its answer, set up three defenses: The first defense is, in effect, a denial of the material allegation of the petition.

For the second defense, it is alleged that the plaintiff had never filed with the city clerk any claim for damages against the city on account of the matters set forth in his petition.

For the third defense, it is averred, that an action was pending, December 20, 1881, in said court, brought by said Walker against said city and said Bookwalter, the object of which was to recover damages on account of said alleged injuries, on the ground that the city and Bookwalter were jointly liable therefor; that the plaintiff, to induce the city to enter into the alleged agreement below stated represented to the city that in his view Bookwalter was liable to him for said damages; that Bookwalter was a positive wrong-doer in the premises in having caused said excavation to be made, in violation of the ordinances of the city and for his (B's) exclusive benefit; and that if the city was liable at all, it was liable only on account of its negligence in the matter; that from these circumstances he (W.) believed he could recover a larger verdict in a separate suit against B. than he could against the city alone, or in said joint suit; and that if the city would do the things hereinafter mentioned, he (W.) would enter into such an

agreement with the city as is below mentioned; whereupon he did enter into an agreement with the city as follows: That he would next day dismiss said joint suit as to the city, and prosecute it against B. alone until a verdict was rendered; that in case such verdict was in favor of W. for such a sum as would be a reasonble compensation for his injuries, he would not prosecute any action against the city; but that in case such verdict should be in favor of B., or in such an amount as would not be fair compensation for such injuries, then and in that case he reserved the right to prosecute an action against the city; that in consideration thereof, the city agreed with W. that it would aid him in the prosecution of the suit against B., until such verdict as is above described was rendered therein—such aid to be rendered by the city's attorneys, and to consist of their advice and counsel, and their participation in the preparation of the law and the testimony and management of the case against B., so far as their services could be rendered and might be required in the prosecution of that suit; and as a further consideration, the city agreed that in the case a verdict was returned against W., or in his favor, but for an insufficient amount, then, in either case, the city would enter its appearance as defendant in any action W. might bring against it, to recover against it for said injuries, and in such action the city would waive all questions that might otherwise arise as to W. having, prior to his having brought said joint action, filed with the city clerk his claim for said damages as required by law; and that the city would file its answer; and that the trial of the action so to be brought should take place without unnecessary delay.

It is further alleged in the defense that the city, by its attorneys, duly performed said agreement upon its part, and that a verdict for $14,000 was returned in favor of W. against B.

The plaintiff, replying to the second defense, denies that he did not present any claim to the city, as stated in the city's second de fense; and says such claim was presented, acted upon and rejected more than sixty days before he began this action.

And replying to the third defense the plaintiff admits that prior to Dec. 20 1881, he had begun said joint action against the city and B., becoming satisfied that he could not legally prosecute them in one action, he deemed it proper and was about to dismiss it as to one of the defendants, and begin a new action against the party so dismissed, and proceed in the then pending action against the other: That the city, by its legal counsel, represented to the plaintiff that it was extremely anxious not to be put on trial then, and that if he would dismiss said joint action as to it, and begin a separate action against it, it would enter its appearance forthwith, and waive any informality in the presentation of his claim to the city previous to beginning such suit, and set upon defense on that ground: That the plaintiff assented to the proposition, dismissed the joint suit as to the city and at once filed his petition in this case and proceeded to trial against B. alone in the suit first begun; but the jury on such trial returned no verdict; and in

January, 1882 another jury was called, which returned a verdict against B. for $14,000 but the court set it aside on the ground that it erred in instructing the jury as to the law of the case. And the plaintiff denies that he made the agreement set up by the city or any agreement other than that set up by him.

Much evidence was introduced before us. Its effect will be stated in connection with the statement of our conclusions of law.

I. As to the legal liability of the city to the plaintiff in the matter complained of.

Section 439 of the Municipal Code of this state, which was in force at the time the alleged right of action arose provided that "the city council shall have the care, supervision and control of all public highways, bridges, streets, avenues, alleys, sidewalks and public grounds within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance." This statutory provision devolved upon the city council as the representatives of the city, the plain duty of keeping Limestone Street, with the other streets of the city "open and in repair and free from nuisance." For that purpose such streets were within the special "care, supervision and control" of the council; and the municipal code conferred ample authority and means to perform the duty. Such duty was, therefore an absolute and imperative duty; and therefore, if the city failed, in this instance, to perform such obligation it is liable in damages to the plaintiff for any injury he actually sustained by reason of such failure, if he was without fault upon his part. It is now regarded as the settled law of Ohio, and of most of the other states, independently of a statute so providing, that whenever such duty has been imposed by the legislature upon a town or city, and is neglected, to the detriment of a private individual, he has this remedy by suit against the corporation.

The gravamen of the plaintiff's complaint against the city is, that it omitted to discharge its duty to keep the sidewalk where he was injured, "in repair and free from nuisance." In order to determine whether or not this complaint is well-founded, it is necessary to inquire what, according to the settled law upon this subject, will constitute an omission or neglect on the part of a city to keep a sidewalk "in repair and free from nuisance."

Whilst in this state, the owners of lots abutting on pavements are required by ordinances of city councils, to construct and maintain them at the expense of such lot-owners exclusively; the city is, as we have seen, charged with the absolute and imperative duty of maintaining suitable sidewalks. It follows, that when a sidewalk has been constructed and thrown open to public use, and has been used with the rest of the street by the public, the city must maintain it in such repair that it will be reasonably safe and convenient to travelers. In a street, or part of a street, in a populous city, on which large numbers of foot passengers travel, the duty to repair and keep the sidewalk safe for travel extends to the whole sidewalk, throughout its entire width. This liability is primary, and extends to all obstructions, no matter by whom placed there; and the city cannot

defend against an action by a party injured by means of an unlawful defect in the sidewalk, by alleging that such defect was caused by another wrong-doer, although it may have an action against him for reimbursement. If dangerous excavations are made in a sidewalk, no matter by whom it must fill them up, or cause them to be filled up; or, if in constructing a building it is necessary to make excavations in a pavement, the city must, if such excavations be dangerous, guard them, or cause the owner of the building or his contractor to guard them, light them in the night season, or otherwise warn travelers against them. That is to say, it must keep the sidewalks in a reasonably safe condition for foot passengers by night as well as by day; and a foot passenger proceeding, albeit in the night time, along a side-walk, has a right to presume that it is free from dangerous obstructions; and if he is injured in consequence of falling into such obstructions which the city, having left or allowed to be left unguarded, he will be entitled to recover damages from the city for such injury, even though the obstruction was created by a third person, provided the city had either actual or constructive notice of the obstruction for such length of time prior to the injury as to have enabled it to remove the obstruction or guarded it.

A city is, in this respect, liable for a lack of only ordinary or reasonable care. It is not held to the liability of an insurer; but the same rule of diligence is exacted from it that is expected from private persons in the control of any business involving a like danger to others. And unless the defect or obstruction causing an injury was produced by the city itself, or by some one in privity with it, it will not be liable for the damages caused by the defect, unless it had notice thereof, express or implied, for a sufficient length of time before the happening of the accident, to have enabled it, by the exercise of reasonable diligence, to abate it; or, if for any reason, it ought not to be immediately removed, to establish barriers or signals for the protection of travelers.

If the defect in the sidewalk caused by an excavation made by a party in the erection of a building is of such a nature and has existed for such a length of time as by reasonable diligence in the performance of the duty of the city to keep the same open and "in repair, and free from nuisance," the defect ought to have been known by the corporate authorities then notice will be presumed and proof of actual knowledge will not be necessary to render the city liable for injuries thereby occasioned. In the latter class of cases the foundation of the liability is negligence, and if the defect in the sidewalk had only existed for a short time, as for a night or a day, so that the proper officers of the city could not reasonably be presumed to have had any knowledge of it, the notice of the defect in the sidewalk, to the city, should be shown, in order to make it liable. But if the defect was of such character and had existed for such a length of time as by reasonable diligence in the performance of the duty of the city the defect ought to have been known by it, then notice will be presumed, and proof of actual notice is not necessary. The

principle is this, that if the city, by the exercise of reasonable diligence in the performance of the duty enjoined by its charter, has the means of knowledge of defects in a sidewalk though caused by others, and negligently remains ignorant thereof, it is equivalent, in law, to actual knowledge. In such case, it is liable because it is guilty of negligence in not discovering the defect.

To illustrate the application of this principle, suppose there be a violent rain storm in the night time, and by the choking of sewers, theretofore and under reasonably anticipated circumstances sufficient to carry off the fallen water, a torrent be turned across a street, and it washed out, to such a state that injury occurred to some one abroad on his travel, before the working hours had come again in which the damage could be repaired or warned against, the city would not be liable for that injury. But just as it would be liable for an injury happening thus, after a reasonable time had elapsed, in which it could be presumed to have become aware of the peril in its public streets, so in our view, it is liable, if after the willful act of one not in its employment has been made a place of danger in a street or sidewalk, a lapse of time has run long enough for it to have learned of the danger and to have removed the obstruction. It seems evident that if the defect be so notorious as to be observable by all persons who pass by it, this comes in the place of express notice of the existence of the nuisance. The continuance of such a nuisance for a long time would render it notorious; and it has been decided that that fact of itself is equivalent to express notice.

Notice, either actual or constructive to the street commissioner of a city, is notice to the city. If, by any reasonable diligence and care in the discharge of official duties, he ought to have known of a dangerous defect or obstruction in a sidewalk and have removed it, or caused its removal or protected foot passengers against it by suitable barriers or signals, notice will be presumed against him as the city. He must be regarded as the officer and agent of the city, for whose default in this respect, the city is responsible.

An excavation in a sidewalk in a populous city of such dimensions and in such part of it as that foot passengers fall into it, they may suffer great harm, left at night without guard, protection or light is a nuisance. The authorities of a city may summarily abate such a nuisance, although it may have been created by an independent wrong-doer. Such authorities may, and it is their duty, to abate a nuisance upon or in a street or sidewalk, if it be such as materially interferes with and prevents the free exercise of the right on the part of the public to the use of the easement, or endangers the lives of persons passing over it.

The city of Springfield was, then, by reason of the provision of the statute above quoted, under a primary obligation to keep its streets and sidewalks in a safe condition for travel; it is responsible for damages resulting from a failure to perform that duty, although the defect or obstruction, which caused the injury was the work of an independent wrong-doer. Its remedy for loss,

in such case, is by a suit against such wrong-doer for reimbursement.

The legal principles and rules above stated, are abundantly established by numerous decisions of courts of highest authority.

We will now proceed to state what is the case of negligence made by the evidence against the city in the case submitted to us.

The construction of the foundation walls of the Bookwalter building was begun on or about September twelfth, and finished in October, 1879. The brick layers began laying brick October third, and finished the nineteenth or twentieth of December. There were two openings left in the foundation wall on Limestone Street for coal chutes, which were about eight feet from the top of the wall down to the bottom, and about three feet wide. One of them, the north opening, was about twelve feet from the corner of the building at Limestone and High streets, called the octagon corner, Limestone street running north and south and High street running east and west. The partition wall which divides the two coal chutes is nineteen feet south of the wall on High street. The width of the sidewalk on Limestone street is eleven feet. A tree, about twelve inches in diameter, stood nearly opposite the south jam of the first or north opening, and the west side of the tree was about two feet from the curbstone. An excavation was made in the sidewalk on Limestone street, commencing at or near the octagon corner, and running southward along the foundation wall, widening and deepening toward the north coal chute, at which opening the excavation was about five or six feet wide and about the same depth. One or two planks or joists were laid lengthwise over the sidewalk and excavation, about eighteen inches from the west side of the tree; the plank walk was twelve inches wide if there was only one plank, as some of the witnesses testify, and twenty-four inches wide if there were two, as others testify; so that there was an open space of five or six feet between the plank walk and the north opening. Such was about the condition of the sidewalk from September twelfth, until plaintiff was injured, December eighteenth. There was no barrier, nor signal, nor lights of any kind to protect or warn foot-passengers of the situation, either day or night. At the corner of said sidewalk on Limestone and High streets, there is a city lamp-post, but it was not lighted on the night of December eighteen, until forty-five minutes past nine o'clock, about two hours after the plaintiff fell into the excavation at the north opening.

The city clerk issued to said Bookwalter a "permit" to erect said building, in pursuance of an ordinance of the city, and September 21, 1879, the city council instructed the city street commissioner to take the gravel from the cellar and use the same in repairing the streets of the city The contractor who erected the building for Bookwalter testified that the city hauled away from the cellar twenty five or thirty loads of gravel.

The city street commissioner saw the workmen engaged in tearing down the old building and in erecting the new building. While

they were laying the foundation for it he passed down Limestone street every day or every two days, but he testified he did not recollect passing on the sidewalk on that street. His headquarters were at the city engineer's office, about a square and a half from the Bookwalter building. He saw them digging the foundation of the building in High street. He saw them hauling out dirt when he was standing on the High street sidewalk. On one occasion when they were leveling down the sidewalk, he passed along High street. He testified he could not get along very well on account of so much lumber being piled around there.

By an ordinance of the city the city street commissioner had "general charge and supervision of the streets, alleys and public ways within the city, but subject to such rules, regulations and ordinances as the city council may, from time to time, prescribe."

The chief of police passed in view of the sidewalk on Limestone street almost every day two or three times; but he did not pass on it very frequently. He didn't pass on it from the time they commenced tearing down the building until the rubbish was cleared away. He passed along the outside of the sidewalk. He saw the excavation; he first saw it when they were digging it; and he saw it afterwards. The police headquarters and the offices of the mayor and marshal were across from the Bookwalter building.

The mayor of the city saw the workmen excavating. He boarded at the Lagonda House, directly across High street from the Bookwalter lot. He thinks he didn't pass on the west side of Limestone street while the building was being erected, but he did pass within twenty-five or thirty feet of the building. He saw boards laid down in the sidewalk, and from that fact supposed there was a hole there. He directed an officer to give notice to the builder for the removal of rubbish on the street, and sent word to the council that they should remove such rubbish.

One of the members of the city council walked upon the board pavement while the building was being erected, frequently. He testified that the excavation was all along Limestone street, but most of it was about the corner of Limestone and High streets; and that the boards extended until foot passengers got on solid ground again on High street; that it was up beyond the octagon corner, and then it extended south some place beyond the tree.

Another member of the council saw the workmen commence the construction of the Bookwalter building. He observed them digging the foundation. He passed along Limestone street during some weeks very frequently, and in others not at all. He testified that he probably noticed an excavation, but gave no particular attention to it.

The Bookwalter building is on that part of Limestone street which leads from the railroad depots to the two principal hotels in the city. One of the depots is a little over a square, and the other about two squares from one of the hotels. On that account there is a great amount of travel on that part of the street in the night season as well as during the daytime.

The evidence shows that the defect in the condition of the sidewalk in question was open, visible and notorious. It was regarded as unsafe and dangerous by many persons who had occasion to pass upon it. In view of the nature of the defect, and the great number of foot passengers, many of whom were strangers in the city, who had to pass there, the defect ought to have been remedied, or signals should have been established, or barriers erected. And in view of the facts that there was so much traveling, both day and night, over this part of Limestone street, and that the dangerous character of the defect was visible to any one who passed along the sidewalk, we think that the street commissioner, or other agents of the city, either knew of the existence of the defect, or that in the exercise of ordinary diligence they ought to have known of its existence.

We are therefore of the opinion that the city was guilty of negligence as alleged by the plaintiff in his petition.

The plaintiff was in no wise at fault. He was guilty of no negligence. On the afternoon of the eighteenth of December he started for the town of Kenton where he resided via Springfield. On his arrival in Springfield he found that the railroad train from there to Kenton would not leave until about half past seven o'clock. The train from Columbus stopped east of the depot of Limestone street; he got off the train and walked to High on a street east of Limestone; and he knew nothing whatever of the condition of the pavement in front of the Bookwalter building. He started on foot from the Lagonda House for the railroad depot about a quarter past seven o'clock at night. It was dark. The moon didn't set until forty-five minutes past nine o'clock. There was nothing whatever to warn him of the dangerous pit in the sidewalk—no signals, no lights, no barriers of any kind. A package which he was carrying in his left hand struck against the tree in the pavement opposite the first opening left for a coal-chute. This caused him to direct his course a little to the right, feeling his way cautiously with his walking cane in his right hand. But he fell into the excavation. He was badly injured by the fall. Some of his injuries are permanent.

II. As to the second defense:

This defense is based on the first clause of section 2326, revised statutes, which reads thus: "No person, who claims damages arising from any cause, shall commence a suit therefor, against the corporation, until he files a claim for the same with the clerk of the corporation, and sixty days elapse thereafter, to enable the corporation to take such steps as it may deem proper to settle or adjust the claim."

At the meeting of the city council, held May 18, 1880, the city solicitor presented a claim for damages against the city as follows:

"To the city council of Springfield.

"In November, 1879, Moses B. Walker, of Kenton, Ohio, in the evening after dark, while on his way from the Lagonda hotel to the depot, on the west side of Limestone street, in front of the

new building then being erected by John W. Bookwalter fell into the deep cellar under the sidewalk, which had been carelessly and negligently left open by said city and Mr. Bookwalter, and was seriously and permanently injured, from which he is not likely to recover, and is greatly damaged.

"On his behalf I ask a just and fair compensation for his injuries.

"Respectfully yours,
"GEORGE SPENCE."

The following action was taken thereon at same meeting:

"Presented a claim for damages by Moses B. Walker, of Kenton, Ohio, through George Spence, his attorney, on account of being injured by falling into an excavation on Limestone, at Mr. Bookwalter's building, corner of High and Limestone streets, in November, 1879."

"Referred to City Solicitor and Mr. Bookwalter."

The council never allowed the claim as a valid claim against the city.

Immediately upon the reference of the claim by council, the same went into the custody of the city clerk, and has there remained ever since, except when he allowed it to be taken temporarily by persons who desired to use it.

The present suit was not begun until January 10, 1882, nearly two years after the claim was presented to the council.

In our view, the plaintiff complied with the statute. The manifest object of the legislature in requiring claims against a city to be presented sixty days before suit is brought thereon, was to give the council an opportunity of adjusting or liquidating such claims without suit, if the council, upon examination, determine to do so. Sixty days were deemed a reasonable time for such examination. It follows that although this claim was not technically filed with the clerk before being presented to the council, yet the presentation of it to the council, their action upon it, and the subequent custody of it by the city clerk, was a subsantial compliance with the statute.

III. As to the third defense:

An agreement which is enforceable by an action at law, requires for its creation at least two parties. The parties must have a distinct intention, and that intention must be common to both, and there must be communication by both parties to one another of their common intention. The intention of the parties must refer to legal relations. Agreement, then, in the sense of the law, is the expression by two or more persons of a common intention to affect the legal relations of those parties. In our judgments, the arrangement that was made between the legal counsel of the parties concerning the dismissal of the action originally begun by the plaintiff in this case against Bookwalter and the city, etc., was not intended to and did not create contractional obligations between the parties; but, on the contrary, it was intended to be, and was a professional arrangement between the legal counsel of the parties to a

pending suit concerning its management in court. Such arrangements are not understood to create obligations which can be asserted and enforced by actions of law; but the court in which the action is pending may take notice of them and prevent the counsel of either party from taking any action which will operate as a fraud upon either party, by reason of his or his counsel's reliance upon such professional arrangement.

After a very thorough review of the evidence on this branch of the case, we are convinced that the counsel of the parties had no common intention to enter into a contract which should preclude the plaintiff in this case from beginning a separate action against the city, after he should dismiss the joint action against it, because of Bookwalter's objection that even if Walker had a right of action against him as well as one against the city, he could not join them in one suit. The counsel of the city may have understood that such was the legal effect of the arrangement; but it is plain, we think, that Walker and his counsel did not so understand it. The plaintiff was present only a part of the time during which the arrangement was discussed. The city council knew nothing of the arrangement until after it was made; and they took no action in regard to it until after the agreement submitting this case to us was entered into.

Again, if the arrangement did create contractual obligations, and was such as the defendant's witnesses understood it to have been, (and we have no doubt they testified to the transaction as they recollect it), we are of the opinion that upon the setting aside of the verdict rendered in favor of the plaintiff against Bookwalter, the plaintiff had a right to begin the present action. A verdict is of no effect or value unless judgment be rendered upon it, for the reason that it cannot be enforced. Surely the plaintiff would hardly have consented that he would not prosecute an action against the city, provided he obtained a verdict against Bookwalter, and the court should set aside such verdict, so that it would be of no value to him.

And again: The consideration of the alleged arrangement, on the part of the city, was, we are inclined to think, so vague that, if the arrangement was actually made as alleged, as to be practically impossible to enforce and for that reason would not be obligatory upon the plaintiff.

Finally, on this branch of the case, there seems to be a conflict in the evidence as to what arrangement or agreement was really made. We think, however, that the conflict is rather verbal than substantial. But if this view be not correct, and there is a real conflict, the defendant has not established its third defense. For inasmuch as such defense consists of new matter the defendant could not establish it without preponderance of evidence, and for anything appearing before us, the witnesses for either side are entitled to equal credit, and three of them testify in behalf of the plaintiff and two of them in behalf of the defendant.

IV. As to the amount of damages.

The plaintiff should be satisfied for all actual damages he has sustained, by reason of his injuries, in the loss of business, his health, his time, and the amount of his expenditures necessarily incurred in consequence of such injuries. No exemplary or punitive damages can be allowed in such an action against the city, although they may be in an action against the party or parties who actually created the nuisance which was the cause of the injuries.

Under all the circumstances, the plaintiff is, in our judgments, legally and justly entitled to recover from the city the amount of damages which we have awarded to him against it.

We therefore find as follows:

First—That the city of Springfield shall pay to said Moses B. Walker on or before the first day of December, A. D., 1883, the sum of eight thousand dollars, and that said sum shall bear interest from this date.

Second—That the city of Springfield shall pay the accrued costs in the case of Walker v. The City of Springfield, and the costs of arbitration, and compensation for arbitrators on or before September 1, 1883.

Third—That upon the payment of said sum said Moses B. Walker shall execute a release in full for all claims, damages and demands against said city, by reason of said suit, and in satisfaction of said award.

Fourth—The costs and expenses are separately taxed and referred to in a schedule which is made a part of this award.

R. A. HARRISON,
OSCAR T. MARTIN,
A. P. LINN COCHRAN,
Arbitrators.

CONSTITUTIONAL LAW—DITCHES.

[Clark Common Pleas Court.]

*JOHN SMITH ET AL v. THOMAS MCKEE ET AL.
(THE MCKEE DITCH CASE.)

The law relating to ditches as provided for in sections 4447, 4510 is unconstitutional, because it does not provide that the compensation for damages for the land appropriated for any given ditch shall first be paid in money or secured by a deposit, as required by section 19, article 1, of the constitution.

MILLER, J.

The court says that in the earlier legislation of this state upon the subject of drainage it does not seem to have been within the legislative apprehension that the location and cutting of a ditch or drain was in any sense an appropriation of private property to public use, for the statutes were neither predicated in language upon the idea that the ditch or drain was demanded by or conducive to the public health, convenience or welfare, nor did they provide for

*The supreme court in the case of Zimmerman v. Canfield, 42 O. S., 463, held that the statutes, relating to county ditches, in force in 1881, were valid and constitutional enactments. This holding of the supreme court necessarily overrules the holding in this case.

any compensation to the land-owner for the land occupied by such an improvement, and even in the first statute enacted under the constitution of 1851, (February 24, 1853, Ohio L. 350) there is no recognition of such an improvement being of public benefit, nor is there any provision as to compensation. Now, however, it is well settled that such improvements are a taking of private property for public use. Mills says Eminent Domain, section 30 that "The constitutional provision is adopted for the protection and security of the rights of the individual as against the government, and the term 'taking' cannot be limited to the absolute conversion of real property to the use of the public, and not include cases where the value is destroyed by irreparable and permanent injury inflicted on it.

Any permanent change in title, or incumbrance on property, or exclusion of the owner from its enjoyment, or substantial injury to the land—such as discharging water upon it—is a 'taking' within the meaning of the constitution.

The court says: "This was definitely settled by the supreme court of Ohio in the case of Reeves v. Treasurer of Wood county et al., 8 O. S., 333, in construing the act of May 1, 1854, authorizing the trustees of townships to establish water courses, and the amendatory act of April 14, 1857, in which the court pronounces that the said acts are in contravention of the nineteenth section of the bill of rights, inasmuch as they authorize an appropriation of private property without reference to the public welfare.

The result of this decision was the act of March 24, 1859 (S. & C. 523), authorizing the county commissioners, whenever the same is demanded by, or will be conclusive to the public health, convenience or welfare, to cause the location and establishment of ditches, drains or water courses. Such recognition of the public character of said improvements is found in every ditch law enacted from that time to the present. So that clearly the acts under which the present proceedings are before the court, being sections 4447 to 4510 of the Revised Statutes of Ohio of the year 1880, and the amendments thereto, are within the limitations of, and are to be construed with reference to section 19, article 1, of the constitution of Ohio.

As the court says, the history of legislation shows that in the act of 1854 "authorizing the trustees of townships to establish water courses," the principle of compensation to the owner of lands upon which a ditch might be located, was fully recognized in the ninth section as follows: "Any person who shall suffer any damage, by cutting any ditch or water course, or throwing up an embankment or changing any water course shall be paid, by those interested in the same, a reasonable compensation in money, to be determined according to the provisions of this act, within thirty days after such damage shall have been ascertained." By the amendatory act of 1857 this section is changed so as to require claimants for compensation to make claim therefore at the time the trustees shall meet, for the purpose of locating said ditch or water course; and

thereupon the trustees shall estimate and determine the amount of compensation to which the claimant will be entitled, for the appropriation of his land, and the amount of said compensation to which the claimant will be entitled, shall be assessed against the parties interested in the ditch and shall be collected as are the other expenses and damages, and when collected shall be paid over to the party entitled thereto. In addition thereto, by the amendatory act, there was given to the claimant the right of appeal to the probate court and an assessment of his compensation by a jury.

The court says that the supreme court, in Reeves v. Treasurer of Wood county, before referred to, with reference to the question of compensation under the above named acts, "But in this respect we think the act is unobjectionable," and that he has had some difficulty, in view of the above decision of the supreme court upon the laws of 1854 and 1857, "in that the language of those laws is somewhat obscure as to whom the compensation shall be charged and when and how collected and when paid over. But at any rate the provisions of those acts are widely different from those of the Revised Statutes of Ohio of 1880, under which the work of construction of the ditch will have been let to the lowest bidder; bonds taken to secure the performance of the work by the contractor; a time fixed not beyond one hundred and fifty days from the day of the sale, for the completion of the work, and, the contractor will have been engaged in the work of constructing the ditch before the commissioners shall have met to determine under section 4479 (if that is applicable) at what time, and in what number of assessments the compensation shall be paid. In other words, the work of constructing the ditch under the present law, will have been commenced and possibly completed before the commissioners can meet and determine when and how the compensation shall be paid.

The act of March 24, 1859, intending to remedy the defects of the act of 1854, authorized the county commissioners, whenever the same is demanded by, or will be conducive to the public health, convenience or welfare, to cause to be established ditches, drains, or water courses. In this act the right of the land-owner to compensation, to have it assessed by a jury and to have it paid or secured before the work of construction is entered upon, is clearly recognized by the provision that when compensation is claimed, the commissioners shall certify the proceedings to the probate judge of the proper county, whereupon such proceedings shall be had to assess and determine the compensation of claimants by a jury as are required by the appropriation act of April 30, 1852, and supplementary acts. The act of 1859, further provides as follows: 'And the compensation so found due and assessed in favor of said claimant or claimants shall be certified by the probate judge to the county auditor, and paid out of the county treasury or remain deposited therein for the use of such claimant or claimants; and said county commissioners shall, at the next regular session after such compensation shall have been assessed and paid, or de-

posited as aforesaid, proceed to locate and establish such ditch, drain, or water course.'

A clear cut provision that the compensation shall be first paid, or first secured by a deposit of money before the commissioners could enter upon the land for construction of the work.

There was a law passed by the legislature, May 1, 1862, giving township trustees jurisdiction as to the location and establishment of ditches, which provides that at the same time the trustees locate any ditch, they shall 'examine and determine all applications made to them for compensation and shall specify the several amounts, by whom and to whom paid and the time of payment.'

In giving construction to this law in the case of Sessions v. Crunkilton, 20 O. S., 357, the supreme court says: "It is true that the statute does not specially state who shall pay the amount of the compensation allowed for appropriated lands, or what particular persons those are to whom it shall be paid. But a reasonable construction of other provisions of the statute clearly shows the persons to whom compensation is to be paid are the claimants, and the persons by whom it is to be paid are the petitioners or others who may desire the improvement. It is clear that no order can be made for the opening of the ditch until the compensation for the lands appropriated shall have been paid, and there is no power given to the trustees to compel the claimants to pay any portion of their own damages. The amount of compensation for lands appropriated is no part of the sum which may be certified to the auditor to be placed on the duplicate to be collected in the form of taxes."

Can this much be said with reference to the county ditch law now in force and under which this proceeding is pending? Certainly not.

That provision in the township ditch law of 1862 has been continued in every act authorizing township trustees to locate ditches until the present with the addition in section 4521, Revised Statutes 1880 of the words 'and no order for the opening or sale of any ditch or any part thereof, located and established under this chapter shall be made until the amount of compensation for land appropriated shall have been paid.'

The provision in the act of 1859 authorizing county commissioners to locate and establish ditches, which requires the compensation to be paid out of the county treasury on the order of the probate judge, or to remain on deposit there for the claimant or claimants, was substantially continued in every successive county ditch act until in the revised statutes of 1880 it was left entirely out.

Will any one explain why the code commissioners took such excellent care not only to retain the provision in the township ditch law as to the payment of compensation, but also to fortify it by the strongest language prohibiting an order for the opening or sale of any ditch or any part thereof, until the full amount of compensation for land appropriated shall have been paid; and on the

other hand, not only left out of the county ditch law the provision for payment of compensation out of the county treasury, but made no other provision for it, or at least a very inadequate one?

It looks to the court like a *lapsus* which is the result of inadvertence, and that it was not intended to leave the law as to compensation in the present shape.

There are only two sections in the present law under which it is claimed that any provision is made for the payment of compensation in cases arising before the commissioners. Sections 4461, 4479.

Bear in mind, that by sections 4475 and 4476 the ditch has been let to contract, and the work of constructing the same has been, or may have been already commenced before the commissioners are required to meet to determine the assessments and place them on the tax duplicate. If it is held that the compensation and damages allowed to claimants are, under this section, to be copulated with the costs and expenses of constructing the work, and provided for by assessments running through a series of years, and collected on the tax duplicate of the county, can it be said that the compensation of the land-owner has been first paid or first secured by a deposit of money? How would such a provision read placed side by side with the language of the supreme court in 20 Ohio St., 357, in which they give as one of the reasons for sustaining, as to the question of compensation, the township ditch law, that 'the amount of compensation for lands appropriated is no part of the sum which may be certified to the auditor to be placed on the duplicate to be collected in the form of taxes.'

While the exercise of the power of eminent domain is an incident to the sovereignty of every state, yet by the constitution of the United States, and those of almost all, if not all the states, a limitation is placed upon this power by requiring that compensation be made to the owner. The Ohio constitution goes farther, and provides that this compensation shall be first paid or secured to be paid before the land is taken. In this particular the Ohio constitution stands almost alone, and has originated a series of judicial decisions that are peculiar to this and a few only of the other states. It was evidently the intention of the framers of our organic law, at a period when public works and particularly railroads were being largely projected, to provide against evils to which land-owners had been subjected in condemnation proceedings, and not leave their compensation for lands taken for public use subject to the uncertainty of payment by railroad companies or other corporations whose property was covered with mortgages to secure bondholders, and it may be added, that it certainly was not the intention to leave it subject to be paid by installments of assessments placed on the tax duplicates, the payment of which is liable constantly to be enjoined on account of substantial defects, either of parties or practice in the proceedings through which the lands had been entered upon and occupied for public improvements. The land-owner was not to be driven to his remedy at common

law, after entry for damages, nor to bring suit to recover his compensation after it was assessed; nor to defend an injunction proceeding against an assessment placed on the tax duplicate for his benefit. He was to have it in hand or deposited where he could lay his hand upon it without resort to any legal process in his own behalf, to obtain it; and this too, first, that is, before his land was in any way taken for, or subjected to, a public use.

But if, however, it is held that the compensation and damages of the land-owner is not to be aggregated with the costs and expenses of constructing the work, and raised by assessments placed on the tax duplicate, as a close examination of section 4479 and subsequent sections might seem to indicate then there cannot be found in the law any provision whatever, by whom and when payment of compensation is to be made. It seems to have dropped out of the law entirely, as before intimated by inadvertence. It is the opinion of the court that the code commissioners, on account of the fact that, although the ditch law is sustained on the ground of being a proceeding for the public welfare, yet that it so largely subserves merely private interests that such compensation ought not to be paid out of the public treasury as had been before provided, left that provision out of their revision, intending to provide for it in some other way and failed to do so.

It has been suggested that such provision is made in section 4461. "The commissioners shall upon actual view of the premises, fix and allow compensation," etc. Allow out of the county treasury? It does not say so. Allow against the petitioners? Neither does it say that. It says simply, allow. Against whom? Nobody. But this section goes on to say "and assess such damages as will in their judgment accrue from the construction of the improvement." Here are three words in this section of somewhat different signification used with reference to the compensation and damages—"fix" —"allow"—"assess", and in the connection in which they are used, they are practically tautological; they are words of judgment to be defined to mean "determine", and in no sense can the words "allow" be held to point to the source from whence the compensation shall be derived. It is hardly worth while to argue the last proposition.

But it is urgued that if there is no provision in the law for the payment of the compensation, then the constitution executes itself and the law can stand. How will or can the constitution execute itself in this particular? In 4 Ohio St., 175, Judge Thurman, in commenting on another portion of section 19 of the bill of rights, as to assessment of compensation by a jury, says: "In this particular the constitution does not execute itself." Why? Undoubtedly for one reason because it will require the machinery of a court, and methods of calling and impaneling a jury—details which the constitution does not provide. Would it not likewise require the machinery of a court, or some tribunal, or the grant of power to some officer to enforce the collection or payment of the compensation? Neither does the constitution here make provision any more

than in the other case. The compensation would not surely pay itself. But it is said that when ascertained the land-owner could himself by proper proceedings enforce its payment. It is enough to say by way of answer that it is precisely to guard against any loss or danger of loss to the land-owner through the expenses of a law-suit or otherwise that section nineteen was incorporated into the constitution." He was to have his compensation, all of it without one dollar of loss or expense in collecting it.

From these various considerations the court is of the opinion that there is not in the law any adequate provision for the payment of compensation or deposit of money to secure the same, or its equivalent before the land is taken that is entered upon and made servient to public use, in the actual work of construction of the ditch, and hence that no valid final order for such construction can be made. To what end then would be the calling of a jury to determine the necessity and practicability of the proposed ditch, and assess the compensation of land-owners, except to entail upon the parties a lengthy trial and a large expense in addition to that already sustained by them. If no valid final order can be made, then all preliminary proceedings are inoperative and of no avail.

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