# REPRINT

OF

# OHIO CASES PUBLISHED

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# TABLE OF CASES.

**Vol. 10, Ohio Decisions Re.**

**Giving the Volume and Page of the Original Publication and This Book.**

# REPORTS

OF

CASES ARGUED AND DETERMINED

IN

# OHIO COURTS OF RECORD

PUBLISHED IN

## THE WEEKLY LAW BULLETIN.

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[Cincinnati Superior Court, General Term, Oct., 1884.]

WM. W. TALIAFERRO ET AL. v. YOUNG MENS' CHRISTIAN ASSN.

**A power of appointment to be exercised by last will cannot be exercised by deed. Nor can the grantee of such a power lawfully exercise the same for a valuable consideration.**

The action was brought to recover the possession of real estate and damages for its detention. It was submitted to the court at special term, a trial by jury having been waived, and was reserved to general term upon the pleadings and evidence.

The material facts were as follows:

The property in question was devised by Richard Southgate to his daughter, Mrs. Parker, for life, with power in her to devise it by her last will to any person or persons lineally descended from Southgate, and to none other.

In the year 1870, Mrs. Parker in consideration of $5,000 paid to her, made a perpetual lease of the property to one Heyl, with privilege of purchase. The three children of Mrs. Parker joined with her in the execution of the lease, and in it she covenanted not to change a will she had then made appointing them as the persons to whom the property should pass at her demise. The leasehold interest of Heyl was afterwards levied upon and sold at sheriff's sale and purchased by defendant, and the latter now claims under it. Afterwards, and before the death of Mrs. Parker, her son Henry died unmarried and without issue, and her son William died leaving children who are the plaintiffs in this action. After the death of her two sons Mrs. Parker cancelling the first

will, made a new one appointing her daughter Julia and the plaintiffs as the persons to whom the property should go. Mrs. Parker died, and her last will was admitted to probate on April 9, 1884.

PECK, J.

The plaintiffs claim that Mrs. Parker, having only a life estate, could make no lease extending beyond her life, and that they are entitled to an undivided half of the property either by virtue of the appointment contained in her last will, or through the direct operation of the will of their great-grandfather Richard Southgate. It is claimed on the part of the defendant that as Mrs. Parker had made a will appointing the three children of her first husband as the persons to receive the property, and covenanted with the lessee not to change it, she could not thereafter execute another will making a different appointment.

The power conferred upon Mrs. Parker was to be exercised by "last will," and it is to be presumed that those words were intended to be understood in their ordinary sense. The power to dispose of property by last will is one that may be exercised at any time during the life of the testator, and it is therefore to be presumed that when Mr. Southgate designated that as the mode of exercising the power, he intended that Mrs. Parker should have her whole life time in which to select the appointees, so that her final determination might be adapted to the circumstances last existing. If she were permitted to exercise the power by an instrument taking effect at any time prior to the decease, she could in that manner deprive herself of the important power to change or revoke, which is implied in the power to act by last will. If such an execution of the power were permissible, it might easily happen, by change of circumstances, as the birth of some eligible person, that the appointment would be utterly opposed to her final wishes. Such an appointment, repugnant to the *last* will of the person clothed with the power, would be plainly inconsistent with the intention of the person conferring the power.

A power to be exercised by will cannot be exercised by deed. 1 Sugden on Powers, *256, 257, 261, 262; Moore v. Diamond, 5 R. I., 121, 130.

The fact that Mrs. Parker, for a consideration paid to herself, covenanted not to change the appointment contained in the draft of a will afterwards cancelled, does not benefit the cause of defendants—but rather operates against them. The donee of a power of appointment cannot exercise it for her own benefit. 2 Pomeroy Eq. Jur. sec. 920; 2 Perry on Trusts, sec. 511*a*.

Any attempt to exercise the power so as to secure a pecuniary benefit to the donee is regarded as fraudulent.

The last will of Mrs. Parker is the only instrument to which we can look for the appointment by her, and as we find there a due exercise of the power, it must prevail, and such being the case it is unnecessary to consider what would have been the effect of Mr. Southgate's will if no appointment had been made.

Judgment for the plaintiffs.

FORCE and HARMON, JJ., concur.

Wilby and Wald, for plaintiffs.

W. M. Ramsey and M. B. Hagans, for defendants

## JUDGMENT—SALE. 36

[Superior Court of Cincinnati, General Term, Oct., 1866.]

DAVID BLOCK ET AL. V. JOSEPH S. PEEBLES ET AL.

1. Where a former judgment is pleaded in bar of a new action, and it appears from the record when offered in evidence, that the former judgment was in favor of three persons, only two of whom are parties to the action, the record does not support the plea and is incompetent as evidence.
2. Where a party obtains possession of goods by fraudulently personating another and then delivers them to a *bona fide* purchaser for value, the person from whom the goods were obtained may maintain an action for conversion of the goods to his own use, against such purchaser, if the latter refuses to deliver up the goods, or account for their value.

PECK, J.

This was an action to recover damages for an alleged conversion by defendants below, of certain goods claimed to be the property of the plaintiffs below. The defendants denied generally that the title to the goods was in the plaintiffs at the time they received them, and also plead an adjudication by the circuit court of St. Louis Mo. in bar of the action.

The facts as disclosed by the bill of exceptions are these: Peebles' Sons received a letter of inquiry from Evansville, Indiana, signed by the name "W. Alexander," asking for a statement of prices and qualities of imported cigars, to which they replied giving statements as requested. Thereupon they received an order for shipment of a certain number of cigars signed with the same name. It appears, from the testimony, that they did not know "W. Alexander," of Evansville, but that they consulted the books of a Commercial Agency and found that there was a substantial and responsible merchant, rated high, doing business in Evansville by that name. They took the further precaution, however, to ask a special report from the Commercial Agency concerning him, and that report was, that W. Alexander was "gilt edged." Thereupon they shipped the goods, as requested, by express, to be paid for "net cash." A few days after the shipment they received a notice from the Commercial Agency that it had been discovered that there were two parties in Evansville going by the name of "W. Alexander," and that there was reason to believe that one of the parties was not to be trusted. Thereupon Peebles' Sons immediately dispatched their attorney to Evansville to investigate the matter and secure the goods, if possible. The attorney proceeded to Evansville, and, after inquiry, found that the goods had been received there, not by the Alexander who was engaged in business there, and in good standing, but by another party, and by him immediately shipped to St. Louis, and, that being the case, the learned and very diligent attorney proceeded to St. Louis, and there, with the aid of a detective, discovered the goods in the auction house of the defendants. After some talk and negotation, an action in replevin was commenced by Peebles' Sons, in St. Louis, against the defendants, in which they ultimately failed; the judgment was for Block, Dean & Company. Afterwards this action was commenced to recover for the conversion of the goods. Under the writ of replevin in Missouri, the practice appears to be that the goods are permitted to remain in the possession of the defendants upon their giving bond for the production of them, or payment of their value, the practice being exactly the reverse of what it is with us, and in that way, the defendants below had retained posses-

sion of the goods, having given bond, and had afterwards sold them at auction and refused to account to Peebles' Sons for the proceeds. At the trial of the action below the plaintiffs offered evidence tending to prove the facts which I have stated, except as to the action of replevin in St. Louis, and rested their case. Thereupon the defendants offered a record of the judgment in the action in replevin in the circuit court of St. Louis, as part of their defense, and, upon objection, the court excluded the record. Several objections were made to the record, the first being that it was not the record which was pleaded in the answer. Such turned out to be the fact. The answer alleged that in the action between the same parties in the circuit court of St. Louis a judgment had been rendered in favor of these defendants. The record, upon examination, showed that the defendants in that action were three persons, who then constituted the firm of Block, Dean & Company. The defendants in this action were only two of the three persons. The parties were not the same, and as it was alleged in the answer that they were the same, and issue had been taken on that allegation in the reply, the record was inadmissible under the ruling of the Supreme Court in the case of Newberg & Goldsmith v. Munshower, 29 Ohio St., 617, which is in accordance with a great number of similar cases decided in this country and in England.

A request for leave to amend the answer so as to meet the alleged variance was then made and refused by the court. Whether leave to amend pleadings shall be given, is within the discretion of the court, and a court of error will not interfere with the exercise of the discretion except where it plainly appears that it has been abused. In this case the answer setting up this record had been on file some two or three years. The reply denying that there was such a record, had been on file nearly the same length of time, and the trial had progressed so far that the plaintiffs had rested their case when defendants asked leave to make this amendment. It was apparently only an offer to plead the record as it was; but if they had pleaded the record and then offered it as it was, it would not have been a defense, for the reason that it would then have appeared from the record itself that the parties were not the same in the two actions, and it would have been necessary for the defendants to allege and prove, further, that, in some way or other, the defendants in this action had become the successors in interest to the successful parties in the other action. No offer of that sort was made, and we do not think there was any abuse of discretion in refusing leave to amend as asked. The verdict was in favor of the plaintiffs below, and Block, Dean & Company now seek to reverse the judgment entered upon that verdict.

Plaintiffs in error claim to have been innocent purchasers of the cigars; that they acquired a good title from the party who turned out to have been the person who ordered them from Peebles' Sons, and who called himself, in St. Louis, "P. Anderson," and they contend that the title had passed from Peebles' Sons to this party by reason of the transaction between them which I have already stated. They urge that, although brought about by fraudulent representation, there was a sale to Anderson, and if such were the case their title may be good; but if no title passed to Anderson, of course they acquired none.

Now, it seems to us quite plain that there was no intention on the part of the plaintiffs to sell to this party. They supposed they were dealing with an entirely different person. It is not a case where a person,

by false representations as to his credit, or by other false statements, induces a sale to himself and thereafter transfers the goods to a *bona fide* purchaser without notice and for value; for, in this action there was no intention, as I have said and as the record conclusively shows, on the part of Peebles' Sons to entrust this person, this Alexander, or this Anderson, or whatever his name was, with either the possession or the title to their goods. They supposed they were dealing with a reputable and responsible merchant in Evansville, by the name of Alexander. And the case is very closely analogous to that of Cundy and others against Lindsay and others, reported in 3 Appeal Cases, 459, and commented upon by the Supreme Court in the case of Hamet v. Letcher, 37 Ohio St., 358. Speaking for the court Judge Okey there says: "The principle involved is, perhaps, more fully considered in the case of Cundy v. Lindsay than any other. Lindsay & Co. were manufacturers of linen goods at Belfast, Ireland. Alfred Blenkarn, who occupied a room in a house looking into Wood Street, Cheapside, wrote to Lindsay & Co. proposing to purchase a certain quantity of such goods, and in his letter used this address, '37 Wood Street Cheapside,' and signed the letters (without any initial for a christian name) with a name so written that it appeared to be 'Blenkiron & Co.' There was a respectable firm known to Lindsay & Co. of the name 'W. Blenkiron & Co., carrying on business at 123 Wood Street. Lindsay & Co. sent letters, and afterwards supplied goods, being all addressed to 'Messrs. Blenkiron & Co., 37 Wood street,' which they supposed was the address of the respectable firm above mentioned. The goods were received by Alfred Blenkarn at that place, of which goods he sold 250 dozen of cambric handkerchiefs to Messrs. Cundy, who had no knowledge of the fraud, and who re-sold them in the ordinary course of their trade. On the hearing of the case before the judges of the Queen's Bench, 1876, it was held that the property in the goods passed to Alfred Blenkarn, consequently that Lindsay & Co. could not maintain an action against Messrs. Cundy, innocent purchasers. But the decision was reversed the next year, in the court of appeals, and the latter decision was affirmed in the House of Lords in 1878."

The case of Hamet v. Letcher, is one where a party, fraudulently representing himself as an agent for a third party and that the latter desired to purchase certain goods, secured possession of the goods, the parties who parted with the possession believing that he was the agent and that he was purchasing for and on behalf of the person whose agent he represented himself to be; but the fact was that he was not an agent for that party, that he got possession of the goods and then sold them to the party whose agent he pretended to be, who bought them in good faith and paid value for them. The Supreme Court held that the parties, who had parted with the goods upon false representations as to the person with whom they were dealing, could reclaim them, distinguishing between that case and one where a person is induced by false statements to sell to the party making the same. In the latter case the seller intentionally parts with his goods to a person known to him; in the former there is no intention of selling to the person who obtains possession by fraudulently personating or pretending to represent another.

We think that the case at bar is within the rule laid down by the Supreme Court, and the judgment is affirmed.

FORCE and HARMON, JJ., concur.

Walter S. Logan, for plaintiffs in error.

William Worthington and Rankin D. Jones, for defendants in error.

## NUNC PRO TUNC ENTRIES. 37

[Hamilton Probate Court.]

### IN RE HENRY R. DICKSON.

**On the hearing of an application for the appointment of a guardian for Henry R. Dickson on the ground of imbecility, said Dickson appeared in open court and submitted to an examination of his mental condition. A judgment was entered finding his imbecility and appointing a guardian, but such entry omitted to show notice to Dickson. *Held:* That such omission may be supplied by *nunc pro tunc* entry even after the term.**

GORBEL, J.

On the thirtieth day of July, 1886, this court on the evidence found Harry R. Dickson an imbecile, and that it was necessary to appoint a guardian for the person and estate of the said Harry R. Dickson, and thereupon did appoint a guardian, all of which appears of record. Now comes the guardian and files his motion for leave to amend the record, alleging that said record does not disclose the fact that at the time of the hearing of said cause, and the appointment of said guardian, said Harry R. Dickson appeared in open court and had notice of the intended application of the guardian, and praying the court for a *nunc pro tunc* entry. This motion is now resisted by Harry R. Dickson, through his counsel, for the following reasons:

First—That at the time of the finding of the imbecility of said Dickson, the court had not decided that said Dickson had notice, and it is maintained that a *nunc pro tunc* entry can only be made where the court had rendered a judgment and made a finding, which judgment and finding were for some reason omitted to be entered on the record.

Second—That the term having elapsed this court has no jurisdiction to make a *nunc pro tunc* entry, and no jurisdiction to alter, amend or modify the judgment or finding.

Third—That Harry R. Dickson, being an adjudged imbecile, could not voluntarily enter his appearance and consent to the appointment of a guardian.

There is no statutory provision which provides for a notice on the hearing of an application to have a person adjudged an imbecile and for the appointment of a guardian for such person. Neither has it been the practice during the existence of this court to give such notice. The mode and manner of such proceeding, the amount of evidence necessary, are matters entirely within the discretion of the court. But it is maintained that inasmuch as it deprives such an adjudged imbecile from the control and management of his property, that upon some authorities such person ought to have notice of such application. In determining the questions presented, this court assumes the correctness of the views expressed by the authorities. As to the first objection, I can not agree with counsel that a *nunc pro tunc* entry can only be made to complete a record of a judgment pronounced by the court, and omitted to be put upon the record. The record in this case does not fail to disclose the judgment and finding made by the court, and if the theory of counsel be correct, there is now a full and complete record of such judgment and finding, and such entry *nunc pro tunc* would be useless. Notice is a jurisdictional fact, therefore is prerequisite to a valid judgment. If the judgment entry omits to find notice, and notice was in fact had, the omission

may be supplied by *nunc pro tunc* entry. It can not be possible that an entry *nunc pro tunc* can only be made to supply an entry of a judgment rendered, and not such an entry showing a jurisdictional fact existing at the time, and requisite to give the judgment on record full force and effect. In the first instance the judgment would not be effective by reason of the failure of the record to disclose such judgment, and in the latter such judgment would be defective by the failure of the record to disclose notice. That is jurisdiction. *Nunc pro tunc* entries are founded on justice and good sense; and this power should not be limited to judgments actually rendered, but that there should be a full and complete power in the court to correct and amend its records so that a judgment of the court might in all respects be effective, and this seems to be in harmony with the ruling made in the case of Supervisors against Durand, 9th Wallace, page 736, where the court permitted the marshal to amend his return by showing that the persons named were duly served, which fact was essential and prerequisite to the rendition of the judgment.

And this is also in harmony with the case of Benedict v. State, 44 Ohio St., 679, where a prisoner having been put on trial, the jury failed to agree upon a verdict, and were discharged. The record omitting to state the reasons of the discharge of the jury, the prisoner filed a motion on the second hearing for his discharge, for the reason that the record failed to cite the reasons of the discharge of the jury. An order *nunc pro tunc* was made to supply the omission. The motion to discharge the defendant was overruled, and the trial allowed to proceed. It was held that there was no error in such action of the court.

Judge Owens, in deciding the case, says:

"The principle is fundamental, that every court has a right to ajdudge of his own records and minutes; and if it appears that an order was actually made at a former trial, and by inadvertence omitted on the journal, it may at any time direct such order to be entered as of the term when it was made, and that this power may be exercised in criminal prosecutions as well as in civil cases. It will be seen that in the case of Supervisors v. Durand. there was no omission on the record of any act of the court, and in the case of Benedict v. State, there was a failure to enter on record the action of the jury.

For the purpose of this motion it is admitted that Harry R. Dickson had notice of such application and was present in the court at the time. That judicial action was taken is not denied. He is not here now asking that the judgment and finding be set aside, but resisting an amendment of the record by supplying an entry of a finding of a jurisdictional fact without which such judgment might be effective. As no rights of third parties intervened, it is proper for the court to make its records speak the whole truth, and cause that to appear upon the journal which in fact transpired in the course of judicial proceedings, and thus to render the judgment effective. Upon the second objection it is sufficient to say that the power of the court to make a *nunc pro tunc* entry is not limited to the term in which the judgment was rendered.

There are authorities to show that the power was exercised after the lapse of many years. Rugg v. Parker, 7 Gray, 172; Freeman on Judgments, sec. 56. As to the third objection, namely: Could Dickson, being an adjudged imbecile, voluntarily enter his appearance and consent to the appointment of a guardian? It is not necessary for me to decide whether a person adjudged an imbecile can voluntarily enter his appearance in a proceeding of this kind. It is not a question of the

power of the court to make a finding, but whether the record shall show that Dickson had notice, leaving it for another tribunal to determine whether the judgment and finding of this court shall stand after the fact is made to appear that such adjudged imbecile voluntarily entered his appearance at the time. It is not necessary for me to determine whether he could under the circumstances, consent to the appointment of a guardian. If he was an imbecile, and had property, the appointment of a guardian followed as a necessity, and without regard to his wishes in the matter.

Jordan & Jordan, for guardian.
Thos. McDougall, for Dickson.

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## COMMON CARRIERS. 39

[Lake Common Pleas, May Term, 1887.]

JESSIE KING v. DELAND & ST. JOHN'S RIVER RY. CO. ET AL.

Where plaintiff delivered her trunk to defendant, the owner of five miles of railroads in Florida, to be transported to a place in Ohio, knowing that the road was a local one, and that she was to get a receipt or shipping bill, the fact that she did not get a shipping bill until several days afterwards by reason of not being willing to wait for it at the time, and the fact that the agent marked the goods for their ultimate destination, are not sufficient to show that the shipping bill, which was a contract to forward only, and not to be responsible for loss on connecting lines, is not the true contract, and do not show that the defendant agreed to carry through.

CANFIELD, J.

The pleadings and the evidence in this case disclose, in substance, the following state of facts: At and prior to the third day of March, 1885, E. W. Bond was the owner of and operated five miles of railroad in the state of Florida, extending from the St. John's river to the village of DeLand, in said state, which road was used and operated by him for the purpose of carrying freight and passengers between these two points.

The plaintiff, Jessie King, was a resident of the city of Cleveland, in the state of Ohio, and at that time was visiting relatives in DeLand village, and the proof shows, that in going to DeLand she passed over this road, riding upon the engine, and that she had knowledge that Mr. Bond, the defendant, was a resident of Lake county, Ohio. On the third day of March, the plaintiff was preparing to return to her home in Ohio, and was desirous of sending her clothing as freight, and the same was packed in a box for the purpose of being shipped to her residence at Cleveland, Ohio. This box of clothing was taken by Mrs. Wolsey, an aunt of the plaintiff, and conveyed to the railroad station at DeLand, and delivered to the agent of the defendant at that place, with the request that the same should be directed and forwarded to Cleveland, Ohio, and the directions were marked upon the box, as directed by Mrs. Wolsey. The agent at once entered the same upon his shipping book, which was kept by him for that purpose, and a copy of the same drawn off by him to be delivered to the plaintiff or her agent. For some reason Mrs. Wolsey did not receive the shipping bill that day, but returned and called for it a few days afterwards.

A copy of the shipping bill delivered to her and entered upon the books of the company, has been offered in evidence, which is as follows:

DELAND, March 3, 1885.

Copy:

Shipped by Miss Jessie King on DeLand & St. Johns Railway, the following property, in apparent good order, marked and consigned as in the margin, which they agreed to deliver with as reasonable despatch as their general business will permit, subject to the conditions mentioned below, in like good order (the dangers incident to railroad transportation, loss or damage by fire while at depots or stations, loss or damage of combustible articles by fire while in transportation, and unavoidable accidents excepted) at Landing Station, upon the payment of charges. The company further agree to forward the property to the place of destination, as per margin, but are not to be liable on account thereof after the same shall be delivered as above. The company, however, guarantee the through rate of freight, as designated below.

Conditions:

The company does not agree to carry the property by any particular train nor in time for any particular market. It is a part of this agreement, that all other carriers, transporting the property herein receipted for, as a part of the other line, shall be entitled to the benefit of all the exceptions and conditions above mentioned, and if a carrier by water, it is to be entitled to the further benefit of exceptions from loss or damage arising from collision, and all other damages incident to lake or river navigation.

On left hand of page: Zenas King, 1252 Euclid avenue, Cleveland. On the right hand of page: One box clothing.

Signed: J. W. TAYLOR, Agent.

These are the only conditions of the agreement, set forth in the shipping bill, so far as they can have bearing upon this case.

A few days afterwards, the shipping bill, or a copy thereof, was received by the plaintiff, and no objections were made thereto. The goods were taken by the defendants and transported to Landing Station, and were shipped upon one of the steamers of the Transportation Company to Jacksonville, the goods not arriving at their destination in Cleveland. Upon search being made, the last trace of the goods that could be found, was while, and they were last seen, on the boat of the Transportation Company, and so far as the evidence shows, they are lost or destroyed.

The plaintiff says that the goods were of the value of two hundred dollars, and more, for which she asks judgment against the defendants. The plaintiff asks the right to recover, upon the ground that the contract entered into with the defendants, was, that the defendants should deliver the goods at Cleveland, Ohio. The defendants deny this, and aver that the contract was, that the goods should be delivered at Landing Station, to be forwarded, by them towards their proper destination, and that the same were so forwarded, and that, therefore, they are not liable to the plaintiff for any loss of the goods. And the question is here presented, whether upon the facts shown, the plaintiff is entitled to recover, and in our judgment must be determined upon the finding of facts as to what the real contract was between the parties. If the contract was, that the defendants should deliver the goods at Cleveland, Ohio, without any express limitation upon their common law liabilities as common carriers, the plaintiff would have a right to recover the value of the goods. If, upon the other hand, the contract was to deliver the goods at Landing Station and to forward the same, subject to the conditions and limitations expressed and set forth in the shipping bill, in such case the plaintiff cannot maintain this action, and would have no right to recover, for the law in Ohio is well settled, that common carriers have a right, by express contract, to place limitations upon their common law liability.

So that it becomes an important question in this case to determine whether or not the terms and conditions set forth in the shipping bill constituted the contract between the parties. An examination of the evidence shows, that when the goods were delivered, they were taken by the agent of the defendants, and that directions were placed by him upon the box, and that he immediately entered the same upon his books, and that a copy of the same was drawn to be delivered to the agent of the plaintiff. Had the agent of the plaintiff gone into the office at the time of the delivery of the goods, and received the shipping bill, containing the conditions, at that time, no question whatever could have arisen as to whether or not that paper contained the terms of the contract. That being so, the question arises, whether the legal effect would in any manner be changed by reason of the shipper delivering goods, causing them to be marked and directed to their place of destination, and then immediately leave at their own instance, and not call for the shipping bill for a period of several days. By so doing, would the shipper have the right, in this manner to change the legal obligations of the common carrier? We think not. The evidence shows that it was well understood by the agent of the plaintiff that she was to receive some kind of a receipt, paper or shipping bill, from the defendant at the time she delivered the goods, but that not choosing to remain, although it was made out and ready for her, she did not call for it for the period of several days, and when it was thus called for, no objection whatever was made thereto. For if this were to prevail, and this distinction should be recognized by the courts, it would open the door to the perpetration of the grossest frauds upon common carriers, and would place it in the power of the shipper, by his own act, to compel the carrier to be bound by a different contract from that which he in fact entered into, or had any reason to believe he was entering into.

The only real controversy between the parties to this suit is that the plaintiff claims that the contract was to deliver the property at Cleveland, and the defendant claims that the contract was to deliver the property at Landing Station. If the contract was that the property should be delivered at Cleveland, the contract has not been performed. The defendant had the legal right to enter into either of the contracts aforesaid, and is estopped from denying his capacity so to do.

We think it clear that the real contract was that contained in the shipping bill, signed by the agent of the company, and that the mere fact that the agent of the defendant placed the directions upon the box as requested by the plaintiff, cannot be regarded as establishing a contract to carry the goods to Cleveland, and that circumstance appears to be about the only evidence in support of the plaintiff's claim, except that the agent of the plaintiff informed the agent of the company that they desired to send this box to Cleveland, which under all of the circumstances disclosed by the evidence, in our judgment fails to establish a contract between the parties that the defendant was to deliver the goods at Cleveland. For the contract, as written at the time and signed by the agent of the company, expressly provides that the goods were to be delivered at Landing Station, and forwarded by connecting lines of transportation to Cleveland, Ohio, and that the defendant was not to be responsible for any loss which might arise by reason of the laches, negligence or failure of such other lines to deliver the goods at their destination.

And finding, as we do, that the defendant has fully performed the conditions of the contract, a judgment for costs may be entered in favor of the defendant. This being the view entertained by the court, we do not regard it as important in this case, to determine any of the other questions that have been suggested in this case, further than to say, that the decisions of the Supreme Court of this state are to be observed and followed by this court, rather than the decisions of other states.

H. C. Bunts, for plaintiffs.

Horace Alvord and F. C. Carrall, for defendants.

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## DIVORCE. 41

[Franklin Common Pleas.]

### †SARAH C. NEESE v. GEORGE NEESE.

**Where a wife leaves her husband and goes into another county and files a petition for alimony, and the husband, his place of residence not having changed, answers asking for a divorce, the court is without jurisdiction to grant it, the cross-petition and evidence failing to show that the alleged cause of action arose in the county where the case was pending.**

EVANS, J.

In March last Mrs. Neese left the residence of her husband in Lima, O., where he and she had resided for several years, and came to Columbus, and about a month later filed her petition for alimony in the Franklin Common Pleas; the defendant, whose place of residence has not been changed, appeared and filed his answer, in which he denied certain material averments of her petition, and by way of petition charged her with gross neglect of duty and prayed for a divorce. On the hearing the counsel for the respective parties stated that Mr. and Mrs. Neese had agreed upon the alimony to be paid to her in case the court granted the defendant a divorce upon his cross-petition. Thereupon the court heard the case upon said cross-petition, and the evidence being insufficient, in the opinion of the court, to sustain the charge of gross neglect of duty, said cross-petition was dismissed. It was, however, suggested by the court that at common law the husband's residence is the wife's, but that by sec. 5691, Rev. Stat., the common law rule is changed to the extent that the residence of the husband shall not be construed as to preclude the plaintiff from obtaining the relief sought in her petition; and inasmuch as sec. 5690, Rev. Stat., provides that "all actions for divorce or alimony shall be brought in the county where the plaintiff has a *bona fide* residence at the time of filing the petition, or in the county where the cause of action arose," and the pleadings and evidence failing to show that any alleged cause of action arose in Franklin county, that it was questionable whether the Franklin Common Pleas had jurisdiction to grant the defendant a divorce upon his cross-petition. Whereupon after consultation between the parties and their counsel, the plaintiff's petition was dismissed at her request.

†The above is a communication by Judge Evans in explanation of his decision in the proceeding.

## INCOME BONDS—INTEREST—PRACTICE. 43

[Montgomery Common Pleas.]

### †ROBERT M. SHOEMAKER, EXECUTORS OF, v. DAYTON & OHIO RAILROAD CO.

Dayton & Union R. R. Co. issued its income bond, dated December 1, 1879, payable at the pleasure of the company after December 1, 1910, only out of net surplus earnings, to bear such rate of interest *not exceeding six per cent.* per annum, payable semi-annually as said *net earnings will reach to pay.* These Income Bonds, as well as its first mortgage bonds, were secured by a bond of trust over the corporate property, etc., wherein the *net income*, after the payment of certain charges and expenses, is pledged to the payment of the interest on said Income Bonds to an amount equal to six per centum per annum semi-annually *Held:*

1. In such cases the interest is cumulative. The income bondholder is entitled to be paid his interest, out of the surplus earnings, up to the maximum rate; and if the net earnings in any year, or interest period, is insufficient to pay such interest in full, he is entitled to have such deficiency made up from the *future* surplus net earnings.

2. Where the words or terms of the bond are equivocal, or not entirely clear, the court may consider the deed of trust in connection with the bond in order to ascertain the real contract between the corporation and the Income Bondholder.

3. A court of equity, upon application of an income bondholder for himself and others, should take cognizance of the trust and restrain the corporation from diverting the funds, to which alone he and his associates may look for the payment of their interest.

ELLIOTT, J.

The petition in this case was filed March 8, 1886, by the plaintiffs, who sue for themselves and other holders of the *income bonds* of the defendant, a railroad company owning and operating a railroad from Dayton, Ohio, to Union City, Ind.

It is alleged that on the sixth day of January, 1880, the board of directors of the defendant, at a meeting that day held, and being duly authorized thereto, resolved that it was necessary to issue certain income bonds to the amount of $225,000, to bear date December 1, 1879, each of the denomination of $1,000, and to *bear interest at the rate of six per cent.* per annum payable *semi-annually.* These bonds were to be used for the purpose of retiring certain other income bonds then outstanding, and to be secured by a trust deed on mortgage to Chas. E. Drury as trustee. The interest on these bonds was to be paid on the first days of June and December in each year, only out of the net income of the road—*i. e.*, out of the surplus earnings, after satisfying prior liens, running expenses, taxes and fixed charges.

These bonds issued and dated as aforesaid were placed upon the market and sold, and were made payable at the pleasure of the defendant at any time after December 1, 1910, and were of the tenor and effect stated in the resolution aforesaid. Incident to and connected with the aforesaid action, and as part of the contract between the railroad company and its bondholders, defendant reserved the right to establish a *sinking fund* into which should be paid *semi-annually all its net earnings* after payment of the interest on its bonds, etc.

Whenever the sinking fund should amount to more than $999, it should be used to take up, 1st. *Mortgage bonds*, if they could be obtained at par or less, and if such bonds could not be so obtained, then the fund should be used in taking up *income bonds* on the same term.

There now remains outstanding of the income bonds $173,000 of which plaintiffs are the holders of $28,000; that the interest for the two installments of each of the years 1882 and 1883 has not been paid, and the defendant has wholly neglected and refused to pay same although it had and has now surplus net earnings appli-

†This judgment was affirmed by the circuit court; see opinion 2 Circ. Dec. 270; see also, *post*, 19 B. 322 for another decision of the common pleas.

cable thereto. Instead of paying the interest on the income bonds as it is bound to do by the terms of its contract, and as it has the means to do in full, it threatens, intends and claims the right to place said surplus as a sinking fund and use the same in taking up bonds, and in advertising for tender of bonds to be so redeemed on or before the twelfth day of March, 1886; and unless restrained by order of the court the defendant will so apply the surplus, and all of it without paying said interest. It is alleged that the property of the defendant is mortgaged to its full value, and there is no other property or fund out of which the interest due on the income bonds can be paid.

Plaintiffs, therefore, pray that defendant be enjoined from diverting the fund aforesaid; that an order may be made finding that said net earnings are applicable to the payment of the interest on the said income bonds in default, and directing that such application be made, and for general relief.

(2.) Upon showing being made that the whole of the interest on the unredeemed income bonds for the years 1882 and 1883 was unpaid, that there was a surplus of net earnings now in the treasury of the railroad company, amounting to $12,000 probably applicable to the payment of such interest, and that the defendant was about to use the same as a sinking fund and in the redemption of bonds, and had refused to pay the said interest, the court granted an order of injunction against the defendant as prayed for.

(3.) Subsequently, on January 7, 1887, plaintiffs filed a supplemental petition and made showing that since the filing of the original petition the defendant had accumulated net earnings to the amount of $17,000 in addition to the $12,000 aforesaid, and which by the terms of the contract was applicable to the payment of the arrears of interest as set up in the original petition, and that defendant was about to use this $17,000 as a sinking fund, and in the redemption of bonds as before stated, instead of paying said interest. Thereupon, a further temporary injunction was granted restraining defendant from using $9,000 of said $17,000 in the redemption of bonds until the matter could be further heard in this court.

(4.) The matters now come on for hearing upon defendant's motion to dissolve temporary injunctions heretofore granted, and also on demurrer to the petition and supplemental petition.

I. The demurrer is placed substantially, on two grounds: 1st, that there is a defect of parties plaintiff; and 2d, the facts stated are not sufficient.

(1st.) As to the first ground assigned—defect of parties plaintiff—I am not fully advised of the grounds upon which it is based. The plaintiffs in their trust capacity are the holders of $28,000 of the income bonds upon which the interest for 1882 and 1883 has not been paid. The interest has not been paid for those years on any of the $173,000 of said bonds outstanding. The railroad company has the funds on hand applicable to the payment of this interest, but refuses to pay and proposes to apply the same otherwise. It seems to me under the rule of our code, sec. 5008, the plaintiffs may sue for themselves and for the use of others who hold said income bonds. The rule of equity is substantially the same, as the further discussion of the questions in this hearing will show. If the *trustee* for the income bondholders fails to sue, the *holders* of the bonds may sue for themselves, and some of such holders may sue for themselves and the others, especially when all are in the same position.

(2d.) Are the facts stated in the petition, if true, sufficient to entitle the income bondholders to the relief they ask, or to any relief under their prayer?

The plaintiffs hold $28,000 of these income bonds, which by the terms of the contract, as set forth in the petition, bear six per cent. per annum, payable semi-annually on the first days of June and December in each year out of the *net earnings of the road.* The interest for the years 1882 and 1883 was not paid. They allege that there were net earnings during those two years, which have been since applicable to that purpose, sufficient to pay said interest; that defendant refuses to apply same to the payment of the interest so in default for those two years, and threatens, intends and is about to divert the said fund to other purposes, and finally that the property of defendant is mortgaged to its full value, and if the fund out of which the interest on these bonds is alone payable, shall be diverted as threatened, plaintiffs will be without remedy.

It would be strange if the bondholders should be required to stand by and see the fund out of which they are alone entitled to their interest, wholly diverted, unable to obtain relief. Under the averments of the petition a judgment at law would probably be worthless. We may, however, go further. Whether the defendant is or is not insolvent, there is no reason why the plaintiffs should not be entitled to the relief prayed for. The deed or mortgage which pledges the net earnings to the payment of the interest on these income bonds, is a *trust* deed; the net

earnings out of which plaintiffs can alone obtain their interest is a trust fund, which is held in trust by defendant for beneficiaries in virtue of a trust. A court of equity will see that the true intent and purpose of the trust is faithfully carried out. In the numerous cases cited by counsel, on both sides, in support of the questions arising on the motion and demurrer, this was substantially the remedy invoked and sustained by the courts. In the disposition of the motion to dissolve I shall refer to some of those cases, in addition to the following: 2 Rover on R. R., 1378; R. R. et al. v. Menzies, 26 Ill., 122; Barry v. R. R. et al., U. S. C. C., 27 Ind., 1; Williston v. R. R., 13 Allen, 400; Sturge v. The Eastern U. Ry., De Gex M. & G., 158.

II. The motion to dissolve the temporary injunction is based upon two grounds; to-wit:—First. That the facts stated in the petition and supplemental petition are not sufficient to justify the injunction; and second, That the facts stated in the petition are not true.

The *first* ground which raises the question of the sufficiency of the petition has already been disposed of in considering the demurrer. The conclusion thus reached and the reasons therefor will suffice for the present. Some additional authorities will be referred to in considering the second ground of the motion.

The *second* ground of the motion to dissolve asserts that the facts stated in the petition as the foundation for the relief prayed, are not true. It is claimed that the allegations in the petition that the Railroad Company is practically insolvent, and that there was during the years 1882 and 1883 and now is on hand net income applicable to the payment of the interest on the income bonds for those two years, is not true. The main question involved in the case is whether or not the interest on these special bonds is *cumulative*. In other words, inasmuch as the interest on the income bonds is payable semi annually out of the net income at not exceeding six per cent. per annum, it is contended that the interest is limited to the *net income* applicable to the payment accumulated in each particular period, and that if there be a deficiency in one year or half-year, it cannot be made up from any subsequent surplus.

This is a question of great importance and of much difficulty. Whether or not the property of the railroad is mortgaged to its full value, or it had net income in 1882 and 1883, which ought to have been applied to the payment of the interest for those years, are minor considerations. The motion has been heard on the evidence and submitted on oral and written arguments. The railroad in the hands of the present management seems to be in good condition, reasonably well equipped and prosperous. For the years 1884 and 1885 and 1886, after paying running and current expenses, costs of betterments, interest on the first mortgage bonds, and on the income bonds, a surplus has accrued amounting to $29,000, which the management proposes to place to the credit of the sinking fund for the redemption and payment of mortgage bonds. It appears that first mortgage bonds to the amount of $325,000 were authorized to be issued and sold; but as a matter of fact only $225,000 was actually disposed of. These are dated December 1, 1879, and are payable in thirty years at seven per cent. per annum, and income bonds to the amount of $225,000 were issued and sold, dated December 1, 1879, and payable at the pleasure of the railroad company after December 1, 1910, out of surplus earnings. Since their issuance income bonds to the amount of $52,000 have been redeemed and cancelled, leaving an outstanding bonded indebtedness of $225,000 first mortgage bonds and $173,000 of income bonds, with a surplus on hand applicable to the redemption of bonds, as it is claimed, of $29,000. This to our apprehension is a very good showing. So long as the present management, which is a sort of partnership between the C., H. & D. and the C., C. & I. R. R. Companies, is harmonious and acts in perfect good faith toward the owners and bondholders of the Dayton & Union R. R., there is a reasonable probability that the property will be kept in good condition and the interest on the two classes of bonds promptly paid. Whether a judgment at law, should one be obtained, for the defaulted interest on the income bonds for the years 1882 and 1883, could be made by process of execution is not so certain. Should the fund now held by order of court, contingently for the payment of that interest, be used in the redemption of bonds, there would be no fund out of which such payment could be made, unless of net income to be made in the future. Such interest being payable only out of net income, it might happen that there would be no net income. The earnings might, at least for several years, be used in betterments and other expenses.

It seems reasonable that a court of equity ought not to be expected to take such a risk, or require creditors to be placed to such disadvantage. I believe the remedy here sought is the proper one whether the railroad is solvent or insolvent; whether it is mortgaged to its full value, or will probably be able by good, honest management to pay all current and fixed charges and expenses and save

enough to pay the maximum rate of interest on the income bonds. When the old management of the D. & U. R. R., as the result of a litigation, turned the property over to the control and joint management of the C., H. & D. R. R. Co. and the C., C., C. & I. R. R. Co., there was also, as the testimony shows, turned over a cash balance of some $64,000. Of this amount the two contending parties used $7,500 to pay the expenses of their litigation, leaving a balance of about $56,500. It is claimed by the defense that this balance, together with the entire earnings of the road for the years 1882 and 1883, was necessarily consumed in expenses, repairs, betterments and the payment of the interest on the first mortgage bonds, leaving nothing with which to pay any part of the interest on the income bonds. Hence the interest was defaulted. It is contended by the plaintiffs, with much reason, that at least the $7,500 used, as above stated, by the present management of defendant to pay the expenses of their litigation, was unlawfully so used, and was therefore applicable to the interest on these bonds. A court of equity, undoubtedly, may be invoked to aid in ascertaining the true condition of the railroad, its earnings and the disposition thereof; and the management may be prevented from squandering the earnings to the injury of the beneficiaries under a trust. The questions thus presented on the pleadings and the evidence in this case open a fair field for an equitable proceeding. If it shall appear that the unpaid interest on the income bonds for the two years named is payable out of the surplus earnings in question and cannot be otherwise paid, then it is manifest that said surplus should not go into the sinking fund to be used for other purposes; and whether the road is practically insolvent or not, or whether the surplus earnings of the two years in question were misappropriated or not, will not determine the right and duty of the court. In either state of circumstances equity will interfere to protect those entitled to the fund.

I turn now to the question in the case of paramount importance and of real difficulty. Is the interest on the income bonds cumulative? If the net earnings in any period applicable to that purpose are not sufficient to pay the maximum rate of six per cent. on the income bonds, and there should be a future surplus, may the deficiency of the former period be made good?

In solving these questions reliance must be had upon principle in the interpretation and construction of the terms of the bond. I do not find that the question here raised has ever been decided by the courts of either England or America. The question of dividends—sometimes denominated "interest"—on preferred stock has been before the courts in various forms; but we are without authority when the same dispute arises as to income bonds.

So far as necessary to an understanding of the matter in contention, we quote from the bond:

"The Dayton & Union R. R. Co. will pay to Charles E. Drury or bearer $1,000 * * * at the pleasure of said company after the first day of December, 1910, *payable only out of net surplus earnings* after satisfying the interest upon prior liens, and all taxes and other fixed charges upon said company's property, and the operating expenses and repairs of said railroad, *at such rate not exceeding six per centum per annum*, payable semi-annually, *as the said net earnings* of the company *will reach to pay, after* full payment of the interest, charges and expenses aforesaid; * * * *such interest on this bond for each six months* being payable at the office or agency of said company in New York, *on the first days of June and December in each year, only out of said net surplus earnings* * * * This bond is one of an issue of 225 bonds each for $1,000 * * * amounting to $225,000. All bearing date on the first day of December, 1879, * * * the *payment of which is secured by a deed of trust* * * * duly executed and delivered * * * to Charles E. Drury, trustee, and conveying the said * * * railroad and equipments, etc. * * * subject to the priorities established therein in favor of an issue * * * of first mortgage bonds amounting to $325,000 and interest thereon, provided it is agreed * * * that no recourse shall be had for it's (this bond's) payment to the individual liability of any stockholder of the company or to any liability of the company except for the application of the net surplus earnings of said railroad as defined and provided in the deed of trust by which this bond is secured."

Counsel for defendant is pleased to term the foregoing bond "the contract," between the holder thereof and the company. In one sense it is the "contract," but not the whole contract. The bond itself refers to the deed of trust by which it is secured, to the terms thereof. We are bound, therefore, in order to ascertain the full meaning and effect of the bond, to look at the deed of trust, and to construe them together.

"When there is a contemporaneous written contract affecting the terms of the bill or note, it is to be construed with the bill or note, in so far as each may be given effect, and there is no repugnancy between them. Thus, when a note is payable in five years with interest at ten per cent., and at the time of its execution a mortgage is given to secure its payment, in which it is stipulated that interest shall be payable annually, the mortgage, as between the parties will control the payment of interest." 1 Daniel's Neg. Int., 123.

In the numerous cases cited in reference to interest or dividends on preference stock the courts invariably held that the language of the stock certificate must be construed in connection with the action of the company, so as to determine the true meaning of the contract between the parties. In order to ascertain what should be done with the surplus earnings, if there should be any, after paying the interest on the income bonds, we must of necessity look to the trust deed. If we may do this for our purpose in ascertaining the relation of the parties, we may do so for other purposes so far as the same will assist to an understanding of the real contract. Especially may this be done when, as in this case, the language of the bond may not be entirely clear.

The trust deed provides as a part of the agreement, "that a sinking fund shall be established by the party of the first part (the R. R. Co.), into which shall be paid semi-annually any and all net earnings of said company after payment of the interest upon the said first mortgage bonds and said income bonds." It is then provided that when the sinking fund shall exceed $999.00, it shall be used to redeem and cancel first mortgage bonds, if such may be offered at not above par, or if such are not offered, then to be used to redeem income bonds on the same terms.

It will thus be seen that if the $21,000 of net surplus which plaintiffs claim should be applied in payment of their interest for the years 1882 and 1883, is not so applicable, under the terms of the contract, the injunction must be dissolved and the sum in controversy be allowed to go into the sinking fund.

Looking alone to the bond, its language, it must be conceded, does give color to the claim contended for by defendant. The bond is payable at the pleasure of the company after December 1, 1910, only out of net surplus earnings. We have a very good definition of what is meant by net earnings, to-wit: the net surplus "after satisfying the interest upon prior liens, and all taxes and other fixed charges * * * and the operating expenses and repairs of said railroad." As to interest, the bond is to run, "at such rate, not exceeding six per cent. per annum as the said net earnings will reach to pay." * * * Such interest on this bond for each six months being payable * * * on the first days of June and December in each year, only out of said net earnings. It is fair to conclude from the reading of the whole bond that the entire net earnings, as defined, is pledged to the payment of the maximum rate of interest. No greater rate can be obtained than six per cent. per annum, nor will a less rate satisfy the bond if the net earnings are sufficient. That is the only limitation, and, it may be added, it is only a limitation upon the amount of interest. "At such rate as the net earnings will reach to pay," evidently has reference to the whole net earnings for the entire period, 'not exceeding six per centum per annum;" that is, not exceeding six per centum for each and every year during the running of the bonds. If the net earnings, not within any one year, but during the life of the bond, will reach to pay six per centum per annum, the holder is entitled to so much; otherwise he takes only what the net earnings will reach to pay. The company might upon any other construction, easily perpetrate a great wrong upon the holder of the bond, by using all the income for any given period in expenses and betterments, etc., just as was done by this defendant in 1882 and 1883, and then subsequently accumulate a large sinking fund, thus making itself rich at the expense of the income bondholders. A construction that would encourage a wrong will not be put upon the contract unless it is plainly required by its terms. The relation of debtor and creditor is here established, and that contemplates a promise to pay which is at once certain and definite if the terms of the contract may be so construed.

A reference however to the deed of trust will dispel any doubt which might arise as to the real nature of the contract and the intention of the parties. The bond itself refers to the deed of trust and practically makes it an indispensable part of the contract. The bond recites that it "is one of an issue of 225 bonds, each for $1,000, * * * all bearing date on the first day of December, 1879, * * * the payment of which is secured by a deed of trust * * * duly executed and delivered * * * conveying said railroad and equipments * * * subject to the priorities established therein in favor of an issue of * * * first mortgage bonds and interest thereon as therein provided." It is then provided that no recourse is to be had to the individual liability of the stockholders, or of the com-

pany "except for the application of the net surplus earnings * * * as defined and provided in the deed of trust by which this bond is secured."

Thus we have in the bond, not only a pledge of the net surplus earnings to the payment of the interest, but we are remitted to the deed of trust as the instrument in which is defined and provided in what manner the net surplus earnings are to be applied to the payment of the interest on the income bonds.

After providing for the issue of the first mortgage bonds to enable the company to cancel its maturing bonds and to more fully equip the road, the deed of trust further recites that the board of directors had provided for the issue of income bonds to the amount of $225,000 "for the purpose of paying, retiring and canceling the income bonds of said company, now outstanding, said bonds containing the recital of the pledge of all the net income of said company after providing for the payment of the interest on said first mortgage bonds, during the running thereof, and the principal at maturity, to an amount equal to six per centum per annum upon said income bonds, payable semi-annually." Thus we see not only what was pledged, but also the nature and extent of the pledge, in regard to the payment of interest on the income bonds, to-wit: "to an amount equal to six per centum per annum, * * * payable semi-annually." It was undoubtedly the intention of the parties that the holders of the income bonds should realize six per centum per annum, provided the net income should be sufficient, or should reach to pay so much The next paragraph of the deed of trust provides for the sinking fund "into which shall be paid semi-annually any and all net earnings, * * * after payment of the interest upon the first mortgage bonds and said income bonds." There can be no net surplus to go into the sinking fund so long as any part of the interest upon the income bonds remains unpaid. Another paragraph provides for the sale of the railroad and its property in the event of certain defaults, and that "the proceeds of said sale shall be appropriated, first: to the payment of the principal and interest of said * * * first mortgage bonds; second: to the payment of principal and interest of said income bonds." According to the theory of the defense there could be no interest to pay on the income bonds beyond that of the last six months. But the same instrument which pledges the entire income to the payment of seven per cent. on the first mortgage bonds during the running thereof, likewise pledges the net income to the payment of six per cent. on the income bonds if it will reach to pay so much. A subsequent paragraph of the deed of trust makes it a further condition, "that after the payment of the interest of the said first mortgage bonds during the running thereof, and the principal at maturity, the remaining net income * * * shall be paid to the holders of said income bonds hereinbefore recited, *pro rata* to the amount of six per centum upon the par value of said bonds, payable semi-annually."

The expression in the bonds, * * * "at such rate, not exceeding six per centum per annum, as the said net earnings, * * * will reach to pay," is here made manifest, to-wit: to the amount of six per centum per annum, if the net income will reach to pay so much. The amount of six per centum is the sum total of the several payments of interest; the aggregate of the sums which the net income will reach to pay; hence, if the aggregate net income will reach to pay six per centum per annum on the income bonds until it shall be the pleasure of the company to redeem them, the contract requires that amount to be paid.

It is not inappropriate to observe, right here, that the deed of trust itself provides for the very remedy which plaintiffs are seeking in this case. It provides "that if any default shall be made in the covenants, agreements and provisions herein contained, or in any or either of them a decree of specific performance may be obtained, and pending the application therefor, one or more receivers shall in the discretion of the trustee be appointed, and such other or further equitable relief as shall be proper and adequate in the premises."

Having considered the language of the deed of trust and the income bond together, for the purpose of ascertaining the contract between the parties, it is not necessary to more than refer in a general way to the leading authorities cited by counsel on the subject of preferred stock. While there are significant differences between what is known as preferred stock and income bonds, yet in many respects the two classes of securities are alike. They are both generally issued to raise money, and contain a pledge of the net income of the corporation to the payment of a certain, or a maximum rate of interest or dividends. In some cases, as occasion has seemed to require, the courts have held the terms interest and dividends as convertible.

In the case of Burt v. Rattle, 31 Ohio St., 116, the Supreme Court construed the term dividend to mean interest, where preferred stock had been issued containing

a pledge of the payment of semi-annual dividends of four per cent. out of net income.

As to the construction of the promise to pay dividends or interest out of net income on preference stock, the general rule laid down by the authorities is to this effect: The preferred stockholder is entitled to his dividend out of net income whenever it accrues; and if there is a deficit one year, which prevents a dividend, he is entitled to a dividend for such year from the profits of succeeding years, before any dividend can be made on the common stock. And this seems to be the rule unless the agreement confines such dividends to the earnings of the present year. Pierce on R. R's., 125; 1 Rover on R. R., 167; Morawetz Corp., secs. 345 and 352; Jones R. R. Securities, sec. 620.

The rule is further laid down that: Where certain annual installments of interest or dividends are promised or guaranteed, this impliedly means that they shall be payable out of profits only; but if the profits in any one year are insufficient to make up the required amount—or as the bond here specifies—will not reach to pay the amount, the deficiency will be a charge upon subsequent profits. Morawetz Corp., secs. 352, 405; Henry v. Gt. N. Ry. Co., 1 De Gex & Jones, 606; Sturge v. Eastern U. Ry., 7 De Gex M. & G., 158; Bailey v. Hannibal R. R., 17 Wall, 96; Proutty v. M. S. R. R., 85 N. Y., 272.

Counsel for defense cite a note on page 147, of Green's Brice's Ultra Vires, to this effect: "Unless the contract by which the preferred shares are issued, having a sum stipulated as interest, expressly provides that the interest shall be cumulative, the holders of such stock will be entitled to payment only out of the income earned in any one year; and in estimating the earnings the entire year should be considered, and not any fraction of a year." With due deference, we are unable to find any authority sustaining that proposition. Certainly none of the cases cited by the learned author lay down any such proposition, but rather the contrary. The true rule would seem to be that unless the contract expressly confines the payment of interest or preferred dividends to the net income of the current year or half year, as the case may be, such interest or dividends are cumulative. This is certainly the result of the adjudged cases both in England and America.

In Stevens v. South Devon Ry., 9 Hare, 323, the railway company issued preferred shares and guaranteed interest at six per cent. for ten years out of earnings. It was contended that the holders of such shares were only entitled to dividends out of current profits, and were not entitled to arrears of dividends out of the profits of subsequent years. But the court held that the holders were entitled to arrears of interest or dividends payable out of future profits.

In the case of Sturge v. The Eastern Union Ry. Co., 7 DeGex M. & G., 158, the railway company issued preferred shares of stock in which it guaranteed interest a 6 per centum in perpetuity. Other preferred shares were issued bearing interest at 5 per centum per annum. By the act of parliament it was directed that the *annual* profits should be applied in payment: Ist, of interest on mortgages; 2d, of interest on debenture shares; 3d, of the interest, or dividend on the guaranteed or preferred shares and the arrears of such interest of dividends; and 4th, as in the act specified.

It was held by the court that the payment of the interest or dividends was not confined to a share of the *current* profits; but that the holders of the preferred shares were entitled to resort to a *subsequent* division of profits to make their dividend or interest up to 6 per cent.

Perhaps the most notable of the English cases is that of Hensy v. The Great Northern Ry. Co., 2 DeGex & Jones, 606. Pursuant to act of Parliament, the railway company issued preferred shares of stock, providing that they should bear 5 per cent. interest or preferred dividends in perpetuity.

*Held*, by the court, that if the profits at any period of distribution were insufficient to pay in full the interest or dividends due to the preferred shareholders, the *arrears* must be paid out of subsequent profits. It was moreover held in this case, that if the act of parliament had required the preferred holders to be satisfied with the *current* profits each period, the rule might have been different. Recurring to the question of practice, Vice-Chancellor Turner, finding the language of the shares equivocal—as is the case with the bonds in our case—declared it proper to look to the contract for an understanding of the shares.

Taft v. The Hartford P. & F. R. R. & R. I., 310, is generally referred to as the leading American case. Pursuant to authority the railroad company issued "preferred and guaranteed stock" containing the expression, "the same being entitled to preferred and guaranteed dividends at the rate of *10 per cent. per annum* payable semi-annually, before any dividends shall be paid on any other stock in said company." It was held by the court that the holders of the preferred shares were

entitled to their dividends only out of the earnings or profits of the company applicable to that purpose.

In other words if there were no profits to divide, the preferred shareholder was not entitled to his dividend; that in the proper sense the relation of debtor and creditor did not exist. The court considered the contract to be an engagement that a dividend equal to the sum of 10 per cent. per annum shall be charged upon all profits which, from year to year, may accrue; thus binding and pledging the *total sum of all* the earnings of the company, so long as the engagement lasts, to the payment of a dividend equal to 10 per cent. per annum or if paid semi-annually, as will amount to the sum of 10 per cent. per annum before the common stockholders receive anything.

In the case of Bailey v. R. R., 17 Wall., 96, where preferred stock was issued, it was held that the dividends were not cumulative, but there the contract so expressly provided.

In St. John v. Erie R. R., 22 Wall., 136, the preferred stock was "entitled to preferred dividends out of the net earnings of the road (*if earned in the current year, but not otherwise*) not to exceed 8 per cent. in any one year, payable semi-annually, etc." Such a precaution on the part of the Dayton & Union R. R. Co. would have shown that the interest to be paid on the bonds in question, in our case, was not cumulative.

In Lockhant v. Van Alstyne, 31 Mich., 76, a corporation had issued preferred stock and guaranteed the payment of 5 per cent. semi-annual dividends from September 1, 1872. The question under consideration was as to whether under the contract the dividends were payable at all events, whether there were net earnings or not. The court held that the grantee was only to pay the promised dividends when there should be net earnings applicable to that purpose. Judge Cooley says: "We think the guaranty here in question will bear the construction that the preference stockholders shall be entitled to 5 per cent. semi-annual dividends when there are profits to pay them, and not otherwise. Probably if profits were not realized to the necessary amount in any one year, they would be entitled when they were realized to have all *arrears* made up."

In Jermain v. The R. R., 91 N. Y., 483, the R. R. had issued certain preferred and guaranteed stock, upon which the holders were entitled under the terms of the contract to annual dividends of 10 per cent., payable out of the net earnings of the company, etc. No dividends were paid for four years, at the end of which time, dividends were regularly declared and paid, but the *arrears* of dividends on the preferred stock were not paid and no fund set apart to pay them. Subsequently forty shares of such stock were transferred and the assignee brought suit to compel the company to pay the arrears and it was held he could maintain the action.

In Boardman v. R. R. Co., 84 N. Y., 157, preferred stock was issued in 1857 and no dividends were paid until 1863. The contract was that "said stock is entitled to dividends at the rate of 10 per cent. per annum, payable semi-annually * * * in each year, out of the net earnings of said company * * * And the payment of dividends as aforesaid is hereby guaranteed." In 1875 suit was brought to compel the railroad company to pay the arrears of dividends, and to restrain the payment of dividends upon the common stock until the claim of plaintiff was satisfied. It was held that the action could be maintained. On the main question the court say: "The fair and reasonable interpretation of the contract is, that the dividends were not only to be preferred, but, being guaranteed, were *cumulative* and a specific charge upon the accruing profits, to be paid as arrears before any other dividends were paid upon the common stock."

Many other cases might be cited to the same purport and effect were it necessary.

So far as the adjudications with regard to preferred shares are, by analogy, applicable, they strongly support the conclusions to which we have come in the case at bar.

Indeed the language of the courts and the reasons assigned are in many respects strongly in point. In the English cases it is held that the preferred stock, issued, as it is in nearly every instance, to enable an embarrassed railroad to raise money, is but a form of loan, the contract taking the place of a mortgage, and hence is, in this regard, the same as an income bond, the interest or dividend in each case being payable only out of net earnings.

It is not so much what the security is called as what is the purpose and effect of it. This was the position of the Supreme Court of Ohio in the case of Burt v. Battle, already cited.

In Rutland, etc., v. R. R. v. Thrall, 35 Vt., 536, it was said that the issue of preferred stock was but a mode of raising money, much used in public enterprises,

and regarded only as in the nature of a mortgage. It is treated as a legitimate mode of borrowing money, and only as a form of mortgage.

See also the same view emphasized in West Chester, etc., R. R. v. Jackson, 77 Pa. St., 321.

In view of these conclusions, the demurrer to the petition and supplemental petition will be overruled, with leave for defendant to answer.

The motion to dissolve the injunction heretofore granted is overruled and the same continued in force until the further order of the court.

Paxton & Warrington, Matthews, Holding & Greve and Geo. O. Warrington, for plaintiffs.

H. H. Poppleton and R. D. Marshall, for defendants.

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## PARTNERSHIP—VERDICT. 58

[Superior Court of Cincinnati, General Term, June, 1887.]

G. Y. ROOTS ET AL., PARTNERS v. JAMES P. KILBRETH ET AL.

1. Where a promissory note, made by R. & K., was on the day of its maturity taken up by a firm of which R. was a member, the check of the firm being given for the note, and the latter received from the holder with a receipt of payment written upon it, and nothing was said or done by the firm of the holder to indicate that either regarded the transaction as a purchase of the note by the firm, *Held*, that the note was paid, and the firm could not afterwards maintain an action upon it against R. & K.
2. After dissolution, one who was a member of the previously existing partnership cannot bind his former partner, by any agreement whereby the unpaid indebtedness of the firm is materially altered in form or character.
3. A presumption of liability is necessarily overcome by a presumption of payment of the same.
4. The court may direct a verdict for the defendant after all the evidence of both parties has been given, where there is no conflict in the evidence as to the material facts of the case, and where the law admits of no inference from the evidence except that which is favorable to the defendant.

The plaintiffs began the action by a petition, setting forth eight causes of action, in each of which they alleged that they were the holders and owners of a joint and several promissory note, made by the defendants and indorsed by Kilbreth, which was overdue and unpaid, and praying judgment for the aggregate amount of said notes with interest.

The defendants answered admitting the execution and indorsement of the notes and their possession by the plaintiff, but averring that they came into the plaintiffs' possession under the following circumstances, and not otherwise: Roots and Kilbreth had agreed to form a partnership and go into the business of manufacturing and selling salt, and a few days before the commencement of the partnership the notes were executed and negotiated by them for the benefit of the business into which they were about to enter; that when the notes became due the firm of Roots & Co., by direction of G. Y. Roots, paid the same, and charged the amounts of said payments to Roots & Kilbreth in an account against them kept by Roots & Co.

It was also alleged that plaintiffs were afterwards supplied with funds by Roots & Kilbreth more than sufficient to pay the notes and interest, and that the same had been applied by Roots & Co., to the extinguishment of that portion of their account containing the charges for payments made on the notes and interest.

Plaintiffs filed a reply denying the allegations of new matter contained in the answer.

At the trial, the court below held that the right to open and close the testimony and argument was with the defendants, and the trial proceeded in that order.

The evidence disclosed the following undisputed facts: That the notes were made and negotiated by Roots and Kilbreth as individuals, but for partnership purposes, and that the proceeds of them were applied in furtherance of the partnership business. That one of them were held by Dr. Ehrmann, four by the bankers Larkin & Co., and three by D. B. Babb; but the causes of action as to the latter were dismissed by plaintiffs during the progress of the trial. That on the day when the Ehrman note fell due, it was presented at the office of Roots & Co., and a check for principal and interest was drawn by the bookkeeper of Roots & Co., and delivered to the agent of the holder, who then wrote upon the note a receipt in full for principal and interest, and delivered it to the bookkeeper of Roots & Co. On the day when the notes held by Larkin & Co. fell due, the bookkeeper of Roots & Co., pursuant to directions given by Mr. Roots, took them up with the checks of Roots & Co., and they were delivered to him at the bank, with a receipt stamped on each, wherein it was stated that they were paid by the checks of Roots & Co. In neither case was there any negotiation or conversation concerning a sale of the notes. The amounts paid by Roots & Co. upon the notes and interest were charged in their account against Roots & Kilbreth, and the account containing such charges subsequently rendered to them at various times. By agreement between the two firms the account bore interest at the rate of ten per cent. The transactions between the two firms were numerous. Roots & Kilbreth shipped salt and coal from West Virginia to Roots & Co. by whom it was sold for account of the former firm, while Roots & Co. purchased supplies and made advances to Roots & Kilbreth. Accounts of these transactions were kept and rendered from time to time, and in those accounts appear the charges for sums paid for principal and interest of the notes on which this action was based, and in an action between the same parties in the courts of the state of West Virginia the balance of the account, including said charges, was set up as one of the claims of Roots & Co. against Roots & Kilbreth. That litigation has not terminated; the accounts are unsettled, and plaintiffs retain possession of the notes which they have had ever since they first came into their hands. The firm of Roots & Kilbreth was dissolved before the maturity of the notes.

When plaintiffs had offered all their evidence and rested their case, the defendants moved the court to instruct the jury to return a verdict in their favor, which was done, and a verdict returned accordingly. Plaintiffs then moved for a new trial, and the motion was reserved to general term for decision.

PECK, J.

The motion is urged upon the ground that the court below erred in awarding to defendants the right to open and close. The answer admitted the execution and indorsement of the notes, and their possession by plaintiffs, and we think it quite clear that from those admissions the law, in the absence of other facts, would presume a liability of defendants to plaintiffs upon the notes. Applying the test provided by the code, the plaintiff must have had judgment if no evidence had been offered by either party, and the burden of proving facts sufficient to overcome the

presumption of liability raised by their admissions rested upon defendants, as the other averments of the answer were denied in the reply.

The principle contention of plaintiffs is, that the court below erred in directing a verdict for defendants. This proposition necessarily involves a consideration of the facts of the case and their legal effect. Although there was evidence given on other points, there was no conflict in the evidence as to the facts above stated and nothing that would, in any way, vary their bearing and effect. What then are the inferences which the law draws from the facts stated?—or to state the controversy definitely, do the facts stated show that the notes were paid and extinguished, or was there evidence to go to the jury tending to show that they were bought by Roots & Co., for their own account; so that they may now maintain an action upon them? Of the various inferences which might by any possibility be drawn from the transaction, it is only the last mentioned which will enable the plaintiffs to maintain this action. If the notes were bought by them as agents for Roots & Kilbreth, either as a firm or as individuals, the notes thereby became the property of the principals, and the right of the agents would be to re-imbursement for expenditures. The same result would ensue if they bought for Mr. Roots as an individual; they could require re-imbursement of him, and he could compel contribution from his co-maker Mr. Kilbreth.

Turning then to the theory of the plaintiffs, let us see if there was any evidence tending to show that they became the owners of these notes by purchase from their former holders. On the day when they were due, plaintiffs delivered to the respective holders their checks for the exact amount due, and received the notes with the receipt, showing payment in full written upon each of them. Nothing was said to the holders about a purchase, and nothing was said by them on that subject. These facts seem to point to a payment, and not to a sale. But it is claimed that because Mr. Roots authorized or directed the payment for the notes, that was sufficient to change the nature of the transaction from a payment into something like a sale, because Mr. Roots was one of the makers of the notes, and we are cited cases such as The Union Trust Co. v. Monticello Ry. Co., in 63 N. Y., 311, wherein the president of a railway company requested a person to pay certain coupons then falling due, and which the company was unable to pay, and promising repayment, and on the faith of the promises the party paid the coupons at maturity, and it was held that he could afterwards recover upon them against the company, although there was no evidence of a sale by the person for whom he received them. If Mr. Roots were the only maker of these notes, the cases would be more analagous—but does the fact that he requested or directed the firm of Roots & Co. to pay affect Mr. Kilbreth? Mr. Roots, it is to be observed, was the principal member of and the owner of seven-tenths interest in the firm of Roots & Co., so that the request or direction by him appears very much in the light of a mere mental operation. Being a maker of the notes, the simplest explanation of the transaction, is that he paid them with the money of Roots & Co. There is no evidence of any consultation between himself and the other members of the firm of Roots & Co. about it, the direction to make the payment having been given by him to an employe of that firm. The fact that under such circumstances he paid with the money of Roots & Co., has no more tendency to prove that the firm purchased the notes, than would the fact that he paid with his own money. But viewing the transaction as if he were not a member of the firm of Roots & Co., and treating it

as a payment made at his request by a party with whom he had no connection, could his request, so made, affect Mr. Kilbreth? Their partnership had been dissolved a year or two before the maturity of the notes, so that there was no longer any power by which one could bind the other to any new engagement, or to a new form of an old engagement. if any such power had ever existed with reference to these notes which were executed by them as individuals, though in furtherance of the partnership business. In Palmer v. Dodge, 4 Ohio St., 21, the Supreme Court held that after dissolution one of the former partners could not bind the other by giving a note in renewal of a previous note of the firm. In the learned and forcible opinion of Judge Ranney it is stated, that "as the dissolution finds the engagements of the company, they must remain until liquidated and paid, unless all the partners consent to come under new engagements or otherwise change their character." It is urged that the direction or request given by Roots did not create any new obligation or alter the form of the old one, but was at most a mere transfer of indebtedness from one set of creditors to another; but we think plaintiffs at this point are met by a dilemma. If the consent of Roots alone would materially affect the obligation of Kilbreth, it is within the rule laid down in Palmer v. Dodge, and if it did not have such effect, it is unimportant to the determination of the case, or, to put it a little differently, Mr. Roots could not at that time by his separate agreement materially alter the case as to Mr. Kilbreth's liabilities from what it would have been without such agreement, and hence neither court nor jury could regard any action of that sort by Mr. Roots as evidence affecting the obligations of Mr. Kilbreth.

The only other circumstance in the case from which it is claimed that an inference of purchase might arise, is the fact that Roots & Co. retain possession of the notes—but that fact seems quite as consistent with the theory of payment as with that of purchase. If they paid the notes they would be entitled to retain them as vouchers until a settlement of their account could be had—and that has never yet taken place. The retention of the notes alone would not justify any inference either of purchase or payment because it is equally consistent with both, and in the absence of other circumstances supporting the claim of purchase, does not aid the claim of plaintiffs. A fact equally consistent with the claims of both parties can hardly be said to be evidence in support of those of either.

As to the power of the court to order a verdict for the defendant under such circumstances as existed in this case, we do not think there is now any doubt. In the cases of Alt v. Weber and Koerbitz v. Weber, not long since decided by this court, evidence had been given by both parties; but the court below finding that the evidence of defendant as well as that of the plaintiffs tended only to support the claims of the latter, directed verdicts for the plaintiffs, which direction was held correct in general term, and the Supreme Court refused defendant leave to file petition in error. See also Whelan v. Kinsley, 26 Ohio St., 131.

From the facts of this case no inference of purchase by Roots & Co., was admissible, and there was nothing to go to the jury to sustain the issue on the part of plaintiffs. We are led to this conclusion not only by the unaided facts, all of which appear to point in one direction, but by presumption which the law raises upon them, and which seems to us decisive of the case.

When a party to a promissory note, or a stranger, delivers to the holder of it, the amount due upon the note, on the day of its maturity, and receives the note from the holder, and there is nothing further to indicate the purpose of the parties, the law presumes that the transaction was intended as a payment of the note. Burr v. Smith, 21 Barb., 262; Eastman v. Plumer, 32 N. H., 238; Lancy v. Clark, 64 N. Y., 209; Dougherty v. Deeny, 44 Iowa, 443; Smith v. Sawyer, 55 Me., 139; Chester v. Dorr, 41 N. Y., 279; Greening v. Patten, 51 Wis., 146; Binford v. Adams, 104 Inn., 41; 2 Daniel, Negotiable Instruments, sec. 1221.

This presumption is one which yields readily to proof of a different intention by the parties; but in the absence of such proof it is decisive. The rule as to payment by a stranger *supra protest* for the honor of the drawer or acceptor, applies only to bills of exchange and does not extend to promissory notes. 2 Daniell Neg. Inst., 1223, 1244, and such payment can only be made after protest *id.*, 1254; Byles on Bills, *262. In a majority of the cases cited it is said that to constitute the transaction a sale, the intention that it should be such must be shown to have existed in both parties, for the reason that a sale is a contract, to which the assent of at least two parties is necessary. It is difficult to resist the force of that proposition; but there are cases in which it appears not to have prevailed. In Dodge v. Freedmen's Trust Co., 93 U. S., 385, it is said that "if the maker had anything to say or do in the premises, it was to present himself with the money when the notes matured, pay them, and secure his obligations. Failing in this, he leaves the securities to be dealt with as others interested may choose." But that hardly reaches the case of the stranger who pays the money, for he was not previously interested, and had no right to deal with them in any way except by the consent of some one who was, and the nature of the interest acquired by him would appear to depend upon his agreement with that party. In the absence of proof showing the intention of the holder to sell, it would seem that the only reasonable inference to be derived from his receiving the money due and giving up the note, on the day of its maturity, is that he believed he was being paid that to which he was entitled.

The case of Dodge v. Freedmen's Trust Co. is not, however, opposed in principle to the conclusions we have reached in the case at bar. The question of payment or purchase was there made to depend upon the intention of the party paying the money, and the court, found that the Trust Co. intended to purchase the notes at the time they were taken up. Applying that rule to the case at bar, the same result is obtained, as would follow if the consent of both parties were held necessary to make it a purchase. There is no evidence that Roots & Co. intended or believed that they were purchasing the notes. On the day when they were due they furnished the money and took up notes of which the head of their firm was a joint maker, received the instruments with a receipt in full written upon each, and charged the amounts paid to Roots & Kilbreth in their account, and frequently rendered it to the latter with interest on such payments computed at a rate different from that specified in the notes. If the presumption of payment arising in the absence of proof of any different intention may be overcome simply by showing that the party advancing the money intended thereby to purchase the notes, the plaintiffs have failed to produce any item of evidence tending to show that they had such intention, and the presumption must prevail.

But we are told that even if such presumption arises from the facts, the case should have been left with the jury, for that there was also a presumption of defendant's liability on the notes arising from the admitted possession of them by plaintiffs, and that it is the duty of the jury to weigh conflicting presumptions. Payment pre-supposes a liability, and a presumption of payment can only arise in a case where there has been proof of a previously existing liability; but when payment is made the liability is extinguished, and when a presumption of payment arises, it necessarily supersedes any presumption upon which the liability rested. If a defendant, admitting the creation of a liability, comes into court with evidence from which the law presumes the liability to have been paid, there is no conflict between the admission and the presumption; but the one furnishes the necessary basis for the other. A presumption of liability and a presumption of payment cannot exist at the same time. The existence of the latter necessarily terminates the existence of the former; hence there can be no conflict between them; and no comparative weighing of them by the jury.

The motion for a new trial is overruled, and judgment may be entered upon the verdict.

TAFT and MOORE, JJ., concur.

Kittredge & Wilby, for the plaintiffs.

Harmon, Colston, Goldsmith & Hoadly, for defendants.

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## ELECTIONS. 61

[Superior Court of Cincinnati, General Term, July, 1887.]

Peck, Taft and Moore, JJ.

### †JULIUS DEXTER v. FREDERICK W. RAINE ET AL.

1. An act (84 L. 221), providing for the erection of a monument to Wm. Henry Harrison in Hamilton county, and to defray the expenses, authorizing the county commissioners to levy a tax on the county duplicate, if a majority of the electors vote in favor of it, is constitutional.

   First, it leaves no discretion in the county commissioners, but compels them to act as instruments of the state, and hence does not violate the Constitution, art. 10, 87.

   Second, the purpose of the act is a public purpose.

   Third, submitting the question to vote is not a delegation of legislative power, nor is the statute one taking effect on the approval of other than the general assembly.

2. A statute providing that a certain tax shall be levied, if, on being submitted to a vote a majority of the votes cast shall be in the affirmative, means a majority of the votes cast on the question, and the ballots on which both yes and no are printed, and neither word erased, are not to be counted in determining what is a majority.

Plaintiff in his petition alleged that the commissioners and the auditor of Hamilton county were about to levy a tax on the county duplicate for the purpose of erecting a monument to the memory of William Henry Harrison, and prayed an injunction against the levy, on the ground that the act of the General Assembly authorizing the same

†This judgment was affirmed by the Supreme Court, without report, October 18, 1887.

is unconstitutional and void, and that the levy has not been authorized by a majority of the votes cast at the April election, as provided in the act.

Plaintiff moved the court for a temporary injunction, and defendants demurred to the petition. Both the motion and demurrer were reserved to the General Term.

PER CURIAM.

The demurrer raises two questions:

First—Is the act entitled "An act to erect a monument in commemoration of the public services of Wm. Henry Harrison" (84 O. L., 221) constitutional? We are of the opinion that by the act no discretion in the levying of the tax is vested in the county commissioners. That they are by its terms compelled to submit the question of the levy to a vote of the qualified electors of Hamilton county, and upon an affirmative vote to make the levy. That in so doing, therefore, they are mere instruments appointed by the legislature for the exercise of the broad power of taxation placed by the constitution in that body. The act is, therefore, not a violation of sec. 7, art. 10 of the constitution, providing that commissioners of counties shall have such power of local taxation for police purposes as may be prescribed by law. State ex rel. Hibbs v. Commissioners of Franklin county, 35 Ohio St., 458.

We are of the opinion that the purpose for which the tax under the act is to be levied, is a public purpose. The erection of a monument in honor of a man who has rendered valuable service to his country is an enduring acknowledgement of the country's gratitude, which will be a strong incentive to patriotic service by other citizens. (Cooley on Const. Lim., 605. Burrough on Taxation, page 20.)

The custom of erecting such monuments at public expense, is so well established in our country, in England and in nearly all other civilized countries, that it tends to support the proposition that an expenditure of that sort is made for a public purpose. The argument that such a power is liable to abuse is hardly sufficient to show that it does not exist, and the remedy for any such abuse, as in other cases of abuse of legislative power, lies within the legislature itself, or with the people rather than with the judiciary.

The people of the county which was the home of such a man have a peculiar interest in his memory, which, added to the fact that the influence of a monument is necessarily local, makes the purpose in erecting it properly a local purpose. Walker v. Cincinnati, 21 Ohio St., 15.

The fact that the execution of the law is made to depend upon a vote of the qualified electors of Hamilton county is not a delegation of legislative power, or a violation of sec. 26, art. 2, of the Constitution. Newton v. Mahoning, 26 Ohio St., 618.

Second—The second question raised by the demurrer is, whether the condition precedent provided in the law before the levy has happened. Section 3 of the act is as follows:

"Before such tax shall be levied the question of making such levy shall be submitted to a vote of the qualified electors of said county of Hamilton at the election in April next. The commissioners of Hamilton county shall prepare ballots for said vote as follows; 'Harrison Monument, Yes,' 'Harrison Monument, No.' If a majority of the votes cast shall be in the affirmative the commissioners shall proceed to levy and assess said tax at one-tenth of one mill on the dollar, but not otherwise."

The ballots used were the municipal and township ballot upon which were printed: "Harrison monument—yes," "Harrison monument—no." The "no" was erased from 23,136 and "yes" voted. The "yes" was erased from 16,844 and "no" voted; 14,000 ballots were voted upon which both "yes" and "no" appeared. We are of the opinion that the words "majority of the votes cast" in the connection in which it appears should be held to mean majority of the votes cast on the question. Commissioners of Marion County v. Winkley, 29 Kan., 36. The fact that no other county question or election was submitted to the voters at the April election, also warrants this conclusion.

Municipal and township ballots upon which both "yes" and "no" appeared were not votes cast upon the question. They were void and of no effect. A vote is but the expression of the will of the voter. State v. Green, 37 Ohio St., 227, 230. Where no will is expressed no vote is cast. The man who casts a ballot expressing no will, does not cast a vote any more than he who absents himself from the polls.

We are of the opinion that the law is constitutional, and that the condition precedent to its execution has happened. The demurrer will be sustained, and the motion overruled.

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## MUNICIPAL CORPORATIONS. 65

[Superior Court of Cincinnati, General Term, June, 1887.]

CINCINNATI (CITY) v. JACOB.

Where injury to property, stored in a building, was caused by a flow of water into the street, and thence into the building, from the defective "service" pipe leading from the main water pipe to another building on the street, which defective pipe had been placed in the street by the owner of the last named building, by permission and under supervision of the city authorities, for the purpose of supplying the last named building with water furnished by the city: *Held*, that after notice that water was escaping from the street into the building, the city authorities were bound to use reasonable care to prevent the continuance of the injury.

ERROR to Special Term.

The action was brought by plaintiff below to recover damages for injury to his premises and to goods stored therein by reason of a flow of water which escaped from a water pipe into the street, and thence into plaintiff's premises. The city denied generally that the injury was caused as alleged, or in any way that could render the city responsible. The evidence disclosed that water was found running into plaintiff's cellar, where a large quantity of meat packed in ice was stored, and efforts made to prevent it which were unavailing. Notice was then given to the Board of Public Works, and an examination was made of the sewers and main water pipes in the neighborhood, but no leak was discovered. The water continued to flow for several months and the attention of the Board of Public Works was called to it at various times by communications from Jacob. Finally a more thorough investigation discovered a leak in a "service" pipe leading from the main water-pipe to a building on the opposite side of the street, a few feet from the point where the service pipe connected with the main, and between the latter and the line of the curb. The leak was easily stopped when discovered and the cause of injury removed. The service pipe had been placed in

the street by the owner of the building to which it extended, for the purpose of supplying the occupants of the building with water. It had been so placed by such owner, by permission of the city authorities, pursuant to rules established by ordinance and otherwise for the management of the water-works. Said rules provided that service pipe should be laid by and at the expense of the owner, but that before any street should be opened for the purpose of laying or repairing such pipe, application for permission should be made to the Board of Public Works, when, it deemed proper, permission would be given; the pipe to be laid pursuant to the regulations of the department for that purpose, and only by a plumber licensed by the city.

On the foregoing state of facts there was a verdict and judgment for plaintiff below for injury caused by the flow of water.

PECK, J.

We are of the opinion that the judgment of the court below should be affirmed. It is true the city did not place the service pipe in the street, and as between itself and the party receiving the water was under no obligation to keep it in repair—but its duty to others was different. The charge of the court below left the jury at liberty only to award damages for any injury that occurred, after notice to the Board of Public Works, of the flow of water into plaintiff's premises. After receiving such notice it will not do for the city authorities to say that the injury was caused by the person who was permitted to place the pipe in the street. It then became known to them that water was escaping, not from the pipe, but from the street into plaintiff's cellar—and if they chose to permit the water to continue to flow into the street from the pipe, it was at least their duty to use reasonable care to keep it out of plaintiff's premises. If a private person permits the accumulation of water on his premises, and it escapes thence into those of his neighbor and there causes injury, it has been held by very high authority that the former is liable without regard to the question of negligence. Fletcher v. Rylands, 3 H. L. Cas. L. R., 330.

That doctrine has been much criticised, and is not adopted by the courts of last resort in various states: 53 N. H., 442; 55 *Id.*, 57; 38 N. J. L., 339. But it is not anywhere denied that if the escape of the water is owing to the negligence of the person on whose premises it accumulates he will be liable to the party thereby injured—and that was the view of the law stated to the jury by the court below. In the charge the jury were distinctly given to understand that the liability of the city to plaintiff depended upon presence or absence of reasonable care on the part of the city officers in discovering and stopping the flow of water, after they had received such notice as to put upon them the duty of inquiry and examination.

As to the claim that the injury was caused by the negligence of the licensee, and that the city is not liable for that reason—the city cannot shift the responsibility for what is done in the streets in that way. The care and control of the streets in intrusted to the city authorities and it cannot be delegated or contracted away. The license was to convey water, to be furnished by the city, through a pipe placed in the street, and gave the licensee no right in or control over the street. In the conveyance of water by such means a certain degree of care was requisite to prevent its escape, and that was as well known to the city authorities as to the person licensed. It was an artificial accumulation of water in

the street by the combined act of the city and the licensee, and cannot be said to have been wholly for the benefit of the latter. Without service pipes the water-works would be useless, the dweller by the wayside would receive no water, and the city no revenue. The pipe having been placed in the street by permission of the city authorities, and partly for its benefit, and the water passing from the pipe into the street, and thence into plaintiff's premises, causing damage, after notice and full opportunity to prevent it by the city's agents, we must either hold the city liable for the damage so occasioned, or that there was no obligation to put a stop to the flow of water through the highway exclusively under its control, although the plaintiff might be helpless to protect himself against the injury. We feel bound to take the former alternative, and in so doing think we are supported by the authorities, although we have not found a case precisely parallel to this. Water Co. v. Ware, 16 Wall., 566; Robbins v. Chicago, 4 Id., 657; Circleville v. Neuding, 41 Ohio St., 465, 466; Rhodes v. Cleveland, 10 Ohio, 160; Steggles v. New River Co., 11 W. R., 234; 13 Id., 413; Dillon Mun. Corp., 3d ed., sec. 1045, 1048; Ashley v. Port Huron, 35 Mich., 296.

The cases cited by plaintiff in error are all distinguishable in fact and principle from the case at bar.

TAFT and MOORE, JJ., concur.

Horstmann, Hadden & Foraker, city solicitors.

Paxton & Warrington, for defendant.

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## INTOXICATING LIQUORS. 66

[Fayette Common Pleas.]

### CHARLES C. MCCREA v. WASHINGTON (VILLAGE.)

A prohibitory ordinance passed by the council of a municipal corporation in Ohio, under the Dow law, against the traffic in intoxicating liquors within such corporation, is within the power of such municipality so far as the retail traffic in liquor is concerned. But a municipality has no power, under the Dow law or any other law of Ohio, to pass an ordinance prohibiting the sale of liquor by wholesale, or compelling druggists to keep lists of persons to whom they furnish liquors on prescription.

ERROR from the Mayor's Court.

HUGGINS, J.

Two cases, entitled as above, have been argued and submitted together. There are a number of assignments of error, the questions presented being, for the most part, the same in each case.

It is claimed that the ordinance in pursuance of which the convictions in these cases were had, is void, because inconsistent with, or unauthorized by, the law of Ohio. The specifications of this claim are:

(1.) That the act commonly known as the Dow law (Ohio L., vol. 83, p. 159), by virtue of which the ordinance was passed, confers no power to prohibit the wholesale traffic in intoxicating liquors, and that the ordinance in terms prohibits such wholesale traffic.

(2.) That the ordinance contains more than one subject and is therefore inconsistent with sec. 1694 of the Rev. Stat., which provides that "no * * * ordinance shall contain more than one subject, which shall be clearly expressed in its title."

(3.) That keeping a place where intoxicating liquors are sold (one of the offenses provided against it), "is, in its nature, continuous in respect to time." That by the provisions of sec. 1862, Rev. Stat., no fine or penalty greater than "ten dollars for each day where the thing prohibited * * * is, in its nature, continuous in respect to time," can be imposed, while the ordinance imposes a minimum fine in such case of twenty-five dollars.

(4.) That section three provides an illegal mode of conducting the trial, the ordinance being thereby rendered invalid.

It is also claimed that the ordinance purports to have been enacted by the village of Washington, C. H., and that the letters "C. H." vitiate the ordinance.

The foregoing claims for the plaintiff in error will be considered in order as stated.

The power to prohibit traffic in intoxicating liquors is conferred upon municipal corporations by a part of section 11 of the Dow law in the following terms: "And any municipal corporation shall have full power, to regulate, restrain and prohibit ale, beer and porter-houses, and other places where intoxicating liquors are sold at retail for any purpose or in any quantity other than as provided for in section 8 of this act." The meaning by common usage, of the phrase, "ale, beer and porter-houses," is, places where ale, beer and porter are sold at retail. The words, ale-house, beer-house, porter, are defined consistently with such meaning.

"Ale-house. A house where ale is retailed; and hence a tippling house."—*Webster.*

"Beer-house. A house where malt liquors are sold; an ale-house."—*Webster.*

"Porter. A malt liquor."—*Webster.*

The phrase is plainly used in this sense in the Dow law: "Ale, beer and porter-houses, and *other* places where intoxicating liquors are sold at *retail*," by fair construction and giving the word "other" as used its proper weight, means retail places alone. Nor does the remainder of the sentence change the meaning. "At retail for any purpose or in any quantity" can not fairly be made to mean wholesale for any purpose or in any quantity.

That part of section 11 above quoted being the only authority under which a municipal corporation may prohibit the traffic, and no power being therein conferred to prohibit the wholesale traffic, the provisions of the ordinance prohibiting the wholesale traffic, are without authority of law and therefore void.

"Municipal corporations, in their public capacity, possess such powers, and such only, as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted."—Ravenna v. Penn. R. W. Co., 45 O. S., 118.

The claim that this ordinance is invalid because it contains more than one subject, rests upon the fact that the second section enacts a regulation for such traffic as the first section does not prohibit. The section is as follows:

"Section 2. It shall be unlawful for any person keeping a place in such village where intoxicating liquors are sold, but not in violation of section 1 of this ordinance, to make sales of such liquor for any purpose, without preserving a record of each sale made in a book for that purpose; wherein he shall enter, at the time such sale is made, the quantity and

kind of liquors sold, to whom sold, and when on the prescription of a physician, the name of the physician furnishing the same; and when not sold on the prescription of a physician, said record shall show whether said sale was made for mechanical, pharmaceutical or sacramental purposes, and such record shall, at all reasonable times, be subject to the inspection of a committee of any three persons whom the mayor, with the approval of the council, may make."

The power to regulate the traffic in intoxicating liquors is conferred upon municipal corporations by the clause of section eleven of the Dow law before quoted, with the exception, perhaps, of the power given in sec. 1692, Rev. Stat., which is only "to regulate ale, beer and porter-houses and shops," and gives no power to regulate "other places where intoxicating liquors are sold at retail." They have the same, and no more or greater power, to regulate than they have to prohibit, so far as the Dow law, and 'places where intoxicating liquors are sold at retail," other than "ale, beer and porter-houses and shops" are concerned.

That power is limited in two respects. First, as to wholesale traffic. Second, by sectien 8 of the Dow law, for after the power to regulate or prohibit is granted, the limitation occurs, to-wit: "other than is provided for in section eight of this act."

Section 8 of the Dow law, as amended, is as follows:

"Section 8. The phrase 'trafficking in intoxicating liquors,' as used in this act, means the buying and selling of intoxicating liquors otherwise than upon prescriptions issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof by the manufacturer of the same at the manufactory in quantities of one gallon or more at any one time."

The eighth section does not, in terms, provide for the sale of anything. It simply defines what the phrase "trafficking in intoxicating liquors" shall mean, and what it shall not include. But courts should give effect to language used in legislative enactment, if such force and effect can be found.

The reference to section 8 in section 11 can have no effect unless it be construed as accepting from the prohibitory and regulative power given to municipal corporations those sales which by section 8 are not meant by or included in the phrase, "trafficking in intoxicating liquors." It is then fairly to be inferred that such construction accords with legislative intent. If that is so, it follows that a municipal corporation has no more power to regulate than it has to prohibit sales of intoxicating liquor "upon prescriptions issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical, or sacramental purposes," and sales by manufacturer at the manufactory in quantities of one gallon or more, and that any such regulation is void. What effect this holding will have upon the claim that the ordinance provides for more than one subject will be noted further along.

It is probable that the second section is void because it is unreasonable. To say nothing of the provisions as to a committee of visitation, it provides that a manufacturer from the raw material, who sells in quantities of one gallon or more either ale, beer or porter, or "other intoxicating liquors, shall record in a book kept for the purpose whether such sale is made on prescription, or for mechanical, pharmaceutical or sacramental purposes."

It is said that one of the things rendered unlawful by the first section of the ordinance, to-wit: "Keeping a place where intoxicating liquors are sold," etc., "is in its nature continuous in respect to time," and the lowest fine imposed being twenty-five dollars, it is therefore unreasonable under sec. 1862, Rev. Stat., which provides in such case that "when the thing prohibited is, in its nature continuous in respect to time," ten dollars for each day shall not be unreasonable.

What is a thing in its nature continuous? It is something more than a thing which is continuous merely. Something must be meant by the words: "in its nature." A thing is in its nature continuous when the quality of continuity is inherent in it. In other words:—a thing is continuous *in its nature* when it goes on of itself. A thing is not continuous *in its nature* when it stops unless carried on. Keeping a place where intoxicating liquors are sold is not a thing that goes on of itself, if it be a thing at all. It stops unless carried on. The thing prohibited by the first section is not, then, "in its nature continuous in respect to time." But if this was not so, the provisions of section 1862 would not render the ordinance invalid, for the last clause of the section provides that "where in any * * * ordinance a greater fine is imposed than as above specified, it shall be lawful for the court or magistrate, in any suit or prosecution for the recovery thereof, to reduce the same to such amount as may be deemed reasonable and proper, and to permit a recovery or render judgment accordingly." A particular case might be infected with error because of an unreasonable fine, but no other result would follow.

It is claimed that section 3 of the ordinance provides an illegal mode of conducting the trial, and that because thereof the ordinance is void. Section three is as follows:

"Section 3. Any shift or device, used by any person or persons, to sell intoxicating liquors contrary to the provisions of this ordinance, shall be held to be in violation of the same, and to subject the person so offending to the penalties thereof."

This section does not provide any mode of conducting the trial. It provides, or attempts to provide, what shall be an offense within the ordinance. In so far as it includes the wholesale traffic prohibited in the first section, and the regulation provided for in section 2, it must fall because that which it is founded upon falls. In so far as it provides against shifts or devices relating to the retail traffic, it is simply a re-enactment of the first section. It only provides against "shifts or devices * * * contrary to the provisions of the ordinance." A shift or device to evade an ordinance contrary to its provisions is an offense against it, whether so expressly enacted or not. The third section is of no effect.

It is also claimed that the ordinance is invalid because the letters "C. H." follow the word Washington in the title and in the enacting clause. It is not claimed that these letters affect the meaning of the ordinance, or that they make it applicable to any place outside of Washington. It is claimed and argued that as "Washington C. H." is the name of the post-office at Washington that the letters "C. H." in the ordinance confine its operation to the place or building in Washington where the post-office is kept. This claim is, I think, founded on a misconception. Washington C. H. is not the name of the building in Washington where the post-office is kept. It is the name of Washington for post-office purposes. No reason is apparent why the letters "C. H." in this ordinance should affect its validity any more than the addition or

omission of any word or letters which would not affect the sense. It would hardly be claimed that if the word Washington were mis-spelled the ordinance would be void so long as it clearly appeared that Washington was intended. This ordinance is entirely identified by the record as having been enacted by the council of the village at Washington.

I thus reach the conclusion that the part of section 1 of the ordinance, which prohibits the wholesale traffic, and the second and third sections are void. It remains to consider and determine whether such invalidity avoids the whole ordinance.

It does not follow because part of an ordinance is invalid that the whole ordinance falls. "A part of an ordinance may be void and the remainder valid"—Piqua v. Zimmerlin, 35 Ohio St., 507.

"The same rule applies to a by-law or ordinance that does to a statute; and that is, that where the statute consists of severable and independent parts having no general influence over one another, and a part is valid and a part is void, the part which is valid is operative and will be carried into effect." Same case, 35 Ohio St., 511.

It must be kept in mind that any ordinance or part thereof not authorized by the laws of the state is void. It is not to be eliminated or set aside. It never was; therefore it cannot be set aside. If it is and was void it is and was nothing. In case of an ordinance in part void the remainder is to be considered as if the void part were not; as if the space wherein it appears were a blank. For the purpose of having a clear view of that part of this ordinance not found to be invalid it will be written out in full, leaving out those parts held void and omitting formal parts. It then reads thus:

"Be it ordained, by the council of the incorporated village of Washington, C. H., Ohio:

"Section 1. That it shall be unlawful for any person or persons to open, establish or keep within the limits of said incorporated village any shop, room, booth, arbor or any place wherein ale, beer, porter or any other intoxicating liquors are sold at retail for any purpose or in any quantity otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes; but this section shall not apply to the manufacturing of intoxicating liquors from the raw material in said village, and the sale thereof by the manufacturer in said village in any quantity of one gallon or more at one time.

"Sec. 4. Any person or persons violating any of the provisions of this ordinance shall, on conviction thereof, for the first offense, be fined not less than twenty-five dollars nor more than fifty dollars, and for each repetition of such offense such person or persons shall be fined not less than fifty dollars nor more than one hundred dollars, and in each case the party so convicted shall pay the costs of his prosecution.

"Section 5. If any person or persons who shall be convicted of violating any provisions of this ordinance and shall after such conviction continue such violation, every such person shall be deemed guilty of a distinct offense for each and every day such violation shall continue."

By an inspection of the foregoing provisions of the ordinance, the void parts being omitted, it appears that there remain the provisions of a complete ordinance within the power of the council to enact, and even symmetrical in form save the numbering of the sections. This could hardly be so if the void parts were not severally from and were depend-

ent upon the void parts. It thus appears that the void parts are "severable and independent parts," and that the void parts have "no general influence over" the parts that remain. No presumption arises that the council would not have prohibited the retail traffic within its power if it had not mistaken its power to prohibit the wholesale traffic, and to regulate such features of the retail as it could not prohibit.

The result reached disposes of the claim that more than one subject is included in the ordinance. The prohibition of the wholesale traffic and the second and third sections being void, there is but one subject, the retail traffic.

The conclusion is reached that the sections relating to the retail traffic, to-wit: the first, fourth and fifth, are valid.

The plaintiff in error having been convicted for a violation of the valid part of the ordinance, that prohibiting the retail traffic, his convictions were not erroneous unless some error occurred in the proceedings in or about the trials. I have carefully examined the records in this respect. Without going into a discussion of each error as claimed in the trial proceedings I will content myself with saying that I find no error "affecting materially * * * substantial rights," except in one particular, in the record of the cause in which the petition was filed July 8th. In that case the fine assessed was one hundred dollars. The maximum fine for which the ordinance provides is fifty dollars, except in cases were there is a repetition of the offense. In the judgment of the mayor, as shown by the transcript from his docket, there is no finding that the offense in this case was a repetition. In the bill of exceptions the following statement occurs:

"And said mayor upon said evidence found said defendant guilty as charged in said complaint, and that this was the fourth offense under said ordinance."

Now, a careful inspection of the evidence as set forth in the bill of exceptions, fails to disclose any evidence tending to show that the offense charged in this case was a repetition. If that fact had been judicially found by the mayor as shown by his record of sentence, it might be sufficient to support the fine. The mere statement in the bill that the offense was a repetition, when no evidence tends to support such statement, is not sufficient. No opinion is now expressed whether the complaint should allege the offense to be a repetition, or whether, the finding in the record of sentence without testimony would be sufficient. Here there is neither such judicial finding or the testimony. The one or the other is a condition precedent to the infliction of a greater fine than fifty dollars.

For this error the cause in which the petition was filed on the eighth of July is reversed and remanded.

The cause in which the petition was filed on July 2d, is affirmed, with costs.

## SALE UNDER DEED OF TRUST—MORTGAGE. 101

[Morgan Common Pleas.]

BARBARA RITTINGER, ADMX., v. J. B. NORTHROP ET AL.

After sale and conveyance by a trustee, under a deed of trust in the nature of a mortgage, a junior mortgagee whose mortgage was given before default under the deed of trust, may, without redeeming, maintain an action to foreclose his mortgage.

PHILLIPS, J.

This action is to foreclose a mortgage given May 24, 1878, by the defendant Northrop, to Louis Rittinger, plaintiff's intestate, to secure a note payable in one year. Mrs. Ferris answers that on December 5, 1877, Northrop, to secure his note to W. H. Leeper, due in one year, conveyed said real estate, by deed of trust, to Jas. K. Jones; said conveyance was by its terms to be void upon payment of the note secured by it; upon default of payment Jones was authorized to advertise, sell and convey the premises without appraisement; the deed was by its terms made irrevocable, and was to be construed as a deed of trust and not as a mortgage; and it contained such other covenants and assurances as are usually found in deeds of trust to secure indebtedness. In February 1879, Jones duly sold the premises, under the deed of trust, at auction, to said Leeper, for less than the debt secured, and conveyed to him. On February 12, 1880, Leeper, for value, sold and conveyed to Mrs. Ferris, who had no knowledge of the mortgage sued upon. She prays that her title be quieted, or, in the alternative, that plaintiff be required to redeem. Plaintiff demurs to her answer.

The conveyance to Jones was not an absolute deed of trust, leaving only an equity in Northrop; it was a deed of trust in the nature of a mortgage, leaving in Northrop the legal title, which he did encumber by the mortgage in question. Martin v. Alter, 42 Ohio St., 94.

As the title remaining in Northrop was subject to the power of the trustee to sell upon default, so the estate conveyed by the mortgage was subject to the same condition; and as the deed to Jones left an interest in Northrop that he could convey by mortgage, so the estate conveyed by the deed of trust became subject to the rights of Rittinger under his mortgage, which, being of record at the time of the trustee's sale, was notice to everybody.

The insertion of power to sell in a deed of trust or mortgage does not change the nature of the conveyance. Such power affects the remedy only, and is merely cumulative; it does not prevent foreclosure, by judicial proceedings. 1 Hill on Mtg., 131; 9 Reporter, 220. Nor does the pendency of a bill to foreclose prevent a sale under the power. Brisbane v. Stoughton, 17 Ohio, 482. By introducing a trustee, the parties simply provide an additional mode for satisfying the debt upon default of payment, Turner v. Johnson, 10 Ohio, 204, 208.

The right to foreclose is an absolute right, and may be exercised by any mortgagee, be his lien senior, junior or intermediate; and he may foreclose without making other lien-holders parties to the proceeding. Strict foreclosure, the common remedy in England, rests upon the original conception that the mortgage vests the mortgagee with the estate, and when the mortgagor's right to redeem is cut off, the absolute title is left in the mortgagee. But foreclosure by judicial sale, the com-

mon remedy in Ohio, proceeds upon the theory that the mortgage creates a lien as a security for the debt, and the premises are sold in order to enforce the lien and pay the debt. The sale transfers to the purchaser the title of both mortgagor and mortgagee. Carter v. Walker, 2 O. S., 339. Sale by a trustee, under power in a deed of trust or mortgage, is a foreclosure by sale under the power instead of by decree of a court. Turner v. Johnson, *supra*; Brisbane v. Stoughton, *supra*.

In this case, the sale by Jones, as trustee, was equivalent to a foreclosure by judicial sale in a proceeding wherein this plaintiff, a junior mortgagee, was not a party. It is well settled in Ohio, that by such sale the rights of the junior mortgagee are not affected; that the purchaser at such sale, whether it be the senior mortgagee or a stranger, acquires title subject to all the rights of the junior mortgagee, and that the rights of such junior mortgagee are (1) to redeem, or (2) to foreclose his mortgage without redeeming. Childs v. Childs, 10 Ohio St., 339; Stewart v. Johnson, 30 Ohio St., 24; Holliger v. Bates, 43 Ohio St., 487.

The plaintiff has the right, notwithstanding the facts stated in the answer of Ferris, to foreclose her mortgage without first redeeming; and as the answer makes no bar to the relief asked by plaintiff, her demurrer thereto is sustained. Whether the plaintiff shall gain anything by a foreclosure, or shall even recover costs, depends upon facts to be hereafter disclosed.

Siegel & Jones and W. B. Crew, for plaintiff.

Metcalf & Berry, for defendant.

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## ELECTIONS. 173

[Hamilton Common Pleas.]

STATE OF OHIO EX REL. COSNER v. BENJAMIN H EHRMAN ET AL.

Under the election act, sec. 2926e, Rev. Stat., (83 L., 209), providing that the election officers shall be appointed on or before September 1st, and shall not be of the same political party, the Union Labor Party having shown by the previous election that it is entitled to recognition as a party, must be recognized by a fairly proportionate representation in the appointments of election officers. But appointments made in good faith in the preceding May or June can not be ordered to be recalled. The law will not restore what has been lost by the delay of the relator. The relator is entitled to a mandamus, but only to secure a fair representation in future appointments.

KUMLER, J.

The relator brings and prosecutes this action in mandamus against the board of elections of this city, for the purpose of compelling the board to give the Union Labor party fair and equal representation in the appointment of judges, registrars and clerks of election. He alleges that said party has a national, state and county organization, and at the April election of this year, it cast about 17,300 votes, and that said organization proposes to nominate a full county ticket, to be voted for at the November election, and that said party is entitled to secure equal representation in the appointment of judges, registrars and clerks in every voting precinct within the limits of the city. That said party called upon said board in April and July of this year, and demanded an equal

representation, which was refused on the ground "that it was impracticable and not required by the letter or spirit of the law."

To this petition the respondents file an answer, in which it is denied that said party has such organization. It is further answered that appointments to the number of 844 have already been made, and that it is not practicable to comply with the demands of the Union Labor party. They further answer by saying that such appointments are entirely within the discretion of the board.

The act of the general assembly passed May 19, 1886, among other things provides that "on or before the first day of September, annually, the board of elections shall appoint for each and every election precinct in any such city, two electors of such city, to act as registrars of the electors, and also as judges of election in such precincts. And on the first day of October, in the year 1886, and every year thereafter, the said board shall appoint two additional judges of elections and two clerks of elections for each and every precinct in any such city, and who shall hold their appointments for one year. It also provides that such judges clerks and registrars, refusing to serve without sufficient cause, to be determined by the board, shall be fined not more than $100 or be imprisoned for fifteen days, or both.

Section 2926e, upon the subject of appointments, is as follows:

"Neither the two registrars for any precinct nor the two clerks of election shall be of the same political party. Appointments of such officers for each precinct shall be made so as in good faith to secure equal representation of political parties if practicable. Any vacancy in such offices shall be filled by the board, and either of such officers may be summarily removed from office by such board at any time for neglect of duty, malfeasance or misconduct therein."

A party may be defined as a voluntary association of persons united in opinion or design, in opposition to others in the community. The answer of the respondents admits that the Union Labor party, in April last, cast in the neighborhood of about 17,300 votes.

This large number of votes indicates that the party represented by the relator, is entitled to recognition as a political party, under the statutes. The testimony disclosed the fact that on April 26, 1887, the Union Labor party called upon the board of elections of this city, and requested representation in the appointment of judges, etc., and was informed that in such appointments, the Labor party "would be considered with others," without making any definite promise to make appointments from such organization. This request was renewed on the twenty-ninth day of July, 1887, when the board "declined to grant the demand, on the ground that it was impracticable, and not required by the letter or spirit of the law."

This action of the board amounted to a refusal to make such appointments.

The record of the board was introduced in evidence, showing that in the appointments already made to the number of 844, only two judges, two registrars and nine clerks of election—seventeen (17) in all—were made from the Union Labor party. Was this in accordance with the law? We think not.

The statute expressly provides that the board, "on the first day of September, annually, shall appoint two registrars and two judges of election in each precinct, and on or before the first day of October in each year, two additional judges and two clerks of election in each and every

precinct within the city, who shall hold their offices for the period of one year, and if they refuse to serve they may be fined or imprisoned."

The law also provides that such judges, etc., may be removed for neglect of duty, malfeasance or misconduct therein.

The record shows that 844 judges, clerks, etc., had already been appointed, commissioned and sworn in by the board. We are asked not only to order appointments under the statute in the future, but to command the board to recall and cancel a certain proportion of the judges, clerks and registrars already made, and replace them with judges, clerks and registrars from the Union Labor party, in order to secure equal representation under the statute.

Can this be done after the board has acted in making its appointments?

The court can require an inferior tribunal to exercise its judgment, or to proceed to the discharge of any of its functions, but it can not control judicial discretion. See R. S., 6742; Comrs. v. Comrs., 24 O. S., 393; State v. Harris, 17 O. S., 608; Burnet v. Auditor, 12 O., 54; 18th Wendell, page 79.

The appointments must be made on or before the first day of September and October in each year, Can appointments made in May and June preceding September and October in each year, within the time prescribed by law, be said to be illegal—without authority from the board?

The relator in this case does not even allege that the appointments already made were so made in bad faith, fraud, and in gross abuse of the discretion vested in the board. The courts cannot assume that fraud and bad faith were practiced in a case where the relator does not so complain that he has been deprived of his rights.

It is a well settled principle of law that where a public officer (or the board in this case) is vested with discretionary power concerning a public duty required at its hands, and it is called upon to use that official judgment and discretion, and exercise it, as in making appointments in this case, in the absence of bad faith, fraud, or gross abuse of discretion, that discretion will not be controlled or directed by mandamus. The State ex rel. Ins. Co. v. Moore, 42 Ohio St., 103, 108; Comrs. v. Comrs., 1 Ohio St., 149; State v. Harris, 17 Ohio St., 608; Moses on Mandamus, 78; High Ex Rem., sec. 24; United States v. Seaman, 17 Howard, 225.

The board having acted in making its appointments, we do not see our way clear to order undone that which has already been done. Under the law the judges and clerks can only be removed for cause, which involves a hearing. Besides a judge and clerk of election are compelled to serve, unless excused by the board, or submit to fine and imprisonment.

Suppose the judge or clerk already appointed refuses to surrender his commission and insists on serving, notwithstanding a Union Labor judge has been appointed to act in his place, who is to decide which judge must give way to the other on election day?

We submit that such a course, if ordered, might result in endless confusion on the day of election. Certainly, no authority cited warrants such a proceeding. Counsel for relator cites the State v. Mitchell, 31 Ohio St., 592, 593, in support of his position. In that case the commissioners undertook to subject certain streets and alleys in Columbus for the payment of a street improvement. The court decide that the selec-

tion of property to be assessed was not submitted to the discretion of the commissioners.

The board answers by saying it is not practical to make appointments from the Union Labor party, and that such appointments are discretionary with it. We can not adopt this view. The statute was expressly passed to secure fair and honest elections. Representation is a safeguard against fraud and corruption in the conduct of elections. The statute is mandatory and the Union Labor party having demonstrated in its numbers and organization its right to be considered a political party within the meaning of the statute, the court finds that the relator is entitled to a peremptory writ of mandamus. The law will not permit an order recalling the appointments already made. State v. Moore, 42 Ohio St., 103, 108. The law can not restore what has been lost by the delay in the relator in prosecuting his action in mandamus. To the end, therefore, that the Union Labor party shall hereafter secure in good faith equal representation in the appointment of judges and clerks of election at the voting precincts within the city limits under the statute, it is hereby ordered that the board of elections in the future make its appointments from the Union Labor party whenever such appointments can be made under the statute.

The law was intended to preserve the elective franchise from the hands of political robbers and pirates from every quarter, and it ought to be strictly obeyed and enforced.

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## CONTESTS OF WILLS. 198

### BOWER'S ACCOUNTS.

(Explanation of an unreported case in Supreme Court.)

*Allowance of Counsel Fees to Executor.* Where a contest of a will, prosecuted on the grounds of undue influence and want of capacity, is successfully resisted by the executors, they are entitled to be allowed their expenses, including counsel fees.

In the case of "The Settlement Account of Henry F. Bowers, Executor of the Estate of Daniel Laws, deceased," being cause No. 352 on the general docket of the Supreme Court, January term, 1887, and disposed of shortly before the summer adjournment, a question of importance to the profession was decided, but was not reported.

The case was this: In 1874 a suit was commenced in the common pleas court of Belmont county, Ohio, to contest the validity of the last will and testament of Daniel Laws, deceased, upon the ground of want of capacity in the testator to make a will, and of alleged undue influence on the part of some of the legatees. To this suit the legatees under the will and the executor were made parties defendant, and the executor assumed the burden of the defense and incurred all of the expenses, by employing counsel and paying them, and defraying the expenses incident thereto. After several trials in the common pleas and district courts, the final result was that the will was sustained. Thereupon the executor filed his settlement account in the probate court of Belmont county, filing therewith his vouchers for the expenses of the contest, including counsel fees, and claiming credit for the same. To these

vouchers exceptions were filed and sustained by that court, from which an appeal was taken to the common pleas court, where the exceptions were again sustained and a petition in error filed in the district court to reverse the judgment of the common pleas court; but in that court the judgment of the common pleas court was affirmed. Thereupon the executor filed a petition in error in the Supreme Court, being the case above referred to. The Supreme Court reversed the judgment of the district court, and proceeding to render the judgment the common pleas court should have rendered, directed that the executor be allowed all of the vouchers to which exceptions had been filed as before stated. The journal entry in the Supreme Court reads as follows:

"This cause came on to be heard upon the transcript of the record of the district court of Belmont county, and was argued by counsel. On consideration whereof it is ordered and adjudged by this court, that the judgment of said district court be and the same is hereby reversed for error, in affirming the judgment of the court of common pleas, and this court proceeding to render the judgment which the district court should have rendered, it is ordered and adjudged that the judgment of the court of common pleas be and the same is hereby reversed for error in sustaining the exceptions to the account of the plaintiff in error, and this court proceeding to render the judgment which the court of common pleas should have rendered, it is ordered and adjudged that the said exceptions to said account be and the same are hereby overruled, and the charges so excepted to are hereby allowed, as proper credits in favor of said executor, to be allowed in the settlement of his accounts. It is further adjudged that the plaintiff in error recover of the defendant in error his costs incurred in the proceedings below and in this court."

This is all the court has to say on the question.

The only decision by the Supreme Court of Ohio on the question whether an executor who undertakes the burden and expense of defending a contested will, is entitled to his expenses from the estate for doing so, is Andrews v. Andrews, 7 Ohio St., 143. In that case (in which the will had been set aside), according to the syllabus, the court holds that where the will is declared invalid, its executor who undertook to defend it is not entitled to an allowance of his expenses, without saying whether he would have been entitled to his expenses if the will had been held valid. But in the body of the decision no such distinction is made—at least it does not appear with any clearness—and from the language it would appear that our Supreme Court was of the opinion that where an executor undertakes to defend a contested will, he would not be entitled to his expenses whether the will were held valid or not. The court seems indeed to be of the opinion that executors in Ohio should not in any case undertake the burden of defending a contested will, and the probate, common pleas and district courts of Belmont county, in refusing to allow the expenses incurred by the executor in defending the will in this case, probably understood the decision of our Supreme Court in the Andrews case in that way. The action of our Supreme Court, therefore, in ordering the executor's expenses in this case to be allowed, is of special importance.

As no opinion of the Supreme Court is reported in the case, we give in the following a copy of the brief of J. H. Collins, counsel for the executor:

STATEMENT OF THE CASE.

In the probate court exceptions were filed to the account of the executor, and after a hearing upon those exceptions was had in that court an appeal was taken to the court of common pleas, where the case was again heard and a bill of exceptions taken, setting out all the testimony and the findings of the court upon the exceptions, and a petition in error filed in the district court to review the finding and judgment of the common pleas court; and the district court having affirmed the judgment of the common pleas court, the case is here for review. The exceptions relate solely to two classes of vouchers, and about which there is no question of fact, there being no dispute in the common pleas court with reference to the facts, but the differences being upon questions of law.

Early in the year 1874, after the probate of the will of Daniel Laws, deceased, a suit was brought by Thomas D. Laws, Crapper H. Laws, Edward M. Laws and Mrs. Ellen Smith, each of whom was an heir of the estate, as well as a legatee under the will of Daniel Laws, deceased, against all of the other heirs and legatees, and against the executor, for the purpose of contesting the validity of the will of the deceased, the averment being that he was of unsound mind at the time of the execution of the will, and that the will was procured by undue and improper influences. This suit was tried in the common pleas court twice, and from there appealed to the district court, where it was finally tried in the spring of 1878, and a verdict and judgment rendered sustaining the will. When this suit was commenced, the executor, who was made a defendant, employed counsel and assumed the burden of the defense, and paid counsel fees and other expenses growing out of the contest. And these vouchers constitute the second class, to which exceptions were sustained in the common pleas court.

No question was made with reference to these vouchers, as to the amount, the fact of payment, the reasonableness of the bills, or any question of negligence or bad faith upon the part of the executor.

With regard to the will suit, it is contended that the executor, when the will, which turns out to have been the valid last will and testament of Daniel Laws, deceased, was attacked, it was the duty of the executor to stand by and permit it to be overthrown, if the beneficiaries thereunder would not themselves assume the burden of its defense, and it is contended that the expenses which he incurred in the defense of the will shall not be allowed him.

These present the two questions involved in this controversy.

ARGUMENT.

2d. As to the expenses of the will contest. At least two-thirds of the heirs and legatees were co-defendants with the executor, and consented to his assuming the burden of the expenses of the suit. These are not now objecting to the allowance of the expenses of the suit to the executor, and they could not object if they would—they would be estopped from so doing. The exceptions were filed by the same parties who brought and prosecuted the suit to contest the validity of the will.

The position occupied by these parties is this: They made an unjust attack upon the will of their deceased brother; they averred that this will was not valid—that it was a void instrument, and when defeated,

they say to the executor: You should not have defended this will, you should have let it go by default, if the other defendants refused to assume the burdens of the defense, and thus permitted us to direct the distribution of the estate of Daniel Laws, instead of the testator. But having assumed the burden of the defense, and having defeated our unjust attack upon the trust estate, you must bear the expense yourself, because otherwise we must bear a small part of the expense of our attempt to destroy it.

Their act in making the contest was wholly unjust, and not warranted by either the facts or the law, yet they are now asking to be protected from the proper and legitimate result of the course they pursued. The proposition is monstrous, and cannot be tolerated; for it is nothing less than compelling the executor, personally, to pay the expense of this unjust attack upon the estate.

The position here assumed rests both upon reason and authority, and I here refer to the authorities cited by Mr. Otis in his brief in Andrews v. His Administrator, 7 Ohio St., 148, 149, which not only sustain the proposition for which he was contending, but that for which we here contend.

It seems to me perfectly clear that the case cited above (Andrews v. His Administrator, 7 Ohio St., 143–153) is entirely conclusive of the question here made.

The argument of counsel in that case was based upon the theory that the expenses were incurred in the defense of a void trust; but it was conceded that if the trust had been held valid, the expenses should have been allowed, and this is the basis of the decision of the court. On page 151 the court say:

"True, an executor is a trustee; and it seems to be well settled that a trustee who has accepted a trust is bound to defend the trust estate, and may in consequence charge upon it the proper expenses of such defense. (2 Story's Equity, sec. 1275; Noyes v. Blakeman, 2 Selden, 567). But with the exception of an *obiter dictum* in John v. Tate, 9 Humph., 388, we find no authority to sustain the position that a party acting as trustee is bound to defend the relation of a trustee, whenever that relation is assailed or called in question; although should he do so, *and do it successfully, it seems he would in that case be entitled to charge his proper expenses against the trust estate;* and this for the reason that his expenditures inure to the benefit of the *cesutui que* trust." (Scott's Estate, 9 Watts. and Sergt., 98.)

As already stated, the course pursued by the executors in defending the will suit inured to the benefit of the legatees under the will, and they should be charged with its expenses; and the fact that some of the parties would have received more as heirs than they received under the will, can make no possible difference, because what they do receive, and what they are now claiming, is as legatees, not as heirs, and it is the estate they are seeking to recover, which was protected by the executor against their assault.

It may be well, however, to look more in detail to the cases bearing on the question of the duty of an executor to defend the trust estate:

The Andrews case, 7 O. S., 143, goes beyond the strong current of authorities, holding that the executor is not entitled, when the will is adjudged invalid, to charge the estate with the expense of maintaining such defense.

But the cases are uniform, and I have been unable to find a single one to the contrary, that where he does make a successful contest of the will, his reasonable expenses incurred, including counsel fees, are recognized as legitimate charges against the estate.

"In analogy to the practice of allowing executors the counsel fees expended in the successful defense of a will, an administrator will be allowed like fees out of the estate, where his right to a controverted administration is successfully established." (Young ex parte, 8 Gill (Md.), 285).

The court say, page 288, the former "practice is well established and conceded."

"An executor is entitled to a credit in his administration account for fees paid to counsel for their professional services in establishing the validity of the will and bequests therein contained, when the legatees entitled to the estate are the parties in interest. (Scott's Est., 9 Watts and Ser., 98).

"An administrator who, in good faith, litigates a claim against the estate of his intestate, is entitled to credit in his administration account for the costs and expenses of the litigation, including the amount paid for counsel fees; and also an allowance for his time and trouble." (Ammons Aff., 31 Pa. Lt., 311.)

"The executor propounding a will for probate, acting in good faith, is entitled to costs out of the estate, whether probate is granted or refused." (Perrine v. Applegate, 14 N. J., Ch. 536).

"*Prima facie*, an executor is justified in propounding a testator's will, and if the facts within his knowledge at the time he does so, tend to show eccentricity merely on the part of the testator, and he is totally ignorant at the time of the circumstances and conduct which afterwards induce a jury to find that the testator was insane at the date of the will, he will, on the principle that the testator's conduct was the cause of litigation, be entitled to receive his costs out of the estate, although the will be pronounced against." Broughton v. Knight, 8 L. Rep.; Prov. and Div. Division (1873), p. 64.

"Reasonable costs and expenses incurred by an executor in propounding for probate a paper which purported to be the last will and testament of the decedent are a proper charge against the estate, if the executor acted in good faith, and had no reasonable grounds for doubting the validity of the paper. * * * Reasonable attorney fees, paid by the administrator *de bonis non*, on account of the services rendered on the contested probate of the supposed will, are allowable as a part of the costs of probate if the attorneys were employed by the proponent and executor." (Henderson v. Simmons, 33 Ala., 292.)

"Allowance to executors of expense of employing counsel to oppose *caveat* to vacate the decedent's will, filed after probate by the guardian of a minor heir, if reasonable, is proper, since it is their duty to oppose the *caveat*." (Compton v. Barnes, 4 Gill, 55.)

"Heir has no standing to appeal from order allowing counsel fees to executors for opposing a *caveat* to vacate the will, where the *caveat* is not ruled good; but if he is a devisee under the will, he has a right to question the reasonableness of the allowance." (*Ib.*)

"After probate of a will and grant of letters supplementary, counsel fees and costs will be allowed to the executors for resisting a *caveat* to the will, and such executors will also be allowed their commissions." (Glass v. Ramsey, 9 Gill, 456).

"It is usual to allow the costs of both parties incurred in contesting a will to be paid out of the personal estate, except where it appears that the conduct of one or the other of the parties is frivolous, oppressive, or fraudulent. (Day v. Day, 3 N. J. Eq., 550.)

"Counsel fees should also be allowed to the executor, who offers the will for probate, and in proper cases counsel fees may be allowed to both parties out of the estate." (*Ib.*)

"It is the duty of the executor to present the will of his testator to the court of probate for allowance. If an issue of *devisavit vel non* is raised upon the will, it is the duty of the executor to take care that the issue is properly tried, and he will be allowed his costs out of the estate, even though he may fail." (Perry on Trusts, Par., 891.)

The principle that it is the duty of a trustee to defend his trust, for which he may be allowed counsel fees, is recognized in Ingham v. Lindeman, 37 Ohio St., 218, where the court say: "After the sale of such property by the assignee under an order of the probate court, where an action is brought by the mortgagee against the assignee for the conversion of the property to his own use, reasonable attorney fees in defending the trust should be allowed to the assignee from the proceeds of the sale of such property."

"It is a general principle that a trust estate must bear the necessary expenses of its administration." (Trustee v. Greenough, 105 U. S. Supreme Court, 527.)

It is submitted that to protect a trust estate from destruction is a part of its administration.

Again, it appears from this record that there were minors who were made parties defendant, and who were legatees, but not heirs. If their guardians had assumed the defense for them, would the guardians be allowed the expenses of such defense out of the trust estate represented by them? If not, it follows that a minor who has an interest in an estate like this, cannot have it defended for want of authority on the part of his guardian to defend it. If he would be allowed such expenses, then it follows that a guardian would be allowed his expenses for defending a trust estate, while an executor, under precisely the same circumstances, would not. This would be an absurdity, and the law is never absurd. But suppose the executor is not allowed these vouchers for money paid in defense of this will, what follows? He has already paid the expenses, and must either lose them himself, or collect from the parties who were the beneficiaries under the will.

To say that the executor shall lose the money thus paid, while others enjoy the benefits of his labor and expenses, is so grossly unjust that I presume it will not be entertained by the court.

If he must collect, from whom and in what proportion? It will not do to make this collection off those who were defendants alone, for some of these may not have wanted to defend—in fact, it is known that some of them did not. It follows that their expenses must be paid by the beneficiaries under the will, in proportion to their several interests. This is the only equitable method of adjusting it.

It may be that some of these preferred their rights as heirs to that of legatees; but it was their rights as legatees that the executor was defending, and they gained by this contest their rights as such whatever they failed to get as heirs by reason of the will being declared valid. It would seem to follow that the legatees should pay their expenses in proportion to their interest in the estate as legatees; but this will result

from allowing the vouchers in this settlement, and will save numerous suits to collect from the several legatees.

ADDITIONAL BRIEF FOR THE EXECUTOR.

Since my former brief was filed it has occurred to me to make some additional suggestions on behalf of the executor, and as a copy of the will of the testator was not printed in the record, a copy is hereto attached. I wish to call especial attention to the opinion of the Supreme Court of the United States in the case of McArthur v. Scott, 113 Sup. Ct. Rep., 340, especially the reasoning of the court on page 395 to 405 inclusive.

I refer to this case because it seems to be conclusive upon some of the questions involved in the present controversy.

1. It settles that the executor was a necessary party to the will contest. Could he be a necessary party with no power to controvert any claims made against him in his capacity as executor?

2. In the McArthur case there were legatees not in being at the time of the contest, and it was there said that it was the duty of the executor to protect and defend the interests of these parties; and had the executor been a party, those legatees would have been concluded by the decree.

So in the present case, Mrs. Crawford and her daughter have the use of the homestead during their lives (see items 1 and 2) and after their death it is to be sold by the executor and the proceeds divided among the brothers and sisters or their heirs, so that the brothers and sisters in being at the death of the testator took nothing under these clauses in this homestead property, but it is the brothers and sisters in being at the death of Mrs. Crawford and her daughter and the heirs of such as may be dead, that will take the proceeds.

It will readily be seen that at that time persons may be in existence who will be legatees who did not exist at the time of this contest.

The McArthur case settles the law that the executor represented and was the sole representative of such as these.

Is the law so absurd as to make it the duty of the executor to represent, and not allow him to protect?

Upon the death of the testator and the qualification of his executor, the legal title to all the real estate vested in the executor in trust to be sold (except the homestead), and the proceeds applied to the legacies named in the will.

The homestead to be sold after the death of Mrs. Crawford and daughter and the proceeds divided among the brothers and sisters, those living and the heirs of those dead. So that the legal title to all the real estate vested in the executor in trust for the purpose named. See Brothers v. Conten, 64 Am. Decision, 568.

He was, then, according to the McArthur case, a necessary party in the contest, in order to divest this estate.

Was it his duty to stand by and see this estate divested without resistance?

Those of the legatees who were defendants permitted the executor either tacitly or by express direction to assume for them the defense of the will. Can these now say that the executor was not authorized so to do?

The plaintiffs attempted to destroy the trust estate; failing in this, they apply to the executor for their legacies, but insist that the legitimate expenses of saving these very legacies for them shall not be paid. Should they be permitted so to do?

When the homestead is sold, those who may be entitled to their share under the will who were not in existence when the will was contested, can they, when they request payment of their legacies, say justly to the executor, "True, you saved these legacies for us, but the expenses of so saving them we will not pay?"

And these three classes compose all who will take anything under the will.

Again, the executor is not only a trustee for the legatees, but he is the sole representative of the testator. It is to him that the testator has committed the management and defense of his estate, and under the doctrines here claimed by the defendants in error, he may defend the trust against every attack, except when the attack is to the most vital part, and then he must quietly submit without resistance. Should the heirs and legatees be of the opinion that the testator has not made a proper disposition of his property, they may dispose of it as suits them, and the testator's representative is without power to resist.

Suppose the testator should say in his will that the executor shall defend it if it is attacked, will it be claimed that such a provision would be invalid? Will it be claimed that the testator has no power to provide for the defense of his will?

But is not this precisely what Daniel Laws did?

He made a certain and specific disposition of his estate, and made H. F. Bowers the instrument through which that disposition was to be made.

Will it be pretended that the power was not impliedly given to use the funds of the estate to carry out the wishes of the testator? The power to do a certain act or series of acts always includes the use of the means necessary to accomplish the end desired.

In controverted will cases the life and every act of the life of the testator is or may be reviewed. He is practically on trial, charged with being either a knave or a fool. He does not meet the witnesses face to face; he cannot be present; he can take no part in selecting or impanelling the jury that is to try him, and he is compelled to submit, without the benefit of counsel or clergy.

In a word, the will contest is a rape on the character of the testator, with no power in the executor to use the funds of the estate for its defense, if the doctrine here contended for is the law.

The foregoing are some of the reasons why it seems to me that an executor in a case like this should be allowed the expenses of a contest, where he assumes the burdens of the suit, and this is fully sustained by authority.

1. In all the states but one the executor is allowed his expenses where he is successful. Bennett v. Bradford, 1 Caldwell (Tenn.), 472; Leavenworth v. Marshall, 19 Conn., 417; Clapp v. Fulton, 34 N. Y., 199; Varney v. Goldsby, 32 Ga., 304.

When unsuccessful, the executors have been equally successful in having their expenses allowed. Henderson v. Simmons, 38 Ala., 391; Gilbert v. Bartlett, 9 Bush., 49; Sterlin v. Gross, 5 La., 107; Butler v. Jennings, 8 Rich. (S. C.), Eq. 89; Brown v. Rogers, 1 Houston (Del.), 458; Gerard v. Babineau, 18 La. Ann., 603; Smith v. Kennard, 38 Ala., 703;

Boylan v. Meeker, 2 McCart. (N. J.), 310; Perrine v. McDonald, 1 *Id.* 531, 536; Clapp v. Fullerton, 34 N. Y., 199; Conley v. McDonald, 40 Mich., 150; Day v. Day, 3 Gr. Eq. (N. J.), 364; Whitenalk v. Stryker, 1 *Ib.* 9; Davies v. Reis, 13 L. T. (N. S.), 609; Boulton v. Boulton, 37 L. J., 19; Tool v. Tretheway, 4 H. L., 201. See also article on this subject in Central Law Journal, Vol. 18, p. 83.

Respectfully submitted,

J. H. COLLINS,
Counsel for Executor.

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## DEED—COVENANT. 202

[Superior Court of Cincinnati, General Term, February, 1887.]

HENRY G. STRIBLE v. CINCINNATI, LEBANON AND NORTHERN RY. CO.

A stipulation contained in a deed, whereby the grantee has permission to enter upon land adjacent to that conveyed and make certain improvements there, on condition that such grantee make good, "by retaining wall or otherwise," any damage thereby occasioned to the buildings of the grantor, does not constitute a covenant running with the land.

PECK, J.

The petition in this case alleges that the plaintiff had sold to the Cincinnati Northern Railway Co., certain lands upon which the company proceeded to construct a part of its railway; that in the deed of the land it was stipulated that the company should have the right to enter upon and make any necessary slope or fill on his, plaintiff's, adjoining land on the west side of the track; provided, however, that said railroad company should make good by retaining wall or otherwise any damage done to the foundation of his barn. And the petition alleges further that the first company did make a slope on the land which damaged the foundation of his barn, and that the defendant company refused to build the retaining wall, and prays for specific performance, and also for damages.

The answer alleges that the defendant, the Cincinnati, Lebanon and Northern Railway Co., purchased the railway and property of the Cincinnati and Northern Railway, and now holds the same, but asserts that it did not assume any of the liabilities of the latter, and admits the making of the deed by plaintiff to the Northern Railway Company as alleged in the petition. A general demurrer to this answer was overruled below, and there being no denial of the allegation of the assignment of the Northern Company to the Cincinnati, Lebanon and Northern, by reply or otherwise, judgment for the defendant was entered at special term. The petition in error is prosecuted to reverse that judgment.

The question, in a word, is whether or not the covenant in the deed from the plaintiff to the Northern Railway Co., to make good by retaining wall or otherwise, any damage done to plaintiff's barn, is a covenant which runs with the land so as to be binding upon the present holder of the railway. It is our judgment that this covenant is not one which runs with the land. In the case of Masury v. Southworth, decided by Judge Gholson in the 9 Ohio St., 341, there is language which seems to point almost directly to this case. The Judge says: "In determining whether the particular covenant was intended to run with the land, the fact that

its particular subject-matter was not in existence at the time the estate was created, is undoubtedly very important and material, and in many instances might be regarded as a controlling consideration. In such a case, though the subject-matter be connected with the land, as a house or a wall to be built upon it at a future day during the term, yet if nothing more appeared to indicate the intent, it might be regarded as a personal covenant and not running with the land."

That was a case of a covenant contained in a lease. The case now before us is that of a conveyance by a deed, and the damage to be made good was not that which might accrue upon the land conveyed, but upon other land of the grantor which was not conveyed. In a very recent case, Austelbury v. Oldham, 29 Chancery Division, 750, the court of appeal reviewed the English decisions upon this subject. The facts in that case were that a party had granted to certain trustees a piece of land over which it was covenanted that the trustees should construct and maintain a road of which the public should have the use, but in which the owner of the property granted should have certain special rights and privileges appurtenant to the remainder of his property. The trustees afterwards sold the property covered by the road to another party, and the court of appeal held that the covenant to construct and maintain the road was not one that ran with the land, and not binding upon the assignees. The language in the case at bar does not, in fact, constitute a covenant to construct a wall; it is that the company shall make good the damage "by retaining wall or otherwise." It might be made good by payment of money, which could hardly be a covenant to run with the land. Nor does the language alleged purport to bind the "assigns" of the grantee, which, though not decisive, is a fact of some significance.

The judgment is affirmed.

FORCE and HARMON, JJ., concur.

J. A. Jordan and N. Bird, for plaintiff.

Ramsey, Maxwell & Matthews, for defendant.

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## DEEDS—MORTGAGES. 203

[Franklin Common Pleas.]

### †JOHN O'DONNELL v. MARY DUM AND HER HUSBAND.

1. In a suit by a mortgagor to redeem the mortgaged property and compel a reconveyance from the mortagee, upon the motion of the plaintiff for a receiver, such an appointment will not be made, if there is anything due to the mortgagee, or the mortgagee is not mismanaging the property, or has not committed, or is not about to commit a fraud which has resulted, or will result in a loss of the property, or in an irreparable injury to the plaintiff.
2. Upon the hearing of the motion, the court need not look beyond the affidavit of the mortgagee, to determine whether anything is due, although the plaintiff controverts the affidavit. The merits of the case on such a question cannot be tried on affidavits.
3. It is the duty and right of a mortgagee in possession, to pay the taxes and assessments imposed, and the cost of improvements made, or ordered to be made by public authority, according to law, and which is a lien on the property, the cost of necessary repairs and improvements made by him, and of permanent improvements made by the consent of the mortgagor, and prior incumbrances,

†The judgment of the superior court in this case was affirmed by the Supreme Court without report, December 18, 1891. Minshall and Dickman, JJ., dissented.

and any other incumbrances, if authorized by the mortgagor; and in determining whether anything is due to the mortgagee, such payments and disbursements made by the mortgagee may be considered as well as the mortgage debt.

4. A mortgagee is answerable for rents and profits, whether any were or were not received.

PUGH, J.

This action was brought by the plaintiff, as a mortgagor, against Mary Dum, his daughter, and as mortgagee.

The plaintiff executed and delivered to Mary Dum, a quit claim deed for the property described in the petition, being a lot and two buildings, in which he had a leasehold estate granted to him by R. E. Neil. At the same time Mary Dum signed a written agreement, by which she agreed to re-convey the property whenever the plaintiff would pay her $150.00, which she had assumed to pay for him. The plaintiff, before he commenced this suit, tendered Mary Dum the $150.00 and demanded a reconveyance of the property. The object of the suit is to compel Mary Dum to allow the plaintiff to redeem the property, and to compel her to re-convey the property. The plaintiff moves the court to appoint a receiver to collect the rents. The mortgagee is in possession of the property, and she has been in possession since November 10, 1886, when the deed was executed.

If the mortgagor was in possession, there would be no difficulty in deciding whether a receiver should be appointed.

But the doctrine of courts of equity, touching the appointment of receivers in cases where the mortgagee is in possession, and the mortgagor suing to redeem, applies for a receiver, is well established. The only difficulty is in its application to a particular case.

It is this: A court of equity will appoint a receiver, if there is nothing due to the mortgagee, or if he is mismanaging the property, which would include waste, loss and destruction of property; or if he has committed, or is about to commit, a fraud which will eventuate in loss of the property, or in irreparable injury to the mortgagor.

The rationale of this doctrine is, that the mortgagor is entitled to the rents and profits of the property from the very time that his right in its possession accrues.

The negative side of part of this rule or doctrine, is thus stated in Quinn v. Brittain, 3 Edw. Chy. Rep. 314:

"A receiver will not be appointed against a mortgagee in possession, who will swear that something remains due."

In one of the pony text-books, (Boone on Mortgages, 184), the rule is couched in substantially the same language, thus:

"In a suit by the mortgagor to redeem, a receiver will not be appointed as against the mortgagee, so long as there is a balance due him on the mortgage debt, unless he is mismanaging the property."

In Beckford's case, 18 Vesey, 377, Lord Eldon declared that he would not appoint a receiver upon the application of a mortgagor, if the mortgagee would swear that a sixpence was due to him from the mortgagor.

To defeat the appointment of a receiver, it is sufficient that the mortgagee makes an affidavit that something is due him. It may not be true, and may be proved to be untrue on the final hearing; it may be contested by the mortgagor; but the court cannot, on the application for receiver, be controlled by such considerations; because upon such an application,

the question of indebtedness cannot be tried. The court has no right to determine it upon affidavits.

The account between the mortgagor and mortgagee can only be settled on the final hearing. The authorities are in harmony on this proposition.

In the case under consideration, it is seriously claimed that some fraud has been committed by the mortgagee, Mary Dum; but there is nothing in the petition or affidavits to support such a contention.

The petition does not charge any fraud, either in express terms or by implication.

In O'Donnell's affidavit, he says that he did not know he was executing a deed; that he did not know the difference between a quit claim deed and a mortgage; that he did not know anything about such matters; that he did not know that the effect of the deed was to divest him of the title; that he did not read the paper, and that he trusted to Mary Dum to treat him fairly, which she did not do. But what if all this is true? It imputes no fraud to Mary Dum. O'Donnell's ignorance is no fault of hers. In external form there is a large number of varieties of fraud; but in all the "multitude of agreements, transactions and dealings of mankind," intrinsically, fraud consists of two classes, false representations and fraudulent concealment. But neither the petition nor affidavit of O'Donnell alleges either of these against Mary Dum. The plaintiff was not induced to make the deed, or accept the agreement by any untruthful representation or fraudulent concealment made by Mary Dum. The statement of O'Donnell that he expected his daughter, Mary Dum, to treat him fairly, and that she did not verify his expectation, is no proof of fraud. It is not claimed that O'Donnell's want of legal knowledge as to the effect of a deed, or as to the difference between a deed and a mortgage, was unduly taken advantage of by Mary Dum, or that it was her fault that he did not read the deed. It is not perceived that there is even the most infinitesimal quantity of evidence in this case to prove fraud.

Hence a receiver cannot be appointed on that ground.

Has Mary Dum mismanaged, or is she now mismanaging the property?

Several witnesses, real estate men, agree that the "buildings are in need of repairs, that they need paint, and that the fences are badly kept and in need of repairs." But it is not shown by the testimony of either of them that this condition was caused, either actively or passively, by Mary Dum. Its condition at the time she took possession, is not proved. The plaintiff, who ought to know what its condition was, and is, testifies that the buildings and lot "are in bad repair, and the salable and rental value of said premises is rapidly depreciating under the control and management of said Mary Dum."

No particular acts of mismanagement or waste are specified; he only gives his conclusion, his inference, which hardly rises to the dignity of evidence. But it is met and answered by Dum and his wife, (1) by an equally general statement that the value of the property has been enhanced $100 by the improvements which have been put on it, and, (2) by a specific statement of some of the improvements which were made and their cost, namely, a sewer costing $38.00, a fence costing $6.00, and repairs on the two houses costing $19.00.

So the conclusion is that there is not enough evidence to prove that the mortgagee has been, or is, mismanaging the property.

The remaining question is: Is there anything due to the mortgagee?

It is not simply whether there is any of the $150 due, but whether there is anything due to the mortgagee for money which it was her right and duty to pay on, or for, the property.

When the mortgagee has been, and is, in possession of the mortgaged property, and the mortgagor sues to redeem the property, equity creates an account between them which must be settled before the property can be recovered by the mortgagor. On such an account the mortgagee is chargeable with the rents and profits, whether any were, or were not received; and he is entitled to a credit against the rents and profits for the cost of repairs and improvements, paid by him, for taxes and assessments legally imposed by public authority, and paid by him, for money paid by him on prior incumbrances to protect the title, and for costs in defending it.

It is the duty of the mortgagee in possession, to preserve the estate in as good condition as it was when he took possession. He is not amenable, however, to the same degree of care that a person would take of his own property. He is only bound to make necessary repairs and improvements, but these do not include the repair of defects caused, in the ordinary way, by waste and decay. He is entitled to an allowance for permanent improvements made by the consent of the mortgagor.

It is not only his duty to pay the taxes, and assessments levied, by proper authority, but also his right to make such improvement, or pay for improvements made, by order of the proper authority, and the cost of which has been made a lien on the property, such as sewers and paving of streets and sidewalks.

For all these payments and disbursements he is entitled to indemnity out of the property. He is not limited to a pecuniary recovery by judgment; the mortgagor must pay it before he can recover the property; it is in the nature of an equitable lien against the property.

The contention between the plaintiff and Mary Dum should be settled by these rules.

Mary Dum and her husband testify that they have, *at the plaintiff's request*, paid more than $250 to relieve the property from the liens against it, and that besides this they have paid the taxes, and the "interest" or rent on the lease of R. E. Neil, to secure which there was a prior lien. And, further, they say, that for repairs on the houses and a fence, they paid $25, and for a sewer $38.

It is true the plaintiff denies this; but the evidence of two witnesses makes a preponderance over that of one against them, when they testify to the same questions, all having equal opportunities for knowing about what they testify, and being of equal credibility. It is not shown whether the sewer was ordered by public authority, or was a private sewer. If it was of the first class, it was a matter of indifference whether the plaintiff consented to its construction; but as the defendants failed to prove what its character was, it will be eliminated from the case on this hearing.

The affidavits of the defendants, also, fail to specify that the liens amounting to $250, which they paid, were prior to the mortgage of Mary Dum; but that seems to be the fair and reasonable inference from their statements, that they paid it "to relieve the property from liens," and that it was done to "save it from being sacrificed at judicial sales."

Still, as this may be a strained construction of the affidavits, the question will not be decided entirely upon that.

Both of their affidavits are affirmative and positive that the $250 was paid at the request of the plaintiff, making a preponderance of the evidence.

It is, therefore, a case where the rights of the parties are not to be determined alone by the deed and written agreements, and by the rule of equity as to the account between the mortgagee and mortgagor. As was said in Rowe v. Wood, 2 Jacob & Walker Repts., 553, the parties have chosen, according to the preponderance of the evidence, to regulate some of their rights by a subsequent agreement. The $250 was paid by the consent, and on the request, of the plaintiff.

Again, it is not shown whether the $250 embraced the $150 for which the mortgage was given; but it was not incumbent on the defendant to do this; and neither the petition nor affidavits enlighten the court as to what debts composed the $150; but that is not the fault of the defendants.

The advantage of an oral hearing of this motion would have been that all the truth would have been ascertained about these questions, which are now involved in darkness.

Upon the question, then, whether there is anything due to the mortgagee, Mary Dum, there is a *prima facie* showing at least that she has paid $275 in discharge of liens and for repairs, and an amount for taxes and interest on the lease not fixed, and that all this is in addition to the $150. If that is true, then the tender of $150 and the rents received, even at the highest estimate made of them, would still leave something due to the mortgagee and for that reason no receiver can be appointed.

This conclusion has been reached, it will be observed, by a partial, though perhaps imperfect, analysis of the evidence.

At the same time it must be remembered, as has been stated, that the court, on this application of the plaintiff, was not required to balance the evidence and ascertain on which side the preponderance was. If the affidavit of the defendant, the mortgagee, showed that there was *any amount whatever* due to her, which it does, the court was not bound to look beyond that and try the case on its merits, although the plaintiff disputed it, and although it was probable that on the final hearing it would be successfully disproved. The rule is so announced in the leading text-books on mortgages (2 Jones Mortgages, sec. 1517), and in Quinn v. Brittain, 3 Edw. Chy. 314.

The plaintiff is not entitled to a receiver under the provision of the statute (sec. 5587) that in an action between "others jointly owning or interested in any property, or fund," a receiver may be appointed; because the plaintiff is not a joint owner of the property, nor is he jointly interested in it, in the sense meant by the statute. The interest or ownership of the plaintiff in the property in question is independent of and separate from that of any other persons. The provision just referred to was designed to embrace all cases of joint ownership and joint interest in property, except that of partners, they being provided for in this section by express terms. They are the cases of tenants in common, joint tenants, and co-parceners.

There are just four classes of cases provided for by the first subdivision of sec. 5587, and no more, in which a receiver may be appointed. They are defined in the language of the sub-division down to and including the word "fund," and the rest of the sub-division, included in the

language following, to-wit: "on the application of the plaintiff or any party whose right to or interest in the property, or fund, or the proceeds is probable, and when it is shown that the property, or fund, is in danger of being lost, removed, or intentionally injured," does not create any additional class of cases for the appointment of a receiver.

This case, therefore, does not come within the provision of this statute.

Counsel referred to the fact that there was no answer denying the petition. That was not material. The petition, being positively sworn to, performed the office of an affidavit as well as a pleading. The defendant had a right to meet it by affidavit as well as by answer, either by denying it or by confessing it, and then avoiding it. The latter course they adopted.

Counsel argued, and cited Wait's Actions and Defenses to support the argument, that if the plaintiff showed an equitable title, he was entitled to a receiver. But the author in the passage cited only teaches that a legal title is not necessary, that an equitable title is enough, to authorize the appointment of a receiver, and he did not intend to state that title was the only condition for the appointment of a receiver.

The motion of the plaintiff for a receiver is denied.

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## TRUSTEES. 220

[Superior Court of Cincinnati, October Term, 1886.]

ANNA HEWITT v. PROVIDENT LIFE AND TRUST CO. ET AL.

Where a trustee, having converted certain funds of his *cestui que trust* to his own use, took out a policy of insurance upon his own life, indorsed upon it an assignment to the *cestui que trust*, and placed it in an envelope in his safe, with a note to his executor, stating that he had assigned the policy to the *cestui que trust*, to pay off the obligation so incurred, and the policy and note were found in the safe after the death of the trustee: *Held*, that the circumstances constituted a valid assignment of the policy to the *cestui que trust*, to secure the payment of the obligation from the trustee.

RESERVED on the pleadings and evidence.

PECK, J.

This action was brought by the plaintiff, asserting title to a part of the proceeds of a policy of life insurance on the life of Clerke, deceased. The Insurance Co., and the executors of Clerke, were made defendants. The company has admitted that there was due to the plaintiff or to the executors of Mr. Clerke, the amount of the policy, and has since paid the money into court, and left the case to be litigated between the other parties.

The facts as shown by the bill of evidence are these: Mrs. Hewitt had a considerable sum of money, which she intrusted to her attorney, Mr. Clerke, to invest for her benefit. Afterwards she purchased a piece of property, and to pay for that, she wished to use the money she had placed in the hands of Mr. Clerke. He told her that the money was outstanding, invested in such a way that it could not be realized at once, and advised her to pay a portion of the purchase money with the money she had, and to give a purchase money mortgage, upon the premises for the remainder, and that he would, during the year before the mortgage became due, secure the money which was outstanding, and pay off this purchase money mortgage. She followed his advice; the mortgage and a note for the deferred payment were executed. When the note became

due, instead of paying it off, the attorney caused it to be transferred to another party, who took the note and mortgage by arrangements with Clerke, Mrs. Hewitt, being under the impression that the mortgage was paid and cancelled. After the death of Clerke, the holder began an action of foreclosure. Then for the first time Mrs. Hewitt discovered that the mortgage was still outstanding in the hands of a *bona fide* holder for value, and unpaid. But it was also discovered, after the death of Clerke, that he had left in his safe an envelope in which was enclosed this policy of life insurance, with an assignment to Mrs. Hewitt endorsed upon it, and a note to his executor in these words: "Mr. Jones: Mr. Anderson, son-in-law of Mr. Herron, and his former partner, hold a mortgage on Mrs. Hewitt's place for less that $2,000. This policy is assigned to pay that mortgage oft and cancel same, as I am under obligation to do so. I had her money loaned out, and am bound to replace it. Alfred A. Clerke." On the back of the envelope was endorsed the name of Mrs. Hewitt, in Mr. Clerke's handwriting.

The claim of the executors is that this assignment did not take effect, because not delivered during the life-time of Mr. Clerke, and that it comes under a rule laid down in a number of cases decided by the Supreme Court, that where parties have attempted to make what the court held to be in substance testamentary disposition of their property without will, no effect could be given. On the other hand, it is claimed that this assignment did take effect by reason of its terms and of the peculiar relations of the parties.

The question seems to turn upon the further question, whether the paper called an assignment took immediate effect, or whether it was only to take effect after the death of the person making it. The case of Phipps v. Hope, 16 Ohio St., 586, is of the latter sort, and it is a fair sample of the cases relied on by Clerke's executor. In it there was plainly an intention that no transfer should be made, and no title pass until after the death of the party who left the memorandum directing that a certain note should be delivered to a person designated. But in this case, as we read the note to Mr. Jones, in connection with the assignment on the back of the policy, we think the latter was intended to and did take effect from the time it was executed. Clerke says, "This policy is assigned." There is no direction to Mr. Jones as to what he shall do; there is simply a statement of fact as to what had already been done by Clerke himself. The case seems to us to come within the rule laid down in the case of Uran v. Coates, 109 Mass., 581, and other cases of that sort, where a party, under some such obligations to another as it is disclosed by this record that Clerke was under to Mrs. Hewitt, made and placed among his papers a declaration that a certain sum should be paid to a party therein named. The Supreme Court of Massachusetts held that to be a valid declaration of trust. See also *In re* Ways Trusts, 2 De G. J. & S., 365. Here Mr. Clerke had taken Mrs. Hewitt's money in trust to be invested for her; the relation between them was that of trustee and *cestui que trust* from the beginning, and when he made this assignment of the policy of insurance and wrote this letter, we think it was a sufficient declaration on his part that he held the policy in trust to pay off his obligation to her; so the judgment will be for the plaintiff.

FORCE & HARMON, JJ., concur.

Baker, for plaintiff.

W. E. Jones, for defendant.

## EVIDENCE. 221

[Muskingum Common Pleas.]

STATE OF OHIO v. LA FAYETTE GRAYSON.

**On trial of one charged with murder, an exculpatory declaration of the deceased, which is neither a dying declaration nor part of the *res gestæ*, is not competent evidence for the accused.**

PHILLIPS, J.

The defendant is upon trial, charged with murder in perpetrating a robbery. The deceased, while traveling alone in the night, was attacked and beaten until disabled and unconscious. He lived several days after the assault. The evidence for the state was circumstantial. The accused offers to prove a statement of the deceased, made several hours after the assault, and tending to exculpate him. The state objects.

1. The statement in question is not a dying declaration, and is not offered as such.

2. It is not admissible as a declaration against interest, for the declarant is in no sense a party to this prosecution.

3. It is not a part of the *res gestæ*, because too far removed, in point of time, from the principal fact; it is mere narrative, finding no support or credence from anything *then being done*, but depending for its force upon the credit of the declarant.

4. It is not competent as an admission, because the deceased sustained no such relation to the state as to bind it by his declarations. In prosecutions for offenses *mala in se* the state does not assert a private right or maintain an individual interest in any such sense as to be bound by the hearsay statements of those who have been the victims of the criminal acts sought to be punished. There is no such legal identity or privity between such victims and the state as to make their statements admissible against the state.

"On the trial of an indictment for manslaughter, committed in an affray, declarations of the deceased, made several hours after receiving the injuries from which he died, and not made in view of approaching death, are not admissible as evidence in favor of the defendants, for the purpose of showing the circumstances of the affray." Com. v. Deesmore, 12 Allen, 535.

"The declarations of a party other than the defendant, and which formed no part of the *res gestæ*, although they may amount to an admission that the declarant committed the offense charged against the defendant, are not admissible in evidence, in behalf of the defendant." State of Kansas v. Smith, 16 Bull., 384.

It is true that in Mimms v. The State, 16 Ohio St., 221, it is held that on a trial for murder, where it appears that property in possession of deceased shortly before the murder was soon thereafter found concealed on the premises of a third person, about that time in the company of the accused, the state may prove, as part of the fact of discovery, the acts and declarations of such third person accompaning the discovery of the property. And in the State v. Hayden, 9 Rep., 237, it is held that on a trial for murder the declaration of the deceased, made while in the act of going to see the accused, that she was going to see him and inform

him of her pregnancy by him, and require him to do something for her, is competent evidence to characterize the act of going.

But these two cases are not in conflict with the principles before stated. In each case the declaration was part of the *res gestæ;* not part of the *litigated act*, but part of an *evidentiary fact.* In the Ohio case, the declaration was admitted to characterize the co-incident act of discovery of property; and the declaration and the act thus united became a single evidentiary fact, tending to show that the property though concealed, was in fact in the custody of the accused. In the Connecticut case, the declaration was admitted as part of the co-incident act of going; the two being so correlated as to constitute a single evidentiary fact relevant to the fact in issue.

I am of opinion that upon both principal and authority the statement in question is not competent, and the objection of the state is sustained.

Verdict, guilty of manslaughter.

Power & Crew, for the state.

Andrews & Durban, for the defendant.

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## 243 MARRIED WOMEN—JUDGMENTS.

[Logan Common Pleas, September Term, 1887.]

LUCINDA E. DRAKE v. E. M. BIRDSALL & CO.

**Under the legislation of 1884, a personal judgment cannot be recovered against a married woman upon a promissory note signed by her as surety merely, without any consideration connected with her separate estate.**

STATEMENT OF CASE.

On the fifth day of June, 1885, W. M. Skidmore, as principal, and Will Skidmore, W. T. Penhorwood, and Lucinda E. Drake (plaintiff herein), as sureties, executed their promissory note, with warrant of attorney attached, to the defendant, E. M. Birdsall & Co., for the sum of $316.67, due in ninety (90) days after date with eight per cent. interest.

On the sixth day of October, 1885, E. M. Birdsall & Co. filed a petition in the ordinary form based upon said promissory note; and on the same day an attorney of this court, by virtue of the warrant of attorney attached to said note, waived the issuing and service of process, entered the appearance of the defendants in said action, and confessed a judgment against them for the amount of said note and interest; and on said last mentioned date a judgment was rendered against them for the sum of $325.11.

On the twenty-eighth day of June, 1886, Lucinda E. Drake filed her petition to vacate said judgment, alleging therein the foregoing state of facts, together with the additional facts that at the time she signed said note, and at the time of the rendition of said judgment she was a married woman; that she signed said note as surety merely, and no consideration whatever passed to her therefor. To this petition to vacate said judgment, the defendant, E. N. Birdsall & Co., a corporation, has interposed a general demurrer.

William Lawrence, for plaintiff:

This case presents two principal questions for decision:

First. Can a married women execute a valid promissory note as surety for a third person without any consideration connected with her sole and separate property?

Second. Can a married women execute a warrant of attorney to confess a judgment against herself as surety on a promissory note having no connection with her separate property?

The first question is: Can a married woman execute a valid promissory note as surety for a third person without any consideration connected with her sole and separate property? I maintain she cannot.

At common law she cannot make a personal contract. 1 Bishop M. Women, sec. 842; Levi v. Earl, 30 Ohio St., 158; Williams v. Urmston, 35 Ohio St., 296; Jenz v. Geigel, 26 Ohio St., 528; Swasey & Co. v. Autram & Co., 24 Ohio St., 87.

Has this common law rule been changed?

The act of April 14, 1884, vol. 81, p. 209, provides as to a married woman that "the separate property of the wife shall be under her sole control, and shall not be taken by any process of law for the debts of the husband, or be in any manner conveyed or incumbered by him, and she may, in her own name, during coverture, contract to the same extent, and in the same manner, as if she were unmarried."

If the last clause stood alone a married woman could contract as a *feme sole*. And so it has been construed by the court of common pleas of Hamilton county, in Dunkham v. Bruce, 16 W. L. B., 291.

But this is not the true construction for several reasons:

I. A statute is not to be construed by its mere words. *Qui haeret in litera haeret in cortice.* The intention of the legislature as gathered from all proper aids is to control.

II. The power to contract, as given by the statute quoted, only extends to the "separate property of the wife." The subject with which the legislature was dealing in the section quoted was the "separate property of the wife." It is a rule of construction founded on the maxim *noscitur a sociis* and others of similar import, that "where the meaning of any particular word [or phrase] is doubtful or obscure * * * the intention * * * may frequently be ascertained * * * by looking at the adjoining words, or at expressions occurring in other parts of the same instrument" [statute]. Broom Legal Max., 294; Ruffner v. Hamilton Co., 1 Disney R., 198. The first clause of the section treats of "the separate property of the wife;" this is connected by the copulative "and," with the second clause, which treats of the same subject, and the third and last clause, relating to the powers of the wife, is connected by another copulative "and," with all that precede it. Here the maxim applies *copulatio verborum indicat acceptationem in eodem sensu.* Bac. Works, vol. 4, p. 26. The coupling of phrases together "shows that they are to be understood in the same sense." Broom, 294. They all relate to one subject and they only enlarge the common law powers of the wife so as to authorize her to "contract [in relation to her separate property] to the same extent and in the same manner as if she were unmarried."

III. This conclusion is not defeated by the general form of expression used in the last clause of the section of the statute. This is shown (1) by a maxim of construction; (2) by reference to other sections of the same act; (3) and by reference to other acts.

1. The maxim is *verba generalia restringuntur ad habilitatem rei vel personam.* "General words shall be aptly restrained according to the subject-matter or person to which they refer." Broom, 275. And Broom, in making an explanation of the maxim, says:

"Where a particular class [of persons or things] is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* [of the same sort] with such class; the effect of general words when they follow particular words being thus restricted."

The application to the statute in this case is this: The statute first deals with a "particular class of things"—the wife's separate property.

It then exempts it from process of law for the husband's debts. It then—treating of the same class of things—copulates therewith "general words," declaring what the wife may do with the subject-matter, and upon the maxim quoted these "general words" are to be "restricted" to the particular subject-matter.

There is a kindred maxim which leads to the same result—*generalia specialibus non derogant.* Many cases illustrative of this maxim are cited in Huidekoper's

case (second), 3 Lawrence Comptroller's Decisions, 160, to which reference is made solely for the cases collected therein. These and the construction above given.

2. A reference to other sections of the same act of April 14, 1884, leads to the same result. This act re-enacts and amends section 3111 of the Revised Statutes, which is taken from the act of April 3, 1861, vol. 58 Ohio St., p. 54, sec. 4. This section, as found in the Revised Statutes, provides that the court of common pleas may vest a married woman, whose husband neglects to provide for his family, "with the rights, privileges and liabilities of a *feme sole* as to acquiring, possessing and disposing of property real and personal." The section as amended April 14, 1884, provides that the court may vest her "with the rights, privileges and liabilities of the head of a family, as to the care, custody and control of her minor children, and with all the powers of a *feme sole* as to disposing of her real property free from the curtesy of her husband."

Now, if section 3109 gave a married woman power, as its general words literally construed say, to "contract to the same extent and in the same manner as if she were unmarried," then she could dispose of her real property without the provision of section 3111, authorizing the court to give her such power. This shows that the legislature did not intend that section 3109 should be construed as giving a general power to contract in all cases, but only in relation to her separate property, and hence as to her separate real estate section 3111 provides a means by which she may in the cases specified sell such real estate. And to avoid all controversy as to this, section 3112 declares that section 3109 shall not affect the general statute providing the mode by which a married woman's realty may be conveyed. And if section 3109 gave a general power to contract there would have been no necessity for the provision in section 3111 for vesting her with the "rights, privileges and liabilities of a head of a family," etc.

The act of March 20, 1884 (81 Stat., 65) was passed prior to the act of April 14, 1884, and has no reference to or effect upon the question now being considered. It permits a married woman to sue without, as at common law, having her husband join with her (1 Chit. Pl. 8 Am. Ed., 29), and without the intervention of a next friend (Laughery v. Laughery, 15 Ohio, 406) in those cases where she has a right of action.

So it authorizes a judgment against her when there is a cause of action against her, but it does not define the cases where there may be such causes of action. Its purpose perhaps was to authorize proceedings directly as at law against her, when according to previous rulings she had charged her separate property for debts. Levi v. Earl, 30 Ohio St., 147; Williams v. Urmston, 35 Ohio St., 386. So it will apply in actions on the wife's contracts made in her own name "for labor and materials for improving, repairing and cultivating her separate estate," as authorized by act of April 3, 1861, as amended March 23, 1866. Levi v. Earl, *supra*.

IV. The history of the legislation as to married women leads to the result now claimed. The history of legislation is an aid in giving construction to it. See cases cited, Conger's App., 4 Lawrence Comptroller's Decisions, 539.

The act of April 3, 1861 (58 Stat., 54) secured to the wife her separate property "under her sole control." The amendatory act of March 23, 1866 (63 Stat., 47; 2 Sayler, 947—carried into sec. 3108, Rev. Stat.) not only secured the right, but gave the wife a power to contract in relation to her separate property.

"She may in her own name during coverture make contracts for labor and materials, for improving, repairing and cultivating, and also lease the same for any period not exceeding three years."

This gave her a power she did not have at common law; it authorized her to make some contracts, but not all contracts, relating to her separate property. She could not lease for a period longer than "three years." She became liable, as at law, on her own contracts, so authorized. Levi v. Earl, *supra*. But she could not bind herself personally by any other contract. Jenz v. Geigel, 26 Ohio St., 528. As to all other contracts so far as any remedy thereon at law was concerned, she had no legal existence.

Now, let it be remembered, the act of 1863 carried into section 3108, of the Rev. Stat., combined in one section, several subjects:

(1.) It made her real estate her separate property.

(2.) It gave her power to make some but not all contracts, including leases as to it.

(3.) It exempted such property from legal process for her husband's debts.

It was defective; it related to real property only.

The act of March 30, 1871 (68 Stat., 48, carried into the Rev. Stat. as sec. 3109) made an inadequate effort to remedy the defect.

(1.) It made her personal property, including rights in action, hers.

(2.) It did not, in terms, give her power to make any contracts in relation to this property.

(3.) It exempted it from legal process for the husband's debts.

Now, we have before us these statutes; two sections in the Rev. Stat. of 1884. These were "the old law."

The "mischief" found or supposed to exist in them, consisted of defects to be remedied:

(1.) That a wife could not make all contracts relating to her realty; other than selling and mortgaging.

(2.) That she could not make contracts as to her personalty, including rights in action, assuming, as is too often the case, that such power did not exist, unless a statute so expressly provided.

Accordingly, for the purpose of giving a "remedy" for these defects, the legislature, by act of April 14, 1884 (81 Stat. 209), revised the sections of the Rev. Stat., on this subject, as follows:

(1.) It re-enacted that part of section 3108 which made real estate a wife's separate property, and it put into this same section, that portion of section 3109 which made personal property, including rights in action, also separate property; it unified the two sections on this subject, by declaring real and personal property separate property, and it severed this subject from that of (1) liability for husbands and (2) from the matter of power to make contracts.

(2.) The legislature copied from the old section 3108, the provisions exempting the wife's realty from the payment of the husband's debts, and it copied from section 3109, the similar provisions as to the wife's chattel property, and it unified the two old sections on this subject, by putting altogether in a new section, 3109, and then to complete the work of dealing with such separate property, and to give to the wife a power of contracting as to her personal estate as well as her real estate, and to enlarge the previously given power of contracting, there is added to this section the words:

"And she may [as to her separate property] in her own name, during coverture, contract to the same extent and in the same manner as if she were unmarried."

The result is, that under this act she might lease her realty without limit as to time. The act of April 16, 1885, (82 Stat., 131), again amended section 3108, with a restriction of three years as to leases. Now she may make contracts, not only as under the old law, "for repairing and cultivating her lands and lots," but for the erection of store-rooms where none stood before, and for the erection of barns where none stood before, etc.

V. If there be doubt on the question whether the wife's power, as at law, to contract, is limited to her own separate property, the doubt is to be resolved in favor of limitation. At common law, she has no general power to make contracts. The common law is as forcible, live, vigorous law as statute law, and generally much better and wiser law. Where conditions remain unchanged, the common law cannot be abrogated, except by a statute. Courts sometimes indulge in the huge jest that they only declare the law but do not make it! Of course courts know better; they make the common law, by far the largest part of the law. But there is no pretense that there has been any such change in the condition and circumstances of our people, that courts will now give to married women, a sweeping general power to contract as fully as unmarried women.

Then, if there be doubt whether the act of April 14, 1884, has abrogated the common law on this subject, the court must say it has not.

It is said of statute, that repeals by implication are not favored; that is where one statute does not, in express terms, repeal a prior one on the same subject, courts will, if possible, so construe both, as to continue in force, each operative for a purpose peculiar to itself. Broom, Legal Max. 11.

It may be true, that this principle does not technically apply as between a common law rule, and a statute on the same subject; but an equivalent and equally forcible rule of construction does apply generally, that statutes in derogation of the common law, are to be strictly construed, and carried no farther than their words necessarily require. This is so because as Broom has said: Changes in the law "carry along with them a tacit reflection upon the legislature," [and upon the wisdom of the common law].

VI. The *argumentum ab inconvenienti* has persuasive weight. Broom says, "in doubtful cases arguments drawn from inconvenience are of great weight." Legal Max. 85. All the books on the construction of statutes say the "effects and consequence" of a particular construction will have weight in ascertaining the in-

tention of the legislature where the words are doubtful. Weaver v. Gregg, 6 Ohio St., 547, 551; Terrill v. Auchauer, 14 Ohio St., 80, 87.

A change of the common law is a reflection on the wisdom of the past. Principles which have been sanctioned and sanctified by time, which are hoary with age, which have stood "the test of human scrutiny of talents and of time" come to us with the highest evidences of their wisdom, and admonish us that very often that which is new is not good, and that which is good is not new. The usages and wisdom of centuries should not be lightly or unadvisedly changed. If married women may make all contracts as fully as men serious results may follow. Is it wise to destroy the home life of woman by permitting her to borrow money and embark in speculation? Is it wise that she should become a rival and competitor with her husband in business? Is it wise that she be invited by law to abandon the position which ages have given her in the domestic relations and enter into the fierce contests with which wild speculation afflicts too many of the sterner sex? Nature, humanity, and the civilization of enlightened nations, all revolt at a policy which would unsex woman, and subject her to conflicts alike repulsive to her gentle nature, and finer sensibilities, and which would retard the progress of society in all that refines, elevates and ennobles our race.

Physical, and mental and moral science, prove, that women have a different sphere from men. Statutes cannot unsex either, an attempt thereby to do so is a fraud upon nature, demonstrating that,

> "A woman impudent and mannish grown
> Is not more loath'd than an effeminate man."

Holy writ protests against every law which attempts to give the wife unlimited power to contract without the husband's consent, and declares that he "may make it void." Num. 30: 13; Gen. 3: 16; 1 Cor. 11: 3; Eph. 5: 22; Col. 3: 18; 1 Tim. 2: 11; 1 Pet. 3: 1; Eph. 5: 21; Tit. 2: 4.

All this is necessary as Paley says "to guard against those competitions which equality, or a contested superiority is almost sure to produce." Mor. Ph. Ch. 8.

In view of all this, and much more, it is not to be assumed, without the clearest, strongest language in a statute to so require, that the Ohio Legislature has undertaken to annihilate nature, nullify science, enact as law, that which is condemned by the Divine Law, by human reason, by the common law which is the "perfection of reason," by the usages and legislation of all past time, and the civilization of every enlightened nation. Courts with their proper and accustomed conservatism, will not seek out of ambiguous language, a pretext for an innovation which would overturn the entire social fabric of a great state, destroy the unity and sanctity of the holy marriage relation, invest it with the attributes of savage life, breed discord, encourage and create antagonisms where now is peace and domestic happiness, and make "heaven's last best gift to man," his worst and deadliest enemy. This in turn must destroy in the husband the confidence he now reposes in her whom he has vowed to "love and cherish," and thus engendered rivalries and conflicts of interest destructive not only to the best interests of the wife, but to children, home and society. "War, pestilence and famine," with all their horrors and plagues, would be a relief from the evils worse than Sheol, which would result from the anomaly which the court is asked to carve out of the statute.

If a married woman can "contract to the same extent and in the same manner as if she were unmarried" she may engage her services to Barnum's traveling circus, or for similar wandering exhibitions, thus taking her away from home, and the society of husband, I know it may be said the common law gives the husband a right to her society,—a right which he may sometimes enforce by the writ of *habeas corpus*—and that the statute is to be construed in subordination to this marital right. But if the statute is to be construed literally, and so gives the wife a right to make contracts beyond sole and separate property "to the same extent * * as if she were unmarried," thus working a repeal of the common law on this subject, the same process of reasoning which brings this result, will also make the statute work a repeal of common law marital rights of the husband when they cross the path of the wife's contracts.

VII. The sections 4996 and 5319 of the Revised Statutes as amended by act of March 20, 1881—81 Stat. 65—do not recognize or give any power to a married woman to make contracts.

There are cases which support the doctrine that where a statute even by mistake recognizes or assumes the existence of a power it is equivalent to the grant of such power. Some of these cases are cited in Proceeds of Sales' case, 3 Law-

rence Comptroller's Decisions, 41; Otto's case Id. 302; Bliss' case, 5 Id. 39. It may be stated that these cases are not cited as authority, but only as containing a reference to cases which are authority. This remark will apply whenever herein a reference is made to these volumes.

The cases on which the principle stated rests, show that the statutory recognition of a power does not grant it unless a clear legislative purpose is shown by such recognition to give the power.

In order to understand the purpose and meaning of the secs. 4996 and 5319 as revised by act of March 20, 1884, it is necessary to examine the state of the law before they were enacted. The common law recognizes the right of a married woman to have what was called a "separate estate" and a general estate, or as was sometimes said "her separate property" and her "general property."

Thus it was said in Albany Fire Ins. Co. v. Bay, 4 Const. 27 that:

"Separate estates in married women which courts of equity recognize their right to dispose of as femes sole, are strictly equitable estates. They are always created by deed, devise, or marriage settlement. Her power over such property is in the nature of a power of appointment."

The legal title in such estate is held by a trustee. The wife's power over it, depend in a large measure on the terms of the deed, devise, or marriage settlement creating the estate.

The wife's estate is an equitable estate.

But at common law a married woman could hold "general property" or a general estate. In that she held the legal title whether realty, chattels, or choses in action. This was subject however to the marital rights of the husband, who at common law was entitled to the possession and profits of realty, and who could reduce chattels to his possession and make them his own, and could maintain an action on choses in action and make the money thereon recovered his own. 2 Kent Com. 130-143; Bishop on Married Women, 528.

Courts of equity resorted to various contrivances to secure to married women some rights in their general property. 2 Kent. 140. The tendency of public sentiment has been for a considerable period in favor of securing to the wife a right at law to hold and manage property.

Accordingly in Ohio the acts of February 28, 1846, February 5, 1847, April 3, 1861, and March 23, 1866, made changes in the common law, which as carried into the Revised Statutes (of 1884, 3d ed.), sections 3108, 3109, 3110 and 3111 provide that there shall "be and remain her separate property and under her separate control" real and personal property belong to her "at her marriage or which may have come to her during coverture by conveyance, gift, devise or inheritance, or by purchase with her separate means and money," or "due as the wages of her separate labor, or growing out of any violation of her personal rights."

These acts created a statutory separate property, in which the wife holds the legal title without the intervention of a trustee.

These statutes borrowed a phrase from equity jurisprudence—"separate property"—thus creating some confusion in our legal and equitable nomenclature so that now there may be two classes of wife's "separate property"—that known to equity jurisprudence, and that known to the statute, which has made much of that which at common law was wife's general property now wife's statutory separate property.

The Civil Code Practice Act of March 11, 1853, section 28 provided that a married woman might sue by her next friend and without her husband "when the action concerns her separate property." In other cases it provided that "where a married woman is a party, her husband must be joined with her."

This section was amended by act of March 30, 1874 (4 Sayler, 3222), and again by the act of January 21, 1879. (76 Stat., 3), and carried into the Revised Statutes as secs. 4996 and 5319, as follows:

"Section 4996. A married woman cannot prosecute or defend by next friend, but her husband must be joined with her unless the action concerns her separate property, is upon her written obligation, concerns business in which she is a partner, is brought to set aside a deed or will or to collect a legacy, or is between her or her husband."

"Section 5319. When a married woman sues or is sued alone, like proceedings shall be had, and judgment may be rendered and enforced as if she were unmarried, and her separate property and estate shall be liable for the judgment against her, but she shall be entitled to the benefit of all exemptions to heads of families."

These sections were amended by the act of March 20, 1884 (81 Stats., 65), which is now in force as follows:

"Sec. 4996. A married woman shall sue and be sued as if she were unmarried. and her husband shall be joined with her only when the cause of action is in favor of or against both her and her husband."

"Sec. 5319. When a married woman sues or is sued, like proceedings shall be had and judgment rendered and enforced as if she were unmarried, and her property and estate shall be liable for the judgment against her, but she shall be entitled to the benefits of all exemptions to heads of families."

In Jenz v. Gugel, 26 Ohio St. 527, 529, it appeared that Gugel and wife executed a promissory note to Jenz for the husband's debt. Jenz brought suit at law and the common pleas rendered judgment against the husband, but held the wife not liable. The Supreme Court overruled a motion for leave to file a petition in error and said:

"Counsel seem to argue that the 28th section of the code as amended March 30, 1874 (71 Ohio L. 47), gives the right to sue the wife upon such note. We think otherwise. That section was not intended to enlarge or change the liability of the wife, but merely to change the form of the remedy."

And this is our answer to all that can be said as to the claim that the sections of the statute under consideration authorize suit at law against the wife.

The only material difference between the original and amended section 5319, so far as the present case is concerned, is that the former provided that judgments against a married woman might be satisfied by execution against "her separate property and estate," while the latter provides that "her property and estate shall be liable for the judgment against her."

The word "separate" is dropped out of the amended section, thus making the wife's general property as well as her statutory separate property subject to execution.

The statute giving the right to separate property specifies nearly all the means of acquiring it which can exist, but not all. This chattel property may be acquired by finding (2 Kent, 356) and by occupancy.

The statute provides as to the wife that the "wages of her separate labor" is her separate property, but not the wages earned by the joint labors of herself and husband.

Patent rights and copyrights constitute property, but they are not enumerated in the statute; hence such rights acquired by the wife are not her separate property. So clothing for the wife purchased by the husband with his means is not statutory or equitable separate property. Pratt v. State, 35 Ohio St., 514.

So the wife may create property from materials furnished by her husband, as paintings, statuary and every conceivable article of chattel property "from a needle to an anchor," the innumerable tangible products of her skill and "handiwork." The statute does not enumerate these as her statutory "separate property." The statute is in derogation of the common law, and on general principles is to be strictly construed, so that it shall not extend beyond the fair meaning of the words it employs. It does not in terms include property acquired by "distribution"—the only mode technically in which chattel estates pass by administration under the statutes of distribution, though it is possible that courts may hold that such property may pass to her as statutory separate property under the word "inheritance" in the act of March 23, 1866.

A wife may acquire money under a life insurance policy or by a lottery ticket in her favor procured by the means of her husband or a stranger. A question may arise as to the character of money so acquired. Thus it is certain that married women may acquire many classes of chattel property which remain "general property."

It has been suggested that sections 4996 and 5319, of the Revised Statutes, as amended by act of March 20, 1884, (81 Stat. 65), recognize the right or power of a wife to make contracts generally, and make her property liable to execution on judgment against her.

To this, it may be said: The power to make contracts, is given by section 3109, and beyond this there is no power to contract; this has been shown to extend only to separate property.

Then, section 4996, recognizing this power to contract, authorizes a suit and judgment directly against the wife on such contracts.

The statute of April 3, 1861, (1 Sayler, Stat. 63) first creating separate property rights preceded that of March 23, 1866, 2 Sayler, 947 giving a wife the power to make contracts as to her separate property. The act of 1861, made the wife's separate property liable to execution against husband and wife, "upon any cause [of action] existing against her at their marriage, or upon any tort committed by her during coverture."

The act of 1886, first gave her a limited power to make contracts as to her separate property, and first made her property liable to execution on a judgment rendered on a contract "concerning her separate property."

At the December term, 1877, the Supreme Court Commission, in Rice v. Railroad Co., 32 Ohio St., 380, decided that when a wife gave a note for the benefit of herself or her separate property, an intention to charge her separate property in equity, would not be inferred merely from the execution of the note.

Thereupon the legislature passed the act of January 21, 1879, (Rev. St. 4996. 5319) authorizing a suit in such case and judgment at law directly against the wife. with execution against her "statutory separate property."

The object of the statute was to give a remedy as at law, because by the common law there was no remedy at law, and a remedy in equity was denied in Rice v. Railroad Co. This case was overruled at the January term, 1880, in Williams v. Urmston, *supra*, but not until after the statute had been passed.

Then came the act of March 20, 1884, amending sections 4996 and 5319, so as to reach, not merely the wife's statutory separate property, but all "her property and estate."

This latter act does not relate to the power to make contracts at all; it does not deal with that subject, but a wholly different one.

The two statutes are not even in *pari materia*. The one gave a right of action at law where none existed before, the other enlarged the property subject to execution at law, but in no way affected the power to make contracts.

The act relating to the mode of suing, and as to judgments, was passed March 20, 1884, (81 Stat. 65), to meet the decision in Rice v. Railroad Co. At the time it was passed, the power of the wife to make contracts, was regulated by the act of March 23, 1866, (2 Sayler Stat. 947; Rev. Stat. 3103), and was limited in these words: "She may, in her own name, during coverture, make contracts for labor and materials for improving, repairing and cultivating the same, her [separate property] and also lease the same for any period not exceeding three years."

It is certain therefore, that the act of March 20, 1884, had no reference to the power of the wife to make contracts; it only recognized the power then existing.

Then came the act of April 14, 1884, (81 Stat. 209), amending sections 3108 and 3109 of the Revised Statutes, and enlarging the wife's power to make contracts, by giving her authority, "in her own name, during coverture," to "contract to the same extent and in the same manner as if she were unmarried," in relation to her separate property.

It does not even give her power to contract as to what little remains of her general property; that is very naturally in accordance with the logic of the statute, which still retains some general property, subject to the marital rights of the husband, and as to which he may of course exercise his rights.

If the statute gave her power to make contracts as to that, it would present the strange anomaly of giving conflicting powers; a power in the wife, a power in the husband.

*Nit fuit unquam, sic impar sibi.*

The result from all these considerations is: That the promissory note now in question, does not impose on the married woman maker, any legal liability on which judgment at law could be taken against her.

The second question in this case is: Can a married woman execute a valid warrant of attorney to confess a judgment against herself as surety on a promissory note having no connection with her separate property? I maintain she can not.

Even if a wife can make a contract as surety on a promissory note yet she can not execute a warrant of attorney to confess judgment against herself.

The relation of principal and agent arises in one sense in contract. But agency involves more than contract. It effects a delegation of power. This delegation of power is denied to a wife at common law. The common law denial subsists until repealed or abrogated by statute. The statute gives a power to contract but does not give authority to delegate the personal power to act or to contract. Hence the warrant of attorney executed by the wife in this case is void.

Thus in 2 Bishop on Married Women, 380, the doctrine is stated that: "A married woman can not execute a letter of attorney, consequently where a judgment has been rendered against husband and wife on her warrant of attorney it was set aside." Henchman v. Roberts, 2 Har. Del. 74; Butler v. Wilder, 6 Hill. N. Y., 242; Mendenhall v. Springer, 3 Har. Del. 87; Stevens v. Dabarry, Minor, 379; Patton v. Stewart, 19 Indiana, 233.

And Bishop says the American cases seem to "deny to the wife the power to act by attorney even in things where she can act personally." Whitmore v Delano, 6 N. H. 543.

An attempt to clothe a married woman with power to contract as if she were unmarried, and then to add to this the authority to delegate her powers to others is the sublime of innovations fanaticism and folly. Napoleon said "there is but one step from the sublime to the ridiculous." In material sociology it only remains to enlarge the powers of the wife, so that her duties may all be performed by proxy, and justify the blasphemous sacrilege by a literal reading of the maxim qui facit per alium facit per se quite as excusable as a literal reading of the statute under consideration. If this will not reach the climax mentioned by Napoleon it will only remain to legislate to married women the perfect liberty of absolute feminine license, and then move onward with the satanic teachings which deny the right of property; which sanction plunder and robbery; which justify murder to accomplish pillage, and substitute the power of dynamite for the logic of reason and the precepts of morality.

The result is that the warrant of attorney in question is void, and the judgment thereon must be set aside.

Kennedy & Steen, for defendant.

PRICE, J.

The question raised by the demurrer may be stated in this form: Can a married woman execute a valid promissory note as surety for a third person, without any consideration connected with her separate property, upon which a personal judgment can be rendered against her?

Counsel for the demurrer maintain that it was proper to take a personal judgment against the plaintiff, a married woman, on a note on which she was surety merely, no consideration having passed to her; and which had no reference to or connection with her separate property. In support of their position they cite the case of Williams v. Urmston and Hancock, 35 Ohio St., 296; sec. 5319, of Revised Statutes, as amended March 20, 1884 (81 Ohio L., 65); and sec. 3109, Rev. Stat., as amended April 14, 1884 (81 Ohio L,, 209.)

In the case of Williams v. Urmston et al. the court say:

"A married woman, having a separate estate, may charge the same, in equity, by the execution of a promissory note as surety for her husband or another. When a married woman, having a separate estate, executes a promissory note as surety for the principal maker, a presumption arises that she thereby intends to charge her separate estate with its payment."

It will at once be seen that the question decided in that case was very different from the one we are now considering. That decision was, that a married woman might charge her separate estate, in equity, by the execution of a promissory note as surety. While the question before us is: Can a judgment at law be taken against a married woman on a promissory note which she has executed as surety merely, and which has no connection with her separate estate?

The question depends, in my judgment, upon the construction to be given to the legislation of 1884.

March 30, 1874 (4th Sayler, 3222), the legislature enacted a law as follows:

"Section 28. When a married woman is a party, her husband must be joined with her, except that when the action concerns her separate property, or is upon a written obligation, contract or agreement signed by her, or is brought by her to set aside a deed or will; or if she be engaged as owner or partner in any mercantile or other business, and the cause of action grows out of or concerns such business; or is between

her and her husband, she may sue and be sued alone. And in all cases where she may sue or be sued alone, the like proceedings shall be had and the like judgment rendered and enforced in all respects as if she were an unmarried woman. And in every such case her separate property and estate shall be liable for any judgment rendered therein against her, to the same extent as would the property of her husband, were the judgment rendered against him; provided, that she shall be entitled to the benefit of all the exemption laws of the state to heads of families. But in no case shall she be required to prosecute or defend by her next friend."

That section was carried into the Revised Statutes in the following form:

"Section 5319. When a married woman sues or is sued alone, like proceedings shall be had, and judgment may be rendered and enforced, as if she were unmarried, and her separate property and estate shall be liable for the judgment against her; but she shall be entitled to the benefit of all exemptions to heads of families."

March 20, 1884 (vol. 81 Ohio L., p. 65), said last quoted section was amended so as to read as follows:

"Section 5319. When a married woman sues or is sued, like proceedings shall be had and judgment rendered and enforced as if she were unmarried, and her property and estate shall be liable for the judgment against her, but she shall be entitled to the benefits of all exemptions to the heads of families."

This last section was in force at the time plaintiff executed the note described in her petition; and at the time judgment was rendered against him.

The act of March 30, 1874, authorized a married woman to be sued alone "upon a written obligation, contract or agreement signed by her," and further provided that "in all cases when she may sue or be sued alone, the like proceeding shall be had and the like judgment rendered and enforced in all respects as if she were an unmarried woman."

We have two decisions of our Supreme Court bearing upon the construction of the section as it then stood.

In the case of Fredrika Jenz v. John Gugel and Sophia Gugel, 26 Ohio St., 527, the court decide:

"1. Section 28 of the civil code, as amended March 30, 1874 (71 Ohio L., 47,) was not intended to enlarge or vary the liabilities of a married woman, but merely to change the form of remedy. 2. No recovery can be had against a married woman upon her promissory note, whether executed before or after the date of said amendatory act, unless it appear that she has separate property subject to be charged therewith."

In the case of Patrick v. Littell et al., 36 Ohio St., 79, the court decide:

"In an action under section 28 of the Code of Civil Procedure, as amended March 30, 1874, against a married woman, upon her obligation in writing to pay for services rendered or money advanced, for the benefit of her separate estate, it is not error to render a personal judgment against her."

This last case simply decides that it is proper to render a judgment at law—a personal judgment—against a married woman, under the section referred to, when she is sued upon an obligation "for the benefit of her separate estate."

It does not, however, pretend to overrule or interfere with the principle laid down in Jenz v. Gugel et al., *supra*, that that section "was not intended to enlarge or vary the liabilities of a married woman, but merely to change the form of remedy."

Section 5319 Rev. Stat., as amended March 20, 1884 (vol. 81 Ohio Laws, p. 65), differs somewhat in language from section 28, of the code of civil proceedure, (Sayler 3222) and from original sec. 5319 Rev. Stat., but there is not, in my judgment, any change that effects the principal before stated, to-wit: That the section was not intended to enlarge or change the liabilities of a married woman, but merely to change the form of remedy.

In my judgment the question of the liability of a married woman upon a promissory note, on which she is merely surety, and having no reference to or connection with her separate property, depends upon the true construction of sec. 3109 Rev. Stat., as amended April 14, 1884 (vol. 81 Ohio Laws, 209), which reads as follows:

"Section 3109. The separate property of the wife shall be under her sole control, and shall not be taken by any process of law for the debts of the husband, or be in any manner encumbered by him, and she may, in her own name, during coverture, contract to the same extent and in the same manner as if she were unmarried."

The court of common pleas of Hamilton county, has used this language:

"The manifest effect of the law as it stands now, by virtue of the amendments of 1884, is to remove all restrictions upon the power of a married woman to contract, as if single. She may, in her own name make contracts and bind herself to the same extent and in the same manner as if she were unmarried; she shall sue and be sued as if sole, and like proceedings shall be had and judgment rendered and enforced as if she were sole. In such suit it is not necessary to aver or prove that she is *feme* covert, or the owner of a separate estate, or that she contracted the debt or obligation with reference to her separate estate. "American Law Record," December, 1886, page 388.

This court held substantially the same on a former occasion; but now that the question is before me again, I shall endeavor to decide it without reference to any former opinion of my own.

What is the true construction of section 3109 (vol. 81 O. L., 209.)?

The language is: "And she may, in her own name, during coverture, contract to the same extent and in the same manner as if she were unmarried."

This is the last clause in the section, and if it stood alone undoubtedly a married woman would have the same power to contract as a *feme sole*. But we must look to the whole section, and to the sections connected therewith, in order to arrive, if possible, at the intention of the legislature. The subject with which the legislature was dealing was the separate property of the wife.

The preceding section, 3108, relates to the separate property of the wife, and specifies what shall "be and remain her separate property."

The first clause of sec. 3109, as amended, provides that the separate property of the wife shall be under her sole control; this first clause is connected by the conjunction, "and" with the second clause of the section, which also relates to her separate property, and to nothing else; and the last clause of the section, already quoted, is connected with the second clause by the conjunction "and."

The last clause of the section is general in its terms, and if it stood in a section by itself, or if it is not qualified by anything that has gone before, is amply broad enough to authorize the personal judgment that was taken against the plaintiff in this case.

But we must look to the subject with which the legislature was dealing, and to the whole of the section in order to give a true construction to its last clause.

The question is not, in my opinion, by any manner free from doubt, but I have come to the conclusion that the legislature intended to give a married woman power to "contract to the same extent and in the same manner as if she were unmarried" only in relation to her separate property.

It is scarcely necessary to say that this decision has no bearing upon or reference to the legislation of 1887 relative to the power of married women to contract.

The demurrer to the petition is overruled.

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## STOCKHOLDERS' LIABILITY. 264

[Hamilton Common Pleas.]

Before C. Hammond Avery, Referee.

† THOMAS A. HARDMAN ET AL. v. CINCINNATI & EASTERN RY. CO., ET AL.

1. Stockholders, in an action upon their statutory liability, can plead any defenses to judgment claims that are personal and peculiar to stockholders, and which the company could not plead.
2. In an action to assess the stockholders' liability, creditors can except to the allowance of any other claim upon the ground that it is not of such a nature that stockholders are liable upon it.
3. A railway company issued its third-mortgage bonds, with the express provision that there should be no stockholders' liability upon the same, and afterwards the directors, without a vote of the stockholders, issued the company's promissory notes in exchange for the same at seventy-five per cent. of the face value of such bonds, and the holders of the notes brought suit upon the same and obtained judgment by default; *Held*, that such judgments were not conclusive against the stockholders; but that the stockholders, in an action to assess the statutory liability in which it is sought to prove such judgments as claims, can show the foundation of such claims and resist their allowance.

(In August, 1884, Thomas A. Hardman brought suit in the court of Common Pleas of Hamilton County, Ohio, against The Cincinnati & Eastern Railway Company and the stockholders thereof, to assess the stockholders' liability. An order was made in the case appointing C. Hammond Avery referee, to determine, among other things, who were stockholders, the amount of stock held by each, who were creditors, the amount due to each, and what proportion of the stockholders' liability each stockholder should contribute. In the proceedings before the referee the following decision, upon a matter never decided in this state, was made.)

† See also Hardman v. Railway Co., 9 Dec. Re., 544. A contrary decision will be found in Bronson v. Schneider, 49 O. S., 438.

AVERY, Referee.

Certain persons obtained judgments against The Cincinnati & Eastern Railway Company, which they filed with me as referee as claims entitling them to share in the amount collected from the stockholders of The Cincinnati & Eastern Railway Company on their stockholders' liability. Exceptions to these judgment claims were filed by creditors and stockholders of the railway company, alleging in substance that the judgments were obtained on notes, which were given by the railway company to the judgment claimants in exchange for third-mortgage bonds surrendered by the claimants, on which bonds, by express agreement, the stockholders had waived the security of the stockholders' liability; that said notes were without consideration to the stockholders; that said stockholders had not assented to liability thereon; that the notes were issued for the collusive purpose of obtaining judgments thereon in fraud of the rights of the creditors and stockholders, by securing to the directors an advantage at the expense of creditors and certain stockholders, and that said defenses were not made by the company, nor were they allowed, by the court rendering the judgments, to be made in those trials by these exceptors.

The first question is: Can the creditors except at this time?

It is admitted there is no privity between them and the corporation, so that the judgment against the corporation cannot conclude them. Section 3260 of the Rev. Stat., states, that actions of this kind shall be for the benefit of all creditors of the company. On pages 28 and 29 of 37 Ohio St., Wheeler v. Faurot, it is stated as follows:

"And the action (one like the present) being one in equity, to marshal the liabilities of all the stockholders *inter sese* as well as to the creditors, it was a right which Wheeler and Shuler had to have them brought into court, to the end that when the final judgment was rendered, the rights of all persons interested in the matter, as well as the object of the suit, should be adjudicated and settled, and all further litigation thereby avoided." A necessary duty of a referee is to determine who are creditors, and to whom the money recoverable is due and payable. This was part of the terms of a reference referred to on pages 330, of 44 Ohio St., Mason v. Alexander. This view of the action has been recognized in several other cases decided by our Supreme Court, and also in our courts in this city as, for instance, Wehrman v. Reakirt, 1 C. S. R., 230.

It is argued that creditors cannot raise this objection until it is shown that they will thereby lose part of their claims; but I can see no sufficient reason for saying that certain creditors should be made to wait indefinitely before raising an objection like this. As I understand the law, it is liberal in allowing claims to be filed, and probably not until the report was filed is it too late for creditors to file their claims; and even then, if the report is re-opened, other creditors may then come in. Should it appear at this time, or at the time of filing the report, that there would be enough to pay all the creditors in full, including these judgment claims, there is no assurance that many of the stockholders from whom it is expected to recover, may not now be insolvent, or become so, and the whole amount realized be so much less than expected that there would not be enough to pay all the creditors in full. Without some reservation before me now of the right to make the inquiry at that time, it would then be too late to raise any objection. See Crutchfield v. The Mutual Gas Light Co., 2 S. W. Rep., 658.

But it seems to me, there is a stronger reason than the above, and that is: That in a proceeding of this nature, the duty of the court is to collect only that which is due from stockholders on their statutory liability, and no more. Of course the court can reduce the assets of the company and collect from the stockholders the balance of their stock subscription; but I am now speaking of this peculiar liability. If the stockholders did not become liable by force of the statute, and it only, when the notes were given, then no court, either in this or any other proceeding, could collect any money from the stockholders, merely as a liability incidental to the notes. Any obligation on the part of the stockholders which would be incurred subsequently to the making of the notes, or which did not arise by force of the statute, would not be what is termed a "stockholders' liability," and would have to be recovered, if at all, in some other proceeding, as, for instance, an action on contract. Therefore, in my opinion, now is the time for the question to be raised as to whether there ever was any stockholders' liability collateral to the notes in question. If none arose on the making of the notes, mere acquiescence or silence on the part of a class of creditors, cannot give the court any right to collect money in this proceeding as if there had been such collateral liability.

As this is a proceeding in which the court is to direct what each stockholder is to contribute, and to settle all questions of contributions *inter sese*, the stockholders also, are proper parties to make the exception, if not concluded by the judgments.

With the exception of New York state, and possibly a few others, the weight of authority is to the effect that a stockholder is concluded by a judgment against the corporation as to all matters of defense which the corporation made or might have made. Now the Cincinnati & Eastern Ry. Co. could not raise any point about the stockholders' liability in the suits in which the judgments were given; nor could the stockholders, as it was not a suit against them, and the court very properly so held.

The liability of stockholders is something personal to them, and being separate and distinct from the corporation assets, it is not a part of the corporation assets. The courts have decided that the directors have no control over this liability. See Wright v. McCormick, 17 Ohio St., p. 87.

It has been decided several times by the Ohio Supreme Court, that in a suit to assess stockholders' liability, where some of the claims are judgments against the company, a person can raise the defense that he had ceased to be a stockholder at the time the debt was contracted. Wheeler v. Faurot, 37 Ohio St., 26. And I can see no difference in principle in allowing stockholders to show that there never was any liability as is sought by these exceptions. If they can show no liability for the former reason, they ought to be allowed to show the same thing for the latter reason.

This principle of allowing stockholders to set up some peculiar defense, not inconsistent with the existence of a valid judgment against the company, has been recognized in other states, for instance, in Childs v. Boston & Fairhaven Iron Works, 137 Mass. p., 516. The plaintiff recovered a judgment for damages for an infringement of letters patent by the company. In an action against the stockholders to assess the stockholders' liability, it was held that the judgment did not conclude the stockholders from showing that the judgment was founded on a claim, viz.: a tort, to which no stockholders' liability was attached. Also 134

Mass., 590; Brown v. Eastern Slate Co., and 33 Mich., 257, are exactly in point.

No case has been cited to me which declares the contrary principle. I have examined the 5 Iowa, 300, and the 4 Iowa, 13; in the 4 Iowa, a judgment was gotten against the corporation, and then, according to the practice in that state, the judgment creditor had a rule issued, directed to the directors of the corporation, to show cause why execution should not be issued against the individual members of the corporation. And in that case the court held that this second proceeding was a distinct and different proceeding from that in which the judgment was gotten against the corporation, and that the directors represented the stockholders, and a proceeding against the directors in that second action, was in effect a proceeding against the stockholders. And a judgment having been rendered in that second proceeding, and an execution having issued against individuals, it was too late for these individual stockholders, in still a third proceeding, to claim that that judgment should not have been rendered. That was different from this case, because in this case we have only the judgment against the corporation. Now, if a judgment is rendered against the stockholders in this proceeding, then in a third proceeding they could not collaterally question a judgment rendered; and that, I consider, is the distinction between the case at bar and those cases.

And this brings us to the question: Can creditors waive their constitutional right to the security of a stockholders' liability? This was not argued orally, but is a question in my opinion, of such importance in this case that I have examined the authorities. The text-books lay down the principle that a creditor can waive this right. Taylor on Corporations, sec. 735; Thompson on Stockholders' Liability, sec. 75. The case in 24 Cal. p. 539, is instructive on this point. On page 541 the court says: "This liability is for the benefit of creditors; neither the constitution nor the statutes compel the creditors to take the benefit of it." Again on page 559 the court says: "How the individual liability is more a matter of public policy than the liability of a partner I fail to see. The creditor can waive the right to proceed against a member of the firm. It is a mere liability intended for the benefit of those who deal with the corporation."

In the above case it was held that creditors could waive the constitutional right to have stockholders collaterally bound, and that this was not against public policy. It is a universally recognized practice, and of almost daily occurrence, for persons to waive their constitutional right to trial by jury, and I cannot see on what principle the waiver should be permitted in one case and not in the other. I do not consider that the words of the article of the constitution that secures the stockholders liability, or the words of sec. 3260 of the Rev. Stat., prohibit this waiver expressly or impliedly. In Brown v. Eastern Slate Company, 134 Mass., 590, the creditors waived this right, and to the same effect is the 36 Maine, 154, and also 22 Cal., 379.

Assuming that the third mortgage bondholders expressly waived the collateral security of the stockholders' liability, this was an agreement made between the creditors and the company acting as agent of the stockholders, and to which the stockholders may be presumed to have assented, as it was much to their advantage. If there was any doubt in the matter, their present action in this case demonstrates the fact. If the right was once waived, the Railroad Company could not, without the

assent of the stockholders, impose the liability on them, and make those third-mortgage bonds, carry that additional security. If the company could not do this with those bonds neither could it do it by replacing those bonds by other bonds. In other words, what it could not do directly it could not do indirectly. Neither can the company accomplish this by changing the form of the obligation into notes, and substituting notes for mortgages. The facts that the directors of the company paid the mortgages with notes, and not merely renewed the debts and gave notes to the extent of seventy-five per cent. of the face of the mortgages, do not in my opinion alter the matter. There must have been some consideration to the stockholders, or, at least, a clearly expressed assent by words or acts to incur an obligation which did not exist. In accepting the surrender of a thing that in no wise affected the stockholders, for seventy-five per cent. of its face value, I do not see how it can be said there was any consideration to the stockholders. As said of Wright v. McCormick, *supra*, the directors have no power in relation to the stockholders' liability. If they did act for the stockholders, they acted simply as agents, and the question is simply one of agency and whether there has been any ratification. In the case of Wright v. McCormick, *supra*, the directors attempted to assign the stockholders' liability for the benefit of all creditors, and the court held that the directors had no power over that liability.

Suppose we take the view that the waiver of the stockholders' liability was a clause for the benefit of the stockholders in a contract between the railroad company and each purchaser of third mortgage bonds; in this case we should have a contract between two persons, "the purchaser and the company" for the benefit of a third person, "the stockholder," and the cases of Trimble v. Strother, 25 Ohio St., 378, and Brewer v. Maurer, 38 Ohio St., 543, would apply. These cases hold that where two or more persons contract for the benefit of a third person, the latter may enforce the contract if he has assented to or acted on the contract before it has been rescinded or the contracting parties have released each other therefrom. Section 3286, Rev. Stat., provides that a railroad company may issue bonds if authorized by a vote of a majority of the stockholders at a stockholders meeting of which thirty days notice has been given. This shows that the consent of the stockholders was necessary before the bonds could be legally issued and sold. What was the moving reason for granting such authority, this court cannot say; it may indeed have been this very waiver of stockholders' liability. After such assent has been given and action taken, and an obligation of the company, without stockholders' liability, has been created, it is too late for the company and bondholders, without consent of stockholders, to avoid the clause waiving stockholders' liability or make any new contract imposing such a burden. With every sale of third-mortgage bonds the stockholders had so far assented and acted that their right to be free from liability became fixed against said purchaser and the company.

Now, as to the question whether or not that transfer is invalid because, as alleged, the directors attempted to secure some benefit to themselves. Unquestionably the third-mortgage bonds were the debt of the company. It cannot be said that the directors increased the debt of the company when they gave notes for seventy-five per cent. of the face value of the mortgages. On the contrary, they decreased the debt on its face. Neither can it be said that they transferred any assets of the com-

pany to secure themselves at the expense of other creditors. There was no security transferred to any one—no assets of the corporation transferred to any one, and so far as that transaction is concerned, even if fraudulent, I cannot see how the company could now set it aside. But it has not been attempted before me to set aside the contract between the third-mortgage bondholders and the corporation. If the directors had any power over the stockholders' liability (and, in my opinion, they have not) then perhaps it might be said that, when they, acting as directors, attached this liability to certain debts which did not before have it, and thereby decreased the collateral security of other creditors and gave themselves an advantage which they had not had, then the principle of Sawyer v. Hoag, 17 Wall., 610, might apply; but as my view is that this was not corporate assets, and therefore they have not increased their own or diminished the creditors' security, it follows that this exception, in my opinion, is not well taken.

Simrall & Mack, for plaintiff and creditors.

C. B. Matthews, R. B. Bowler and J. J. Glidden, for creditors.

Britton & Britton, for stockholders.

Black & Rockhold and R. D. Jones, for judgment claimants.

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## TELEGRAPH COMPANY. 267

[Cuyahoga Common Pleas.]

### WILLIAM CAIN v. WESTERN UNION TELEGRAPH CO.

C., a grain and stock broker, became the correspondent of the Chicago Board of Trade, having made formal application to it for the telegraphic messages of the board containing the market reports and price quotations of the commodities dealt in on the floor of the "exchange," and agreeing to pay such charges for compiling and sending such market report messages as might be fixed by said board, and the W. U. T. Co.; C. then contracted with the W. U. T. Co. to transmit and deliver to him such Board of Trade quotations by "printing instruments" commonly called "tickers," C. to pay a stipulated price per week for same. It was a part of the latter contract that the W. U. T. Co. might discontinue the delivery of such messages to C. whenever directed so to do by the Chicago Board of Trade. Subsequently the Board of Trade notified and directed the W. U. T. Co. to discontinue the delivery of its market report messages to C. *Held:*

1. Under these circumstances, in an action against the W. U. T. Co. only, an injunction will not lie to restrain the Telegraph Company from discontinuing the delivery of messages to C. or the removal of the "tickers" from his office.
2. It is the duty of a telegraph company to receive and transmit messages for all alike, and to deliver them to the persons to whom the sender directs, and to no others; and the court will not enjoin the Telegraph Company from discontinuing the delivery of messages to the plaintiff, where the sender has directed them to be transmitted and delivered to others to the exclusion of the plaintiff.
3. Whether or not the "market reports of the Chicago Board of Trade" are so far "property affected with a public use" that their delivery on like and equal terms to all who desire to receive them, will be enforced by injunction in a case against the Board of Trade, is not decided.

STONE, J.

This case is before the court upon an application for a temporary injunction, a restraining order having heretofore been allowed, pending this hearing

The plaintiff, as appears from his petition, is engaged in the business of a commission broker, dealing in grain, provisions and stocks, in this city; that in the prosecution of his business it was necessary to have, in connection with it, telegraphic communication with the Chicago Board of Trade, and to that end there had been placed in his office two instruments commonly called "tickers," by means of which the market reports, as reported from the Chicago Board of Trade, were hourly, perhaps, during the business hours of the day, communicated to him for his own use and benefit. He says that these communications he received from the Western Union Telegraph Company, the defendant. It is alleged that that is a public corporation, incorporated under the laws of the state of New York, and that, being a corporation of that character, he is entitled to have communications delivered to him upon the same terms that are charged and received by the telegraph company from other people engaged in a similar occupation; and he alleges that it threatens to disconnect its wires and remove these tickers, without any cause therefor, he having on his part, made payment according to his contract with the telegraph company; that he has violated no provision of his contract with it, and, by reason of the public character of the corporation, he ought to have these messages delivered as they are delivered to other people engaged in a similar business.

The question, then, presented, is whether this petition, under the proof submitted, makes a case for a temporary injunction.

It is claimed, that while the Western Union Telegraph Company could not, perhaps, in the most technical legal sense, be said to be a common carrier, yet the business being of such a public nature, being a public corporation, exercising public franchises, e. g. eminent domain, that the principles ordinary applicable to common carriers are made applicable to telegraph companies, and that being so, they ought not to be permitted to discriminate and say that these daily quotations emanating from the Chicago Board of Trade, should be delivered to one person and not to another, but should be furnished to all persons desiring them and were willing to pay such reasonable charges as the company might exact for its services. That, I understand, is the claim made by the plaintiff.

On behalf of defendant it is contended, first, that the Chicago Board of Trade is a private corporation, organized and chartered under the laws of the state of Illinois, for the purpose of dealing in grain and produce among the members of such exchange or board of trade, and that the information in the shape of market rates, made or fixed by reason of their transactions, is the property, (if it has a property quality at all), of the board of trade, and that, from the fact that they are a private corporation, they have the right to communicate the intelligence they possess, growing out of their transaction, to whomsoever they please, and they may decline to give it to any person if they see fit.

Second, but, however that may be, they say that the contract with Mr. Cain had in it a provision in this language:

"In case the messages are found to be used in violation of this agreement, or in case of failure to promptly pay the charges for the same, as required by the telegraph company and the board of trade, or for any other reason satisfactory to you, and with or without cause, the right is conceded, that, with or without previous notice, the sending of such messages may be discontinued at the pleasure of the board of trade."

I read from a communication, signed by plaintiff and addressed to

the Chicago Board of Trade, which, by virtue of its acceptance, I take to constitute a contract between the parties named.

So it is claimed that under the very contract had with Mr. Cain, it was the right of the board of trade to discontinue furnishing him the quotations whenever the board of trade, in its own judgment saw fit and to discontinue without previous notice and without alleging any reason therefor. And in this connection, too, as supporting that proposition, it is contended that plaintiff, in his contract relations with the telegraph company, further stipulated in these words:

"I further agree, that you may forthwith discontinue said service without further notice, whenever, in your judgment, any breach of the above conditions shall have been made by me, or whenever directed so to do by the Chicago Board of Trade."

It is not doubted—indeed, it is conceded upon argument—that before the commencement of this cause the Chicago Board of Trade notified the Western Union Telegraph Company not to continue the delivering of their quotations to this plaintiff.

It is contended, thirdly, on the part of the defendant that, whatever may be the rights of this plaintiff against the Chicago Board of Trade, he is not entitled to the relief sought here against the Western Union Telegraph Company, for the reason that the Western Union is simply the agent of the board of trade to deliver messages to whomsoever the board should designate as agents authorized to receive its quotations, and that it has no control over the matter—but when directed to discontinue furnishing this information, it has no alternative but to obey.

These are the principal propositions urged on behalf of the Telegraph Company.

By way of reply to the claims made respecting these contracts and the right reserved in the board of trade to remove these tickers and discontinue the market quotations whenever they see fit, it is said that such provisions in the contract are void as against public policy, perhaps, or at least in opposition to the broad principle contended for, that this board of trade, in the very nature of its business, while it is a private corporation, and professedly is carrying on a private business, yet, in the language of some of the decisions, it is a private business "affected with a public interest," and therefore subject to public control, and that that feature of the contract ought to be nugatory as against the proposition I have named; that the principle so clearly and forcibly laid down by Chief Justice Waite in the case of Munn v. The State of Illinois, 94 U. S. Reports, 113, is applicable in this case. That was an action brought to contest the validity of a statute of the state of Illinois, by which it was sought to control and regulate the business of elevating grain.

The statute declared these elevators (owned and operated by private individuals) to be public warehouses, and fixed the maximum rate that these elevator men might charge for elevating grain. The Supreme Court of the United States, in that case, sustained the law, and held that their business was of such magnitude and character, in connection with the commerce of the country—"standing in the gate-way of commerce"—so to speak, that it was a private business "affected with such a public interest," that the public, by its legislature, and if not by its legislature, by its courts, might fix and determine what would be reasonable in the discharge of that business, and practically held that they might not discriminate, and they might not say that they would elevate grain for one man at one figure and for somebody else at another figure, but must serve all upon equal and reasonable terms.

Now, the question is, can that principle be applied in this case? It has been held by Judge Blodgett, in a case reported in 15th Federal Reporter, 850, decided in the circuit court for the northern district of Illinois, that this principle did not apply to the Chicago Board of Trade. He says that it is a private corporation; that "their franchise as a corporation allows them to hold a limited amount of property, and to prescribe rules and by-laws for the government of the members and the transaction of business between them. Their sessions are not required to be public, and nothing is stated in this bill showing or tending to show why persons not members of the board should have any right to be informed as to prices or the extent of dealings of the board."

He goes on to say:

"I deem it sufficient for the purposes of this motion to say, that this court has heretofore decided, in cases which seem to me entirely analogous to this in principle, that the board has control of its own floor, and can admit such persons as it sees fit; that it can make its transactions wholly secret, and keep them within the knowledge of its own members, or make them public so far, and only so far, as the board itself or its members may see fit to do so. A membership of the board is expensive," —said, I believe, to cost ten thousand dollars—"and an admission to membership is wholly within the discretion of the proper officers of the association."

Then he proceeds to state, at some length, that the information which they have is entirely private, and that they may communicate it to whomever they please. There are two or three decisions of that general character.

On the contrary, Chancellor Tuley, of Chicago, in the case of Public Grain and Stock Exchange v. W. U. T. Co. (Circuit Court, Cook county, May, 1883), held that the business transacted upon the floor of the board of trade is "affected with a public interest" to an extent which would authorize the legislature, and the courts in the absence of legislation, to prohibit the board of trade exercising any discrimination as to who shall receive from the telegraph companies these market quotations, or as to what telegraph companies shall be allowed facilities for distributing the information to the public.

I am not at all willing to adopt the position taken by Judge Blodgett. I am not prepared to say, but that this board of trade is conducting a business of such a character and of such an extent, affected with such a public interest, that, in a proper proceeding, it might be required to furnish this information to any person demanding it, upon such terms as should be held reasonable; provided always, of course, the business or the information obtained was used for lawful and legitimate purposes.

But, whatever we may say of the application of that principle in a proper case, the question presents itself, can it be enforced in this case? I am disposed to think not.

In 1884, or thereabouts, the Chicago Board of Trade discontinued the practice that had therefore prevailed of permitting the reporters from different telegraph companies to come upon their floor, collect their quotations and market reports, and distribute them about the country to whomever the telegraph companies saw fit. About the time I have indicated, the telegraph companies were notified that these message-gatherers or news-gatherers would from a certain date be excluded from the floor of the board of trade, and that the board of trade itself would

take under its control the furnishing of the information which made up its daily quotations, and would furnish that information to such authorized agents as it might appoint throughout the country, and that such agents might make such terms with the telegraph companies by way of paying charges for communications as might be agreed upon between such persons and the telegraph companies, and at the same time contracted with the telegraph companies to make certain charges and collections on its behalf by way of toll and in payment for the information furnished, and after that was done all of the persons throughout the country who had direct communication with the Chicago Board of Trade and obtained daily quotations, became the agents of this board, or at least occupied contract relations with it, and paid such stipulated charges, under, perhaps, another contract with the Western Union Telegraph Company or other companies, as might be agreed upon for this information.

Now, it is said, that for a business of such magnitude the company runs a wire along its poles from Chicago to the great cities east and west, and uses that wire exclusively for the transmission of the information derived from the Chicago Board of Trade, to-wit; the market reports, and that business is so continuous during the business hours of the day —every few moments, perhaps,—that, instead of sending messenger boys from the offices of the Western Union Telegraph Company to these different agents in the different places, they run a wire in the different offices of the brokers and the bankers, and put there an instrument that will write out the communications, which serves, very much better than a messenger boy could, the purposes of a messenger boy; and I take it, because that system is adopted for the transmission of the information and for the carrying on of this business, legally it stands upon no different basis than if each message was sent by the board of trade as we ordinarily send messages, and delivered by a messenger boy; and if that is so, it is a little difficult to see how the court can enjoin the Western Union Telegraph Company from discontinuing sending its messenger boys with messages to this plaintiff's office, when the Chicago Board of Trade has said to the Western Union Telegraph Company, "We shall hereafter deliver to you no more messages to be transmitted to this plaintiff;" and if they are not delivered we do not perceive how the telegraph company could rightfully transmit messages that are designed for other people.

Now, as I say, before 1884 these telegraph companies collected and furnished this information themselves, and sent it to whoever wanted to pay for it; and if that were the mode of doing business now, I do not hesitate to say that a company carrying on business as a telegraph company does (a public corporation exercising the right of eminent domain) ought not to be permitted and would not be permitted to discriminate and say this information may be furnished to one and not to another, when both offer to pay the same charges. But we are disposed to think that this principle cannot be put into operation as against this company, occupying the relations it does to the Chicago Board of Trade, and that if the plaintiff in this case has any remedy at all, it is by a proper proceeding against the board rather than against the Western Union Telegraph Company. Entertaining these views, the application for an injunction must be refused.

S. M. Eddy and J. K. Hord, for plaintiff.

Ranney & Ranney and E. J. Blandin, for defendant.

## NOTES—COLLATERAL SECURITIES. 290

[Hamilton Common Pleas.]

†RACHEL MARTIN, ADM'X. v. L. D. DRAKE, ADM'R.

1. Where the holder of a negotiable promissory note, in his pleadings, claims ownership through the sale and assignment of it by the payee; and the payee in his pleadings specially denies making any sale, assignment or endorsement whatsoever, in order to maintain his claim, proof of holder's possession only is not sufficient without evidence of the execution of the assignment also.
2. The holder of a negotiable promissory note (which is secured by a mortgage), who, in good faith acquired title by payee's endorsement, for value before maturity, and who at the same time exercised due care and diligence in ascertaining the facts of the existence of the mortgage, and of the payee's interest therein, has an equity to the mortgage superior to that acquired by one to whom, prior to the time of said endorsement, the payee had, for value, delivered both a forgery of the note and the genuine mortgage bearing a formal assignment of the mortgage. Bailey v. Smith, 14 Ohio St., 396, distinguished.

SHRODER, J

This is an appeal from an order of distribution made by the probate court.

It appears that on January 1, 1879, Gano Martin made and delivered his notes, payable with interest five years from date, to Wm. R. McGill, or order, for $7,602.72, to Lewis Martin, or order, for $1,579.50, to George Martin, or order, for $1.038.00, and other notes to others not necessary to name here. To secure these notes he executed and delivered to the payees in common, a mortgage on his real property. In proceedings instituted by his administratrix in the probate court, this property was sold, and to the monies arising from the sale, Lewis Martin, George Martin, Robert Kernohan, Louis Stix & Co., Louis and John Manss and others have made claim. Upon a hearing of these conflicting interests the probate court determined the equities and priority of liens, and made an order of distribution from which this appeal is taken. At the trial on appeal, no evidence was offered as to any of the notes or claims other than those of the parties named. The questions here related to the rights under the McGill, Lewis and Geo. Martin notes and their mortgage security. The evidence discloses that about the time of the delivery of their notes, Lewis and George Martin deposited them unendorsed, and also the mortgage with McGill for safe-keeping; that on February 8,1879, McGill borrowed from Kernohan, $11,000.00, and as collateral security for the loan transferred to him what purported to be these genuine notes, but which in fact, were forgeries of the signatures of Gano, Lewis and George Martin, at the same time delivering the genuine mortgage with this endorsement:

"For value received, I hereby assign and transfer to Robert Kernohan, his representatives and assigns, the within mortgage and notes thereby secured.

William R. McGill."

"February 8, 1879."

This assignment was not placed on record until April 25, 1884. In May, 1879, for a valuable consideration, McGill endorsed in blank and delivered to Manss his $7,602 note, informing them upon their inquiry,

†A contra decision is found in Kernohan v. Durham, 48 O. S., 1.

of his being in possession of the mortgage for himself and the other mortgagees. They also had an examination made of the records, and were advised by their attorney that the records showed title in McGill to the extent of the note. In 1883, Louis Stix & Co., for value, became the assignees from McGill of the Lewis Martin note. In their cross-petition they set up a claim to the Geo. Martin note, but offered in evidence the Lewis Martin note only—having thus abandoned their claim to the George Martin note. Lewis and Geo. Martin assert ownership to their respective notes; deny having by endorsement or otherwise endorsed or assigned their notes to McGill or any other person; charge that their names on the papers held by Kernohan and Louis Stix & Co. are forgeries of their signatures. The issues are, as to the McGill note, between Kernohan and Manss; as to the Lewis Martin note, between Lewis Martin, Louis Stix & Co. and Kernohan; as to the George Martin note, between Geo. Martin and Kernohan: The contestants required their adversaries to maintain their respective part of the issues by strict proof.

Louis Stix & Co. do not claim the Lewis Martin note as endorsees, but only as purchasers and assignees. At the trial their counsel announced that he alleged their claim as strongly as he could, and in their cross-petition they assert themselves to be only assignees of the note. This is, the full extent of their claim, which their adversaries were called upon to answer and meet. (Tisen v. Hanford, 31 Ohio St., 193, 194.) With respect to negotiable instruments such as promissory notes, there is a material difference as to rights and obligations between those of an endorsee and of an assignee. (Daniels on Negotiable Instruments, sec. 666-741; 42 Ind., 89; Townsend v. Carpenter, 11 Ohio, 22; Seymour v. Leyman, 10 Ohio St., 283; Kyle v. Thompson, 616, 11 Ohio St., 622; Cushman v. Welsh, 19 Ohio St., 536; Osborn v. Kistler, 35 Ohio St., 99; Rev. Stat., sec. 3171.) And in view of this distinction so uniformly maintained by courts and writers, there can be little question but that counsel adopted this form of allegation advisedly. Kernohan takes issue with them upon this fact of assignment. Lewis Martin filed his answer and cross-petition, in form and in terms as against Kernohan, but in his narrative denies any endorsement or assignment to McGill; and in his prayer asks for distribution to himself upon his note. Affirmative relief is sought, not against Kernohan, but only against the fund. And without considering the question whether the probate court in these proceedings possessed jurisdiction to grant affirmative relief in favor of one co-defendant against another, the allegations of denial in his cross-petition according to the rulings of the Supreme Court, are not to be limited to the controversy with Kernohan, but are to be applied to all contrary allegations in the whole case. Isham v. Fox, 7 Ohio St., 317, 322; Fithian v. Corwin, 17 Ohio St., 118; McNutt v. Kinsley, 127, 26 Ohio St., 130; Simmons v. Green, 35 Ohio St., 104.

In offering the note, Louis Stix & Co., made no proof of the execution of Louis Martin's signature or of any assignment by him to McGill, from whom they derived their title. Their title as assignee without proof of the execution of the assignment on Lewis Martin's part, is not sustained by showing possession only. (McMurry v. Campbell, 1 O., 262.)

Kernohan is in the same position.

Then considering the evidence upon the whole case (R. S., sec. 5311), there being a total failure of proof on the part of L. Stix & Co. and Kernohan in support of their claims to the note, and it appearing from

the evidence that Lewis Martin did not endorse or assign the note at any time, the finding is that he is the owner of it, and is entitled to its proportion of the fund subject to distribution.

As to the Geo. Martin note, the issue is between Kernohan and Geo. Martin. However we may speculate upon the improbability under all the circumstances, of McGill's retaining possession of this note, the court must look for its information to the evidence as produced at the trial. According to this evidence, the last trace of the note is found in McGill's possession when Geo. Martin returned it to him after collecting interest from Gano Martin. This was the latter part of 1879. Under Geo. Martin's special denial of having ever endorsed or assigned the note to McGill, the burthen of proving this assignment or endorsement is upon Kernohan, who derives his claim through McGill's title.

The first question then is, what are Kernohan's rights to this note? Now. it is clear that notwithstanding the form of endorsement on the mortgage, it was not McGill's intention to transfer to him the legal title to the debt. The fact that McGill retained the genuine note, and subsequently delivered it to Geo. Martin to collect interest thereon, argues the contrary intention (47 Barb., 256), and the adopting the form of notes and endorsements in order to effect the transfer of the debt, shows that neither McGill nor Kernohan regarded the endorsement on the mortgage as evidence of the transfer. McGill's fraudulent act, however, inasmuch as it hindered Kernohan from acquiring whatever legal title he (McGill) had, in the note created an equity in Kernohan's favor (Pomeroy's Equity, sec. 146). In law the remedy was not adequate, and his relief was obtainable in equity only. And as against McGill and his legal representatives, this equity on the ground of estoppel against them existed at all times without regard to the time of McGill's acquisition of title.

The next question is, did Geo. Martin at any time endorse, assign or in any way transfer his interest in the note to McGill? Upon considering the whole evidence as to Martin's admission, and the circumstances of his taking no concern in the note until more than six months after it fell due—after July 2, 1884 the date of McGill's death—it is established that about March 1, 1882, Geo. Martin did sell his interest therein to McGill. The evidence fails to sustain Geo. Martin's cross-petition. It establishes Kernohan's equity in the note, and its portion of the mortgage, and his claim to its proportion of the fund to be distributed.

The issues arising out of the transactions with the McGill note, are between Kernohan and Manss. Kernohan's rights to this note and mortgage as against McGill, are similar to his rights to the George Martin note, already discussed. As against Manss; he disclaims all right to the note as such, but asserts a beneficial interest in the mortgage, equal if not superior to the equity in it of Manss, and insists that his equity, being prior in the order of time, ought on that account to prevail. The Manss are the endorsees of the genuine note, which they acquired in good faith for a full and valuable consideration before its maturity. By no mode of conveyance recognized by law, did either Kernohan or Manss obtain a legal title to the mortgage. Kernohan's equity is already defined. Manss's title was an equitable one, by reason of their title to the note. No formal assignment of the mortgage was necessary to create this equity (Exrs. v. Leist, 13 Ohio St., 419, 423, 425; 46 Me., 455.) They held the note free from all defenses and equities; but as to the mortgage according to the decision of our Supreme Court in Bailey v. Smith, 14 Ohio St., 396, they held that instrument subject to the de-

fenses and equities of the mortgagor. Kernohan's counsel urge further than this ruling, and insist that the assignee of the mortgage holds it subject to all equities, although latent, that existed against it when in the hands of any predecessor in the line of ownership. They cite in support of their position, 22 N. Y., 535; 61 N. Y., 121; 2 Circ. Dec., 347. A full discussion of this much debated question can be found in Pomeroy's Equity Jurisprudence, sec. 704 to 715, and notes; and also sec. 1210, and notes; also 104 N. Y., 108; 69 N. Y., 440, 441; 64 N. Y., 41; Combes v. Chandler, 33 Ohio St., 178.

The claim of superiority of equity is founded upon the charge that Manss, when taking the note, were guilty of negligence in not requiring McGill to produce the mortgage for their inspection, and in relying upon his statement. The evidence repels this charge; they had the records searched by a competent attorney, and found the record title in McGill to the extent of his note. In 1879 McGill stood in high credit with his neighbors and those whom he dealt with, and having a due regard to all the circumstances as, according to the evidence, they, at that period, appeared, it is satisfactorily shown that Manss exercised due and reasonable diligence and caution in ascertaining the existence and validity of McGill's interest in the note. (See Johnson v. Way, 27 Ohio St., 374).

Is Kernohan's equity equal to that of Manss? The latters equity in the mortgage is founded upon their being the legal owners of the genuine note for value, before maturity and in good faith; that of the former is based upon an equity to the debt arising from the fraud of McGill. Unquestionably Manss hold their title to the debt free from Kernohan's equity, and it is difficult to see what equity there can exist to the mortgage, that would be more than co-extensive with the title to the principal debt.

Kernohan's claim can prevail against Manss's only upon a theory which pre-supposes the right to separate the ownership of the collateral from that of the debt. But the evidence of the indebtedness being a negotiable note, is conclusive of the question. If these ownerships could be severed, then the debtor's property could, without regard to the mortgage, be subjected to the payment of the note and without regard to the note be held for the equity in the mortgage. Relief would not be granted, exonerating the property from satisfying a judgment on the note; but it would be granted in favor of the mortgagor, as against the enforcement of the mortgage, not only where the debt is paid, but where the note is outstanding in the hands of another for value before maturity. Otherwise an equity would be raised which would operate to subject the debtor to a double liability for the same debt. Now, this is not only clearly unjust and inequitable, but contrary to the debtor's intention in the original transaction, which intention may be presumed to be within the knowledge and notice of every assignee of the mortgage. And an equity acquired under this presumptive notice, will not be permitted to overreach this original intention.

Counsel for Kernohan refer to the propositions found in the opinion in Baily v. Smith, 14 Ohio St., 896, that the mortgage "is a chose in action, having no negotiable quality and not differing in character from collateral personal agreements, designed to effect the same object"; also that the mortgage "secures the debt, whatever changes may intervene, until it is paid." These propositions are to be taken, however, in connection with the principle that where the existing form of the evidence of indebtedness is a negotiable note which in favor of a *bona fide* holder of

it before maturity precludes all defenses and equities, it is that debt evidenced in that particular way which the mortgage is intended to secure—to which it is a collateral chose in action. Other cases were referred to (22 N. Y., 535; 61 N. Y., 121) in which assignees of the debt and mortgage took them subject to the latent equities of third parties; but these cases presented the distinguishing feature of the evidence of the debt being a bond, held to be non-negotiable chose in action.

Morris v. Bacon, 123 Mass., 58, held that the mortgage and other collaterals followed that particular note which was intended to evidence the indebtedness—the case being one in which the mortgagor had been fraudulently induced to duplicate the mortgage note, the two notes falling into the hands of *bona fide* endorsees. Counsel for both Kernohan and Manss, refer to Strong v. Jackson, 123 Mass., 60, in support of their conflicting claims. In this case A, for the purpose of enabling D, a note broker, to negotiate a loan for him, made his promissory note to B's order and delivered with it as collateral security a five years' negotiable note of C, which was secured by a real estate mortgage. B, for his own use, had the note of A discounted by B, who became the endorsee and who took and recorded the assignment of the C mortgage, written thereon. Subsequently B endorsed for value before maturity the C note to E, who took a separate written assignment of the mortgage. The court held that D, as endorsee of the principal note (A's), acquired an equity in all the collaterals placed in B's hands—that, is, the note of C and its accompanying mortgage; that E as subsequent endorsee of the C note, and its legal owner, became such with what the court from the evidence in that case concluded as amounting by reason of the want of care and diligence in taking the note to notice of D's equity in the C note; and therefore sustained the contention of D as against E. So far as this decision has any bearing upon the questions here, it lays down first—that the collateral, even if negotiable in character, follows the principal negotiable note; and secondly—that the equity in that negotiable collateral will not be defeated in favor of an endorsee of it for value before maturity, who takes it with what the court considered notice of the equity. If E had exercised the due care and diligence, which Manss did in the case at bar, it is a reasonable inference that the claim of E would have been sustained. The conclusion is, that Manss' claim to the fund will prevail over the equity of Kernohan.

The order will be for the distribution of the fund *pro rata* according to the amounts of the claims as follows: To Lewis Martin upon the Lewis Martin note; to Robert Kernohan upon the George Martin note; to Louis and John Manss upon the Wm. R. McGill note.

Wulsin & Perkins, for Kernohan.

Mallon & Coffey, for Lewis Martin.

Wm. E. Jones, for Lewis and J. Manss.

Kebler, Roelker & Jelke, for Louis Stix & Company.

## 308 TURNPIKES.

[Hamilton Common Pleas.]

AVONDALE (VILLAGE) v. CINCINNATI & AVONDALE TURNPIKE CO.

1. In assessing the value of that part of a turnpike road which is within the limits of a municipal corporation, in a condemnation suit, the jury may ascertain the probable future net income of the whole road by considering the past net income, the probable future travel, the facilities for evading toll from cross streets that may be opened, also any contract with a street railway company for the use of the road, contracts for keeping the road in repair, and other expenses. Then what proportion of the net income will be taken by the appropriation of this part of the road.
2. In capitalizing to ascertain the sum which would earn that part of the net income, taking a given rate per cent. would imply that the annual income capitalized is a perpetuity, and the jury must determine whether this is so, considering the right of legislature to alter the rates of toll, the chances of forfeiture by failing to keep the road in condition, or refusing to exhibit accounts to proper public officers.
3. Having ascertained the probable duration, the rate per cent. must be used as would reasonably be earned in a safe investment.

### CHARGE TO JURY.

ROBERTSON, J.

Gentlemen of the Jury: The Cincinnati and Avondale Co., is the owner of a turnpike from McMillan street in this city, running through the village of Avondale, about 11,750 feet in length.

The village of Avondale, being authorized by law so to do, asks in this proceeding to condemn that portion of the turnpike which is within the village corporate limits, about 8,650 feet, and to appropriate it to public use for street and avenue purposes.

Before the village of Avondale can take possession of that portion of the turnpike the law requires that it shall compensate the Turnpike Company in money for the damage it will sustain by reason of the taking or appropriation of such portion of its turnpike; and you are called here to assess the amount of what that compensation should be; in other words, to determine the amount which, in justice, will fairly and justly compensate the Turnpike Company, for being deprived of the right to collect toll in the future, upon so much of its road as lies within the corporate limits of Avondale. And if such deprivation will have the effect of impairing or lessening the Turnpike Company's proportionate income on the remaining portions of its road, such impairment or injury to such remaining portion, if any, should also be compensated for and allowed for, in the compensation awarded in your verdict.

In the progress of this case, you have necessarily noticed that the nature of the property or right which is sought to be appropriated by the village of Avondale, is peculiar in that its value cannot be ascertained by the ordinary rules for determining values, namely, "market value." For this kind of property there does not appear to be a market value which can be ascertained, hence recourse is had to another mode of determining the value.

In this case the testimony has been directed towards establishing the net annual income of the Turpike Company in the past, as a basis for fixing what will be a fair and just compensation for the pecuniary loss the Turnpike Company may sustain in loss of tolls by reason of the appropriation of the part of its road within the corporate limits of Avondale.

On this basis of valuation your duty, to some extent, will be to estimate probabilities, which will demand the exercise of sound sense and deliberate judgment, in fairly balancing all the facts and surrounding circumstances which have been brought to your knowledge by the evidence.

When, from all the facts and circumstances in evidence, you have ascertained and agreed upon the sum which the Turnpike Company's net receipts, from the collection of tolls, will be diminished by reason of the appropriation of the part of its road lying within the limits of Avondale, when you have agreed upon that, then you should next estimate and agree upon what present sum of money will fairly and justly compensate the Turnpike Company for such probable future loss in net annual income, and that will be the measure of the Turnpike Company's damages; or the amount of their compensation.

Now, let us consider for a moment, how you are to reach a conclusion on the first of these questions; namely, what will be the net annual loss to the company in collection of tolls resulting from appropriating this portion of its road?

To aid you on this branch of the case, evidence has been introduced as to the present rates and amount of tolls collected on the whole road, and at each of the gates separately, during the past several years; also as to the expenses incident to the management of the business of the company, and what is claimed to be reasonable and necessary expenses of such a company in the exercise of its franchise to collect tolls.

This line of evidence has been introduced to enable you to estimate what the company's net earnings, or net income, has been, under reasonably prudent and careful management in the past, from the exercise of their right to collect toll on their road.

Now, if such net income, as the evidence may satisfy you has been or should have been received in the past, was certain to be the same in the future as in the past, your inquiry on this branch of the case would be a simple question of fact from the evidence; but there is no certainty that the net income will be the same in the future as it has been in the past. It may be more or it may be less, depending upon a variety of circumstances. For instance, the future net income of the road may depend upon the character and the quantity of traveling vehicles passing over it; upon the rates of toll charged in the future, in connection with the facilities for evading the payment of toll by using parallel and cross-streets or roads open, or to be opened, in the territory which contribute to travel on the turnpike. It may depend upon the ease and convenience afforded to travel upon the respective roads leading to the city. It may depend upon the particular purposes the surface of the road or street may be used for, in addition to travel by toll paying vehicles, as, for instance, street railroad purposes.

So, it may depend upon the expenses of management in relation to income. Hence it has been to aid you, in coming at whether the net income will probably be more, or less, in the future than in the past, that evidence has been introduced bearing upon various contingencies which would probably affect the future net income of the road. And in connection with these circumstances, also bearing on the probable net income, are the other facts in evidence, that the Turnpike Company has an existing contract with certain individuals and the village of Avondale for the keeping of the Turnpike in repair for certain per cent. of the receipts from toll, which contract by its terms was to continue as long as

the company continued to collect toll. Also the Turnpike Company's contract with the street railway company, giving the street railway company the right, in the future, to occupy the Turnpike so far, as it may be necessary for a street railroad to be operated by steam, cable, or electric, or other improved system of motive power with such curves, turntables and rails as may be necessary.

These facts and circumstances all bear more or less directly upon what the future net income of the road would probably be.

You will observe, therefore, that when you have reached a conclusion as to what the net income of the road from the collection of tolls has been in the past, during the period to which the evidence has been directed, that such conclusion of finding serves but as a circumstantial fact, to be taken in connection with all contingencies referred to in the evidence, which would probably affect the future receipts from tolls and future net income of the road, if it was not condemned and if the Turnpike Company continued to own the road and manage its business with reasonable care and prudence.

Having arrived at an agreement as to what the net annual income of the road has been in the past, and from that fact, in connection with the other facts and circumstances which have been referred to, when you have estimated and agreed upon what would be the probable net income of this road from the tolls in the future, as if the company continued to own and operate the whole road, then if you proceed in the logical order of inquiry, your next inquiry should be, what proportion of such agreed probable annual net income will be lost to the Turnpike Company by reason of the condemnation and appropriation of the 8,650 feet, if that is the length, of the portion sought to be appropriated?

To guide you in estimating that apportionment, testimony has been introduced relating to the amount of travel and toll collected at both gates, and the character of the travel, and where it comes upon the turnpike, as well as the length of the road and the number of feet sought to be appropriated, and the number of feet that will be left.

From such facts and all the facts and circumstances in evidence, you are to estimate and determine what proportion of such probable net future annual income, the Turnpike Company will be deprived of by reason of the condemnation of the portion of the road lying within the corporate limits of Avondale. And, having agreed upon that, you have then obtained the basis for ascertaining the compensation to be allowed.

Finally you come to the question of the present value, in one sum, of that portion of the probable net future annual income which the Turnpike Company would be deprived of in consequence of the appropriation.

In the progress of this case much has been said in your hearing, and witnesses have been examined about the capitalization of net income, and the rate at which such income should be capitalized, under varying circumstances.

The idea of capitalization on the basis of 6, 8, 10, 12, or any given rate per cent., when the duration of the income is not mentioned, implies that the net annual income so capitalized is a perpetuity; that is, that such income will continue for all time, and the sum ascertained by that process is a sum which, if placed at interest at the assumed rate, will produce that income perpetually.

Now, whether the net future annual income (when that is ascertained or agreed upon) of a Turnpike Company, under the laws, and situate as

this company is in its proximity to our city, is, in its nature and character, such that it should be treated and considered as of perpetual duration or whether it should be treated and considered as of a shorter duration, is a question for the jury to determine from all the facts and circumstances of the case.

The franchise which the company exercises, and which produces its income, is subject to legislative regulation. The rates of toll may be changed at any time in the future; but it should be assumed that in case of such alteration it would be a reasonable and just alteration at the time it was made and under the then existing circumstances.

The company is required to keep its road in serviceable condition for such travel, and if from any cause it should fail in that, for any unreasonable time, it would be subject to forfeit its right to collect tolls.

The company is required to give fair and accurate accounts of its affairs and transactions to be kept, and its books are subject to inspection by the county commissioners, or an agent of the general assembly, or a stockholder, and a refusal or neglect to exhibit its accounts when required by such person, is made a cause for which its right to be a corporation may be forfeited.

So its franchise to collect tolls may be sold upon execution to satisfy debts of the corporation, as other property, and the purchaser can hold and exercise all the corporate franchise purchased at such sale.

These provisions of law, which may affect the future earning capacity of the company or its corporate existence, are proper to be taken in consideration by you in connection with the evidence in passing upon the question of whether the net income should or should not be considered as a perpetuity.

If, under all the circumstances of this case, you should find that the net income which the company will probably be deprived of by reason of this appropriation, should be considered as a perpetuity as continuing through all time, then a sum, the reasonable and probable annual interest on which, would be equal to the net annual income which you estimate the company would be deprived of by reason of the appropriation, would be its measure of damages, or the amount of its compensation; but if you should find that such net future income should not be considered as of perpetual duration, but of a shorter duration, then you should determine under, all circumstances, what its duration would probably be, and proceed by the ordinary rules of discount to find the present value of such net annual income, which you estimate the company would be deprived of, for the length of time which you may determine it would probably continue, using such rate of interest in discounting as would reasonably be earned in a safe investment of money.

In brief, gentlemen, the nature of this class of cases and this case in particular, in all its branches, as I said in the beginning calls for the exercise of good sense and sound judgment on the part of the jury. The company should be fairly and justly compensated for any and all pecuniary injury it may sustain by reason of the loss of tolls resulting from the appropriation of this part of the road, without regard to any benefit its remaining property may derive from the appropriation of the portion sought to be condemned.

A form of verdict will be prepared and given you in this case, which should be signed by your foreman and then by each of the other members of the jury.



E. W. Kittredge and John Warrington, for Turnpike Company.

W. L. Avery and A. B. Huston, for Village of Avondale.

## 310 LIFE INSURANCE.

[Hamilton District Court.]

Judges Buchwalter, Connor and Maxwell, JJ.

### †RACHAEL S. GAFF v. PENNSYLVANIA MUTUAL LIFE INS. CO.

A member of a purely mutual life insurance company, or one holding a policy therein, is bound to know all the rules and regulations of such company, and where one of the regulations is, that the secretary is not authorized to make contracts changing the terms of policies, a letter of the secretary to an assignee of a policy, promising to notify such assignee in case the assured makes default in payment of his premiums, is without consideration, and cannot bind the company, so that such assignee may, at any time, after default of payment of premiums, by the assured, by simply paying up the premiums, and without complying with the rules of the company as to re-examination of the assured, require the company to re-instate the policy for its full original value.

MAXWELL, J.

The plaintiff in error brought her action before the superior court, to recover upon a policy of insurance for the sum of $5,000, which was issued to one Rasdal on the thirtieth day of November, 1877, and by Rasdal assigned to J. W. Gaff & Co. on the seventeenth day of December, 1877, to secure an indebtedness which was alleged to be greater than the amount of the policy. A copy of the policy is attached to the petition, and the usual averments, made in the petition, entitle the plaintiff to recover upon the policy, if there be no defense shown.

The defense set up is: First, that the Pennsylvania Mutual Life Insurance Company is a purely mutual company, and that each policy holder in the company becomes a member of the company and entitled to all the rights, and subject to all the liabilities of the company. That averment is made as inducement, we presume, for averments which follow after. It is averred also in the answer as a defense, after setting out what premiums were to be paid upon the policy annually, or quarterly, that "in case the payments of premiums as aforesaid shall not be made to said company on or before the several days appointed as aforesaid, for the payment of the same, then in every such case the company shall not be liable to the payment of the sum stated in the policy and this policy shall cease and determine." "And it is further agreed," so it is alleged in the answer, and so it appears by the policy, which is put in evidence, "that in every case where this policy shall cease and determine, or become null or void, (except in case of death), all previous payments made thereon, and all profits, shall be forfeited to the company; provided, however, in case of default in the payment of any premium when due after two full years' premiums have been made in cash, and provided that no provision of this policy has been violated, then upon the surrender of this policy by the above named Leander W. Rasdal, and any assignee thereof, within thirty days of such default, a paid up non-participating policy, payable at death, will be issued for an equitable amount; and provided, further, that if such default occur after three full years' premiums have been paid thereon, that a credit for a nonparticipating insurance for an equitable amount payable when the person whose life is hereby insured, shall have attained the age of eighty years, or up-

†This Judgment was affirmed by the Supreme court, by their refusal to allow a petition in error to be filed, May 25, 1886; no report.

on his previous death, shall be given upon the books of the company, without any surrender of the policy." The defendants admit that the policy was duly assigned to J. W. Gaff & Co., but they say that the assured, Leander W. Rasdal, having failed sometime during the year 1881, or having ceased, during the year 1881, to pay his premiums, and having at the time paid up three full years' premiums, that they thereupon credited him upon their books, under this second provision of the policy, with the equitable amount, to-wit, about the sum of $500. And it will be noticed that in this provision of the policy, there is no provision for the surrender of the policy upon such default in payment and such termination of the policy, while in the first provision, that is that which gives him certain rights after the payment of two years' premiums, it provides that the policy must be surrendered in order to entitle him to it. And they virtually confess judgment in favor of the plaintiff in this case for some $515, but deny any further liability upon the policy.

The reply to this defense, out of which the controversy in this case mainly grows, is set out in the petition in the case, and it is this: Plaintiff avers in the petition among other things, that at the time the policy was assigned, it was consented to in writing by the company, which, as I said, it admitted in the answer. The plaintiff says that sometime after the assignment of the policy, that is, in July, 1880, the policy then being in the possession of the Mill Creek Distilling Co., as is claimed, as trustees for the firm of J. W. Gaff & Co., that is to say, the Mill Creek Distilling Co. having the policy for the purpose merely of settling up the business of James W. Gaff & Co., which was in some way complicated with the Mill Creek Distilling Co., wrote this letter to Henry Austie, the secretary of the company:

"CINCINNATI, July 21, 1880.

"Henry Austie, Esq., Secretary of Pennsylvania Mutual Life Insurance Company, Philadelphia, Pa.:

"DEAR SIR: We hold in trust policy No. 23,057, for $5,000 in Pennsylvania Mutual Life Ins. Co., of Philadelphia on the life of Mr. Leander W. Rasdal of Macon, Georgia, and we would be gratified if you would advise us the amount of the next payment and when it is payable. Should Mr. Rasdal fail to pay premiums when due, please notify us, as we do not wish the policy to lapse, and will pay premiums in case Mr. Rasdal fails to do so. Your attention and early reply will greatly oblige,

Yours very truly,

MILL CREEK DISTILLING CO.,
Koehler."

they say that in answer to this letter they received this (the letter head is upon the heading of the Penn. Mutual Life Ins. Co.):

"PHILADELPHIA, July 27, 1880.

"Gaff & Co., Cincinnati, Ohio:

"GENTLEMEN: The premium on policy No. 23,057, in this company, on the life of L. W. Rasdal, will be due August 30th next. The insured has up to this time promptly paid the premiums. If he should fail to do so, you will be notified. The amount of the next quarterly payment will be $32.82.

Very respectfully,

HENRY AUSTIE,
Secretary."

And the claim of the plaintiff is, in substance, that by reason of that letter the defendants are now estopped from setting up the default of Rasdal in payment of premiums and the termination of the policy.

The question is as to the effect of this letter. First, was the secretary authorized to bind the company by this letter; and in the second place, if he was so authorized or not, what is the construction to be put upon the letter?

A deposition was taken pending the suit, in order to introduce certain rules and regulations of the company, and by these rules and regulations it appears, in substance, that the secretary is not authorized to make contracts, of this character at least, for the company. And it is claimed, that inasmuch as this was a purely mutual company, the plaintiff as the assignee of Rasdal, was bound to know the rules and regulations of the company, and was bound thereby; in other words, was bound to know that the secretary of the company could not bind the company to the extent, at least, of making a new contract; for, if the letter is to be construed as the plaintiff claims it, it in effect makes a new contract. That is to say, as the plaintiff claims, this letter was a promise to them to advise them whenever Rasdal should fail to pay the premiums upon the policy, and further, to hold the policy, keep it alive, or some way to hold it until the assignee, J. W. Gaff & Co., might pay the premiums upon the policy and revive it. Necessarily, as will be seen from the position of the parties, some time must elapse after a default upon the part of Rasdal for the payment of premiums, before the information could be communicated to J. W. Gaff & Co., and they in turn make such communication as they pleased to do to the Penn. Mutual Life Ins. Co. Rasdal was a resident of Macon, Georgia. The policy was issued to him there. The Penn. Mutual had its office in Philadelphia, Pa., and J. W. Gaff & Co., had their office in Cincinnati, Ohio.

It is claimed by the defendant, however, that admitting that the secretary wrote this letter, and admitting, so far as they are willing to admit, that he had authority to write the letter, that a fair and proper construction may be put upon the letter consistent with the contract between the parties and the obligation upon the company, and that is this: It will be observed by the second clause set out in the answer of the company, that with relation to the policy it provides that after two years, upon surrender of the policy, the assured may then have credited up to him an equitable amount—that this letter may be construed to mean fairly that J. W. Gaff & Co. desired to avail themselves of that privilege; in other words, that it was nothing more than an agreement upon the part of the secretary that upon failure of Rasdal to pay the premiums, that he would then notify J. W. Gaff & Co., so that they might upon surrender of the policy be credited with an equitable amount upon the books of the company; for if Rasdal failed to pay his premiums after two years and before the expiration of three years, and the policy was not surrendered according to the terms of it, the policy would be wholly void and there would be no credit to be given to Rasdal or to Gaff & Co., as assignees, upon the books of the company.

First, as to the effect to be given to this letter: we think that it needs neither argument nor authority to sustain the position, that the secretary of the company, under its by-laws, could not make a new contract for the company. The president and actuary of the company are authorized to issue policies countersigned by the secretary only; but if this letter of the secretary meant anything at all other than what I have already spoken of, that is, giving Gaff & Co., the privilege of surrendering the policy and being credited with an equitable amount, then it meant to make a new contract, that is to say, that the company would

hold the policy a sufficient time after having received advice from Macon, Georgia, that the premiums had not been paid, for Gaff & Co., to pay the premiums, which would be wholly inconsistent with the provisions and terms of the policy. It could not possibly be done within a reasonable time. Now, that certainly would be a new contract, and just as certainly the secretary was not authorized to make such a contract. If, then, he had no authority to make such a contract, we see no difficulty in putting upon the letter the construction which I have just indicated, and that is that he had in his mind this second clause in the policy, and only proposed, in writing that letter, to give Gaff & Co., the benefit of such second clause.

Another objection might be made to the letter, although we do not think it necessary to urge it here, and that is that if it was intended by this letter to make a new contract between the company and J. W. Gaff & Co., there was no consideration for such contract; and there must be some consideration; not only some consideration, but some tangible consideration, for such a new contract as this would have been, if this letter is to be enforced against the company according to the construction put upon it by the plaintiff.

There is yet another objection to the recovery of the plaintiff upon this. It appears that in the first place, the policy was procured to be taken out by an agent of the plaintiff who was selling their products through that part of the South, and for whom, virtually, Rasdal was a sub-agent. It appears from the testimony, that Rasdal by that means had become indebted to a considerable amount to J. W. Gaff & Co., and that this agent of Gaff & Co. took out the policy, or had it taken out, for the purpose of protecting Gaff &Co. In the summer of 1882, this same agent, who was still in the employ of either J. W. Gaff & Co. or the Mill Creek Distilling Co., who for purposes of this action are the same parties, both as claimed by the plaintiff and admitted by the defendant, was in Macon, Georgia, and made inquiry in regard to the policy, went to the agent to whom Rasdal was accustomed to pay his premiums, and the agent then stated to him that Rasdal was in default for premiums about a year, but that he was endeavoring to collect the premiums from him. Now, we think that under the terms of the policy that was a fair and reasonable notice in accordance with the provisions of the letter, if the letter is to be construed against the company, that Rasdal had failed to keep up his premiums. There is no positive testimony upon that point, but we think it highly probable that the agent furnished J. W. Gaff & Co., or the Mill Creek Distilling Co., with this information. But whether that be so or not, it is only one of the incidents in the case, showing, as we think, the construction which is to be put upon the letter.

It seems that sometime after this, whether J. W. Gaff & Co., or the Mill Creek Distilling Co., had learned through the agent or not does not clearly appear from the testimony, learning Rasdal was in default for payment of his premiums, on January 4, 1883, they wrote to the Penn. Mutual Life Ins. Co., as follows:

"Pennsylvania Mutual Life Ins. Co., Philadelphia, Pa.

"GENTLEMEN: You are aware that we hold by assignment, dated December 17, 1877, and entered on your records December 20, 1877, in book 2, page 501, policy numbered 23,057, on the life of L. W. Rasdal, and we have but lately learned that the premiums for the past year or two have not been paid. We had and have relied on the agreement and promise contained in your letter to us of July 27, 1880, to notify us of any default in the payment of premiums, so that we could in such case

see to the payment. We desire, of course, to keep the policy in force, and will thank you to advise us of the arrears of premiums and we will pay or remit in any way you suggest. We can pay your agent in this city, or to your agent in Macon, Georgia, or will remit directly to your office, as you desire. Also please advise how we shall make the future remittances; that is, for the premiums hereafter maturing. We understand that the assured is now in excellent health, though this is an immaterial circumstance to the matter in hand. Please let us hear from you promptly, and oblige,

Yours respectfully.

J. W. GAFF & Co., *per* HUBBELL."

Hubbell was the agent who in 1882 visited Georgia and obtained the information I have spoken of.

In answer to this the Penn. Mutual Life Insurance Co. wrote: "January 12, 1883—Messrs. J. W. Gaff & Co., Cincinnati, O.—Gentlemen:—Delay in replying to your favor of the 4th inst. has been caused by the pressure of business" etc. Then they go on to repeat substantially all that had been done in the matter and in closing the letter say: "Should you desire to revive the policy for the original sum, this can be done on furnishing us an examination of Mr. Rasdal, to be approved by our medical director, and on payment of the past due premiums with interest. Yours respectfully." Signed by vice-president of the company.

It appears in the testimony indirectly that Rasdal was not in the excellent health that J. W. Gaff & Co. supposed him to be at this time, supposing that they had any information on the subject; and no re-examination was furnished. The defendants admit that the premiums were tendered to them, but they say that no re-examination was furnished to them, and that the tender of the premium without the re-examination was a vain thing; Rasdal died on March 10, 1883.

The case, we think, stands substantially upon these clauses in the policy which have been set out in the answer of the defendant, and which, in our opinion, furnish a complete and sufficient defense. The letter written by the secretary of the company to Gaff & Co., was, we think, without authority to make any new contract at least, and in no way alters the condition of the case. We think that the judgment of the superior court should be affirmed.

Moulton, Johnson & Levy, for plaintiff in error.

Sayler & Sayler, for Insurance Company.

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## 340 INVESTIGATION OF MUNICIPAL OFFICERS.

[Hamilton Common Pleas.]

### †HENRY MUHLHAUSER v. JAMES C. MORGAN ET AL.

Section 1686, Rev. Stat., empowering a committee of either branch of the common council to compel the attendance of witnesses for the purpose of investigating charges against officers, does not authorize one branch of the council, of its own volition, to investigate, but the whole council must first provide by ordinance when and how a particular committee must investigate before a witness can be compelled to attend the investigation.

On the nineteenth day of August, 1887, the board of councilmen of the city of Cincinnati adopted a resolution reciting that, Whereas it has come to be a matter of public notoriety that serious irregularities have

†This judgment was affirmed by the Circuit Court.

existed in the management of the workhouse, etc., Resolved, that a committee of five be appointed by council to investigate such charges, etc.; and be it further Resolved, that such committee is empowered to examine such witnesses as may be necessary and employ such assistance as may be required to effect a speedy and thorough investigation.

Under this resolution on the twelfth day of September, 1887, the defendants, caused a subpœna to be issued requiring the plaintiff to attend as a witness on the thirteenth day of September; he refused to attend as a witness and thereupon on the fourteenth of September, 1887, compulsory process was ordered by said committee to compel his attendance before them at 7:30 P. M.

On this state of facts the plaintiff filed a petition for an injunction to restrain the defendants from compelling his attendance, and from ordering his arrest and imprisonment for refusing to attend. A temporary restraining order was allowed and a motion was filed to dissolve the restraining order, and also a demurrer to the petition. The case was then submitted upon its merits on the motion to dissolve, and on a demurrer to the petition, when the court rendered the following decision.

ROBERTSON, J.

As these questions present themselves to my mind, their solution turns on the construction of sec. 1686, at least so far as to obviate the necessity of deciding any other point in the case. Section 1686 provides that "For the purpose of investigating charges against members or other officers of the corporation, or such other matters as it may deem proper, the council of any branch thereof, or any committee of the members of either, shall have power to issue supœnas or compulsory process to compel the attendance of persons and the production of books and papers before the council or either branch thereof, or any committee of the same, and shall have power to provide by ordinance for exercising and enforcing this provision."

Prior to the passage of this act, that is, prior to the amendment of the old sec. 95, neither council nor any branch of it had power delegated to them to issue compulsory process. They had authority to make any investigation they chose, but not to issue compulsory process. The legislature changed that section, extending their power, giving them the power of a court in regard to issuing process and enforcing the attendance of witnesses, and if necessary to commit to jail.

Now, if as contended by the city, the exercise of this power required no act on the part of council precedent to the exercise of it; if the legislature intended to vest that power immediately and directly in council, and each and every existing committee of council (because the statute would so read), then any of these committees may, of their volition, go to work and investigate charges about any matter specified in the act.

If such was the intent of the legislature, that each of these committees should be erected into courts of justice, my impression is, that they would not have deemed it necessary to provide that the council should have power to "provide by ordinance for the exercise or enforcement of this provision." In other words, it is clear that the passage of an ordinance authorizing the exercise of this power is precedent to their right to exercise it, or the right of any committee to exercise it. The legislative intention, undoubtedly, was not to leave this extraordinary power in the boards, but to leave it to the whole council to provide when and how a particular board of the council and what board of the council,

may exercise it. They have no power to issue process until council has passed an ordinance authorizing its exercise, and an ordinance can not be passed by one board; it must be passed by both boards. They may empower a specified committee, to exercise the power that is here delegated, but the intention of the legislature was that it should be submitted to the common council, and not to any existing board, or one or two or three members. I do not know how many boards the council may have; they may have fifty, and the idea would be to erect each of these fifty boards into so many different courts to go to work and summon the community in before them to investigate what one of the members of such board might want investigated.

That is not the intention of the legislature at all. If anything needs investigation, the common council, shall, by ordinance, provide for it and designate the committee that shall have the exercise of this power.

In this view of the case it is, of course, unnecessary to go into the other questions as to what matters are included within their range, because the preliminary step giving them jurisdiction to issue compulsory process has not been taken. They always have the jurisdiction to investigate as much as they please, but the jurisdiction to issue compulsory process and commit to jail was vested in the mayor and police court judge before the change, and since the change the exercise of the power is given to council after they pass an ordinance for that purpose, and not before.

Jerome D. Creed and Wulsin & Perkins, for plaintiff.

Horstman, Hadden & Galvin, City Solicitors, for defendants.

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## 349 LANDLORD AND TENANT.

[Superior Court of Cincinnati, General Term.]

Peck, Taft and Moore, JJ.

†MARY A. DEE v. THOMAS J. AND J. J. EMERY.

Where premises let to a tenant include a walk appurtenant to the property, to which certain other tenants of the same landlord have a right of access and use, the landlord, in the absence of a contract to that effect, is not bound to keep such walk in repair, and is not responsible in damages to the tenant if injured by reason of the defective condition of the walk.

RESERVED on motion for a new trial.

PECK, J.

The action was brought by plaintiff to recover damages for a personal injury received by her from a fall occasioned by a defective plank-walk in the rear of the premises occupied by her as tenant of the defendant.

There are allegations in the petition which assume the right of plaintiff to recover upon two grounds: That defendants had agreed with plaintiff to repair the walk in question, and that by reason of their failure to comply with that agreement the injury had been occasioned; and also that the walk was upon property owned by defendants, and under their

†A judgment of the circuit court of Hamilton county in the case of Thomas J. Emery et al. v. Mary A. Dee, was affirmed by the Supreme Court without report, March 8, 1892.

control, and it was their duty to keep it in repair, and by reason of their failure to perform that duty the plaintiff was injured.

There was a failure of proof as to the first of the alleged grounds of recovery, and the case went to the jury solely upon the question whether the defendants were bound, without regard to contract, to repair the walk, and whether their failure so to do caused the injury to plaintiff without any contributory negligence on her part; and the jury returned a verdict for plaintiff.

Whether defendants were bound to repair, obviously depends upon the question as to who had control of the property on which the walk was situated. It was claimed on the part of the plaintiff, that the walk was not included in the premises let to her by defendants, while the later assert that it did constitute a part of such premises, which consisted of a house and lot, the house being one of a block of eleven houses owned by defendants. The walk in question was in the rear of the block, extended its whole length, and was used by the tenants of all the houses as well as by others in going to and from the various houses. Beyond it was an open space extending to a bank of earth, beyond which all parties are agreed that the premises did not extend. Defendants contend that the premises leased to plaintiff extended from the rear of her house between parallel lines drawn from and continuing the center line of the wall of the house on each side, and back to the bank of earth. Plaintiff claims that the premises let to her only extended to the walk; or if beyond it, that the walk itself was excepted from the operation of the agreement as to the letting, because it was a common walk used by the tenants of all the houses. The first of these two claims of plaintiff is disposed of by her own testimony. Upon cross-examination she testified as follows:

"*Question*: How much yard is there that corresponds to the house; how much yard did you have the use of there? *Answer*: Well I don't know just how many feet; there is the width of the house. *Q.* Just the same as the width of the house, is it not? *A.* The width of the house, and so many feet back to this bank of earth.

* * * *Q.* And this walk is part of the yard, is it not? It is in the yard? *A.* It is in the yard." There is more to the same effect, and it is plain that on this point the learned counsel for plaintiff does not understand the facts as his client understood them, or she did not understand his theory of the case, for the facts and the theory will not agree.

As to the claim that the walk, although in the yard, was in some way excepted from the operation of the agreement to let, by reason of the fact that it was used in common by all the tenants, it seems to us that this proposition involves a *non sequitur*. The conclusion does not necessarily follow from the premise. The fact that each tenant has an easement of way in that part of the walk extending through the yard of each of the others, does not show that the custody and control of such part is not in the tenant through whose yard it passes, any more than the fact that the public has a right of way over a sidewalk in front of a house excludes the owner from a property interest in the walk and the ground covered by it. From the plaintiff's statements as to what was let to her, it seems to us that the only reasonable inference to be drawn is that she took the walk as part of the premises, subject to the right of the other tenants to make use of it, and that the responsibility as to its condition rested upon her, and not upon the landlord.

Plaintiff's counsel has cited to us certain cases. Redman v. Conway, 128 Mass., 374; Milford v. Holbrook, 9 Allen, 17; Loony v. McLean,

129 Mass., 33; Walkins v. Goodall, 138 Mass., 53, and others, wherein it is held that the owner of a tenant house, letting rooms therein to various tenants, is responsible for the condition of the common halls, stairways, and other parts of the building remaining under his control, but to which the tenants had the right of access. We do not question those cases; on the contrary, we have recently followed them in the case of Dorse v. Fischer, believing, in the absence of any decision by our own Supreme Court on the subject, that they are based upon sounder views of public policy than the cases which maintain a contrary doctrine, such as Purcell v. English, 86 Ind., 34.

The case at bar is distinguished from the cases just cited by the fact that the control of that part of the walk, where the injury occured, passed to the tenant by virtue of the agreement under which she held the premises.

The motion to set aside the verdict and order a new trial is granted.

Taft and Moore, JJ., concur.

W. L. Dickson, for plaintiff.

Perry & Jenney, for defendant.

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## 350 BANK CHECKS.

[Hamilton Common Pleas.]

### †NATIONAL LAFAYETTE BANK v. CINCINNATI OYSTER AND FISH CO.

**The holder of a certified check must look for payment to the bank, to the exoneration of the drawer.**

SHRODER, J.

The petition sets forth that plaintiff holds defendant's certified check to the plaintiff's order on the Fidelity National Bank; that upon due presentation the bank failed to honor it. Defendant demurs on the ground that by accepting the certified check the plaintiff accepted the bank as its debtor, to the release of the defendant as drawer of the check.

Under section 5208, U. S. Rev. Stat., it is unlawful for a national bank to certify a check unless the drawer has at that time on deposit an amount equal to that specified in the check. It is, therefore, presumed that at the time the defendant had the amount of the check to his credit in the bank. By the certification the bank assumed an unconditional obligation to pay the amount of it to the lawful holder upon presentation, regardless of the state of the drawer's account.

The theory of the law is, that when such certificate is made the amount is charged to the drawer's account, since all well regulated banks, for their protection, adopt this practice, and the reasons for it are so strong that the law presumes they all do so. (Merchants' National Bank v. State National Bank, 10 Wall. U. S. S. C., 604.) The drawer is charged the amount of the certified check as so much cash paid—his account is reduced to that extent—and this amount is placed to the account of a certified check account or its equivalent. He is not released from responding to future overdrafts because the certified charge may happen to enter into the overdrawn balance, although the check be then still outstanding and not presented for payment.

These consequences of certification follow whenever and by whomsoever it is obtained from the bank. It is therefore of no importance that it was obtained by the depositor himself, for in any case, by accepting the check, the holder is presumed to have done so with a knowledge of these consequences, and to have

†See, also, *supra*, 20 B. 419. This Judgment was affirmed by the circuit court, 2 Circ. Dec., 463, and the circuit court was affirmed by the Supreme Court: see opinion, 51 O. S., 106.

assented thereto, and thereby to have accepted the bank's obligation (secured at the expense and charge of the drawer), in satisfaction of the drawer's liability on the check. First National Bank v. Leach, 52 N. Y., 340; Thompson v Bank of N. A., 82 N. Y., 1; Girard Bank v. Bank of Penn., 39 Pa. St., 92; Ballard v. Randall, 1 Gray, 605; Morse on Banks, pp. 310, 311 et seq.

Opposed to this view are the decisions of the Illinois and Tennessee courts (Beckford v. National Bank, 42 Ill., 238; Andrews v. German National Bank, 9 Heisk., 211), in which the certified check is compared to an accepted bill of exchange, the bank to the acceptor and the depositor to the drawer. These decisions overlook that the construction of the commercial paper is to be founded upon commercial practice, and that by the certification the check has ceased to be an order against the depositor's account, and they become an order upon the bank's own certified check account. It therefore follows that upon principle, and according to the weight of authorities, the demurrer ought to be sustained.

It is urged that the petition does not allege the fact of certification. It sets forth an exact copy of the check as certified in the usual form. Thus set out, it must receive the reading and construction usually and ordinarily given to it; and so read, it amounts to a complete statement of the fact of certification.

F. V. Andrews, for plaintiff.

A. W. Symmes, for defendant.

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## TRADEMARK. 362

[Superior Court of Cincinnati.]

### SOCIETE ANONYME DE LA DISTILLERIE DE LA BENEDICTINE v. MICALOVITCH, FLETCHER & CO.

"Benedictine" is a valid trade-mark for a liquor invented by and made after a recipe of the Benedictine monks, although used by an assignee of the original proprietor whose name is employed in the labels, without disclosing the change of proprietorship, and although such assignee is a French alien who has not deposited a copy of the trade-mark in Paris.

Action for injunction against infringement of a trade-mark. The opinion states the case.

TAFT, J.

Plaintiff alleges that it is a French corporation engaged for some years past in manufacturing a liqueur of superior quality, known and branded by plaintiffs as "Benedictine," which it sells extensively and at a profit in Europe and America in peculiarly-shaped bottles with labels and trade-marks, described in the petition and duly registered in the patent office at Washington, and that defendants have put up and sold an article in imitation of plaintiff in bottles with labels and trade-marks exacly like those of plaintiff, thereby deceiving the public and defrauding the plaintiffs. An injunction is asked and damages. The answer of defendants raises two issues, first, that tne trade-marks, labels and advertisements claimed by defendant were in use long before defendant adopted them, and were registered at the patent office several years prior to plaintiffs' registration of them; and second, that they contain misrepresentations as to the person manufacturing the liqueur, which deceive the public and so disentitle plaintiffs to relief. Defendants do not deny that they are putting up and selling an article in imitation of the plaintiffs' article in bottles with labels, marks and advertisements exactly like those described in the petition. An allegation at the close of the answer, which seems to be such a denial when carefully read with the rest of the

answer, turns out to be only an argument from previous allegations and no denial of fact at all.

The evidence discloses the following state of fact:

At Fecamp in Normandy, France, the Benedictine Monks had a monastery for several centuries before the French revolution. They invented a liqueur or cordial made from cognac and a decoction of an herb growing wild in that country and other ingredients, and made it for their own use. They preserved the recipe as a secret in a book of recipes. In 1792 the abbey of Fecamp was destroyed and the monks driven out. A. Legrand, Senior, of Fecamp, one of whose ancestors was an attorney-general of the abbey, came into possession of the book of recipes by inheritance. In 1863 he began the manufacture of the liqueur in question, on an estate which was formerly part of the lands of the abbey, and where now is situated a museum of the relics of the abbey. The recipe of the monks was followed exactly in the manufacture of the liqueur. The recipe is preserved as a secret known only to LeGrand, Aine, and two sons in business with him. In 1863 the liqueur first became an article of commerce, and then for the first time was it given the name "Benedictine." In 1876 Le Grand, Aine, registered his trade-marks for this liqueur in the patent office at Washington. They were:

First. The letters D. O. M. with a cross above them, and the letters A. L., Le Directeur, beneath.

Second. A representation of the Holy St. Benoit, former Abbot of Fecamp, in a circle, used as a seal impress on the cork of the bottle.

Third. The coat of arms of the Abbey of Fecamp, used also as a seal impress on the face of the bottle.

Fourth. The word "Benedictine."

Fifth. A lead band running round the top of the bottle and down the side, ending beneath the seal of the abbey on the face of the bottle.

Sixth. A *fac simile* of the signature of A. Le Grand, Aine, under the words "Veritable Liqueur Benedictine, Brevetee France et a l'tranger."

How long he had been using these trade-marks does not clearly appear, but it had probably been since he began the manufacture in 1863. In 1876 he organized a corporation which was called the "Societe Anonyme de la distillerie de la Benedictine liqueurde l'Abbaye de Fecamp," to which he conveyed all the property used for the manufacture of this liqueur, together with his trade-marks, business assets and good will, and received therefor 4,500 shares out of the 5,000 shares of the company. He became sole director of the company. In 1883, on behalf of this company, he registered in the patent office at Washington the trade-marks described in the petition, on which the controversy arises at bar. The trade-marks include all that have been described above as registered in the name of A. Le Grand in 1876. Also a label containing the words: "Liquor Monachorum Benedictorum Abbatiæ Fiscanensis." Also a label containing the following, in French: Every bottle of the genuine Benedictine liqueur bears on the lowest label a *fac simile* of the General Director, A. Legrand, Aine." The broadest leaden ligature surrounding the neck of the bottle bears the following marks and inscription: "* *Veritable* † *Benedictine** " The cork is marked all around with * " *Veritable Liqueur Benedictine.**" At last on the under side of the cork is to be found: "*D. O. M.* "

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To increase the sale of the liqueur, advertisements of its good qualities accompany each bottle, and placards are sent to be hung up in

saloons and liquor houses. In these advertisements the liqueur is spoken of as the genuine liqueur of the Benedictine Monks of the Abbey of Fecamp. It is said that the cordial has not varied since 1510; that the ancient ingredients are strictly preserved. Then a general description is given of it ingredients, and then quite an extended account of its good qualities, which, in the longer advertisements, is accompanied by certificates of French physicians and by wood cuts of the distillery building, the laboratory, the bottling room, and finally, of two rooms in the museum of relics from the old Abbey of Fecamp. At the bottom of the advertisement is "General Warehouse, A. Le Grand, Aine, at Fecamp. Later advertisements contain the name of the plaintiffs at their head.

On these facts counsel for defendants ask for a decree dissolving the temporary injunction and dismissing the petition on four grounds:

First. That the word "Benedictine" is a generic term denoting only the kind of liquor sold, and cannot be used as a trade-mark.

Second. That the labels, devices and advertisements imply and lead the public to suppose that the Benedictine Monks now manufacture the liqueur, and that a court of equity will not protect the plaintiffs in practicing such fraud upon the public.

Third. That even if A. Le Grand, Aine, might have had a right to protection in equity for these trade-marks before his assignment of them to the plaintiffs, the use of them by the plaintiffs without any words denoting successorship or change is equivalent to mis-representation that Le Grand, Aine, is still engaged in the manufacture, which disentitles plaintiffs to equitable protection.

Fourth. That even if plaintiffs' right to equitable protection is other wise perfect, it is a citizen of the Republic of France, and only entitled to enjoy this protection after taking certain steps prescribed by treaty, which steps have neither been alleged nor proven at bar.

I shall consider these objections in their order:

First. Le Grand, Aine, first applied the name "Benedictine" to this liqueur. It had never been applied to a liquor of any kind before. It was a new use of an old word. There is nothing in the word describing the article by its ingredients or qualities. It does refer to the inventors of the article, and that is doubtless its derivation; but that is no objection to its use as a trade-mark. When Le Grand, Aine, first used this word, then, as a trade-mark for his liqueur, it was a legal trade-mark. Having once rightly adopted the word as a trade-mark, he cannot now be deprived of it unless he has himself abandoned it, and there is no abandonment established by the evidence. By Le Grand's use of "Benedictine" as a trade-mark in a successful and world-wide sale of the article, he has made the trade-mark mean the article; but that is no reason why he cannot have an assignable property in the trade-mark. The latest case on this point is Celluoid Mfg. Co. v. Cellonite Mfg. Co., decided by Mr. Justice Bradley, of the United States Supreme Court, on the circuit, reported, page 125, vol. 36, of the Albany Law Journal. The question there was as to the use of the word "celluloid" as a trade-mark. The justice says: "The complainant's assignors, the Hyatts, coined and adopted the word when it was unknown and made it their trade-mark, and the complainant is assignee of all the rights of the Hyatts. When the word was coined and adopted, it was clearly a good trade-mark. The question is whether the subsequent use of it by the public, as a common appellation of the substance manufactured, can take away the complainant's right. It seems to me that it cannot.

"As a common appellative, the public has the right to use the word for all purposes of designating the article except one; it cannot use it as a trade-mark, or in the way a trade-mark is used, by applying it to or stamping it upon the articles; the complainants alone can do this; and any other person doing it will infringe the complainant's right."

In this case the word "celluloid" was invented. It never had been used as a word before to mean anything. At bar "Benedictine" was a word in common use, but it had never been used before to designate a cordial. In that new use the trade-mark property is as clear as if it were a word. Selchow v. Baker, 93 N. Y., 59, cited by Justice Bradley, seems to settle this. The words in that case were "sliced animals" applied as a trade-mark to a puzzle consisting of card-board animals so sliced that when taken apart it was a puzzle to restore them. In deciding that this might be used as a trade-mark, Judge Rapallo said: "Our conclusion is that where a manufacturer has invented a new name, consisting either of a new word or words in common use, which he has applied for the first time to his own manufacture or to an article manufactured by him to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients or characteristics, but is arbitrary or fanciful, and is not used merely to denote grade or quality, he is entitled to be protected in the use of that name, notwithstanding it has become so generally known that it has been adopted by the public as the ordinary appellation of the article."

So that a new word, and an old word in a new sense, are equally available as trade-marks.

The first objection of defendants' counsel cannot be maintained.

Second. He who comes seeking the protection of a court of equity, must come with clean hands. If he has made a trade-mark valuable to himself by fraud, equity will not help him to preserve it. It is claimed at bar that the devices, trade-marks and advertisements used by Le-Grand, Aine, were intended to and did lead the public to think that the Benedictine Monks were the manufacurers of the liqueur made and sold by him. The Latin words "*Liquor Monachorum Benedictorum Abbatiæ Fiscanensis*," which appear on his bottles and the French words, "*Veritible Benedictine Liqueur des Moines Benedictins de L'Abbaye de Fecamp*," which appear on the advertisements are the two expressions which, it is said, denote that the monks are the present makers. Evidence has been adduced as to the meaning of the preposition and article *des*, from which it appears that as used here, it has an idiomatic meaning denoting origin, *i. e.*, "in accordance with the method of." With such a meaning, the words certainly do not contain a misrepresentation. But I do not think it necessary to translate *des* by a paraphrase. *Des* in this connection means literally "of the". The literal translation of the French would be, "The genuine Benedictine liqueur of the Benedictine Monks of the Abbey of Fecamp," and of the latin the same, omitting the words "genuine Benedictine." The use of the possessive case, or the preposition "of" in English, may either denote possession or origin. Crockett's leather cloth may mean cloth manufactured and owned by Crockett, or it may mean cloth manufactured according to Crockett's method or invention. It follows that the expressions relied on may have one meaning, and that an ordinary one in which there is no misrepresentation; for the liquor is made according to the mode invented by the Benedictine Monks of the Abbey of Fecamp, and is made in the very place where they

made it, under the same conditions as to climate, soil, water, etc. The rest of the advertisements point to this as the meaning. The advertisement dwells at length on the ingredients as if to impress the reader with the recipe rather than the maker. The pictures given in the advertisements of the distillery, the bottling room, the laboratory, the packing room, are entirely unlike the popular idea of a monastery. There is one picture of a room in the distillery described as a museum, containing objects of interest coming from the Abbey of Fecamp, showing that the abbey as a residence for monks must have been given up. Then on one side of the bottle is a caution that every bottle of the genuine Benedictine must bear the *fac simile* of the managing director, and on the other side is this *fac simile*, "A. Le Grand, Aine." His initials also appear on another label under the words "Le Directeur." On other advertisements the general warehouse is said to be that of A. Le Grand, Aine, at Fecamp. It was thought by counsel for defendants to be full of suspicious meaning that Le Grand, Aine, designated himself as managing director instead of proprietor. I do not think so. Le Grand, Aine, was a manager as well as proprietor. The French word "*directeur*" and the English word "manager" do not suggest the head of a monastery, but the head of a business house. If a monk or any other person desired to advertise his liquor as a monkish make, he would hardly use as a trade-mark and advertisement the *fac simile* A. Le Grand, Aine, Directeur, which is not a monkish name, and does not indicate the celibacy of its author.

From what has been said, therefore, I do not think that either the advertisements or the trade-marks give the impression that the liqueur is made by the monks. It is in evidence that some people have thought so, but there was very little to show that they got this impression from the words of the advertisements or the labels. The fact that it is generally known that Chartreuse is made by the Carthusian Monks would explain an impression that the liqueur known by another monkish name was manufactured by monks. There is nothing at bar to make Le-Grand, Aine, responsible for such impression if it exists.

Counsel have cited a decision of Commissioner of Patents Hall, reported in 40 Official Gazette, 443, Ex parte M. Block & Co., in which registration was refused for the trade-mark upon whiskey of "K. of L." and "Knights of Labor Distillery," on the ground that it was fraudulently used by the manufacturer to give the impression that it was either made by the Knights of Labor or had its origin with them, and so attract the custom of sympathizers with that order, when in fact the Knights of Labor had nothing to do with the whiskey at all. That case is very different from the one at bar, for it does not appear that the name Benedictine will attract the sympathy of any class of purchasers, or that it was intended to do so, and further, it does not appear that the Benedictines had sufficient to do with originating the liqueur to justify the use of their name as a trade-mark.

Third. The third objection to plaintiff's right is founded on the same principle of law as the second. It is claimed that the use by the plaintiffs of the trade-mark of A. Le Grand, without an indication that it has changed ownership, is a representation to the public that A. Le-Grand is still manufacturing the liqueur, and is therefore a falsehood. It is true that in the case of Manhattan Medicine Co. v. Wood, 108 U. S., 218, and in Siegert v. Abbott, 61 Md., 276, the general rule is laid down that where a trade-mark is assigned and used by the assignee, the latter,

in order to avoid misrepresentation, should indicate that the present owner enjoys by assignment from the original proprietor.

In those two cases the trade-marks and labels used by the complainants contained distinct assertions that the article was manufactured by a certain person and at a certain place, both of which by the assignment to the complainant had become false. Such too were the facts in the Leather Cloth Manuf. Co. v. The American Cloth Manuf. Co., 11 H. L. C., 533, relied on by defendant.

There is another class of trade-marks where the trade-mark contains no express statement as to who the manufacturer or seller of the article is, but where the association of the article with the trade-mark comes to indicate that the manufacturer or seller is always the same. Where this is the indication by the association, then used by an assignee without qualification is just as much of a misrepresentation as if the indication had been expressed. The general rule would certainly apply to this class of cases. Such was the case in Sherwood v. Andrews, 5 Am. Law Reg., 588.

But in trade-marks containing no distinct assertion as to who the maker or seller is, association with the article sometimes comes to represent not the seller or manufacturer, but the place or process or quality of manufacture. This class many include cases where the name of the original manufacturer is the mark. In such case, so long as the place or process or quality of manufacturer remains the same, there representation which the association, between the article and the trade-mark makes to the public is true, no matter who is the owner. Here the reason for rule laid down and the cases cited ceases, and so should its application. The distinction which I am trying to make is brought out in the opinions of Lord Justice Turner and Lord Cranworth in the case of Bury v. Bedford, 4 De Gex, Smith & Jones, 369, and 11 H. L. C., 533, and is alluded to in the opinions of Lord Westbury in the cases of Leather Cloth Co. v. American Leather Co., 4 De Gex, Jones & Smith, 143, and Hall v. Barrows, *Id.* The question in these cases was as to the assignability of trade-marks. No reference whatever is made in them to the necessity for a qualifying statement by the assignee of a trade-mark in its use, and it might seem therefore at first that the opinions referred to have no bearing upon the question I am discussing. But a closer examination will show that what is meant when it is said by those eminent English judges that a trade-mark is assignable, is that it is so assignable as that it can be used by the assignee exactly as the assignor used it, *i. e.*, without a qualifying statement.

To hold that the assignee cannot use a trade-mark of his assignor without qualifying its use by an accompanying statement of a change of ownership is to hold that the trade-mark in question is not strickly assignable, for used with such a statement, the trade-mark is not the trade-mark of the assignor.

It would seem to follow from the opinions referred to that the question as to whether a qualifying statement must accompany an assigned trade-mark is to be determined by what its association with the article has come to indicate. At bar the various trade-marks in which there is no distinct assertion as to personal manufacture or ownership, have come by association to mean to the public that the liqueur in connection with which they appear is made at a distillery at Fecamp, in France, of certain herbs of Normandy and cognac, and other ingredients, according to an invariable recipe of the Benedictine Monks. It would follow that the

plaintiff, to whom was assigned the distillery and the recipe with the trade-marks, might use the latter to designate the same liqueur produced as indicated without saying to the world what to it is wholly immaterial, that the ownership of the trade-marks, distillery and recipes had changed.

But if I am mistaken either in maintaining an exception to the general rule expressed by Justice Field in the Manhattan Co. v. Wood, or in applying that exception to the facts at bar, because the name A. Le Grand, Aine, and Le Directeur, with A. L. under it, should be construed to be a distinct assertion as to the person manufacturing the liqueur, I am still of the opinion that the third objection is unfounded. If I am mistaken in either respect, then the trade-marks at bar indicate, either by association or in meaning, the person engaged in the manufacture of the liqueur. That was, before the assignment, Le Grand, Aine. The evidence shows that he is still engaged in the manufacture as sole director of the plaintiffs and the owner of 4,500 shares of its total capital of 5,000 shares. The representation to the public as to the manufacture of the article is material only as it conveys to the public the information that the skill or care, or superintendence of the same man is used in making it. The public is not concerned whether he makes it as sole proprietor, as the member of a firm or the manager of a company. As either he is the manufacturer. Until he dies, therefore, or severs his connection with the company, a distinct assertion in the trade-mark, or an implication by association, that he is the manufacturer of the liqueur, is not a misrepresentation.

The correctness of this view is fully established by the two cases of The Dixon Crucible Co. v. Guggenheim, 2 Brewst., 321, and in Meriden Britannia Co. v. Parker, 39 Conn., 450. In the first of these cases the trade-mark contained the words "Jos. Dixon & Company," which was the name of the firm originating the trade-mark. The firm became the corporation. The Joseph Dixon Company and the trade-mark passed by assignment. It was held that the use of "Joseph Dixon & Co." on the trade-mark was not a material misrepresentation by the corporation sufficient to disentitle it to relief in equity. In the Connecticut case the proprietor of the manufactory was the Meriden Britannia Company, the complainant. It manufactured silver-plated utensils, and used in the trade-mark stamped upon the goods the words "Manufactured by the Rogers Bros." There were in the employ of the company as superintendents of silver-plating three Rogers brothers who had been in business for themselves, had used such a trade-mark and had sold it to the company. It was held that as the trade-mark assured to the public the skill of the Rogers Bros. in the make of the articles so stamped, and as it appeared that such skill was in their make, the use of the trade-mark by the company was not a material misrepresentation. The facts at bar are more clearly within the rule than in the cases cited.

The third objection to plaintiff's right must be overruled.

Fourth. The fourth and last objection of defendant's counsel to plaintiff's right to protection at bar is that being a French alien, it has not taken a step which is a condition precedent by treaty with France to its asserting any right in its trade-mark.

Plaintiff has proven registration of its trade-mark in the patent office at Washington by the certificate of the commissioner of patents, in which it is stated that it deposited *fac similes* of the marks in the office, and complied with the other regulations of the act of Congress of 1881 on trade-marks. By that act persons are allowed to register their trade-

marks in use in international commerce, and secure legal and equitable protection for them in this country if they are citizens of any foreign country in which citizens of the United States are accorded similar privileges. By the convention between France and the United States, proclaimed in 1869, citizens of the United States were accorded privileges in France similar to those granted by this act to citizens of other countries. Plaintiff may therefore claim the benefit of this act.

But it is said that the convention between France and this country requires citizens of France to deposit duplicate copies of their marks both in Paris and in Washington, and the deposit in Paris is not proven. To this it may first be said that the act of Congress of 1881 was later than the convention, and that so far as courts of law are concerned, subsequent legislation prevails over treaty provisions in the administration of municipal law. See Cherokee Tobacco case, 2 Wall., 632; Taylor et al. v. Morton, 2 Curtis C. C., 454; The Clinton Bridge, 1 Woolworth, 150.

But the second and conclusive answer to this objection is that the article in the convention relied on by counsel does not require the deposit of duplicate copies of trade-marks in Paris by French citizens. The article, as proclaimed in English, was as follows: "If the owners of trade-marks, residing in either of the two countries, wish to secure their rights in the other country, they must deposit duplicate copies of those marks in the patent office at Washington, and in the clerk's office of the Tribunal of the Seine at Paris.

In a decision rendered by General Leggett, when commissioner of patents, December 6, 1872, this article was construed to mean that citizens of the United States should deposit duplicate copies in Paris only to secure rights in France, and that French citizens only need to deposit their marks in Washington to secure their rights in this country. See Browne on Trademarks, 559, note at bottom of the page.

In 1887 the French minister at Washington called the attention of the Secretary of State to the fact that the French draft of this treaty as signed contained in this article after the verb the word "respectivement" or "respectively," which did not appear in the English draft, as proclaimed by President Grant. The Secretary of State responded that the article was construed by the United States as if the omitted word had been used. See Browne on Trade-marks (2d ed.) 559. It is thus apparent that whether the law of 1881 or the treaty of 1869 prevails, the plaintiff is in court with all the rights of protection to its trade-marks that this court could accord to a citizen of the United States.

The decree will be for a perpetual injunction, and for reference to Rufus B. Smith as special master to take testimony and report on the amount of damages sustained by plaintiff by reason of the use of its trade-marks by defendants.

Follett, Hyman & Kelley and Chas. Bulkley Hubbel, attorneys for plaintiff.

Geo. J. Murray and Wm. L Avery, attorneys for defendant.

## "DOW LAW." 367

[Mayor's Court of Wilmington, Ohio.]

Before Z. G. A. Haworth, Mayor.

### † WILMINGTON (VILLAGE) v. LARRY EGAN.

The action in the above entitled cause was for the alleged violation of a prohibitory ordinance of said village, passed in pursuance of and by virtue of sec. 11 of the act commonly called the Dow Law, wherein sec. 11 of said act purports to confer power on municipal corporations to wholly prohibit the liquor within their corporate limits.

A copy of the ordinance is as follows:

AN ORDINANCE

To prohibit ale, beer and porter houses, and other places where intoxicating liquors are sold at retail, within the corporate limits of the village of Wilmington, Ohio.

SECTION 1. Be it ordained by the council of the incorporated village of Wilmington, Ohio, that all ale, beer and porter houses, and other places where intoxicating liquors are sold at retail for any purpose, or in any quantity, other than upon prescriptions issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, are hereby prohibited within the corporate limits of said village; but nothing herein contained shall be construed to prohibit places where intoxicating liquors are or may be manufactured from the raw material and sold by the manufacturers thereof, at the manufactory, in quantities of one gallon or more at any one time.

SEC. 2. Be it further ordained, that it shall be unlawful for any person or persons, either as principal, agent or employe, to keep within the corporate limits of said village any ale, beer or porter house, or other place where intoxicating liquors are sold at retail for any purpose or in any quantity contrary to the provisions of sec. 1 of this ordinance.

SEC. 3. Be it further ordained, that whosoever, either as principal, agent or employe, shall keep within the corporate limits of said village any ale, beer or porter house, or any other place where intoxicating liquors are sold at retail for any purpose or in any quantity contrary to the provisions of secs. 1 and 2 of this ordinance, shall on conviction thereof be fined ten ($10) dollars for each and every day upon or in which such house or place is so kept, but not to exceed fifty dollars upon the first conviction, nor one hundred dollars upon any subsequent conviction under this ordinance, and all persons convicted under this ordinance shall pay the costs of prosecution.

SEC. 4. This ordinance shall take effect and be in force from and after the twenty-third day of May, 1887.

Passed April 14, 1887.

Z. G. A. HAWORTH, Mayor,
WM. MCMILLAN, Corporation Clerk.

The defendant filed a motion to quash the affidavit and assigned the following reasons:

First—The ordinance under which this action is brought is invalid because it is not properly and legally authenticated as required by law.

Second—Said ordinance as appears of record was not published in the form and manner required by law.

Third—The said ordinance is invalid because the penalty prescribed for its violation is void for uncertainty.

Fourth—The offense complained of in this action is in its nature a continuous one, and the penalty imposed is in excess of the power of the corporation to enforce.

† A contra decision is found in Van Wert v. Brown, 47, O. S., 477.

Fifth—The act of the legislature under which the corporation claims the right to enact the ordinance under which this action is brought is an act to provide against the evils resulting from the sale of intoxicating liquors, as expressed in its title, and could not confer the power to prohibit the traffic in said liquors unless it so expressed in its title.

Sixth—The ordinance is void because it is in conflict with the second clause of of sec. 18 of the schedule to the constitution of the state of Ohio.

Seventh—That said ordinance is unconstitutional and void.

The first, second, third, fourth and fifth causes of the motion to quash were passed upon by the court, the motion as to the first cause was overruled, but as to the second, third, fourth and fifth causes they were sustained. Without giving the opinion of the court on these points we come to the sixth and seventh causes assigned in said motion as to the constitutionality of the prohibitory or local option feature of the Dow law.

The opinion of the court on this question is given in full, as follows:

We now come to the most important question involved in this case, in the causes assigned in the sixth and seventh sections of the motion to quash the affidavit, which causes are: That the ordinance is void because it is in conflict with the second clause of sec. 18 of the schedule to the constitution of the state of Ohio, and because said ordinance is unconstitutional and void.

The language of schedule 18, as referred to, is as follows: "No license to traffic in intoxicating liquors shall hereafter be granted in this state, but the general assembly may by law provide against evils resulting therefrom."

The decision of the question involved in the discussion of this proposition is a very embarrassing and delicate duty when devolved on an inferior court (municipal court), and it is a duty we would gladly have had placed in another, because we feel that the influence of a decision with reference to such a subject-matter is far reaching in its results, be that opinion as it may. But while the disposition of a question of its nature is of great importance, though it be the opinion of an inferior court, the same duty when devolved on the Supreme Court of our state would be of exceedingly more importance, and its decision would be stamped with that character that would invite the respect of all. And while it is the imperative duty of our highest court, which is endowed with the power and required to determine the validity of an act when its constitutionalty is at an issue, yet it is a well known and conceded proposition of law that the presumption of every act of the general assembly must be in favor of its validity, and unless such court can show such act to be irreconcilable and in conflict with the constitution, it will be unwarranted in an adverse conclusion on its constitutionality.

Being fully advised as to the duties and obligations of a court in its judicial inquiry of the subject-matter before it, we endeavor to dispose of the questions before us in the light of our conception of what the law is, and leave to a higher court, if necessary, the correction of any errors which may leaven our decision in this matter.

The subject of temperance, or rather that of intemperance, is a question that has agitated the legislation of this state from its infancy. Under the old constitution we had a license system in which provision was made against tavern keepers retailing spirituous liquors to be drank in the place where sold, or selling in less quantities than a quart without being duly licensed, and any keeper of any such place found viola-

ting any of its provisions was punished. This was substantially the tenor of legislation under the old constitution in regard to the liquor traffic. The sale of intoxicating liquors being licensed on certain terms the legislature then made certain provision for its regulation.

But the first legislation in reference to the liquor traffic, and of which we have more directly to do, was under the new constitution of 1851. The act of May 3, 1852, "For the organization of cities and incorporated villages," was the first. Then follows the general act of May 1, 1854, entitled "An act to provide against the evils resulting from the sale of intoxicating liquors in the state of Ohio." The first section of the act reads as follows:

"That it shall be unlawful for any person or persons, by agent or otherwise, to sell in any quantity intoxicating liquors to be drank in, upon or about the building or premises where sold, or to sell such intoxicating liquors to be drank in an adjoining room, building or premises, or other place of public resort connected with said building." This act took its authority from the second clause of sec. 18, of the schedule to the constitution, "to provide against evils resulting therefrom."

The above law remained substantially the same till 1857, when it was declared that all cities and incorporated villages shall have the power and may by ordinance provide for its exercise. "To regulate or prohibit ale and porter shops and houses, and places for significant or habitual resort for tippling and intemperance." Up to this time the liquor traffic was under direct control of the state legislature. But by this act the power, so much as the legislature had the right to confer, was given to municipal corporations in order that they might more effectually provide against the evils of the liquor traffic by exercising a police regulation over the business of trafficking in intoxicating liquors. From this time on till the period of the revision by the commission of 1880, municipal corporations exercised the power conferred on it by this act and amendatory acts thereto, and the municipal code of 1869, all being substantially the same legislation.

By the act of revision the general law of May 1, 1854, was substantially incorporated in sec. 6941 of the Rev. Stat., but in order that municipal corporations might exercise the power they had under the act of 1857, sec. 1692 of the Rev. Stat., in its enumeration of power conferred on municipalities, declared by paragrph 5 of such section, the power in such corporations "to regulate ale, beer and porter houses and shops."

But passing hastily to the Act of May 14, 1886, known as the Dow law, which is entitled, "An act providing against the evils resulting from the traffic in intoxicating liquors," we find a provision in sec. 11 of said act providing: "And any municipal corporation shall have full power to regulate, restrain and prohibit, ale, beer, and porter houses, and other places where intoxicating liquors are sold at retail for any purpose or in any quantity other than is provided for in sec. 8, of this act." Now this power is unlike any heretofore granted to municipal corporations. All other legislation never attempted to further legislate and restrain or prohibit places where such traffic was carried on always with the limitation "to be drank in or upon the premises where sold," while the power conferred by this act is prohibitory of the traffic or sale of liquors at retail as a beverage in any place within the corporate limits of the village. But we will elaborate on this point farther on in the case.

We have endeavored briefly to review the liquor legislation of the state and now will proceed to discuss the several adjudications arising out of such legislation.

Excepting the prohibitory provision in the Dow law, and as a summary of the above review of the liquor legislation, we aver the proposition, that in all its legislation in reference to the traffic in intoxicating liquors, the general assembly never intended in such legislation to absolutely prohibit the traffic in intoxicating liquors, but its sole purpose as evidenced by the effect as well as the form of its legislation was to regulate and restrain the liquor traffic, and we say this in the sense of it being with reference to the traffic as a beverage, because this was the evil to be provided against and not with reference to the use of liquors for medical or mechanical purposes.

Now, the authority to enact the various laws we have just briefly reviewed to regulate and restrain the liquor traffic, is founded on the second clause of sec. 18 of the schedule to the constitution of 1851, and as to the meaning and intent of that clause, "but the general assembly may, by law, provide against evils resulting therefrom," there have been several decisions. And in none of those decisions of the Supreme Court we have been able to find the contrary of our proposition true.

The first case arising as to the power conferred on the legislature whether to prohibit or to regulate and restrain the liquor traffic was so conferred by the second clause of sec. 18 of the schedule, is so found in the case of Miller v. The State, 3 Ohio St., 475.

There a prosecution was had for a violation of the general act of May 1, 1854, being sec. 1 of said act, which was "An act to provide against the evils resulting from the sale of intoxicating liquors in the state of Ohio," and making it an offense for "any person, or persons, by agent or otherwise, to sell in any quantity, intoxicating liquors, to be drank in, upon, or about the building or premises where sold, or to sell such intoxicating liquors to be drank in any adjoining room, building or premises, or other place of public resort connected with said building." Said act also made it unlawful to sell to minors, to persons intoxicated or in the habit of getting intoxicated, and also providing in sec. 4 thereof, that the keeper of any such place where intoxicating liquors were sold in violation of this act, should on conviction thereof, be punished, and the business be declared a nuisance and abated as such.

This law did not attempt to prohibit the sale of intoxicating liquors, but to regulate and restrain the sale in such a manner that it might be sold, but must be taken from the premises where sold, to be drank. But in the event the keeper allowed a sale of liquor so made to be drank in or upon such premises where sold, then he became a violator of this act, and on conviction his business was to be declared a nuisance and abated as such.

There was no intention, as evidenced by the effect and the form of this act, to prohibit a sale, but the object sought was to provide against the evils of the traffic. The validity of this statute was the issue as well as the question of correct legislative action, and the extent of judicial power.

In this case it was contended by the plaintiff in error, that the second clause of sec. 18 of the schedule was "a limitation of the power of the general assembly under which they may not prohibit such sale, but may pass laws providing against the evils resulting therefrom."

The plaintiff was arguing on the theory that the law in that case operated as a complete prohibition upon the sale of intoxicating liquors.

But Judge Thurman, among other things in his decision, says: "We are unable to perceive that either of these provisions of the constitution, or any of its other provisions, is violated by the law in question. In saying this, we by no means affirm that the legislature has no power to wholy prohibit traffic in intoxicating liquors. Without deciding what, if any authority over this subject can be derived from the general grant of legislative power in sec. 1, article 2 of the constitution, we hold that the act before us is authorized by the express grant of power in sec. 18 of the schedule already quoted, for the law is not prohibitory, and does not interfere, in any degree, with any right of property. It belongs to that class of legislative acts commonly called 'police laws,' and is framed with a view to regulate and not to destroy.

"If, to guard against these evils, some restraint upon the traffic itself is necessary, it may be lawfully imposed, the fact being always borne in mind and always acted upon, that the power is a power to regulate and not to destroy. To this power intoxicating liquors are expressly subjected by the constitutional provision we have just quoted."

We have, in the above quoted opinion of Judge Thurman, shown what construction was placed on the second clause of sec. 18, of the schedule, as to the meaning and intent of the language then used "to provide against evils resulting therefrom," and we find that under that language there is no power conferred on the general assembly to pass any law wholly prohibiting the liquor traffic. Now, if we have shown in our review of the liquor legislation, that it was stamped with a substantial sameness up to the period of the Dow law and cannot farther on find any authorities overruling Judge Thurman's opinion then we have ascertained the construction to be placed on the above quoted section of the schedule.

Then we take up the case of Thompson v. Mt. Vernon, in the 11 Ohio St. This is a very strong case in support of the position we take in this case. You will observe that this case arose five years after the first act was passed conferring authority on municipal corporations "to regulate or prohibit ale and porter shops and houses, and places for significant or habitual resort for tippling and intemperance."

But first revert to Miller v. State, *supra*, and you will find that that case arose out of a violation of the general statute of May 1, 1854, and not by reason of a violation of a village ordinance, whereas the case of Thompson v. Mt. Vernon arose out of a violation of an ordinance passed by the city of Mt. Vernon four years after, being in the year 1858, and passed by virtue of an act of May 1, 1857, the first section of that conferring authority on corporations to pass such ordinances, making it "unlawful for any person or persons keeping any tavern, grocery, bazar, eating house, drug store, office, shop, saloon, stall, booth, or tent, or other place of public resort, within the city of Mt. Vernon, by agent or otherwise, to sell or give away or permit to be taken, under any shift or device to evade the provisions of this ordinance, in any quantity, spirituous or vinous liquors, wine, cider over thirty days from the press, ale, porter, beer, or other fermented beverages, of any kind or description whatsoever; to be drank in or about the building, premises or place where sold, given away or permitted to be taken, or to be drank in any adjoining building, room, or place, or other place of public resort connected with the place where sold, given away, or suffered to be taken as aforesaid." The fourth section says: "It shall be unlawful for any

person, by agent or otherwise, within the limits of the city, to sell, give away, or suffer to be taken, any of the liquors and beverages specified in the first section of this ordinance, in less quantity than one gallon at one time, provided that the provisions of this section shall not apply to sales made in pursuance of a written prescription of a practicing physician, as a medicine, or to sales made to mechanics or artists, who use it in their business, for the purpose of being so used."

We have given the language of the Mt. Vernon ordinance in order that our reasoning may be better followed with reference to the premises. By reference to the act of May 1, 1854, and to the act of May 1, 1857, under which the above ordinance was passed, we find the same principle involved so far as the case at bar is concerned, for municipal corporations can possess only such powers as are conferred on them by legislative acts, and if the general assembly exercise an act that is unwarranted by the constitution, such unwarranted act will confer no municipal power, and hence both equally fail so far as they attempt to exercise any act, the one under such purported legislative authority, or the other being with the constitutional inhibition. Now, having just passed through the heated debates of the recent constitutional convention, in which the question of the liquor traffic was most conspicuously commented upon, we see that no legislative effort had been made to wholly prohibit the traffic in intoxicating liquors, and to be more emphatic we speak with reference to the traffic as a beverage. Up to this time you will notice that the legislature went as far as it could possibly, to place a restriction on the liquor traffic, not to wholly prohibit it, and also thus indicating very distinctly that if they could have placed the construction on the clause to "provide against evils resulting therefrom" that of "to prohibit" it certainly would have legislated to wholly prohibit and not to regulate. And thus when the city of Mt. Vernon, not having the proper construction of the constitution and the act of May 1, 1857, before it, not being unduly leavened with temperance zeal, that is to say, at the expense of a proper legal and judicial balance, attempted to exceed the power conferred upon it by said act "to regulate, restrain and prohibit places where intoxicating liquors are sold" "with the limitation" to be drank in or upon the premises where so sold, by prohibiting the traffic absolutely, as it did by section 4 of said ordinance, then the ordinance fails because it violates the principle laid down in Canton v. Nist, 9 Ohio St., 460, which declares that: "It must be presumed that the legislature would not intend to give a corporation the power of contravening and defeating state policy by ordinance inconsistent with the laws of the state," "and that, too, whether in the grant of power the limitation is expressed or not." Thus we find that the case of Thompson v. Mt. Vernon supports the case of Miller v. The State, 3 Ohio St., 475, because the former declares that an ordinance that purports to prohibit sales is void because it contravenes the policy of the state as expressed in its legislation of the act of May 1, 1854, as amended by act of May 1, 1857, while the latter says that that act of May 1, 1854, as amended does not contravene the constitution inasmuch as the act itself does not wholly prohibit, but only regulates and restrains the traffic in intoxicating liquors, and hence the correct conclusion of the two cases is that any law or ordinance under such law that purports to entirely prohibit the liquor traffic as to making any sales whatever (as a beverage too) is unconstitutional and void.

But we will speak more particularly of this case in connection with the celebrated case of Burcholter v. The Village of McConnellsville,

popularly known as the McConnellsville Ordinance, a case that has been so much discussed that the whole people of the state have learned to look upon it as unquestionable dictum as to what the settled policy of the liquor legislation and adjudication of this subject-matter is in this state. Now we will look and see whether this case goes any further in determining this case than either Miller v. The State, or Thompson v. Mt. Vernon, *supra*.

The village of McConnellsville in 1869, eleven years after the Mt. Vernon Ordinance was passed and seventeen years after the new constitution went into effect passed an ordinance, the second section thereof, declaring it to be "unlawful for any person or persons to keep within the said incorporated village of McConnellsville, a house, shop, room, booth, arbor, cellar, or place, where ale, porter or beer is habitually sold or furnished to be drank in, upon or about the house, shop, room, booth, arbor, cellar, or place where so sold or furnished."

You will readily see that this ordinance is unlike the Mt. Vernon ordinance, because it has reference to houses and places, and the express limitation is used "to be drank in or upon the premises where sold," whereas limitation in the Mt. Vernon ordinance is left out, thereby, in the Mt. Vernon case, instead of coming within the second clause of sec. 18 of the schedule, "to provide against evils," it purports to prohibit the traffic itself instead of houses and places only.

The court's opinion, Judge Scott rendering the decision, as expressed in the syllabus, was, "That municipal corporations of this state were at the date of this ordinance and prior thereto, were expressly empowered to pass such a prohibitory ordinance." Prohibiting in what? Why as to the houses and places where intoxicating liquors were sold, to be drank in or upon the premises where sold. The court did not say that the traffic could be prohibited under this law and by virtue of this ordinance, but houses and places only where liquors were sold in violation of this ordinance.

And right here is the point where not only the people are mislead as to point here decided, but a great many persons possessing a legal education have for some cause or other become stranded. By a close analysis of the opinion of the court in this case we find that the court in its able review of the case of Thompson v. Mt. Vernon, say that the power conferred in both cases, that is the McConnellsville and the Mt. Vernon cases, is substantially the same, Mt. Vernon being authorized by the former statute of May 1, 1857, "to regulate or prohibit ale and porter shops and houses, and places for significant or habitual resort for tippling and intemperance," and McConnellsville was by the municipal code of 1869, authorized "to regulate, restrain, and prohibit ale, beer, and porter houses or shops, and houses or places of notorious or habitual resort for tippling or intemperance." The court goes on to say that the case of Thompson v. Mt. Vernon is different from that of Burcholter v. McConnellsville for that, in the former case the ordinance assumed to prohibit every single act of selling or giving intoxicating liquors away, etc., without reference to the place or its business character. But the authority of law by which these respective ordinances were passed was in each case to prohibit a certain class of houses or places, described with reference to their business character. The McConnellsville case does neither affirmatively or by implication declare the single act of selling an offense with reference to the business of trafficking in intoxicating liquors, but the place only with reference to the business character, and

the business character of the place was determined with reference to the fact whether intoxicating liquors were sold in such business "to be drank in or upon the premises where sold," or in violation of law. And thus by the limitation "to be drank in or upon the premises where sold," the affirmative implication is made that the single act of selling may be made, but if made in violation of the ordinance, or, that the sale is so made, and the liquor so sold is drank in or upon such premises where sold, the business character of the place, is, then by such unlawful act determined a nuisance not the place itself with reference to its physical environment, and may be declared a nuisance and abated as such.

In the examination of the above cases we find that they all justify the conclusion that places where intoxicating liquors were sold not to be drank in or upon the premises where sold, nor otherwise in violation of law, were not prohibited, but such places only where liquors were sold in violation of law; thus indicating that the liquor traffic was not prohibited. We now approach the later period of 1880, ten years since the McConnellsville ordinance was passed upon and twenty-eight years from the time of the first legislation on this subject, or more particularly from the act of May 1, 1854. We find in the revision of our statutes by the commission that the act of May 1, 1854, and amendments thereto being substantially the same on this subject to this time, under which the above discussed cases of Miller v. The State, Thompson v. Mt. Vernon and Burcholter v. McConnellsville arose, and are substantially embodied in sec. 6941 and 6932 of theRev. Stat., of Ohio, of 1880.

And here, now, we will call attention to the case of Oshe v. The State, and there find the same principle touched upon. In this case the argument is conceded that the legislature has power to prohibit the making of individual sales as described in sec. 6941 of the Rev. Stat., which section is a substantial rescript of sec. 1 of the act of May 1, 1854. And on the same principle the court there holds "it is equally competent to prohibit the keeping of a place where such sales are habitually made as a business." That is in violation of section 6941, inasmuch as the section there quoted provided that individual sales could not be made, but with the usual limitation, "to be drank in or upon the premises where sold," and the court in speaking of this point say it is equally competent to prohibit the keeping of such a place where sales are made in violation of law or to be drank in and upon said premises where sold. In other words, sec. 6941 says you can not make an individual sale to be drank on the premises, and the court simply follow the conclusion that if the legislature has the power to prohibit individual sales to be drank in or upon the premises where sold, it likewise has the power to prohibit the keeping of such places as violates the law. So that the reasoning of the court in that case is in accord with that of the former cases we have mentioned and does not refute the proposition with which we started out.

In the light of the facts we have adduced do we not see a studied effort, we might say, on the part of the courts to affirmatively and impliedly construe the power of the legislature to regulate and restrain sales only? Does not the keeping of such a place, while it does not absolutely prohibit a single sale if not made in violation of its provisions, constitute a very emphatic regulation and restraint of the business of trafficking in intoxicating liquors, and in full compliance as to its effects with the form of the second clause of sec. 18 of the schedule, and an implied denial of the power to wholly prohibit?

We now come to the case of Bronson v. Oberlin, 41 Ohio St., 477, 482. In 1882 a law was passed entitled, "An act authorizing certain incorporated villages to regulate the sale of intoxicating liquors therein." Under that law an ordinance was passed by the village of Oberlin, entitled as follows: "An ordinance to provide against the evils resulting from the sale of intoxicating liquors." The question, however, was not involved under this act "whether the legislature could confer the power to prohibit the sale of intoxicating liquors, or whether the council by ordinance could prohibit with the power conferred."

But in this case this act did not confer any power on municipal corporations to prohibit the traffic of intoxicating liquors as expressed in this title. And in an examination of this case we are confirmed in our conclusion that the courts in construing the language of the legislature in reference to this business, have regarded the word "prohibit" as necessary, and not the words "to regulate" and "to provide against evils." The same reasoning may be brought to bear in the case at bar, as was held by Judge Nash in that case, wherein he says: "We are confirmed in this conclusion from the fact that in previous legislation the word 'prohibit' has been used when that was the object sought, and not alone the words 'to regulate' and 'to provide against evils.'" The same reasoning that is applied in the construction of these words when used in legislative language is surely applicable in the construction of the second section of sec. 18 of the schedule. "But the general assembly may, by law, provide against evils resulting therefrom."

But the ordinance in question in the case at hand is not like the McConnellsville ordinance. The Wilmington ordinance is entitled: "An ordinance to prohibit ale, beer and porter houses and other places where intoxicating liquors are sold at retail within the limits of Wilmington, Ohio." Section 2 of this ordinance provides that "it shall be unlawful for any person or persons either as principal, agent or employe, to keep within the limits of said village any ale, beer, or porter house or other place where intoxicating liquors are sold at retail for any purpose or in any quantity, contrary to the provisions of sec. 1 of this ordinance." Here we see that the ordinance in question is substantially the same as the one in the case of Thompson v. Mt. Vernon, wherein it leaves out the limitation "to be drank in or upon the premises where sold," and on account of which the court in the McConnellsville case held it was void, because it contravened the policy of the general statute then in force. The Wilmington ordinance, like the Mt. Vernon ordinance, by leaving out the limitation clause found in the McConnellsville ordinance, "to be drank in or upon the premises where sold," absolutely prohibited the sale of intoxicating liquors as a beverage, the sale of intoxicating liquors as a beverage being without doubt the evil always contemplated by the provisions in sec. 18 of the schedule, as well as in the legislative intent. By using the oft repeated limitation we have regulation and restraint, whereas leaving that limitation out we have a prohibition of the traffic instead of the place.

Reverting for a moment to the Dow law, you will observe that the act is entitled, "An act providing against the evils resulting from the traffic in intoxicating liquors." The ordinance now under consideration was passed by virtue of a provision in sec. 11 of this act, which is as follows: "And any municipal corporation shall have power to regulate, restrain and prohibit ale, beer and porter houses and other places where intoxicating liquors are sold at retail, for any purpose or in any quantity

other than provided for in sec. 8 of this act." And in your review of the legislation on this question you will observe that the municipal prohibitory clause of the Dow law is the first legislation of the state attempted to confer on such corporations the power to wholly prohibit the liquor traffic, and the way it is done is by leaving out the usual limitation, "to be drank in or upon the premises where sold," which is found in all the previous legislative enactments on this question as you can readily see by a glance at the review we have given you. But the face of sec. 11 of this Dow law does not seem to have for its consideration the providing against the evils of the traffic in as strong a degree as previous legislation, because if that was the sole purpose, there would not be another provision in the same section providing, "that nothing in this section shall prevent the council of any municipal corporation in the state from regulating and controlling, on such first day of the week, the sale of beer and native wine, in such manner as may be provided."

The two provisions of sec. 11 are inconsistent with each other in so far as they purport to legislate with a view to lessen the evils of the liquor traffic, because the evils can not in one sentence be wholly restrained by a prohibition of the traffic and in another by a restraint in regulating and controlling it on the first day of the week, by permitting the traffic on that day. Besides it partakes of class legislation, because it licenses a class of business that of keeping a place where intoxicating liquors are sold at retail and does not permit the carrying on of other traffics or business on the first day of the week, works with reference to charity being excepted. In further remarking on this particular part of the subject we might inquire into the title of the act and see whether in the light of the discussion of this question in Bronson v. Oberlin and Senior v. Ratterman and other authorities which we have already referred to in this case, there is any power conferred on municipal corporations as expressed in the title of this act, "providing against the evils resulting from the traffic in intoxicating liquors," to wholly prohibit the traffic. We do not think there can be any power conferred in this act as expressed in its title to prohibit the traffic, but the title could only confer the power to regulate and restrain. And an ordinance passed under such an act is invalid and void for that reason aside from any other objection.

In closing our discussion on this proposition it is well that we inquire into the rules for the construction of statutes briefly as well as the constitution:

It is quoted in State v. Sinks, that: "In constructing these laws it has been truly stated to be the duty of the court to effect the intention of the legislature, but this intention is to be searched for in the words which the legislature has employed to convey it." Is there a technical meaning in any of the words of the second clause of sec. 18 of the schedule? If not, then we are to look at the popular meaning if there is nothing in the context to furnish a reason for a departure from such construction. "The business of the interpreter is not to improve the language in question; it is to expound it"—not what the legislators meant, but what their language means."

Were we to refer to the debates of the constitutional convention, we would find various expressions and opinions as to what the best policy in reference to handling the liquor traffic, and we briefly cite some quotations in the opinion of the court in the case of Senior v. Ratterman, 44 Ohio St., 674 and 5. As to the history and external circumstances surrounding the adoption of the second clause of sec. 18 of the

schedule, it is quoted: "Some prayed the adoption of a clause preventing the legislature from passing any act authorizing the retail of intoxicating liquors;" others, a clause forbidding the legislature passing any law "whereby the sale of spirituous liquors is granted to any one, or the traffic therein legalized;" others a provision "prohibiting the sale of ardent spirits;" others, a clause "prohibiting traffic in intoxicating liquors;" and others, "that an excise be laid on every gallon of liquor manufactured sufficient to prevent the distillation." "These several phrases of the question were matters of discussion, and there was no manifest haste or want of consideration in the formulating of the language of this section."

Now the principle we apply to the construction of the second clause of sec. 18 of the schedule, which reads: "But the general assembly may, by law, provide against evils resulting therefrom," is the same as in the case of Senior v. Ratterman, *supra*, where it is made to apply as well to the wholesale as retail traffic, so far as the rule of construction is concerned. But the application of the rule is more emphatic in the construction that "to provide against evils," does not mean to wholly prohibit, but to "regulate" and "to restrain."

As above quoted some members of the convention wanted this language used: "Prohibiting traffic in intoxicating liquors;" and "prohibiting the sale of ardent spirits." It looks to us with all the light the convention had thrown around it, the discussion of the history of previous legislations and the well known evils of the traffic of intoxicating liquors, that if they had intended to prohibit absolutely the traffic or to wholly prohibit it as a beverage only, they would have so expressed it in the second clause of sec. 18 of the schedule.

We, therefore, in the light of all the weight of decisions, or rather we might say, simply the decisions in reference to the liquor traffic, because we have been unable to find a single adverse view outside of the *obiter dictum* of Judge McIlvaine, in the case of State v. Frame, 39 O. S., 399, and even there Judge Okey, in his dissenting opinion on the questions involved in that case, also expresses an *obiter dictum* adverse to Judge McIlvaine and in accord with our proposition in this case, come to the conclusion that the ordinance in question is unconstitutional and void, because it does wholly prohibit the sale of intoxicating liquors as a beverage.

J. C. Martin, City Solicitor, for plaintiff.

A. H. Jones, for defendant.

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## CERTIFICATES OF STOCK. 382

[Superior Court of Cincinnati, General Term.]

†MARY J. PERIN v. CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RY. CO.

1. The presumption of validity, attached to a paper purporting to be a certificate of stock issued by an incorporated company, and bearing the genuine signatures of the president and secretary of the company, and the corporate seal, is very strong, but it may be overcome by clear and satisfactory evidence showing the certificate to be spurious.

†For decision of the Superior Court in special term, see 9 Dec. Re. 800.

2. A valid certificate of stock can only be issued to an original subscriber, or in lieu of a certificate or certificates for an equal number of shares surrendered in consideration of its issue.

3. Such certificate, duly signed and sealed, is presumed to be genuine until it has been shown by clear and satisfactory evidence, that it could have been issued neither as an original certificate, nor in lieu of a certificate or certificates surrendered for that purpose.

4. Where a certificate is shown to have been invalid when issued, and it is claimed that it was rendered valid by a subsequent surrender for that purpose, the burden of proving such subsequent surrender rests upon the party asserting it.

RESERVED on motion for a new trial.

PECK, J.

The sole question submitted to the jury, was whether the alleged certificates of stock were genuine or spurious. That plaintiff is the pledgee for value of the disputed certificates, and that the company has refused to recognize them as valid, or to pay dividends upon them, are facts admitted. That the company is liable to the plaintiff in damages for such refusal, if the certificates be genuine, has been heretofore decided by this court. Railway Co. v. Rawson, 9 Dec. Re., 709.

The jury found the certificates to be genuine, and returned a verdict in favor of the plaintiff for their value. The only question presented by counsel for our consideration upon the motion for a new trial, is the question of fact involved in the claim, that the verdict was plainly against the weight of the evidence. The certificates admittedly bore the genuine signatures of the president and secretary of the company and its corporate seal. Thus arose a presumption of genuineness, which it was necessary for defendant to overcome by evidence sufficient for that purpose.

In order to overcome the *prima facie* case thus made, defendant offered evidence from which the following facts appeared: That George F. Doughty, from whom plaintiff received the disputed certificates, was at the time of the transaction, November, 1881, and up to the time of his death, May, 1882, the secretary of the company, having charge of the books which related to the issue and transfer of stock, and that it was his duty to attend to such issue and transfer, and to make entries in the books relating to the same, and that the books offered in evidence were kept by him:

That the entire capital stock of the company consisted of 30,000 shares of $100 each, the whole of which was subscribed and issued at the time of the formation of the company in October, 1881, the certificates for all such original shares being numbered from 1 to 172 inclusive:

That George F. Doughty subscribed for and received certificates of 650 shares of original stock, and purchased ten shares in addition thereto, before the issue of the certificates 296 and 332 which form the basis of this action:

That Doughty had so pledged or disposed of all of the 660 shares so held by him, that none of them remained in his possession or under his control at the time certificates 296 and 332 were issued.

That Doughty caused an overissue of certificates similar to the genuine and to those held by plaintiff, purporting to represent stock in the company to the extent of about 4,000 shares.

That at the time of Doughty's death, in May, 1882, which terminated his official connection with the company, there were found in an envelope in the safe of the company, kept under Doughty's charge,

certificates for 900 shares of stock. On the back of the envelope was written the name of Doughty, and the word "private." The safe had been used by Doughty at times as a place of deposit for his own papers along with those of the company.

There is another proposition of fact, which is disputed by plaintiff, but which appears to have been fairly established by the evidence, viz.: that there are now outstanding, in the hands of *bona fide* holders, certificates for 30,000 shares, traceable through a connected series of entries in the books from the 172 original certificates, which at the beginning were issued to the subscribers of the capital stock, and certificate 296 held by plaintiffs, is not one of those so traceable to the original certificates, but certificate 332 does appear to have been issued in lieu of original certificate No. 90, which was one of those found in the envelope in th safe after Doughty's death.

The circumstances differ materially with respect to the two certifi cates, so as to render it necessary to treat of them separately.

First, then, as to 296.

Plaintiff relies strongly upon the presumption arising from the face of the certificate, and as was stated to the jury, it goes so far as to include the presumption that the certificate was issued in lieu of a certificate for like number of shares, duly surrendered by or on behalf of the person to whom it was issued. We have been much impressed by the forcible statement of counsel for the plaintiff, of the strength of this presumption; but we hardly think it necessary that the defendant should show that it is impossible that this certificate should be genuine; yet the defendant was bound to furnish evidence sufficient to overcome the presumption, and to produce that result, the evidence should be clear and satisfactory. At the outset the presumption is much weakened by facts which are not open to dispute.

First—There were issued certificates for about 4,000 more shares than the authorized capital of the company; that is to say, among the certificates for 34,000 shares outstanding, there are spurious certificates, purporting to represent 4,000 shares. But the certificates on their faces are all alike. The presumption of validity attaches to all alike; yet some are invalid. Plainly, the presumption of validty as to each is weakened in proportion to the number of invalid certificates outstanding, until there is a separation of the good from the bad. The presumption as to any given certificate is weakened by the fact, that invalid certificates, precisely similar to it, are outstanding in the hands of persons who have received and paid for them in the same belief that they are genuine as that entertained by plaintiff.

Second—The person to whom this certificate was issued and from whom it was received by the plaintiff, was the person who caused the overissue, and by whom all the spurious certificates were received and sold or pledged. The number of shares purporting to be represented by the spurious certificates, so far as we can ascertain, was much greater than the number of genuine shares for which Doughty ever held certificates. Arithmetically considered, the chances would seem greatly in favor of the proposition, that any certificate received from him is spurious.

The presumption here relied on by plaintiff, is not one of those which the law arbitrarily draws from a given state of facts, from reasons of public policy, but is based upon probabilities. The probability of genuineness attached to a certificate of stock duly signed and sealed, is

very great; but as the probability lessens, the presumption is weakened. So when we find that among a given number of certificates, all of which are alike in appearance, there are a certain number of spurious ones, and that all the spurious certificates came from the person from whom the one in question was received; and that the number of spurious certificates uttered by that person was equal to or greater than the number of genuine certificates which he ever held, there would seem to be very little of the presumption left.

The defendant had still further evidence, tending to overthrow the presumption. That evidence was derived from the stockbooks of the company which were admitted against the objection of plaintiff. In the Rawson case, *supra*, we passed upon the same objection, and we perceive no reason why we should apply a different rule in the case before us. The books are, to some extent, discredited, by the fact that they were kept by Doughty, and that certain irregular and fraudulent entries appear therein; yet the expert witness offered by defendant, asserted that he was able to separate the true from the false entries, in every instance, and very little evidence was offered by plaintiff to controvert this assertion. The defendant has also strengthened the evidence so derived from the books, by testimony showing, as above stated, that the whole thirty thousand shares of original stock can be traced by a connected series of entries through the books from the original subscribers to the present holders; and the testimony of all said holders has been taken, and in every instance confirms the entries in the books. In this, as in other respects, the case differs from the Rawson case, where the entries from the books were before us with very little of corroborative evidence.

Turning, then, to the books we find that certificate 296 is without lineage. There is nothing to show that it was issued in lieu of any certificate surrendered for that purpose, and it is wholly outside of the chain of transfers leading from the original certificates to the present holders of certificates issued in lieu of them. We also find, that at the time of the issue of certificate 296, Doughty had received certificates for 660 shares and no more; and from the other evidence we ascertain that all those shares were so disposed of, that he could have surrendered the certificates of none of them at that time. He may have purchased other stock, and disposed of it so that no entry thereof in the books was made; but there is no evidence that he did make such purchases and the possibility that he may have done so, if it can be considered at all, furnishes a small basis for the presumption of genuineness. Yet, in view of the facts above stated, this possibility is all that remains to support the presumption. When all the stock Doughty is known to have had, is shown to have been so disposed of, that none of it could have entered into certificate 296, apparently all that remains to be said in favor of the genuineness of that certificate, is that he might have acquired and surrendered certificates that we know nothing of, so as to give validity to the one in question. As against that feeble remnant of the once powerful presumption, there are the facts that spurious certificates do exist, exactly similar in all respects to the genuine; that Doughty issued all of them, and that he issued 296; that he probably issued many more spurious than genuine certificates, and that 296 appears on the books without lineage or connection, while the amount of the entire authorized capital stock may be traced through the books from the present holders back to the original subscribers. In view of those facts, we think it not too much to say that the presumption of genuineness has been over-

thrown by defendant, and it has been fairly shown that certificate 296 was invalid when it was issued.

It remains to be seen whether it was made valid by any after surrender of certificates for that purpose, for it is true that even if invalid when issued, yet if Doughty afterwards surrendered valid certificates for an equal number of shares, in such a way as to make the surrender applicable to certificate 296, that would cure the original defect and render it a valid certificate.

As to this, the burden of proof, in our judgment, rested upon the plaintiff. It being shown that the certificate was invalid when issued, it will continue so, until the contrary appears.

From the facts relating to the certificates found in the safe, plaintiffs contend that the jury were at liberty to infer that these certificates, or some of them, were surrendered so as to give validity to certificate 296. The only fact that goes to support that proposition, is that they were found in the safe belonging to the company, where such certificates were kept; but it is in evidence that Doughty also kept private papers there; that no one except himself had access to it; that those certificates were found in an envelope upon the outside of which appeared the words "Geo. F. Doughty, private;" that the certificates bore no marks of cancellation, and that no entry showing their surrender appears in the books. These facts, especially the endorsement on the envelope and the absence of entries in the books, seem to negative any presumption of surrender, which might arise from the fact that the certificates were found in the company's safe. The words on the back of the envelope, point directly to the conclusion that they were placed there to negative the presumption of surrender that would arise in the mind of any one finding them in the safe.

The certificates found in the envelope were nine in number, and of them, numbers 300, 448, 497, 488 and 525, purporting to represent 625 shares, are shown by the same sort of evidence as that above recited in connection with 296, to be invalid. So they could not have been used by Doughty to give validity to 296. Whatever we may say as to the legal effect of the surrender of an invalid certificate by a person not an officer of the company, and the issue to him, by the secretary, of another certificate on the faith of such surrender, it seems plain that if Doughty were to issue himself an invalid certificate, and then surrender it, and receive in lieu thereof another issued by himself as secretary, the second certificate could be no better than the first. So we have only left to consider, the valid certificates for 275 shares found in the envelope. Of these, Doughty apparently disposed of No. 90, for 100 shares, by entries on the books, showing his intention to surrender it in favor of certain certificates which will be more fully explained when I come to speak of certificate 332. Of the remaining certificates, numbers 89 and 91, for 150 shares, were owned by Doughty and one Adolf Klein jointly—each owning a half interest therein, which fact militates against any presumption that Doughty intended to surrender them for his sole benefit. He could only surrender his interest in them, and to do that he would have to separate his interest from that of Klein which he never did. There remains then but one certificate, 434, for 25 shares, of the nine found in the envelope, which is not shown by the evidence, aside from the facts as to when and where it was found, to have been so disposed of, as to preclude the belief that Doughty surrendered it in favor of certificate 296. As to it, the disparity of the number of shares represented by 434 and

296 is the only circumstance which tends to throw light on the question, and that is perhaps very little; but as before stated, the facts as to its being in the envelope, and others already alluded to, are sufficient in our judgment to rebut any presumption of surrender, and I have only gone through this recital of the facts as to each of the certificates found in the envelope, to show that at least as to eight of them there is proof strongly corroborating the inference drawn as to them collectively.

We cannot avoid the conclusion that the verdict of the jury as to certificate 296 is plainly against the weight of the evidence, and it must therefore be set aside.

As to certificate 332, the facts differ materially in this, that Doughty made in the books an entry, showing that certificate 90 was surrendered in favor of 332 and certain other certificates. No. 90 was a valid certificate, originally subscribed by Doughty, and represented 100 shares. It could not have been surrendered when 332 was issued, for it was at that date in the hands of another party, to whom it had been pledged as security for a loan; but Doughty afterwards recovered possession of it by paying the loan, and it was found in the envelope in the safe after his death, the entry as to its surrender in favor of 332 and other certificates, remaining uncancelled on the books. That entry is the important fact which perhaps authorized the jury to find certificate 332 to be valid. If it were before us as an original question, our findng might be otherwise; but in view of the entry in connection with the other facts, we cannot say that the verdict as to certificate 332 is so plainly against the weight of the evidence, so as to authorize as to set it aside.

Taft and Moore, JJ., concur.

Kittredge & Wilby and Paxton & Warrington, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly and Ramsey & Maxwell, for defendant.

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## 391 RES ADJUDICATA—WILLS.

[Hamilton Probate Court.]

### † In re Will of Robert Barr.

A proceeding in the probate court, on a second application to have a foreign will admitted to probate, is an adversary one, and the rule of *res adjudicata* applies to it.

Gorble, J.

Robert Barr and others, in the January term of 1886, of this county, presented for record, under sec. 5037, Rev. Stat., a paper writing purporting to be an authenticated copy of the last will and testament of Robert Barr, deceased, maintaining that the same had been admitted to probate and record in Westmoreland county, Pa.

Anna M. Johnson, together with a large number of other persons interested in real estate which it is claimed would be affected by the admission of said will to record in this county, applied to the court for leave to be heard, and to resist the application. This was accordingly granted, and evidence was heard on both sides, the arguments of counsel, and was submitted to the court for decision. On the sixth day of April, 1886, the court found that the will of Robert Barr had never been probated or proved, according to the laws of Pennsylvania, and refused the application and ordered that said will be not recorded in this county. To all of which Robert Barr and his co-applicants excepted, and took an appeal, and also filed their petition in error in the common pleas court. The appeal was dismissed, and upon the petition in error, the judgment of this court was affirmed. Applicants then

† This judgment was affirmed by the common pleas but reversed by the circuit court; see opinion, 2 Circ. Dec., 251, 253. For decision on first application to probate this will, see 9 Dec. Re., 615.

prosecuted their petition in error from the common pleas to the circuit court, where on full hearing the judgment of the common pleas was affirmed. 1 Circ. Dec., 546.

Robert Barr, together with his co-applicants, now come and make a second application to have this will admitted to record. To this application, the same parties who resisted the first application asked again to be heard, and for leave to resist. This being granted, an answer was filed, pleading that the applicants are concluded by the former hearing.

Does the plea of *res judicata* apply? It is well known that the effect of *res judicata*, as a bar to the removal of a former motion, applies only to the parties to the judgment and their privies. It is essential, therefore, that there must have been parties to the judgment. The probate of a will is a proceeding *in rem*. The proceeding is in form and substance, upon the will itself; no process is issued against any one. The judgment is, that the will is or is not the will of the testator. It determines the status of the subject-matter of the proceedings, and makes the instrument, as to all the world, just what the judgment declares it to be.

Section 5937, which is the section under which this paper writing is presented, provides for no parties to the proceeding.

It was not error to permit these contestants to be made parties. Barr v. Closterman. 1 Circ. Dec., 546.

If then, the court having jurisdiction of the subject-matter, and by its power having brought the parties into court, and having adjudicated the subject-matter, and the same stands unreversed, can the same be pleaded as *res judicata* upon another hearing, upon the same subject-matter, and between the same parties? Or must it be denied, because such parties are not necessary parties?

In regard to the term "parties," as used in connection with the doctrine of estoppel, the law includes all who are distinctly interested in the subject-matter of the suit, and have the right to make defense or control the proceedings; the right to adduce testimony, and the right to cross-examine witnesses adduced on the other side, and to appeal the proceedings, if an appeal lies, or prosecute error. And such parties are concluded by the decision, judgment or decree.

This court had exclusive jurisdiction of the subject-matter; it had therefore full power to hear and determine all questions which arose in the case, and all questions necessarily arising in the case become *res judicata* by the final order which binds all the world, until set aside or reversed by direct proceedings for that purpose. Shroyer v. Richmond and Staley, 16 Ohio St., 455.

But it is maintained that the court having refused to admit this will to record, these contestants were not affronted by such refusal, and such refusal was not the vindication of a judgment.

It must be conceded, that the application to admit this will to record called for the exercise of a judicial function. In the exercise of this judicial function the court found that the will was not proved and admitted to record in Pennsylvania, and refused to admit it to record here. How could it be said that this was not the exercise of a judicial function? The right to plead *res judicata* does not depend upon the effect of the rights of the parties which were or were not affected by the judgment. The order made was as effective and binding as an order would have been admitting this will to record until set aside and reversed. "The sentence of the probate court whether it be one of the acceptance or rejection, is indispensible and it is conclusive upon the matter which it professes to decide." Swazey's heirs v. Blackman, 8 Ohio, 118.

The court's refusal, therefore, did not make it less a judicial action, for it would seem strange that the result of a judicial action should be the test of the exercise of a judicial power.

Counsel for applicants in support of their claim to again present this will for record rely upon Chapman's Will, 6 Ohio, 149; Hunter's Will, *Ib.*, 500; Swazey's heirs v. Blackman, *supra*.

The court in Chapman's will say: "An application to prove a will, though rejected, may be made again upon fuller proof. The rejection extinguishes no right, and binds nobody, for there are no proper parties before the court to be concluded. But when a will is declared established, and ordered to be recorded, it binds every body until set aside." The question in the case was whether an appeal would lie to the Supreme Court from the decision of the court of common pleas adjudging that the proof adduced to prove the execution of a will was insufficient for that purpose, and the court held that the appeal could not be sustained. It does not come within the provisions of the statute.

The court in Hunter's will say: "The proceedings to make probate of a will are *ex parte*, not adversary. No process is required to notify any whose interest are to be affected. No one is necessarily before the court, other than a party apply-

ing to prove the will. No judgment is given. The order of probate is not conclusive upon the subject of it, for the statute law expressly provides a way in accordance with the common usages of chancery to contest and vacate the probate, if allowed. If rejected, another application may be made, and probate established on new and better proof."

The question there was, when the judges of the court of common pleas are so interested that a quorum cannot sit to take proof of a will, can the case be certified to the Supreme Court for taking such proof? And the court held that this case is not within the appellate jurisdiction as provided for by the act for certifying causes from the court of common pleas, where a majority of the judges are interested in it, and the application was dismissed in the cause for want of jurisdiction.

In Swazey's heirs v. Blackman, *supra*, the court say: "If the will is rejected, it may still be filed for probate." The question involved was, whether a will can be received as evidence of any title set up under it, until it is established by probate; and the court held that until the will is established by the probate court, it cannot be admitted in evidence. In neither of these cases was the court called upon to decide the question whether an authenticated copy of the will once offered for record and refused, can again be offered; nor was it called upon to decide whether a domestic will once refused can again be offered for probate. But let us assume the court did so decide.

Chapman's will and Hunter's will were cases decided under the laws existing prior to the adoption of the constitution of 1851. Under the constitution of 1802, probate and testamentary matters were vested in the court of common pleas, and the Supreme Court held that the court of common pleas had been given exclusive jurisdiction in probate and testamentary matters, and the Supreme Court would not interfere to either to confirm or reverse orders of the common pleas in probate and testamentary matters, and that the action of the common pleas court on these matters was final and conclusive. Gregory's Accounts, 19 Ohio, 357.

Since the adoption of the constitution of 1851, and the creation of probate courts, the laws on these subjects have been materially changed. While the probate court has exclusive jurisdiction in testamentary matters, an appeal lies on the refusal to admit a domestic will to record, and error to all final orders.

Section 5917 of the Rev. Stat., provides for notice to the widow and next of kin on application to admit a will to probate and record. Section 6406 provides, that the probate court may give notice of any proceeding, if deemed necessary, to all persons interested therein, when there is no provision in the statute directing otherwise.

I think the effect of this legislation is to make this proceeding adverse in its character, so far as respects the person who are made parties.

In this case Robert Barr et al. applied to have this will recorded, and Anna M. Johnson et al. by permission of the court (which permission it was not error to grant) resisted the application, thus raising an issue between two hostile parties in in a proceeding within the court's jurisdiction as distinctly as in any ordinary civil action between plaintiff and defendant.

The court proceeded to hear testimony and arguments of counsel and pronounced judgment. Was there an element of adverse proceeding wanting? I think not.

In this view I am supported by the Supreme Court of Illinois, in the case of Story v. Story, 11 North Eastern Rep., page 209. There the court held a probate under the statute of Illinois to be a proceeding *in rem*, but when appealed to the circuit court by some one interested the proceeding assumes an adverse character, simply because there are two contending parties to a legal issue.

Therefore when a question of fact has been thus tried and adjudicated by a court of competent jurisdiction upon evidence, it cannot be re-opened in a court of competent jurisdiction between the same parties. They are concluded by the former judgment. Grant v. Ramsey, 7 Ohio St. 157.

This rule extends to all matters of action or defense, which the party might have brought to the consideration of the court on the former trial. The Cincinnati and Covington Bridge Co. v. Sargent, 27 Ohio St. 233.

For the reasons given the application will be denied.

S. T. & W. L. Crawford and T. A. O'Connor, for the applicants.

Lincoln, Stephens & Lincoln, Simrall & Mack, S. A. Miller, Cowan & Ferris and Henry T. Fay, of Columbus, O., for contestants.

## BANK CHECKS. 410

[Superior Court of Cincinnati, General Term, January, 1887.]

CINCINNATI NATIONAL BANK v. WILLIAM CREASY & SONS.

**A depositor in a bank is not bound to look for forged signatures among his checks when his book is balanced and the checks returned to him, and will not be presumed to have acquiesced in the account charging him with the payment of such check, where he has failed for more than a reasonable time to examine the checks and discover the forgery.**

ERROR to Special Term.

The action below was brought by the bank to recover on a promissory note executed by the defendants. The latter admitted the making of the note, in their answer, but alleged that part of it had been paid in cash, and that a tender of the remainder had been made by the offer of a check upon the plaintiff for the exact sum due. The bank replied, admitting the offer of the check, but alleging that there were, at the time of the offer, no funds in its possession to the credit of defendants. Upon the trial it appeared that the defendants had kept a deposit account with the bank, and that the whole controversy in the case turned upon the validity or invalidity of a certain charge made by the bank against defendants, of a check purporting to be drawn by defendants and paid by the bank officers, for the exact amount remaining due on the note. The defendants claimed that the signature to the check with the payment of which they were charged was a forgery. The bank officers denied that the check was forged, and further asserted that if it proved to be so, the defendants had not examined the paid checks, or notified the bank of the forgery, for a period of seventeen days after their book was balanced up and the checks returned, and that it was too late for them to question the account after permitting it to remain so long uncorrected. The defendants proved that they had notified the officers of the bank of the forgery as soon as it was discovered by themselves. The jury returned a verdict for defendants and judgment was entered thereon, to reverse which the present proceedings in error were instituted in the general term.

PECK, J.

On the questions of fact arising in the case, we are not disposed to disturb the finding of the jury. The bank book of Creasy & Sons was balanced up and returned to them with the checks, including the forged one, October 28th, and it was not until November 14th, following that the checks were looked over by one of the firm and the forgery discovered, which was immediately made known to the bank. It is claimed by counsel for plaintiff, that there was a duty resting upon defendants to examine their checks within a reasonable time after they were returned to them, as well as to notify the bank immediately upon the discovery of the forgery; and the court was asked to instruct the jury that if they did not make the examination within a reasonable time, defendants would be presumed to have acquiesced in the correctness of the account stated in the book returned, and could not afterwards question it. The court declined to so instruct the jury, but did instruct them in substance, that if the check was forged, and the defendants notified the officers of the bank of the forgery as soon as it was discovered by them, they had done all

that the law required, and plaintiff could not recover. It is claimed that there was error in this instruction, and that the true doctrine is set forth in that requested by plaintiff and refused by the court. In support of this claim plaintiffs rely mainly upon Leather Manufacturers Bank v. Morgan, 117 U. S., 96, and the cases therein cited. That was a case where a confidential clerk had increased the amount of a number of checks duly signed by his employer, the depositor. There was a series of forgeries covering a considerable period of time during which the depositor's book had been balanced on three occasions, and the paid checks returned. The depositor admitted that he had made no examination of the checks until about the time of the final discovery of the forgeries, and that an examination would have easily disclosed to him the true state of affairs. The Supreme Court held this to be evidence of acquiescence in the account stated.

There is, however, a difference between that case and others like it which were read in argument, and the case at bar. The cases vary in several particulars, but that which is most important to the question now under consideration, is the fact that there the signatures to the checks were genuine, while here the signature was forged. At first sight this difference may seem immaterial, but upon closer examination it will be found that there is ground for distinction. The officers of a bank are bound to know the signature of a depositor, and if they pay a check to which his name has been forged, the loss falls upon the bank, and the law admits no excuse for the error. But the rule as to altered or "raised" checks, does not appear to be so absolute. In such cases the presumption is still against the bank, but it may be overcome, and the loss thrown upon the depositor, by showing that the alteration was such as that the failure to detect it was not due to any negligence of the bank officers, and that the drawer had negligently drawn the check in such a way as to easily admit of alteration. Young v. Goite, 4 Bing., 253; *Ex parte* Swan, 7 C. B. N. S., 400, s. c., 7 H. & N. 603, and on appeal, 2 H. & C., 175. The reason for the difference is not far to seek. The signature must be that of the depositor, while the body of the check may be filled up by any one; and it is well known that checks are frequently drawn up by a clerk or bookkeeper, and subsequently signed by the employer. The signature is the invariable guide to the paying teller, but changes in the body of the check, alteration of figures, or variances in handwriting, do not necessarily imply a criminal alteration.

When we come then to consider the duty of the depositor after his book has been balanced, and the paid checks returned to him, we find that he has the complete right to assume that the bank has only paid the checks signed by himself. A payment made upon a forgery of his own signature, is no payment, and cannot affect his rights. Orr v. Union Bank, 1 Macq. H. L. Cos., 513; 2 Daniel Neg. Inst., sec. 1370 and cases cited. Why, then, should he be on the lookout for forgeries of his signature? On the other hand he knows the amount for which each check was drawn, and if an alteration be so skillfully made as to defy detection by the most careful and experienced bank officer, it is within the drawer's power to discover it at once, and, what is of still more importance to him, the circumstances may be such as to cast upon him the loss occasioned by the alteration, and to make it to his interest to discover the change at the earliest moment, so as, if possible, to recover the amount from the forger. In the case of an alteration he has such interest in the discovery, as to put upon him the duty of examining the

checks to protect himself as well as the bank; but in the case of a forged signature such an examination would be made for the sole benefit of the bank, and it is difficult to discover any reason why such duty should be cast upon the depositor. In any case, it is the duty of the depositor to make known a forgery to the bank as soon as discovered whether it was accomplished by alteration in the body of the check, or by imitation of the signature, for acquiescence might fairly be presumed from silence after actual knowledge had come to him; but to go further and say that the depositor must seek for that which he has no interest to discover, seems a step beyond what reason warrants.

The adjudged cases are not altogether clear or without some appearance of conflict on this question, but the weight of authority appears to favor the view we have taken. Weisser v. Denison, 10 N. Y., 68; Welsh v. German American Bank, 73 N. Y., 425; Frank v. Chemical Bank, 84 N. Y., 209; Manufacturers Bank v. Bames, 65 Ill., 69; National Bank v. Tappan, 6 Kansas, 456; First National Bank v. Whitman, 94 U. S., 343.

The judgment at special term is affirmed.

Force and Harmon, JJ., concur.

Hagans and Lehmer, for plaintiff.

King, Thompson, Richards and Thompson, for defendant.

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## MUNICIPAL CONTRACTS—ARMORY. 10

[Superior Court of Cincinnati, Special Term, 1887.]

†WILSON v. CINCINNATI (CITY).

1. The statute providing that before a city can enter into any contract involving an expenditure of money, the amount to be expended under the contract shall be in the city treasury and specially set apart for that purpose, do not apply to a case when the city has leased a building for an armory, pursuant to the provisions of sec. 3085 of the Rev. Stat.
2. If a lessee fail to deliver possession to the landlord at the end of his term, by reason of the refusal of his sub-tenant to go out, he will remain liable for the rent during the occupancy of the sub-tenant.

PECK, J.

This is an action to recover rent claimed to be due from the city for the use of a building known as the armory building situated on Court street. Under an act of the legislature requiring the city of Cincinnati to provide an armory for the militia, the city authorities made a lease of the building for the term of five years, and put the first regiment in possession, and the regiment continued in possession during the term of the lease, and for a large part of the term the city paid the rent.

Toward the latter part of the term the finances of the city got into such a condition that there was no money to pay the rent, and then certain questions were raised as to the validity of the contract of lease, under what are known as the Worthington and Burns Laws. Secs. 2699, 2702, Rev. Stat.

†The judgment in this case was affirmed in general term of the superior court, and a motion by defendant for leave to file a petition in error was overruled by the Supreme Court, thus affirming the case. October 24, 1887.

Those questions were reserved on demurrer to the general term, and there it was decided that the allegation that when the lease was made there was no money in the city treasury specially set apart to meet the expenditure to be incurred under it, did not constitute a defense, because the act under which the lease was made (74 O. L., 235, now sec. 3085, Rev. Stat.), is mandatory, and requires the city to provide an armory for the militia and pay the expense of the same, while providing no method of raising funds therefor, and was passed after the original adoption of the laws above mentioned. The case was remanded and has been now tried at special term.

It appears that there is a certain amount due for the term covered by the lease, and it is conceded that the only question as to that has been settled by the general term; so the plaintiff is entitled to a judgment for that amount.

The only question now seriously pressed on the part of the city, relates to the claim for rent of the armory after the expiration of the five years covered by the lease. The regiment continued in possession, it appears, for some time after the lease had expired, and the question is whether the city is liable for that.

The city solicitor now claims that the first regiment is not composed of officers or employes of the city, or connected with the city in any way, nor under its control; that the city refused to pay rent further at the expiration of the lease, and that it was beyond the power of the city authorities to compel the first regiment to vacate the premises so as to give the plaintiff possession. Whatever may have been the relation between the city and the first regiment, the building was leased by the city, for the regiment, and it was put in possession by the city, and the law seems to be well settled that when the term of a tenant's lease expires, he must vacate the premises and deliver them to the landlord, and if he has sub-let and put in a tenant who will not vacate, he remains liable for the rent until he in some way succeeds in delivering to the landlord the possession of the premises.

The law on the subject may be found in Taylor on Landlord and Tenant, sec. 524; the case in 9 Conn., 334, and others.

There seems to be no conflict in the authorities on the subject. Now, the city authorities had put this regiment in, and it was their business to put them out. If they did not get them out, the city is liable for the rent. The case is precisely analogous to that of one who has put a sub-tenant into possession of a place leased by him.

The plaintiff is entitled to a judgment for rent at the same rate as for a like period under the lease.

S. F. Black, for plaintiff.

Coppock, Cox & Gallagher, for defendant.

## VIRGINIA MILITARY LANDS. 11

[Hamilton Common Pleas, October Term, November 29, 1887.]

### †TRUSTEES OF THE OHIO STATE UNIVERSITY v. RICHARD L. AYER ET AL.

1. As Virginia military state land warrants were not subject to location in the Virginia military district, which was open only to Virginia warrants on continental line, entries and surveys on the former warrants were void, and land so entered passed to Ohio as unsurveyed, by the congressional grant to this state, and belong therefore to the grantee of this state, viz., the Ohio State University.
2. As the statute of limitations does not run against the government the possession of a locator for ninety-two years is no defense against the university.
3. A tax title of the state is invalid, for the state had no right to tax lands of the United States.
4. The locator had only a presumption right, and this right ceased in 1852.
5. The title of the university is not dependent upon its first surveying and platting these lands, (70 O. L., 109) for these are not conditions precedent.

This was an ejectment for 224 acres of land in Anderson township, Hamilton county, Ohio.

The plaintiff claimed the land under the act of congress of February 18, 1871, ceding the unsurveyed and unsold lands in the Virginia military district of Ohio to the state of Ohio, and the act of the legislature of Ohio of April 3, 1873, accepting the cession and granting the land to the plaintiff.

The petition was, however, in the ordinary form, for the recovery of real estate under the code.

The answer of defendants was composed of seven different paragraphs.

The first was a general denial of the facts stated in the petition.

The second sets up ownership in fee-simple in the defendants, and states that they acquired title by Virginia military continental land warrant No. 2551 for 200 acres, issued February 20, 1864, to James Anderson, assigned to Joseph Neville May 31, 1784. Entry made thereon January 11, 1788, and a survey No. 1680 made on the sixth of January, 1788, and recorded in the office of the surveyor of the district, May 7, 1778, also by a deed from Beverly Randolph, governor of the state of Virginia, June 5, 1789, and by a patent from the United States, which has been lost and the record thereof burned by the British in their invasion of Washington in 1814.

They also claim by conveyances from Joseph Neville to themselves.

The third paragraph was a plea of adverse possession for more than twenty-one years prior to the commencement of the suit.

The fourth paragraph was a plea of possession of ninety-five years, under patent from the United States to Joseph Neville, the original survey No. 1680; that the original has been lost and the record thereof destroyed by the burning of the government building in which it was lodged, on August 24, 1814.

The fifth paragraph was a plea of a tax title under a tax sale made December 8, 1806, and a tax deed thereunder and title derived from the tax purchase.

†See also University v. Satterfield, 1 Circ. Dec., 377.

The sixth paragraph was a plea of adverse possession for eighty years under tax title derived from the state.

The seventh paragraph was an admission of the title in plaintiff, and a plea of the right to pre-empt the land under the act of April 3, 1873, of the legislature of the state of Ohio, accepting the cession of February 18, 1871, from congress, and demanding that the court compel such pre-emption.

To this answer the plaintiff filed demurrers to the second, third, fourth, fifth and sixth paragraphs as not stating facts sufficient to constitute a defense, and moved to strike out the seventh paragraph because the court had no jurisdiction to hear and determine the matter therein set forth, or to grant the relief demanded.

On behalf of the plaintiff it was claimed that the entry and survey of Joseph Neville No. 1680, under which defendants claimed, having been made prior to August 10, 1790, were utterly null and void, because congress having received the land from Virginia, did not open it to location till August 10, 1790, (Vol. 2 U. S. Stat., p. 179) and by resolution of congress passed July 17, 1788, (Vol. 1 U. S. Stat., p. 572) the entry and survey in this case and all others in like situation were declared void.

It also claimed that the statute of limitations and tax title could not avail defendants for reasons stated in Board of Trustees of the Ohio State University v. Satterfield, 1 Circ Dec., 377, in the argument for plaintiff and in the decision of the court.

MAXWELL, J.

This case, with others involving the same questions, was submitted to the court upon the demurrer of the plaintiffs to the 2d, 3rd, 4th, 5th and 6th paragraphs of the answers of the defendants, and also upon the motion of the plaintiffs to strike out the 7th paragraph of the answer of the defendants.

The plaintiffs bring an action in ejectment against the defendants for the recovery of certain lands in Anderson township, in this county, in what is known as the Virginia Military District. They found their claim on the Act of Congress of February 18, 1871, which provided that the lands remaining unsurveyed and unsold in the Virginia Military District in the state of Ohio, should be ceded to the state of Ohio on condition that certain provisions should be made for *bona fide* settlers; and on the act of the general assembly of the state of Ohio of April 3, 1873, which vested in the plaintiffs the title to such lands. It is necessary to say so much for a proper understanding of the questions raised by the demurrer, and the foregoing acts being public, the court must take judicial notice of them.

The defendants claim generally under military survey, 1630, of the Virginia Military District.

In the 2d defense, they say that a warrant for 200 acres was issued by the state of Virginia, February 20, 1784, to James Anderson for services in the Virginia Continental Line; that on May 31, 1784, this warrant was assigned to Joseph Neville; that on January 11, 1788, a location and entry, No 1680 was made by Joseph Neville, which was recorded in the surveyor's office May 7, 1788; that on June 5, 1789 a grant was made to Joseph Neville by the governor of Virginia; and in conclusion that a patent was duly issued and lodged in the land office August 24, 1814.

In the third defense, they plead as against the action of the plaintiff the statute of limitations.

In the fourth defense they plead the derivation of title from Joseph Neville and his patent, and also plead the statute of limitations.

In the fifth defense they plead a title derived from a sale of the lands by the state of Ohio for delinquent taxes.

In the sixth defense they plead the tax title and couple with it a plea of the statute of limitations.

In the seventh defense, they plead that they have demanded a deed from the plaintiffs under the acts of the general assembly of Ohio of February 18, 1871, and of April 8, 1873, which repealed the preceding one, but they do not say under which act they made the demand.

Bearing in mind that the original warrant under which the defendants claim, though issued on February 20, 1784, was not located until January 11, 1788, and recorded in the surveyor's office May 7, 1788, and that the cession by Virginia to the United States was made March 1, 1784, what are the legal consequences?

The warrant created no claim on the land until it was located and entry made. But before any location was made, the territory had been ceded to the United States, and thereafter warrants could only be located in such territory pursuant to the reservation in the act of cession and the acts of congress throwing the territory open for entry, and providing for the carrying out of the reservation in the act of cession.

The reservation in the act of cession, was, that if the good land on the Cumberland and Green rivers proved insufficient for the Virginia troops on continental establishment, then such troops might settle between the Scioto and Little Miami rivers.

But who was to determine the happening of such a contingency? Plainly not the troops themselves. Neither could Virginia alone do so. Congress had the power to do so, and we find that was the view taken. So then, any location made after the cession, and prior to the territory being opened by congress, was void unless afterward recognized and ratified by congress, and any location made after the territory was opened by congress must have been made in conformity to the acts of congress.

Congress, on July 17, 1788, declared all locations and surveys made prior to that time invalid; that disposed of the location and entry made January 11, 1788. Neither could the so-called grant of the governor of Virginia, made June 5, 1789, strengthen the warrant theretofore granted, for Virginia did not have possession of the territory. The United States was in possession and any rights arising under the act of cession could only be made valuable by the acts of congress.

August 10, 1790, congress repealed the act of July 17, 1788, and passed an act providing how locations and entries might be made and patents issued thereupon. This was the first act of congress opening this territory. The third section of this act implies that some locations may have been already made, but if there were any, they became subject to the same provisions as to obtaining patents as those not yet located.

May 18, 1800, another enabling act was passed, but coupled with the proviso that the quantity so taken should not exceed 60,000 acres, and that all surveys must have been in by December 1, 1803. Anyone claiming under this act must negative the exceptions. By successive acts the time for returning entries and surveys was extended to January 1, 1852.

Then followed the act of February 18, 1871, ceding the unsurveyed lands to the state of Ohio, which closed the district against further entries.

The second defense would be bad, if it did not contain the averment that a patent had been duly issued. It may be said that this averment is a legal conclusion. It is as to part of it, but it contains an averment of a fact: to-wit, that a patent was issued. It is true that this averment of fact is coupled with a legal conclusion: to-wit, that the patent was duly issued, which averment is bad pleading. I think that the whole averment taken together may save the defense as against a general demurrer, but it would be open to a motion to strike out the words "duly issued," and make definite and certain the remainder of the averment. The plaintiffs may file such a motion if they wish, and it will be granted. I am at present unable to determine whether the averments as to location, entry, etc., made in this defense should be struck out, but they must be unless they are directly connected with the issuing of the patent. They are not so connected now, and at present are immaterial averments. It would follow that though the defense may be good as against a general demurrer by reason of its averring the issuing of a patent, still it must be amended.

The third defense is bad upon general demurrer. The statute of limitations cannot begin to run against the United States or its grantees until a patent has been issued according to law. As to these plaintiffs it certainly could not begin to run until February 17, 1871.

The fourth defense may be disposed of by the ruling as to the second.

The fifth defense is bad on general demurrer. So long as the lands in question belonged to the United States, the state of Ohio could not tax them, could not sell them for taxes, and could not vest title in anyone by means of a tax title, nor can the state of Ohio be estopped by reason of its having afterward acquired the title from the United States in the manner it did.

The sixth defense is also bad on general demurrer for the same reason that the third and fifth defenses are bad. Being bad singly, they become no better when coupled together.

The motion to strike out the seventh defense, must be granted. This is not the proper form, nor is this action the proper form of action, for the defendants to avail themselves of the enabling part of the act of the general assembly of April 3, 1873. To break the force of the acts of congress with reference to the early location and entry set up by the defendants, they, defendants, claim that such action on the part of congress would be unconstitutional, as impairing the obligations of a contract. Suppose it be admitted that the obligations of contracts were impaired, the constitution of the United States provides that the states shall not make laws impairing the obligations of contracts, but no such limitations are imposed upon congress. Congress has always claimed the right to exercise such power, and has done it, notably in the matter of what shall constitute a legal tender.

The demurrers to the third, fifth, and sixth defenses, will be sustained, those to the second and fourth will be overruled, but with leave to file motions as indicated, and the motion to strike out the seventh defense will be granted.

N. W. Evans, David Davis and Duncan Livingston, for plaintiff.

Richard L. Ayer, for defendant.

## NEGLIGENCE. 22

[Superior Court of Cincinnati, General Term, 1887.]

JAMES CONNELL, JR., v. MILLER, DEBRUEL & PETERS MNFG. CO.

Facts proven consistent with the absence of negligence on the part of defendant do not tend to show his negligence. Plaintiff, a boy of fourteen years of age, in the course of his employment by defendant, wheeled a truck of debris onto an elevator on the third floor, was lowered to the cellar, emptied the debris and returned with the truck on the elevator to the floor from which he had come. The elevator had a seat for plaintiff to sit upon. He had no duty to perform on the elevator, except to be still. A competent employe of the defendant had charge of and run the elevator. Plaintiff was injured by having his foot caught between the wall of the shaft and the floor of the elevator. *Held:*

That a failure to warn the plaintiff of this danger by defendant, was not negligence on the part of defendant causing the injury, especially when plaintiff testified that he knew the danger.

TAFT, J.

Plaintiff, a minor, sued by his father as his next friend, in the court below, to recover damages for an injury received by him when in defendant's employ by defendant's negligence. Defendant was a manufacturing corporation occupying a five story building on Pearl street in this city. Plaintiff was a boy fourteen years of age, in defendant's employ. He was riding on an elevator used and operated by defendant, in its business, when his foot was caught between the platform of the elevator and the top of an arched entrance to the elevator shaft and his leg was so badly crushed that it had to be amputated. The case was tried to a jury in the court below, and at the conclusion of the plaintiff's evidence, was taken from the jury and judgment given for defendant. Plaintiff seeks to reverse the judgment. The evidence shows that the elevator was a nearly new one, moving up and down from the basement to the top story in a shaft surrounded on four sides by brick walls. On each floor, the elevator was reached by a door, and opposite the door was a window to light the shaft. The basement entrance to the shaft was fifteen or eighteen feet high and arched at the top. The doors at this entrance were on the outside of the wall of the shaft, which was a foot thick, so that as the elevator moved upward from the basement floor, there was an open space of one foot between the elevator platform and the doors, just the width of the entrances under the arch and as high as the arch. Above this, the space in front of the elevator between it and the wall was the same as on its other sides, which was a few inches, enough to allow the elevator to work with safety in the shaft. The elevator platform was eight feet long by seven feet wide, and was not enclosed except by the gearing on each side. On the side was a seat. The elevator was operated by a man named Warner, employed by defendant for the purpose. The doors to the elevator on the floors above the basement worked on rollers. The elevator man was called by pressing an electric button. Plaintiff had been working for two months and a half for defendant before the accident, his chief employment being to sand-paper cigar-molds. About a week after he was employed, his foreman, Duffy, sent him with another boy down to the basement, on the elevator, with a truck full of chips which had accumulated on his floor. These chips were constantly accu-

mulating from the making of the cigar-molds, and had to be taken down to the furnace in the basement to be disposed of. The truck which was used had four wheels, and when placed on the elevator, in the middle, left about a foot and a half of space on each end, and about two feet or a little more on each side. The boys pressed the button, the elevator man opened the door, and the boys pushed the truck on to the platform, came on themselves, and were lowered to the basement, where they pulled the truck off, unloaded it, and returned on the elevator, with the empty truck to the floor from which they had come. Plaintiff was ordered to take the truck down twice in two months and a half. It was a ride which the boys, engaged on his floor, liked to take, so that he, with another boy, took the truck down seven or eight times when they were not ordered to do so. On the morning of the accident plaintiff and his companion, Becker, concluded to take the truck down without orders. Coming back, plaintiff stood at the end of the truck at the front of the platform. Just as the platform reached the arch, his foot was caught between it and the edge of the arch. How this occurred, it is very hard to gather from the evidence. Plaintiff says the truck moved against him and his foot was caught. Whether this was occasioned by a push from the elevator man, or Becker, the other boy, or whether, being an easily moved vehicle, a jar in the movement of the elevator set it in motion, plaintiff does not undertake to say. He thinks that it was the movement of the truck that led him to get his foot into the place of danger. Becker, the other boy, who testifies for him, says that he heard plaintiff's cry for help, and then the truck which he had his hands on, moved probably, by the efforts of the plaintiff whose hands were also on the truck, to extricate himself. This latter is the only intelligent explanation.

If Becker's account is accepted, then the rolling of the truck did not cause the injury but was the result of it. If plaintiff's account is accepted then the cause of the injury was the movement of the truck, but we are left in doubt whether the truck was moved by the elevator man, who was leaning against it, by Becker, whose hands were on it, or by a jerky movement of the elevator. Plaintiff does not say which caused the movement. Now, if either the elevator man, or Becker pushed the truck, then the cause of plaintiff's injury would be the negligence of a fellow-servant, which is not the negligence of defendant, and for which he cannot be held liable. If the truck rolled because of a jerky movement of the elevator and injured plaintiff, perhaps that would be a defect in machinery whose presence would tend to show negligence in defendant. But the burden to show negligence of defendant is on the plaintiff. It can not be presumed. Plaintiff's account of the rolling of the truck is consistent with no negligence on defendant's part causing such rolling, therefore it does not tend to establish his negligence. See Cotton v. Wood, 8 C. B. (N. S.), 566. But it is claimed that whether the movement of the truck was caused by defendant's negligence or not, defendant was negligent in sending plaintiff on to the elevator at all with the truck without warning him of its dangers. Plaintiff testifies that the foreman gave him no warning as to the danger in using the elevator with the truck. Plaintiff was a minor a few days over fourteen years of age. Counsel contend that when Duffy, the foreman, ordered the plaintiff to take the truck down on the elevator, he was sending him into a place of danger not contemplated in the contract or scope of his employment, in regard to which he should have given plaintiff full warning, and that his

failure to do so was negligence of defendant. Now, either this truck-tending was within plaintiff's contract of employment, or it was not. If it was not, then plaintiff had no excuse for doing it unless he was especially ordered to do it. He admits himself that the trip which he was taking when he was hurt he was not ordered to take by the foreman. If he was not employed to take the risk, and was not ordered in the especial case to take the risk, it is difficult to see how he can hold defendant liable for not warning him of a risk which defendant had no notice he intended to take.

But it seems to us clear that this truck-tending was part of his ordinary duties.

His chief duty was sandpapering the cigar-molds it is true. But his work and that of his fellow-workers on the third floor accumulated refuse material which must be disposed of, and it was most natural that some of them should assist in removing it. He did it once or twice a week, beginning during the first week of his work. He did it without special orders, showing that he considered it within his general duties. He was not engaged for any particular work, and there is nothing in the evidence tending to show that removal of the chips and debris by the truck was any other than a pleasant and regular variety in his work on the third floor. This brings us to the only remaining question in the case. Does the evidence tend to show that there was any negligence on the part of defendant causing the injury, in that it employed a boy of fourteen years of age to use this elevator under the circumstances described, and did not caution him against its danger?

If there was negligence shown by the evidence, and yet it appears by the same evidence that such negligence did not cause the accident, then plaintiff's case fails. Therefore, before considering whether defendant's failure to warn plaintiff of danger in the use of the elevator was negligence, let us see whether, admitting it to be negligence, there is anything to show that it caused the accident. If the accident occurred because the truck pushed the boy off the elevator as plaintiff testifies, then this was an accident so unexpected, that no ordinary care by an adult under the same circumstances would have avoided it. But the warning in such a case, where to an adult the danger would be patent, can only be required in order that the boy's inexperience and youth may be so supplemented by the warning as to quicken him to an adult's sense of the danger and ordinary care. Where an adult's ordinary care could not have avoided the accident, then certainly a failure to warn and thus produce in the boy an adult's ordinary care could not have caused the accident. If, however, we take Becker's story that the accident was not caused by the truck, then it must be admitted that ordinary care on the part of an adult would have prevented the accident. But plaintiff testifies that he had been up and down in this elevator a dozen times and fully understood that if he got his foot beyond the platform below the arch, it would be injured when the arch was reached. He is corroborated in this by Becker. Adult knowledge of the danger could not be clearer. If plaintiff had that, how could a warning of the danger benefit him or prevent the accident? We do not see. The failure to warn therefore, however negligent, could not have caused the accident.

But was the employment of a fourteen year old boy on an elevator like this, without warning *per se* negligent? The evidence is that seven men could ride up on that elevator with the truck on it. If the truck was pushed over near the back of the platform there would be two feet

on the end, and two feet on each side. There was a seat for passengers. The elevator was run by a man who, so far as appears, was competent. The boys had nothing to do with the machinery. All they had to do was to be still. Elevators are now so common a mode of going up from one story to another in modern buildings, used by men, women and children, that we can not say they are to be regarded as dangerous when in the control of a competent operator. The danger to which plaintiff was exposed, was the same danger to which every person is exposed in the best passenger elevators if he puts his foot beyond the edge of the platform in front, to be caught by the extending lintel of the door above. That danger is so patent that mere youth can not excuse a failure to observe and avoid it. There was a seat upon which plaintiff might have sat. There was plenty of room on the elevator for him away from what he must have known to be the only place of danger. His master had not put him on the front edge of the platform, and might well presume that he would not stand there when a seat was provided for him in a place of safety. It was not necessary to his duty that he should be there. His duty required no movement by him in a dangerous neighborhood.

The boy was not a child of tender years. He was old enough without consultation with his father to make his own contract of employment. He was said to be slow in his studies at school. But that is quite consistent with ordinary discretion. His cross-examination develops an appreciation of his situation, and an intelligence which do not tend to show that he was below boys of his age in perception and discretion. A boy of fourteen years of age is permitted under our law to choose his own guardian. At common law, he was capable of committing a felony at that age. It must be observed that we are not discussing the question of the boy's contributory negligence, but only whether failure to notify was negligence in the master. It will not be claimed, we apprehend, that the elevator was a place of such danger that defendant was required to notify his adult employes not to stand with their feet over the edge of the platform. The only question before us then is whether the danger was of such a kind that a man could perceive it and avoid it, and a boy of fourteen years would not be likely to. If the boy had been ordered to stand at the end of the truck, between that and the edge of the platform, with no room for the restlessness of a boy of that age, we should answer this in the affirmative; but when we consider that he need not have stood there, and that he had ample space at the side with a seat there inviting him to the place of safety, we think that the master had a right to rely on there being sufficient discretion in an ordinary boy of fourteen years of age to prevent his placing himself without any reason in the only place of danger on the elevator. We think so because we think that there is a legal presumption that a boy of fourteen years has this much discretion, and until there are facts shown to rebut that presumption of which the master had or ought to have had knowledge, he may rely on it. In reaching this conclusion as to the legal presumption, we follow a decision of the Supreme Court of Pennsylvania in the case of Nagle v. Allegheny R. R. Co., 88 Pa. St., 85, where it was held as matter of law that it was negligence in a boy of fourteen years of age to cross a railroad track without looking to see that no train was approaching. See also King v. Boston & Worcester R. R. Co., 9 Cush. 112-113: 18 Wis. 331.

This case is distinguishable from all the cases cited by counsel for plaintiff, Combs v. New Bedford Cordage Co., 102 Mass., 572; Sullivan

v. India Man. Co., 113 Mass., 396; and Grizzle v. Frost, 3 Finlayson 6-2, in that in those cases the injured youth was placed in a position of danger where any inadvertence, such as is likely in youth and inexperience, would probably result in injury. In other words, at bar, if warning was given to the boy, it would be "don't seek the danger." In the cases cited, the warning must have been "avoid the danger which is always present." In another case, the duty imposed was by special order of a superior, was not in the scope of employment and involved extreme danger, and it was held that a youth might be excused for obeying such order, where obedience would be negligence in an adult, Railroad Co. v. Fort, 17 Wall 553. The case of R. R. Co. v. Fitzpatrick 31 O. S., 479, can not apply at bar because in that case the possibility of danger was founded on such complicated mechanical action as not to be regarded as patent to a workman of ordinary intelligence and the man's duty required his presence in the exact place of danger.

Ordinarily, negligence is a mixed question of law and fact. But where the facts are not in dispute, the court may sometimes treat negligence as a question of law. We regard certain facts as undisputed in the evidence, first that there was plenty of room on the elevator for safe riding with the truck on it, second that the danger of the place where plaintiff was injured was patent to any boy of fourteen years of age and by plaintiff's own testimony it was known to him, and third that plaintiff's employment did not require his presence in this place of danger. From these facts, we conclude that there was no negligence on the part of defendant in its failing to warn the boy, and that the motion to take the case from the jury was properly granted.

We have not considered the intimations as to plaintiff's contributory negligence found in Becker's cross examination, which, while they may be satisfactory as showing that no substantial injustice was done to plaintiff by the court's action, were really only evidence as contradicting Becker; proper for submission to the jury, but not relevant to the question we have been discussing.

Judgment affirmed.

Peck and Moore, JJ., concur.

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## NEGLIGENCE. 25

[Superior Court of Cincinnati, General Term, 1887.]

### †KASSEN, ADMR., v. C. H. & D. R. R. Co.

Plaintiff's intestate being a passenger upon defendant's train, while it was running at a high rate of speed, walked off the rear platform of the last car, which was unguarded, fell unconscious upon the track and was run over and killed by another train of defendant following within an hour. Immediately after the fall, the brakeman on the first train was notified of it, but did not stop the train to pick up the deceased. *Held:* 1. That even if deceased was guilty of negligence causing the fall, and thereby losing his rights as a passenger and became a trespasser, defendant company owed him a duty to save him from further injury, if notice could be brought home to it of his actual condition, and by the exercise of ordinary care he could have been saved.

2. That immediate notice to the brakeman on the first train that deceased had fallen off the rear platform, tended to show notice to the company of deceased's actual condition.



†This judgment was affirmed by the Supreme Court: See opinion, 49 O. S., 230.

TAFT, J.

This case was reserved by the judge at special term, on a motion for a new trial. On the trial below, after the plaintiff had put in his evidence, the court took the case from the jury and gave judgment for defendant.

Evidence for the plaintiff tended to show the following state of fact:

Plaintiff's intestate was a passenger upon an excursion train running from Middletown to Hamilton. He passed into the last car from the car in front of it while the train was in motion, and after exchanging a few words with a fellow passenger, stepped out on to the back platform as if to enter another car, and in the darkness walked off, there being no guard-rail to prevent it. He fell upon the track, and while lying in an unconscious condition, was run over and killed an hour later by another train of the defendant's. A passenger who saw him fall from the platform, in a few minutes informed the brakeman that a man had fallen overboard, and called upon him to stop the train. The brakeman paid no attention to the information, and the train went on to Hamilton, and the death occured as above described. At the time of the fall the train was going at the rate of twenty-five miles an hour.

It is claimed in support of the action of the court below, and against the motion, that there was no evidence upon which a verdict could stand, for three reasons:

First. That the deceased in passing out on to the platform, was guilty of negligence contributory to his fall; that when he fell he ceased to have the rights of a passenger, and became a trespasser, and the company owed him no legal duty.

Second. That even if any duty was owing him by the company, it was not by the company through the agents operating the train from which he fell, but by the company through its agents operating the train running over him, on whose part no omission of duty was shown.

Third. That even if the duty was owing from the agents of the company operating the train from which he fell, they had no sufficient notice to call upon them for the exercise of any care.

It was conceded by counsel for plaintiff in the argument, that deceased was guilty of negligence in passing out on to the back platform. As the fall immediately followed this negligence, the company cannot be charged with any liability for the injuries directly resulting from the fall. Did the death result directly from the fall? If so, then the negligence in stepping on to the platform contributed to the death and bars recovery. If, however, after the fall, defendant omitted any duty which it owed legally to plaintiff, by the performance of which the death would have been avoided, the negligence of plaintiff, would not, in law, be contributory to the death. The proximate cause would be defendant's omission of duty. It has been held in a number of cases that where a man negligently goes to sleep upon the track, or lies down there in a drunken stupor, his negligence does not contribute to his injury from a train, if, by the exercise of ordinary care, the engineer might have stopped the train after he had notice of the man's presence on the track, and avoided the accident. Warton on Negligence, section 388; Brown v. Hannibal & St. Jo. R. R., 50 Mo., 461; Weymire v. Wolf, 52 Iowa, 585.

The injury in such a case is attributed to the willful or wanton act of the company as the proximate cause, and not to the injured party.

It must be conceded, that when by his own negligence, deceased fell from the train upon the track, he ceased to be a passenger or to have the rights of one, and became a trespasser. Commonwealth v. Boston & M.

R. R. Co., 129 Mass., 500. But trespassers upon railway tracks are not wholly without rights.

Does the principle underlying the liability of the company in such a case apply where the engineer of the train causing the injury has no actual notice to enable him to stop the train, but where an employe of the company, not on the train, is, in the discharge of his duty, in a position to know of the danger of the trespasser and to rescue him from the certain death?

The question is, we admit, a doubtful one. The diligence of counsel has failed to bring to light any case presenting and deciding it.

It is clear that notice to the employe not on the train causing the injury, can not be held to be constructive notice to the engineer of the presence of the trespasser upon the track. The notice to the engineer, if the liability is sought for his omission of duty, must be actual. See Wade on Notice, section 674; 94 Ind., 276; 24 Wis., 157.

The liability of the company, if it exists at all, must be found in the omission of duty on the part of the employe having actual notice.

In the running of a railroad train, the company does not discharge its full duty in regard thereto through the engineer, conductor and brakeman of the train. The switch tender who throws the right switch, the engineer of the yard engine who shunts the standing cars on to a siding, the many employes upon whom is imposed the duty of keeping the track clear, contribute, each in his way, to running of the train, and the safety of the passenger. So where a flagman is stationed at a crossing, he contributes in his way as much as the engineer to prevent injury to travellers by the train by keeping them off the crossing in time of danger. Each employe is a member of the company in its great and delicate work, and if these members do not properly work together to discharge the company's duty to third persons, then the company is liable for the injury resulting. It would seem, therefore, that where death results to a trespasser by the running of a train, the company is as wilful or wanton in the killing when the death might have been avoided by one of its employes who had full notice and in the ordinary course of his duty, without danger to himself, might have removed the trespasser from danger, as when it might have been avoided by the hand of the locomotive engineer running the train. One member of the company is powerless to prevent the injury. But this does not justify the company in not using another member which can do so.

But it is said that even admitting that if a track-walker found a trespasser upon the track in a helpless condition, it would be his duty to remove him from danger, it still is not within the duty of a brakeman or conductor of a train to remove obstructions or clear the track for a train following. We cannot agree with this statement. It certainly is the duty of the conductor and brakeman to remove obstructions from in front of their own train, and when any part of their own train makes an obstruction of the track, either to remove it or to flag the following trains. This accident occurred at night when no one in the employ of the company could have notice, but the officers of the train from which the man fell. Clearly the conductor would not have exceeded his authority in stopping his train to pick up the fallen passenger if he could do it in safety, and for the reasons given we do not think he would have to go outside of the line of his duty in it. But it is said that even if the brakeman or conductor owed the duty, he had no sufficient notice of the facts to call upon him to perform the duty. Notice to the brakeman was

notice to the conductor. Whether the notice was sufficient, was, we think, properly a question for the jury. It is true that in such a case notice must be actual. He was told to stop the train, there was a man overboard. He was told this near the place at the end of the last car where, because of its unguarded condition, such an accident would have been likely to happen, and where it did happen. Notice of such accidents must always be in a few words. We cannot say that, under the circumstances, there was no evidence tending to show from what the brakeman was told, and the circumstances under which it was told, that he ought to have known the facts as they were. The notice in the case of Railway Co. v. Manson, 30 O. S., 451, 453, was not nearly so definite as the notice in this case, and called for much quicker action, but it was held sufficient.

We are therefore of the opinion that there was sufficient testimony upon which the plaintiff should have been allowed to go to the jury. The motion for a new trial will be granted. In the court below a judgment was given for the defendant upon the completion of the plaintiff's testimony. We are aware that where a court makes a finding, it has been customary to include the judgment of the court with the finding. Of course, this custom cannot deprive the party against whom the finding is made, from the right to move for a new trial within three days from the finding. The motion is sustained, a new trial must follow as if no judgment had been rendered on the finding. The case therefore comes into this court as if reserved on a motion for new trial after verdict and we have no power to do other than to remand the case to special term for a new trial.

Motion granted.

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## 27 RAILWAY CORPORATIONS.

[Franklin Common Pleas, December 22, 1887.]

### †Columbus, Hocking Valley & Toledo Ry. Co. v. Stevenson Burke, et al.

1. The powers of a corporation organized under legislative statutes, are such and such only as those statutes confer, and they are confined to the exercise of those powers expressly granted and such incidental powers as are necessary for the purpose of carrying into effect powers expressly conferred.
2. A railway company organized under the laws of this state has no power to purchase the entire capital stock of a mining corporation, and its contract for such purchase is void.

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† Messrs. James C. Carter, Wm. R. Kittredge and Lawrence Maxwell, arbitrators in this case, came to a different conclusion as to the facts. They found that the action of the directors in buying coal lands, by buying the entire stock of the coal land of the company, was *ultra vires*, but they find this action an accomplished fact, fully executed on both sides, with the consent of all the stockholders, and that the law will then not interfere to restore the *status quo*, where the corporation is not insolvent, they deny the trust relation of the directors, in regard to the fund produced by the sale of the mortgage bonds, issued for the promised purpose of improving the road, but in fact used to buy—practically of themselves—those lands. The report of the arbitrators is long, and would require about forty pages to reprint it. As it is not a judicial opinion, and is upon questions of fact, it is omitted. It may be found, 20 B., 287, should any one be interested in reading it.

3. Where money is held by a corporation or its directors, arising from a sale of its mortgage bonds, and the purposes for which the bonds or their proceeds are to be used by the corporation are set forth in the mortgage, and are such as are authorized by statute, it is a trust fund, to be used in good faith by the corporation for the purposes stated in the mortgage.

4. Where such trust fund, amounting to $8,000,000, has been used by the directors of the railroad corporation to purchase from a majority of themselves and from other persons the entire capital stock of a mining corporation, of the value of only $800,000, and such use of the fund was beyond the powers of the railroad corporation and contrary to the terms of the mortgage; *held*, that such use of the fund is *prima facie* a violation of the rights of the owners and holders of the bonds and an injury to them; which equity, upon their application, could have prevented by injunction.

5. The directors of a corporation are its agents, and their relation to it is generally one of confidence and trust. The law does not permit them to purchase for it, their own property, or property in which they are largely interested. Therefore, when the directors of a railroad company have purchased, from themselves and others, the entire capital stock of a mining corporation and paid for the same with the corporate funds, the contract is void, and an action lies against them in favor of the company, to account for the funds so received by them. And the rule is the same, though a minority of the directors had no interest as sellers in the property purchased.

6. The company is not estopped from maintaining the action by the fact that at the time of the purchase of the stock and use of the funds, the directors owned all its capital stock, and as stockholders unanimously ratified what they, as directors, had done.

7. The directors having, from the proceeds of the bonds, discharged a private indebtness due from them to a third party who held their stock in the plaintiff company as collateral thereto, the company may follow the funds so used into the stock and claim an equity in it.

8. Such collateral stock, after redemption, was held by defendants as trustees for the plaintiff, and the latter, though not empowered to traffic in its own stock, may, as *cestui que trust*, have an equity therein.

EVANS, J.

This case is now before the court on motions to dissolve the temporary injunction allowed, at the commencement of the action, against the individual defendants.

In July, 1881, the defendant, Burke and his associates (so called for convenience), purchased substantially all the capital stock of three railway corporations and consolidated them into one company (being the plaintiff herein). The authorized capital stock of the consolidated company was $20,000,000, of which one-half was, in August, 1881, issued to Burke and associates in exchange for their stock in the constituent companies, whereby Burke and his associates became owners and holders of all the capital stock of the consolidated company. They then held a stockholders' meeting and elected themselves directors. Afterwards, these directors purchased the entire capital stock of the Hocking Coal and Railroad Company for $8,000,000 of the mortgage bonds of the consolidated company, or their proceeds. At the time of the purchase, Burke and other persons, who constituted a majority of the directors, were the owners of a large portion of, and interest in, the stock so purchased, which was then of the par value of $1,500,000, and of the actual value of about $800,000. The directors having an interest as sellers in the stock, at the time of the purchase, remained in control of the board of directors of the plaintiff company, and constituted a majority thereof until January 12, 1887, at which time a new board of directors was elected, consisting entirely of persons other than said former directors.

Burke and other directors interested in the sale of the stock of the company, bore such a relation to the company as to render it extremely difficult to determine, from the evidence offered, whether the bonds, or their proceeds, were used to pay for the stock.

The mortgage executed by the plaintiff company to the Central Trust Company of New York, as trustee, to secure the bonds, is in evidence, but the petition sets forth none of its provisions. Its execution, however, and some of the matter contained in it, appear in some of the answers on file.

1. Corporations have such powers, and such only, as are conferred upon them by their charters or the statute under which they are organized. In the case of Thomas v. Railroad Co., 101 U. S., 71, the law is stated as follows: "We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under the legislative statute are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of the corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." This doctrine was approved and followed in Penn. Co. v. St. Louis, etc., R. R. Co., 118 U. S., 307. And the same doctrine was declared by the Supreme Court of this state in Straus v. The Eagle Ins. Co., 5 Ohio St., 59. The court says: "Corporations have such powers, and such only, as the act creating them confers, and are confined to the exercise of those powers expressly granted, and such incidental powers as are necessary for the purpose of carrying into effect powers specifically conferred." This principle has been the settled law of this state from the decision of Straus v. The Eagle Ins. Co. to the present time. (Bank v. Bank, 49 Ohio St., 351; State v. Vanderbilt, 37 Ohio St., 590; Kibbreth v. Bates, 38 Ohio St., 187; Bank v. Ins. Co. 12 Ohio St., 601, 610; Hays v. Gas Light Co., 29 Ohio St., 330, 338; Walsh v. Barton, 24 Ohio St., 28, 42).

The case of Davis v. Old Colony R. R. Co. 131 Mass., 257, contains a full and able review of all the important cases on the subject.

2. It is claimed by counsel for defendants that the plaintiff company had power to purchase the capital stock of the Hocking Coal and Railroad Company, and that such power was conferred by secs. 3300, 3863 and 3866, Rev. Stat. No such power was conferred by statute, unless by these sections. Section 3863 confers no power upon railroad corporations. It authorizes mining, quarrying and manufacturing corporations to purchase or subscribe for such an amount of the stocks of any railroad or other transportation company as its directors may deem necessary, in order to procure proper facilities for transportation for the manufactories, mines or other works of the company. Section 3866 provides: "Companies organized for the purpose of mining, quarrying or manufacturing may, when such purpose is stated in the articles of incorporation, construct a railroad, with single or double track, with such side tracks, turnouts, offices and depots as they may deem necessary to carry out the objects of the corporation, from any mine, quarry or manufactory to any other railroad or any canal, slack water navigation or other navigable water or place within or on the borders of this state; and shall in respect to such railroad be subject to and governed by the provisions of Chapter Two." Being the general railroad laws of Ohio.

Section 3300 provides: "Any [railroad] company may aid another in the construction of its roads by means of subscription to the capital stock of such company or otherwise, for the purpose of forming a connection, when the road of the company so aided does not form a competing line." The subscription to be within the power conferred by this section must be by a railroad company to the capital stock of another railroad company, and it must be made to aid a railroad company in the construction of its road.

The plaintiff company made no subscription to the capital stock of the Hocking Coal and Railroad Company. The directors purchased the stock, not from that company, but from its stockholders; the latter received the price paid therefor and the company received nothing. The purchase was not made and did not aid another company in the construction of its road; and for this reason, if for no other, the purchase was not authorized by sec. 3300.

The only capital stock a railroad company is authorized to subscribe for by sec. 3300, is the stock of another railroad company, and therefore, if the stock purchased was not that of a railroad company, the provision of the statute has no application to the case, and conferred no power on the company to make the purchase. The articles of incorporation of the Hocking Coal and Railroad Company show it was formed for the purpose of mining coal and iron ores, and for manufacturing ores into iron, and for the purpose of owning and constructing railroads. Under its articles of incorporation, the company was empowered by said sec. 3866 to carry on the business of mining coal and iron ores, and of manufacturing ores into iron, and to construct, own and operate a railroad. It had power to purchase or lease coal lands for mining purposes and to engage in the business of mining and selling coal without owning or operating a railroad, and it also had power to locate, construct and operate a railroad from its mine to any other place mentioned in sec. 3866. It, however, never owned or operated, or located a railroad, and never had any interest in or control over one. It was simply a mining corporation, incorporated under secs. 3862 and 3866, Rev. Stat., and empowered to construct such a railroad as is mentioned in sec. 3866. Its power to construct a railroad it never exercised, and it exercised only such corporate powers as belong to mining corporations. It is manifest that such a corporation, clothed with such powers, and under no legal or moral obligation to exercise them, is not subject to and governed by the railroad laws of the state, if it exercise the powers, and only those, conferred upon mining corporations. That such a corporation is to be subject to and governed by the statutes relating to mining corporations, and not the railroad laws of the state, is apparent from sec. 3866, which expressly provides that such a corporation "shall, in respect to such railroad, be subject to and governed by the provisions of chapter two," being the general railroad laws of Ohio. The Hocking Coal and Railroad Company had neither railroad nor asset to be governed by the laws of this state. Its sole asset was ten thousand acres of coal land, which it held for mining purposes.

Section 3268, Rev. Stat., provides: "No corporation shall employ its stocks, means, assets, or other property, directly or indirectly, for any other purpose whatever, than to accomplish the legitimate objects of its creation." The legitimate objects of the creation of the plaintiff company, as disclosed by its articles of incorporation, were such, and such only, as are those generally of Ohio railroad companies. It was not

incorporated to purchase, or own, coal lands for mining purposes, or to engage in the business of mining. The contract was not for the purchase of the land, but the entire capital stock of the Hocking Coal and Railroad Company, whose only asset was the coal land. The purchase of all the stock, if valid, would not make the plaintiff the owner of the land (Button v. Hoffman, 61 Wis., 20), but its board of directors could elect a board of directors for the Hocking Coal and Railroad Company, and through them control its affairs. As to the power of a corporation to purchase and own the stock of another, Judge Boynton, in the case of Franklin Bank v. Commercial Bank, 36 Ohio St., 350, 354 and 355, says: "There would seem to be little doubt, either upon principle or authority, and independent of express statutory prohibition of the same, that one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute."

3. Preliminary to the issuing of the bonds and the execution of the mortgage, the board of directors of the plaintiff company, on September 21, 1881, passed a series of resolutions authorizing the company to issue $14,500,000 of its mortgage bonds. According to these resolutions, $6,500,000 of the bonds were to be held by the Central Trust Company, of New York, trustee for the purpose of being exchanged for, or providing for, the payment of the outstanding bonds of the constituent companies which had been consolidated into the plaintiff company; and the remaining eight thousand bonds, amounting to $8,000,000, were to be sold by the president and executive committee, and the proceeds applied to double-tracking, equipping and increasing the transportation facilities of, and improving the company's railways, and in purchasing real estate and other property. These resolutions, and a recital of the fact of their adoption by the board, were embraced in the mortgage and constituted part of it, and the rights of the bondholders touching the use of the proceeds of the bonds, must be worked out with reference to the terms of the mortgage, and the law applicable thereto.

The law enumerating the purposes for which a railroad corporation may issue its bonds, is contained in sec. 3286, Rev. Stat., and is as follows: "A company may issue its bonds, convertible or otherwise, bearing a rate of interest not exceeding seven per centum per annum, to an amount not exceeding two-thirds of its capital stock, actually subscribed, for one or more of the following purposes: completing or extending its road, constructing branch roads, laying double or additional track, increasing its machinery or rolling stock, building depots or shops, making improvements, paying its unfunded debts, or redeeming its bonds, and it may secure the bonds issued for such purpose by mortgage on its property or otherwise." The language of this section must be construed and understood with reference to all other statutory provisions conferring powers upon railroad corporations, or imposing limitations upon the powers thus conferred. Effect must be given to sec. 3268, Rev. Stat., which provides that: "No corporation shall employ its stocks, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation."

The purposes set forth in the resolution, as well as in the mortgage, for which the proceeds of said $8,000,000 of bonds were to be used by the plaintiff company, were such as railroad companies were empowered by statute to issue their bonds for. And when said $8,000,000 of mortgage bonds had been issued by the plaintiff company, and sold upon the

market, the proceeds therefrom that came into the hands of its directors, were held by the company in trust, to be used in good faith for purposes stated in the mortgage.

4. If, however, the bonds or their proceeds had not been appropriated to specified purposes by the mortgage or act of the company, sec. 3286, Rev. Stat., limits the purposes for which they can be used.

Independent of the mortgage the bondholders, considered as general creditors of the corporation, and restricted to the rights of such creditors, had and have an interest in and a lien upon the general funds and assets of the corporation for the payment of their bonds. (Taylor on Corp., secs. 117–118, 651–659; Morawetz on Corp., (2d. ed.) sec. 780; Field on Corp., sec. 403; Goodin et al. v. The Cin. & W. Canal Co., 18 Ohio St., 169; Wood v. Dummer, 3 Mass., 308).

Upon the well settled doctrine, that a corporation holds its funds and assets in trust for the payment of its creditors, rests the right of the latter to interfere in the management of the corporate affairs. Those who give credit to a corporation, are presumed to be cognizant of its corporate powers and the limitations upon them, and to deal with it with reference thereto; and, therefore, as long as the corporate affairs are being carried on in good faith and within its powers, a creditor cannot interfere in the corporate management. But if the corporate funds are being applied to purposes beyond the scope of the corporate objects, in such a way as to imperil the solvency of the corporation and the lien of its creditors on its funds, a creditor can restrain the misapplication and he can follow the funds into the hands of any one receiving them, with notice of their misapplication. (Taylor on Corp., secs. 115–118, 653–659; Morawetz on Corp., secs. 784, 797; Field on Corp., secs. 406, 408; Conro et al. v. Gray et al., 4. How., Pr. 116.)

The bondholders have the rights of general creditors of the company, and such additional rights as are given them by the mortgage. The mortgage was drawn so as to cover all the property, real and personal, which the company then owned or might acquire, except stocks, notes or bonds of other companies (Pennock v. Coe, Trustees, etc., 23 How., U. S., 117), and it is set forth in the mortgage that the proceeds of the bonds were to be applied to double tracking, equipping and increasing the transportation facilities of and otherwise improving the company's railway, and in purchasing real estate and other property. These provisions of the mortgage are covenants between the plaintiff company and the trustee named in the mortgage to induce parties to invest in the bonds and for the better security and benefit of the successive *bona fide* owners and holders of these negotiable bonds, which are payable in fifty years from their date, and bear interest at five per centum per annum, payable semi-annually. If the directors had in good faith, applied the proceeds of said $8,000,000 of bonds to the authorized purposes stated in the mortgage, the value of the property mortgaged to secure the bonds would have been largely increased. But the directors did not use the bonds or their proceeds, or any of them, for any purpose stated in the resolution or mortgage, or for any purpose within its corporate powers. They used all of said $8,000,000 of bonds or their proceeds to purchase, at ten times its actual value, the entire capital stock of a mining corporation in which, at the time of the purchase, a majority of the directors had a large interest, and for which they have received in payment a large portion of the bonds or their proceeds.

The use which the directors made of said entire fund was *prima facie*, at least, a violation of the rights of the bondholders, and an injury to them which equity, upon their application, could have prevented by injunction, if such remedy had been necessary to protect their substantial interest. The only interest, however, which the bondholders had or have in the funds, is that payment of their bonds, and the interest on them, shall be made, as the same fall due. As to what remedies equity affords bondholders after the trust funds have been wrongfully misappropriated by directors, see Pennock v. Coe, 23 Howard's Rep. 117; Weetzen v. St. Paul and Pacific Ry. Co., 4 Hun., 529.

5. The bondholders are not parties to this action, and their rights and remedies I have only incidentally referred to, the better to present the relation of the corporation to its bondholders, its stockholders, and its funds. As to the directors of a corporation, they are its agents, and they stand in a fiduciary relation to it, and are sometimes called its trustees, or *quasi* trustees of the corporation Perry on Trusts (2d ed.), sec. 207; Morawetz on Corp. (2d ed.), sec. 516; Goodin v. Cin. and W. Canal Co., *supra*. And because of their fiduciary relation to it, the law does not permit them to purchase for it, from themselves, or themselves and others, their own property or property in which they are largely interested, and pay for the same with the corporate funds. Such contracts are void. And for the same reason the directors are incapable of making such contracts, they are equally incapable of executing them. They can neither make such contracts with themselves, nor execute them with themselves, so as to bind the company. If the directors purchase their own property from themselves and pay themselves for it with the corporate funds, an action lies against them in favor of the company to compel them to account for the fund so received by them. (Taylor on Corp., sec. 612, *et seq.*; Perry on Trusts (3d ed); sec. 207; Morawetz on Corp., secs. 520, 522, 525, 528, 435; Wardell v. Union Pacific R'y Co., 103 U. S., 651, 658; Robinson v. Smith, 3 Paige, 222; Butts v. Woods, 37 N. Y., 317.) And the doctrine is the same, though a minority of the directors had no interest as sellers in the property purchased.

The directors of a corporation, acting as its agents, and for and on its behalf, may bind it by any act done within the limits of their authority; but if they use the corporate funds for illegal or *ultra vires* purposes, they are liable to it for injuries done to the corporation. Taylor on Corp., sec. 622.

6. It is urged, however, by counsel for defendants, that a corporation and its stockholders are substantially identical, and that the unanimous ratification by all the stockholders of the use which the directors made of the funds was that of the corporation itself, and estops it from maintaining this action.

A corporation having stockholders and creditors is in law the owner of its funds and assets, but in equity it is considered as a trustee holding its funds and assets in trust for those having an interest in them, to the extent of their respective interests. It follows from this equitable principle that by no act of the stockholders or corporation itself, can the corporation be absolved from its duty as *quasi* trustee to its creditors without their consent. If the directors and stockholders wrongfully appropriate the corporate funds to their own private purposes, or to purposes beyond the corporate powers, the duty of the corporation to its creditors as *quasi* trustee for them is not absolved, but remains; and if

the duty remains, then the right of the corporation to the funds remains, at least until they reach the possession of the parties who have given full value for them in ignorance of their trust character.

The ratification by the stockholders of the plaintiff company of the unauthorized use made by its directors of the bonds, or their proceeds, simply shows their assent to that act. The directors were the owners of all the stock of the plaintiff company, and they only ratified as stockholders what they had done as directors. Their unanimous action, as directors, clearly manifested their individual assent to what had been done, and therefore their formal ratification as stockholders was unnecessary, and is of no significance or effect.

And when stockholders have received and retained for a long time illegal dividends, with knowledge of their illegality, they thereby manifest their assent to what has been done as unmistakably as if they had met and formally ratified the payment of such dividends. Yet the corporation may, in its own name, maintain an action against its stockholders and compel them to return to it such illegal dividends. (Taylor on Corp., sec. 566; Lexington Life, Fire and Marine Ins. Co., etc. v. Page and Richardson, 17 B. Monroe (Ky.) 412; Gratz v. Reed, 4 B. Monroe (Ky.) 178). If the assent of all the stockholders does not estop the corporation, it is manifest that their express ratification does not.

If the ratification, expressed or implied, by all the stockholders be considered as that of the corporation itself, it does not follow that it should be estopped from prosecuting the action, for in such case its position as *quasi* trustee for creditors is like that of a natural person in the capacity of a trustee, such as an executor holding funds in a fiduciary relation, who has wrongfully converted them to his own individual purposes, and afterwards brings an action to recover such funds, or their value, from the person receiving them, with notice of their misuse. That the executor in such a case may maintain the action was decided in Wetmore v. Porter, 92 N. Y., 76. Chief Justice Ruger delivering the opinion of the court, says: "The legal title to these bonds and the right of their custody was and remains in the trustee, at least, until they reach the possession of some person who has paid full value and is ignorant of their trust character. Whoever receives property knowing that it is the subject of a trust and has been transferred in violation of the duty or power of the trustee, takes it subject to the right, not only of the *cestui qui* trust but also of the trustee to reclaim possession of the specific property, or to recover damage for its conversion, in case it has been converted. * * *

It is an alarming proposition to urge against the legal title which a trustee has to funds that his recovery of their possession may be defeated by a wrong-doer, upon the allegation that the lawful guardian of the funds colluded with him in obtaining their possession. * * * We see no reason why a trustee who has been guilty even of an intentional fault, is not entitled to his *locus penitentiæ* and an opportunity to repair the wrong which he may have committed.

7. Burke and other parties, among whom were several defendants, in July, 1881, borrowed, through Winslow, Lanier & Co., $6,000,000 in money, for which they gave their joint and several promissory notes to W. L. Samson, or order, being twenty-four notes in number, and being each for $250,000, due in four months from their date. Burke and his associates used this money to purchase the stocks of said three constituent railroads, and according to the original agreement the stock

as purchased, were placed with the holder of the notes as collateral security. Subsequently, and after the consolidation of the three railroads into plaintiff company, and pursuant to the original agreement under which the money was loaned, the stock of the consolidated company was issued and exchanged for the stocks of the constituent companies and deposited with the holder of said notes as collateral thereto in place of said constituent stocks. Afterwards the notes, at their maturity, were paid from the proceeds of said $7,000,000 of bonds, and the notes and stock taken up by Burke and associates. By reason of the premises, counsel for the plaintiff company claim it may follow the proceeds of the bonds into the consolidated stock, and, is entitled to the stock or a lien upon it. The question here raised is difficult to determine.

Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form, liable to the rights of the original owner, or *cestui que* trust. The rights ceases only when the means of ascertainment fail. (2 Story's Eq. Jur., secs. 1258, 1265; Perry on Trusts, secs. 828, 835, 842.) "In all these cases the transaction is looked upon as a purchase paid for by the *cestui que* trust, as the beneficial interest in the money paid belonged to him, and the identity of the money does not consist in the specific pieces of money or bills, but in the general character of the fund out of which the payment is made, and the fund may be followed so long as its general character can be identified." Perry on Trust, secs. 128, 127. "Where the trust fund constitutes a part only of the purchase money of an estate, the court usually gives a lien on the land only for the amount of the trust fund invested and interest; but where the entire land is the fruit of the trust fund, the *cestui que* trust has an election to take land or the trust fund and interest." Perry on Trust, sec. 842. In Turner v. Pettigrew et al., 6 Hump., 438. *Per curiam*, Turley, J.: "There is no principle of chancery law better settled than this. If a trustee buys property with the trust fund, it shall, at the election of the *cestui que* trust, belong to him. Such is, in substance, this case. The reception of his own debt by the guardian, as a portion of his ward's distribution from the administrator, and this debt having contracted for a purchase of these slaves, makes a strong case against him, as if he had actually paid out the money of his wards. It, so far as their interest and rights are concerned, places them in the same position; and in as much as it is the appropriation of the money that raises the equity, it can make no difference whether these appropriations be made at the time of the contract of purchase, or afterwards, in payment thereof. This principle then, being conclusive in favor of the complainants against the defendant, Hill (guardian), it will be so likewise against all persons claiming this property through and under him, who stand in a position to be affected by this equity."

In Gannaway v. Tarpley, 1 Caldwell, 572, Tarpley had bought lands giving his note therefor, in whole or in part. Afterwards he was appointed guardian and took up his notes giving his receipt as guardian for the amount. *Per curiam*, Caruthers J.: "In effect this was the purchase of the land with the money of his wards. He was not their guardian at the time of the purchase, but was at the time of the payment, and as guardian vested their funds in the land. What difference can it make whether this was done at or after the contract of purchase? It was, in one case as well as in the other, the conversion of the trust fund into land. It is everywhere laid down that in such case the owners of the

land may elect to take the land instead of the money, whenever the fact comes to their knowledge. * * * Their right to the land is not a resulting trust, properly so called as stated in the decree. That is well established by the authorities cited in the argument. But it is an equitable right of the owners of a trust fund to pursue it into any property in which the trustee may have invested it."

The case of McCall v. Flipper, adm'r, et al., 2 Bax. (58 Tenn.), 161, was decided adversely to Gannaway v. Tarpley and Turner v. Pettigrew et al., but afterwards the court, upon its own motion, reversed its decision and followed the doctrine of the former decisions. In a note in Moak's Eng. Reps., 18, p. 720, it is said it must be apparent that McCall v. Flipper, as first decided in 58 Tenn., 161, cannot for a moment stand upon principle.

Butler v. Hicks, Smeads and Marshall's Reps., Vol. XI (being 19 Miss.), 78, 85, cites and follows Turner v. Pettigrew et al; *vide* also Laudenberry v. Purdy, 16 Barb., 376, 380; Hopper v. Conyers, 12 Jur., N. S. 328.

If the law is correctly stated in these cases, they establish the principle that where a person purchases property on his own credit and subsequently pays the debt out of funds held by him in trust, the property so purchased, shall, at the election of the *cestui que* trust, belong to him as against the trustee and those claiming under him, with notice of the trust.

No debt, however, was created by Burke and his associates, in the acquisition of the consolidated stock. They received it from the plaintiff company in exchange for their stocks, in the constituent companies, and these stocks were paid for when purchased out of funds which belonged to Burke and associates, the most of which they had raised on their said twenty-four promissory notes, aggregating the sum of $6,000,000 and collaterals, none of which belonged to the plaintiff company. In August the stocks of the constituent companies, which were then held by the holder of the notes as collateral, were delivered up and exchanged for consolidated stock, which was then deposited with the holder of the notes as collateral, and was so held by him, until November 4, 1881, when the notes were paid from the proceeds of the bonds, and the notes and stock taken up by Burke and associates. It seems to me, that if the plaintiff company has any equity in the consolidated stock by reason of this transaction, it must arise from the fact that the fact that the proceeds of its bonds, paid off and discharged the lien, which the holder of the notes had upon the stock for their payment. If a trustee use trust funds, to pay off a mortgage or other lien upon his own property, no good reason appears why the *cestui que* trust may not have the benefit of the lien, and follow the fund into the property, while in the hands of the trustee or his assignee with notice of the trust. I incline to the opinion that the company may follow its funds into the stock, and have a lien upon it, to the extent that its fund paid the debt for which the stock was held as collateral.

8. The question whether a railroad corporation can, as *cestui que* trust, have an equity in its own capital stock, is presented for decision. In England the rule is established by a long line of decisions, that at common law a corporation can not purchase shares of its own capital stock. (Cook on Stock and Stocks., sec. 309, and cases cited.) In this country the decisions are not uniform. In some states, including Ohio, the rule

is established that corporations can not traffic in their own capital stock. (Coppin v. Greenless & Ransom Co., 38 O. S., 275. The State ex rel. etc., v. The O. B. & L. Association, 35 Ohio St., 258.) In other states the contrary rule is established. (Cook on Stock and S., sec. 311.) But in this country, in jurisdictions where the power to purchase has been denied, an exception is recognized to exist, whereby the corporation is permitted to receive its shares in payment of, or as security for a debt. (Taylor on Corp., sec. 135, and cases cited.) And this exception to the general rule has been recognized as the law of this state. In Taylor v. The Miami Exporting Co. et al., 6 Ohio, 176, it was held: "A bank may receive from the stockholders transfers of stock in payment of debts previously contracted by them." In the State ex rel., etc., v. The O. B. and L. Assn., *supra*, Okey, Judge, 263, says: "It was illegal for the association to traffic in shares of its own stock. We do not deny that a corporation has power to receive shares of its stock as security for a debt, or other similar purposes." In Coppin v. Greenless & Ransom Co., McIlvaine, Judge, says: "It is true, however, that in most jurisdictions where the right of a corporation to traffic in its own stock has been denied, an exception to the rule has been allowed to take its own stock in satisfaction of a debt due to it. This exception is supposed to rest on a necessity which arises in order to avoid loss.

The question, however, is not whether a corporation has power to purchase or own its own stock, but whether it can have an equitable interest in or lien upon it. If it has corporate power to hold a lien on its stock for the payment of a debt due to it, it has power to follow its fund into its own stock and enforce a lien upon it. That a corporation has power as *cestui que* trust to hold an equity in stock, which it had no power to purchase, or own, was directly decided in Great Eastern R'y Co. v. Turner, L. R., 8 Ch., 149.

The extent of the plaintiff's equity in the stock, if it had any, I am not now called upon to determine; and whether it can be the equitable owner of all its stock, is a question which need not at present, at least, be considered. For the present, I conclude that a corporation without power to traffic in its own stock may, as *cestui que* trust, have an equitable interest in or lien upon it. Whether the plaintiff company may follow its funds into its stock, now held by its former directors, and enforce a lien upon it, is a question involved in such uncertainty that no final decision should be attempted until the case is heard upon the merits.

Other questions raised and argued by counsel have been considered, but I do not deem it necessary to particularly refer to them at present. The conclusion reached is: That the oral motion to dissolve the injunction, on the ground that it was obtained under circumstances and in a manner which cannot be countenanced by the court, is overruled; and the written motion is also overruled, as to all and each of the individual defendants.

## GUARDIANS. 64

[Superior Court of Cincinnati, Special Term, 1887.]

ISAAC M. JORDAN, GUARDIAN, v. CHARLES T. DICKSON ET AL.

1. The due appointment, by the probate court, of a guardian for a person as an idiot, imbecile or lunatic, is conclusive evidence of such person's incapacity to make or to ratify contracts, or to do any act in derogation of his guardian's authority pending the guardianship.

2. As to the ward's capacity to marry, to make a will, or to commit a crime, the appointment is only *prima facie* evidence of incompetency.

TAFT, J.

The question is on the demurrer to the answer of H. R. Dickson. The petition avers the due appointment of plaintiff, by the probate court of this county, as guardian of Harry R. Dickson an imbecile, and then sets out a series of transactions between Harry Dickson and the defendant, his brother Chas. T. Dickson, resulting in the transfer from Harry Dickson, to defendant, of all his real and personal property. The petition alleges that at the time of the execution of the mortgages and quit-claim deeds, and the recovery of the judgments described in the petition by which the transfers were made, Harry Dickson was an imbecile, and unable to understand the effect of the conveyances signed by him; that his brother unduly influenced him, and was guilty of fraud in obtaining his assent to them, which were without consideration. The petition prays that Chas. T. Dickson may be declared a trustee for Harry R. Dickson, in his ownership of the real estate transferred, and may be compelled to account for rents and profits. Defendant admits the mortgages, judgments and quit-claim deeds; avers them to have been for valuable consideration, and denies all the other allegations of the petition, one of which is the due appointment of plaintiff as guardian. In an amended answer and cross-petition, defendant avers that Harry Dickson is of sound mind, and asks that he be made a party and that defendant's title to the real estate in controversy be quieted against plaintiff and Harry. Harry Dickson, by order of the court, was made a party.

First.—It is claimed that this order was inadvertently made, and that Harry Dickson is not a proper party in this case. On the issues as made between petition and answer, it seems to me that while he is not a necessary party, he is a proper party. One issue made on the original pleading is, whether plaintiff is the duly appointed guardian of Harry Dickson. If plaintiff had chosen to abide by this issue alone, then Harry Dickson could not have been made a party. But defendant in his answer also makes issue on the merits of the case. Even if he succeeds on both issues against the plaintiff, he is still liable on another suit on the same subject matter, by the proper person to sue. He therefore has the right to bring into court the person who would have the right to bring the suit if plaintiff cannot; namely, the real party in interest, Harry Dickson, on whose behalf the petition was filed, in order that the defendant may not be compelled to answer to the same cause of action twice. Thus, where the committee of a lunatic was authorized by statute to sue for personal property of his ward in his own name, but not for real property, and he brought suit to recover both rents and profits and the real property, it was held that the defendant might bring in his

ward as a party, so that the result on the whole suit would be final and decisive, and the defendant might be saved from another action for the realty when the ward recovered his reason. See Gorham v. Gorham, 3 Barb. Ch., 35.

Second.—It being determined that Harry Dickson is a proper party, I come now to the sufficiency of his answer—the question raised by demurrer. The answer denies that he was imbecile, or unduly influenced by his brother when he executed the mortgages or deeds set forth in the petition; avers that he is living in harmony with his brother, and is satisfied with their relations; that he is able to take care of his own estate and needs no guardian for that purpose; denies that he was imbecile when plaintiff was appointed his guardian, or that he is an imbecile now, and further avers that the suit was brought without his consent, and that he wishes it dismissed. The answer of Harry Dickson does not, like that of Chas. Dickson, deny the due appointment of plaintiff as his guardian, and therefore admits it. If Harry Dickson is not concluded by this admission from pleading and proving that at the time of the appointment and at the time of answering he was not imbecile, it seems to me clear that the allegations of the answer are a sufficient defense to the petition, and if they are proven, the petition must be dismissed and a decree entered for Chas. Dickson. For even if the denials of the allegations of the petition are not complete, as claimed by counsel for plaintiff, they clearly amount to a ratification of the deeds and mortgages under whatever circumstances they were executed. It has been held by this court, in general term, in the case of Mahoney v. Goepper, 8 Dec. Re., 154, that the mortgage of an insane person is voidable, not void. So too is one obtained by fraud. If, therefore, Harry Dickson being now of sound mind, is satisfied with the transactions set forth in the petition as he avers, and does not desire to avoid them, he thereby ratifies them, and plaintiff has no cause to complain of Chas. T. Dickson on account of the transaction so ratified, even if the answer does not deny the fraud, undue influence and incapacity set forth in the petition.

Third.—There is, therefore, only one question to be answered in disposing of the issue of law caused by the demurrer. What is the evidential effect of the admission of the answer that plaintiff was duly appointed guardian of Harry R. Dickson, an imbecile, by the probate court of this county, just previous to the bringing of this action? Does it conclude Harry Dickson from pleading and proving he was not an imbecile when the appointment was made, and that he is not now an imbecile? Or is it only *prima facie* evidence of his imbecility which he can now rebut?

In the case of Shroyer, guardian v. Richmond, *supra*, the Supreme Court has decided that proceedings for the appointment of guardians are not *inter partes*, but are proceedings *in rem*, and that therefore the order of appointment, made in the exercise of jurisdiction, binds all the world; that the record of the appointment imparts absolute verity, and that if it shows nothing to the contrary, it will be conclusively presumed in all collateral proceedings that the order was made upon full proof of all the facts necessary to authorize it.

In the language of Scott, C. J., "All questions necessarily arising in the case become *res adjudicata* by the final order of appointment, which binds all the world until set aside or reversed by a direct proceeding for that purpose." Unquestionably, the effect of this decision is that person for whom a guardian has been duly appointed by the probate

court as an imbecile, and all other persons, are concluded from denying that at the time of the appointment such person was an imbecile, in any proceeding where the authority or power of the guardian duly appointed is involved. Now, that is just what Harry Dickson has done in his answer, and what he therefore can not be permitted to do in the face of his admission that plaintiff was duly appointed his guardian. If this were the only averment of the answer upon the subject, the discussion might end here.

Fourth.—But there is a further averment that at the time of answering, he is not an imbecile. Is he concluded from pleading present soundness of mind while the guardianship subsists? Counsel for defendants contend that even if the appointment be held to be conclusive of his imbecility at the time of the appointment, it thereafter only has a presumptive force arising from the rule of evidence that insanity once established is presumed to continue and that this presumption is a rebuttable one.

By the statute, the guardian is given substantially the same powers and duties as the guardian of a minor. He becomes the custodian of all the property of his ward, collects what is due him, and pays his debts, providing for his support. He takes charge of his real estate, and can with permission of the probate court, lease it for five years. If the debts exceed the personal property, he may by petition in the probate court obtain a sale of enough real estate to satisfy the debts. He invests his ward's income, and with permission of the probate court, may change investments. By sec. 6305, Rev. Stat., a guardian of an imbecile, idiot or lunatic, may sue in his own name describing himself as guardian of the ward for whom he sues. By sec. 4998, the action of an insane person must be brought by his guardian. By sec. 5000 the defense of an insane person must be by his guardian.

By the appointment the court takes out of the custody and control of the ward his entire estate. The guardian becomes his representative before the law. It is on the ground that it is necessary for the preservation of his estate, that the guardian is appointed. We have seen that the appointment conclusively establishes the condition of mind justifying it at the time. But the effect of the appointment is not like an ordinary judgment a final adjustment of rights. It has a continuing purpose and effect. It would be defeating the very object of it to hold that the finding of the court lost its conclusive character the moment the entry was made upon the probate court minutes. It would be taking from the guardian the protection in the discharge of his duties which it must be the purpose of the law to secure. It would be inconsistent with that purpose to allow the ward, while such relation exists, to make contracts or deal in respect to his property in such a way as to bind that property, and thus compel the guardian in every case to try the question whether the relation ought to have been created or ought still to continue. The court which makes the appointment, may terminate the guardianship at any time. The remedy is always open to the ward. The order terminating the guardianship restores to the ward his rights of property as fully and completely as the order of appointment deprived him of them.

For the reasons given, it seems to me that the appointment of a guardian of an idoit, lunatic or imbecile, must be conclusive evidence of the incapacity of the ward to contract or do any binding act in regard to his property in conflict with the authority reposed by law in his

guardian, so long as the guardianship continues. It, of course, follows that Harry Dickson's answer in this case, in which he seeks to ratify the transactions in regard to his property complained of in the petition, and to dismiss the action to recover it by his guardian, who is authorized by the statute to sue in his own name, is an act within the principle announced.

But the view I have taken as to the conclusive effect of the existing guardianship, is said by counsel to be opposed to all the authorities. I do not think so when the correct distinctions are made. It in no way conflicts with the authority of the guardian, for his ward to make a will, because it is inoperative until after the guardianship terminated. It probably does not conflict with the guardian's authority over the ward's estate, that the ward should marry, for it only indirectly affects his property rights. It in no way conflicts with the guardian's authority over his ward's property that he commits a crime. These are none of them acts in the doing of which the ward supplants the guardian, for the guardian could not do them for, or instead of, the ward. Where, therefore, the reason of the rule ceases, the rule ceases. Where the capacity of the ward to make a will, to marry or to commit a crime is in question, the guardianship is at the most only *prima facie* evidence of incapacity, and in some cases hardly this. Wheeler v. State, 34 Ohio St.

Coming now to the authorities, there being none in Ohio on this point, I am met by the statements of every text-book on evidence, that inquisitions in lunacy, to which such proceedings in the probate court are claimed to be analogous, are only *prima facie* evidence of the lunacy of the subject of the inquest.

Let us see what the analogy is between inquisitions and probate court orders of appointment. In England, the king was guardian of idiots and lunatics. He was the custodian of their property. He deputed his authority to the lord chancellor by sign manual. In the exercise of this royal prerogative, whenever it came to the knowledge of the chancellor that a person was an idiot or a lunatic, he issued a commission to have the sheriff summon a jury to determine the question of the person's soundness of mind. If the person was an idiot from his birth, the king was entitled to the profits of his estate after his necessities were provided for. If he had lost his reason after birth, the king had no such perquisite. It, therefore, became important in aiding the conscience of the chancellor, that the jury should report how long the subject of inquiry had been a lunatic or idiot, if at all. On the finding, the chancellor in his discretion appointed a committee to take charge of the body and estate of the lunatic or idiot for the king. The inquisition was said to overreach those years before the time of the inquisition, during which the jury found that the subject of inquiry had been insane. The inquisition frequently reported that a lunatic had lucid intervals. The proceeding was only for the information of the chancellor. It came however to be used as evidence of insanity in suits between the subject of it, and third persons, being likened in effect to a judgment *in rem*.

It is evident that as far as the evidential effect of an inquisition upon acts done during the period overreached is concerned, it can have no bearing upon the present discussion. For the hearing of the probate court has a present and future and not a retrospective effect. Every English case cited in the books showing the *prima facie* effect of the finding of the inquisition, is a case where the point of time in issue was in the period overreached, or was the case of a will, a marriage, or a

crime, as to which, as has been said, a different rule applies. Sargeson v. Sealy, 2 Atkyns, 412; Faulder v. Silk, 3 Camp., 126; Frank v. Frank, 2 Moody and Robinson, 315; Snooks v. Watts, 11 Beav., 105; Frank v. Manaring, 2 Beav., 115; Hall v. Warren, 9 Vesey, 609; and Jacobs v. Richards, 18 Beav., 300, include all the cases which I can find in which inquisitions were introduced to defeat suits on contracts or to set them aside, and the time of making the contract in each one was in the overreached period.

It is true that in the first case cited Lord Hardwick says that the finding of the inquisition would not only be not conclusive as to the period overreached, which was the case before him, but not even as to the time of the inquisition, because there had been many instances of subsequent inquiry. But Coke says in his comments on Beverly's case, 4 Coke, 126*a*, 127*b*, that the deed of an idiot or lunatic before office found is voidable, but after office found is void. So in 3 Bacons Abridgment, 539, it is said, "yet it seems that even at law the contracts of idiots and lunatics after office found and the party legally committed, are void, and it must be at the peril of him who deals with such a one." In Shelford on Lunatics, the great English authority, it is said, page 296, "It would be inconsistent with the nature and object of a commission of lunacy to allow the party subject to it to alien his estate by deed, even during lucid interval; but as a will does not take effect until his death, it may be doubted whether the same objection would apply to a disposition by will, made during a lucid interval by a person subject to such a commission." Again page 264, "Lunatics, after they have been so found by inquisition, can not alien their estates until the commission has been superseded and they have been restored to their property." It would seem therefore, that there is as much in the English books to uphold the conclusive character of the appointment of a committee after inquisition in respect to the disability of the ward in regard to his estate, as to disprove it. Coming now to this country, we find that in those states where the jurisdiction of the insane is still in a court of chancery, the inquisition retains its retrospective feature, and as to that is only *prima facie* evidence. New York is one of those states, and in the reports of New York there is an unbroken line of authorities holding that an inquisition as to the period overreached is only *prima facie* evidence of incapacity of the subject of inquiry, but that as to subsequent acts *inter vivos*, affecting his estate, the inquisition and commission issued is conclusive against all the world. L'Amourieux v. Crosby, 2 Paige, 426; Wadsworth v. Sharpsteen, 4 Seld., 388; Fitzhugh v. Wilcox, 12 Barb., 285; Lewis v. Jones, 50 Barb., 645; Banker v. Banker, 63 New York, 410.

In Massachusetts which was the first state to give jurisdiction over the persons and estates of the insane to the probate courts, the inquisition of lunacy was abolished, and with it the overreached period. The powers of a guardian of the insane in Massachusetts are much like those in our own state. In Leonard v. Leonard, 14 Pickering, 283, where a person under guardianship as *non compos mentis* had in his possession a promissory note payable to himself, and received payment of it from the promisor, who had knowledge of the guardianship, it was held that such payment was of no effect, and the letter of guardianship was held to be conclusive evidence that at the time of the payment, the ward was not of sound mind.

The court say: "In the case of White v. Palmer, 4 Mass. R., 147, it was held that the letter of guardianship was competent evidence of the

insanity of the ward; and the reasoning tends to show it is conclusive; but this was not the question then before the court. If this were not the general principle of the law, the situation, of the guardian would be extremely unpleasant, and it would be almost impossible to execute the trust. In every action, he might be obliged to go before the jury upon the question of sanity, and one jury might find one way and another another. We are of opinion, that as to most subjects the decree of the probate court, so long as the guardianship continues, is conclusive evidence of the disability of the ward; but that it is not conclusive in regard to all. For example, the ward, if in fact of sufficient capacity, may make a will, for this is an act which the guardian can not do for him. But the transaction now in question falls within the general rule."

See, also, for the same distinctions: Stone v. Damon, 12 Mass., 488; Walt v. Maxwell, 5 Pick., 217; Breed v. Pratt, 18 Pickering, 115; Gibson v. Soper, 6 Gray, 279.

In Maine, Rhode Island, Pennsylvania and Missouri, that which in Massachusetts and New York is declared to be the law by the courts, is made the law by statute. And it shows the correctness of the distinctions already made that the courts of these states have very generally excepted from the operation of the disabling statutes wills and marriages. See Imhoff v. Witmer, 31 Penn. St., 243; Jenckes v. Court of Prob., 2 R. I; Hamilton v. Hamilton, 10 R. I., 538; and Brinkman v. Ringgeseck, 71 Mo., 553.

In Indiana the statute provides that every contract sale or conveyance of a person of unsound mind shall be void. In Redden v. Barker, 86 Indiana, 191, it is held that the appointment of a guardian is conclusive evidence of incapacity to contract, until the guardianship is removed by the probate court. In this last case, the argument is based largely upon the context in the statutes, but reliance is also placed upon the New York and Massachusetts authorities.

In the case of Elston v. Jasper, 45 Texas, 413, the New York and Massachusetts authorities are approved. The court say: "But such a person, whilst actually under legal and subsisting guardianship and in support of the guardian's authority, is conclusively presumed incompetent to contract, and his deed as against his guardian is absolutely void." In the last case it is held that the same conclusiveness does not attach where the guardian has practically abandoned the guardianship, and the relation has in fact terminated.

There are cases in Vermont and North Carolina, the decisions in which do not look with favor on the theory I have followed. Blaisdell v. Holmes, 48 Vt., 492, was a case where the ward was held after the guardian's death for wages for hired help for services rendered during the life of the guardian, the contract of employment being made by the ward. But it appeared in that case that the guardian had told the plaintiff that he should be paid, that the services rendered came under the head of necessaries, and that the guardian had practically abandoned his guardianship by allowing his ward to go into business. In Motley v. Head, 43 Vt., 633, it was held that an adjudication of insanity was not conclusive evidence of the subject's incapacity to contract and that therefore such an adjudication would not necessarily terminate an agency made before the guardianship. But, in this case, the adjudication was that of a foreign court, *i. e.*, of Massachusetts. In North Carolina there are two cases, Arrington v. Short, 3 Hawks. Law & Eq. 71, and Parker v. Jones, 8 Jones, 460, which present squarely the question of the evi-

dential effect of a guardianship for insanity upon contracts entered into by the ward during the guardianship, and in which it was held not to be conclusive. In the last case, the question turned on the purchase of goods which seems to have been necessaries. There are other cases where the dicta of judges repudiate the Massachusetts and New York doctrine. See Lucas v. Parsons, 23rd Georgia, 267. But this case involved the question only of testamentary capacity. In Clark v. Trail, 1 Metc. (Ky.), 35, the court while recognizing the conclusiveness of the relation as to alienation of the estate by the ward, declined to extend to it the saving of rights by the statute of limitations. In Key v. Norris, 8 Richardson Eq. 388, the question was as to the validity of a marriage the wife in which was under commission at the time of it, and the commission was decided not to be conclusive evidence of the wife's incapacity to marry. But the court approves the reasoning in Stone v. Dawson, 12 Mass., cited above.

It therefore seems to me that by reason and the weight of authority I am justified in holding that as against third persons, the fact that a person is under guardianship as an imbecile in a probate court of this state, is conclusive evidence of his incapacity either to make or ratify a contract, or to do any other act pending the guardianship in derogation of the authority over his estate vested in his guardian. If this is true in respect of third persons, a *fortiori* is it true as between the guardian and the ward, in any but a direct proceeding to reverse the order or remove the guardian.

This conclusion makes it unnecessary for me to discuss the case of Messenger v. Bliss, 35 Ohio St., 47, the decision in which rested solely on the proviso, which was in the statute at the time of the appointment, that an appointment of a guardian for an imbecile should only be *prima facie* evidence of imbecility. This proviso has since been repealed.

Counsel for Harry Dickson urge that the question presented at bar is the same question which would be presented were plaintiff administrator of Harry Dickson, and Chas. T. Dickson were to find that Harry Dickson was not dead, and were to make him a party. It is said that on cross-petition, Harry would not be concluded from showing that he was alive and wished the case dismissed, before revocation of the letters of administration. It is not necessary to decide the question, for it presents little analogy to the question at bar. It has been decided that the issuing of letters of administration is not an adjudication *in rem* of the death of the party as against the party, but assuming the death, is an adjudication against the estate. See Day v. Floyd, Adm'x, 130 Mass., 488; Mutual Benefit Ins. Co. v. Tinsdale, 91 U. S., 238, 243.

For the reasons I have given the demurrer of plaintiff to the answer of Harry R. Dickson will be sustained.

Isaac M. Jordan, for plaintiff.

E. W. Kittredge and Judson Harmon, for C. T. Dickson; Thos. McDougall, for H. R. Dickson.

## 84 INJUNCTIONS.

[Superior Court of Cincinnati, September 5, 1887.]

CINCINNATI BELL FOUNDRY CO. v. JOHN B. DODDS ET AL.

1. A court of equity will protect the inventor of a secret process against its disclosure or unauthorized use by any person obtaining knowledge of it in confidence.
2. The inventor may sell the secret to another, and thereby vest in his assignee as full right to protection from disclosure or use by persons acquiring knowledge of it in confidence, as he himself would have.
3. The process must be shown to be a secret to entitle the complainant to protection.
4. On preliminary hearing, if there is any probability that the complainant's case may be maintained, the injunction must be continued until final decree.

TAFT, J.

Plaintiff alleges that it is the owner by purchase of a secret process for the manufacture of bells, and that it has been selling bells of this manufacture for two years last past; that the business is a valuable one, having been made so by the excellence of the bell and the extensive advertising done, by plaintiff and its predecessors in ownership for twenty years; that defendant John B. Dodds was the foreman of the Blymyer Manufacturing Company, from whom the bell business was purchased by plaintiff, and which continued to manufacture bells for plaintiff after the sale; that Dodds as foreman acquired a knowledge of this secret process under an injunction of secrecy and now proposes to use this process in the manufacture and sale of bells for the firm of John B. Dodds & Son, consisting of himself and his co-defendant Robert H. Dodds, and to communicate the secret to the Eureka Foundary Company, to enable the latter company to manufacture the bells for this firm. Plaintiff further alleges that the defendant Chas. Lange was formerly in the employ of plaintiff; that while there, he obtained a list of the customers of the plaintiff; that he is now in the employ of John B. Dodds & Son as bookkeeper, and is using the list so obtained to address letters to plaintiff's customers representing that the firm of John B. Dodds & Son are successors to the Blymyer Manufacturing Co., in the making the bells according to the secret process belonging to the plaintiff. The prayer is for an injunction to prevent the manufacture, or sale of the bells, the communication of the secret process to any one, or the misrepresentation to the customers of the plaintiff above described. Defendants answer denying, that plaintiff's process is a secret; but aver that it is well known to the trade, and that John B. Dodds knew it before entering the employ of any alleged predecessors of the plaintiff, and never agreed not to use or reveal the same. The answer also denies the misrepresentations.

When the petition was filed, a preliminary injunction was granted. A motion to dissolve has been made, which is now to be considered.

It is clearly established in the case of Peabody v. Norfolk, 98 Mass., 452, that he who discovers and keeps secret a process of manufacture, whether a proper subject for a patent or not, has a property in it which a court of equity will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. He has not an exclusive right to it as against

the public or against those who, in good faith, acquire knowledge of it. In the case of Vickery v. Welsh, 19 Pick., 523, and in Taylor v. Blanchard, 13 Allen, 373, 374, it is settled that such a secret is a legal subject of property and that a bond to convey it may be legally enforced, thus fully recognizing that the inventor of a secret process may sell or assign it to another. It is indispensable to value in such a process, that the owner shall have the right to protect himself against persons who wish to use or disclose it in violation of contract or confidence. It follows, therefore, that the vendee of the secret acquires by the sale the same right to protect it against disclosure, which belonged to the inventor because if he does not, he gets little or nothing by the sale. But it is said that he can not have this right against one who acquired the process in confidence from the inventor before the sale, because there is no confidential relation existing between the vendee and such person. The vendee's remedy, it is claimed, must be against the vendor and the vendor's against the unfaithful servant. I do not think so. If the vendee has a property right in the secret, the confidential servant of the vendor has no more right by disclosure to destroy property of his vendor's assignee than of his vendor. To prevent such destruction, the assignee has as clear a right to protection, against the wrongdoer from a court of equity as the assignor.

The property in a secret process is the power to make use of it to the exclusion of the world. If the world knows the process, then the property disappears. There can be no property in a process, and no right of protection if knowledge of it is common to the world. It would be a violation of every right of the employe of a manufacturer to prevent the former from using, in a business of his own, knowledge which he acquired in the employ of the latter, when he might have acquired such knowledge in the employ of other manufacturers. Indeed, a contract not to do so would probably fail of enforcement because in restraint of trade.

The principles of law governing in the consideration of this case therefore are:

1st. That the inventor of a secret process has a property right in it which he may call upon a court of equity to protect him in against the use or disclosure of the secret by any person acquiring knowledge of it in confidence.

2d. That the inventor may sell the secret and all his property in it and thereby vest in the purchaser as full rights as he himself has to protection against its use or disclosure by any who have acquired knowledge of it in confidence from the inventor or himself.

3d. That the process must be a secret process, not common to the trade, to entitle the plaintiff to protection.

Coming now to apply these principles at bar, there seems to be no doubt that John B. Dodds proposes to make exactly the same bell that was made by the Blymyer Manufacturing Company, and that he has made a contract with the Eureka Foundry Company to make this bell for him, necessitating the disclosure of the process of manufacture to third persons. I do not think that from the evidence, this statement can be seriously disputed. It further appears that the Blymyer Manufacturing Co. sold this process, together with the good-will of the bell business, to the plaintiff's assignor in Nov. 1884. From what has been said it follows that plaintiff has the same remedy against defendants that the

Blymyer Manufacturing Co. would have had against them, had no assignment taken place. The questions of fact are simplified to two.

1st. Was the process a secret one?

2d. Did John B. Dodds acquire knowledge of it in confidence, and under an implied obligation not to use or disclose it?

The manufacture of bells has been extensive for many centuries. The metal of which they were made was copper and tin. This is known as bell-metal, and is still the metal generally used, while iron in recent years has been used for small bells. The particular mixture of metals used by plaintiff for bell material is of very recent date, and was for years of doubtful success. Mr. W. H. Clark seems to have experimented for several years in making bells of this mixture. His experiments included not only the mixture of certain metals, but the proper form and size and weight of the bells adapted to produce the best result. It seems that the size, weight and form of a bell have as much to do with the tone as the metals used.

During these experiments, he transferred all his interest in them to the Clark Sorgo Machine Company. This was in 1863. In 1866 this company sold all its assets and business to Blymyer, Norton & Co. At this time Mr. Clark seems to have closed his experiments. He had then arrived at a standard form and weight for each size of bell now manufactured by the plaintiff, except the bell with a 54-inch diameter, the largest size. Since 1866, with this exception, the form and weight of the various sizes have not changed. The only change in the mixture of metal was a substitution of one form and grade of one of the metals for another, the proportion between the metals remaining the same. Bells so made have been sold for twenty years by Blymyer, Norton & Co., the Blymyer Manufacturing Co., and the plaintiff. There is no evidence tending to show that at the present time, there is any other manufacturer engaged in making bells of the same proportions of form, size, weight and mixture of metals. Another manufacturer has made a bell of similar metals, but there is nothing tending to show in what proportion those metals are mixed by him, or that they are molded into forms, sizes and weights like those of the plaintiff. One witness makes an affidavit that bells were made in Maysville some years ago in which the proportions of the metal mixture were the same as those arrived at by Mr. Clark, but he is contradicted in this by the proprietor of the foundry at which he says the bells were made, and it does not appear in what form or size or weight of bell this metal was used. Every case of manufacture of bells where these metals have been used, stated in the evidence, was probably an experiment soon abandoned. It is important at this point, to say that because bells of plaintiff have been sold everywhere, and it would be easy therefore to make patterns from the bells, it does not follow that the use of those forms with a certain mixture of metals may not constitute a secret. The result from those forms and sizes with any other mixture of metal than the one used, as copper and tin for instance, or white iron, would be entirely different from the result obtained from these forms and sizes with the metal mixture which is used. Knowledge of the fact that these forms, sizes and weights made a good bell, and that these metals made a good bell-metal mixed in a certain proportion, would not be knowledge of plaintiff's process, unless it was accompanied by knowledge of the fact that a good bell was made by a combination of this bell-metal with these forms, sizes and weights. The success of the plaintiff's bells for so many years, and its continued

manufacture, without competition, except by bells of other metals, is itself evidence that the process which was used was one either not known at all, or at best so imperfectly understood, as to make it impossible for anybody else to succeed in making merchantable bells of this variety. That is a trade secret, which is not well enough or exactly enough known by any person but the inventor or owner as to enable other persons to make use of it in trade.

Mr. Dodds and some others testify that the proportion of the metals varies somewhat according to the character of one of them. This is quite likely, but this variation is probably only a variation from a fixed proportion established for that metal when of the ordinary degree of hardness. It is not necessary to discuss whether such a description of the process of manufacture as Mr. Clark gives would justify the issuing of a patent for it, because a secret may be property even though it is not patentable. Mr. Clark's description seems to be such a one as would enable a person of ordinary skill in mixing metals to reach the result desired.

Many affidavits have been filed of persons formerly in the employ of the Blymyer Manufacturing Co. as to the publicity with which this process of bell-making was carried on. The knowledge thus acquired by the affiants seems to have been largely confined, to the fact that certain metals were used in the mixture. It is very doubtful whether the knowledge which these subordinate employes had, was knowledge which could be used to reproduce the bell made by the Blymyer Company. They were fellow-employes of Mr. Dodds. As was said in the case of Peabody v. Norfolk, cited above, "Although the process is carried on in a large factory, the workmen may not understand or be entrusted with the secret, or may have acquired a knowledge of it upon like confidence. A secret of trade or manufacture does not lose its character by being confidentially disclosed to agents or servants, without whose assistance it could not be made of any value, even if, as argued in support of the demurrer, the process is liable to be inspected by the assessor of internal revenue or other public officer. The owner is not the less entitled to protection against those who in, or with knowledge of, violation of contract and breach of confidence, undertake to disclose it or reap the benefit of it." At bar it does not appear that the Blymyer Manufacturing Co. attempted to enjoin secrecy upon their many subordinate employes, but preferred rather to rely upon the difficulty there would be in acquiring such a complete knowledge of the bell-making as to enable them to communicate it or use it if they wanted to. The fact that in twenty years, the process does not seem to have been successfully reproduced, indicates that such a course has sufficiently protected the secret. The bill of sale of the process as a secret by the Blymyer Manufacturing Co. to David W. Blymyer, in November, 1884, before there was any fear of disclosure or use by other persons, is evidence that the process was so considered by its owners.

On this question of whether the process is a secret, there has been introduced a great deal of testimony, oral, by deposition and by affidavit. In some respects it is quite conflicting, and raises doubts whether the process is a real secret. Cross examination of witnesses and the sifting process of a trial are necessary to a complete determination of the question. I have considered it rather with a view to determining what probability there is of the plaintiffs maintaining the existence of a secret at the trial, and it seems to me that there is such a probability. I may

add that the claim made by John B. Dodds & Son, in their letter of April 25, 1887, to Farrington & Taylor, in which they claim that the process to be used by them in making bells is only known to J. B. Dodds, is an admission which tends to strengthen me in this conclusion.

I come now to the last question; is John B. Dodds under an obligation not to use or disclose the secret? Mr. Dodds says that he knew that the combination of these metals would make a bell-metal, from working at another foundry, in 1862 and 1863, where bells were so made. That, as I have said, was probably rather an experiment than a business, and one which was abandoned. The testimony of D. W. Blymyer, W. H. Blymyer, and the witness Alford shows that Dodds knew and understood and was told that the process was a secret which it was his duty to use every effort to preserve. He denies that he had any such understanding, or instruction. The weight of the evidence is against him. Moreover, if there was a secret, as I have found probable, and he came to know it because he was foreman and had to know it that it might be used, and knew that it was a secret, then I am inclined to think that his obligation to preserve such secret as the property of his employer must be implied, even though nothing was said to him on the subject.

Coming now to the other branch of the case. The facts are that Lange was a clerk of the plaintiff, and had enough to do with plaintiff's correspondence to learn the names of those persons with whom plaintiff was in correspondence with a view to a sale of its bells; that he left the employ of plaintiff, and entered the employ of J. B. Dodds & Son; that he at once began a correspondence for J. B. Dodds & Son, on letter-heads of The Blymyer Manufacturing Company in three or four instances, and sent out a circular headed J. B. Dodds & Son, then in small letters, lessees of the foundry of, and then in large letters, The Blymyer Manufacturing Co., then immediately following, Bells of all Kinds, etc. The circular which follows nowhere says that J. B. Dodds & Son are successors of The Blymyer Manufacturing Co., in the bell business, but clearly it was the intent of the circular to convey that impression, and the evidence shows that such an impression has been conveyed to many of plaintiff's correspondents. Plaintiff is the legitimate successor of The Blymyer Manufacturing Co. in the bell business. To it belongs the good-will of The Blymyer Manufacturing Co. Defendants cannot be allowed to appropriate that good-will by the use of words likely to give a false impression, though strictly and literally true. Such a circular or advertisement is not to be construed like a contract, but is to be viewed from the stand-point of an ordinary purchaser. The rule is much the same as in the case of a trade-mark. It is a question of fact whether an advertisement or trade-mark is likely to deceive. At bar, there is no question about the fact; persons have been deceived to the injury of plaintiff's right in good will. The name Blymyer in the bell business belongs to plaintiff. The bell seems frequently to have been called the Blymyer bell. Indeed, it is so called in one of defendant's letters. The plaintiff is therefore entitled to protection against such misrepresentations.

From what has been said it will be seen that I deem it my duty to continue this injunction. I reach this conclusion the more readily, because this is only a preliminary hearing, and not final. To decide against the plaintiff on this hearing on the question of the secret, would be equivalent to a final decree in advance. The mischief, if any there is, would be done, no matter what the final decree. It is, therefore, plainly the duty of the court in such a case to continue the injunction if

there is a possibility of plaintiff's sustaining its case on final hearing. See Poor v. Carlton, 3 Sumner, 70; Cork v. Rooney, 7 L. R. (Irish, 191); Owen v. Bryant, 2 Tenn. Ch., 238, 295; Bd. of Supervisors v. Paxton, 56 Miss., 679; Pernell v. Daniell, 8 Iredell Eq., 11; Fargo v. Haynes, 35 Iowa, 494.

Motion overruled, and injunction continued in a modified form.

William Worthington and Ferris & Wilder, for plaintiff.

Champion & Williams and D. Thew Wright, for defendants.

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## PARTNERSHIP. 87

[Superior Court of Cincinnati, General Term, May, 1887.]

### *Henry Blackwell v. Miami Valley Insurance Co.

**The policy provided that if the assured sell or transfer the property it should be void. The insured subsequently transferred to a firm consisting of himself and a partner. Held, That the insured did not part with his insurable interest by the transfer so as to avoid the policy irrespective of conditions in that instrument; but there had been a sale which worked a forfeiture within the provision.**

Error to Special Term.

Taft, J.

This was an action on a renewal of a policy of insurance issued by defendant to plaintiff on stock of dry goods in the city of Cincinnati.

The third defense set up the following condition of the policy: "If the assured shall sell or transfer the property herein insured, * * this policy shall be null and void," and that, after the last renewal, plaintiff sold and transferred the insured property and the business to the firm of Blackwell and Horman, consisting of himself and one Horman, and that thereafter until the time of the loss, the property was owned and the business was carried on by Blackwell & Horman as partners, and that Blackwell was not the owner of the property at the time of the fire. A demurrer to this defense was overruled, and the plaintiff declining to plead further, judgment was given for the defendant. The case comes before this court on a petition in error.

Counsel for defendant in error urge the sufficiency of the defense upon two grounds. They claim, first, that even if there was no express restriction upon alienation, the transfer by Blackwell to the firm avoided the contract of insurance, because by such transfer, Blackwell, as an individual, lost all his insurable interest in the property; that thereafter he had no interest save in the profits of the partnership and the surplus of the proceeds of the stock after the debts of the partnership had been paid, and that as it does not appear that there would have been any proceeds left after payment of the debts, there is no interest shown which entitles him to recover on the policy.

We do not think this ground a good one. The interest of a partner in the assets of the firm is an insurable interest. In the partnership account he is entitled to a credit of his proportionate share of the assets. If any of the assets are lost, it results in a pecuniary loss to him. This is the case whether the assets exceed the debts or not. If they do not, then the loss increases the liability of each partner to the creditors of the firm. To the extent of the proportionate increase of his liability by reason of a burning of the stock, each partner has an insurable interest.

The Supreme Court of Massachusetts held in the case of Converse v. Citizen's Mutual Insurance Co. (10 Cushing, 37), that a partner may have an insurable interest in a building purchased with partnership funds, although it stands upon land owned by the other party. Chief Justice Shaw in summing up on this point says:—

*This judgment was reversed by the Supreme Court; see opinion 48 O. S., 533.

"We are of opinion, therefore, that upon a settlement of the joint account this building must have been treated as joint property, for his share of which the son would have been entitled to credit on the partnership account. He, therefore, had such an equitable interest in the building before any account settled, that though it stood on the land of his father, he must sustain a pecuniary loss by its destruction by fire."

In Gordon v. Mass. F. & M. Ins. Co. (2 Pick., 249), a vessel was insured on the first of June for "whom it may concern." She was then owned by the plaintiff who on the first of July made an absolute bill of sale of her, taking a memorandum from the assignee wherein he promised to appropriate the proceeds of the vessel to himself as security for indorsing for the plaintiff. Afterwards a loss happened. It was held that notwithstanding there was at the time of the loss, a subsisting interest which was protected by the policy; since the debts, on account of which the transfer was made, would still exist, except so far as they should be discharged by the proceeds of the property assigned.

The same principle is laid down in Phillips on Insurance, sec. 208.

The difficulty of determining the exact extent of plaintiff's loss by the burning of the goods because it might involve an investigation of the partnership account, which is urged by counsel, cannot affect a substantial right of the plaintiff to recover if there is no other objection. Whether his interest is legal or equitable it is insurable.

The second ground urged by defendant is that the transfer from Blackwell to Blackwell & Horman was a sale or transfer in violation of the condition of the policy.

The authorities are in conflict as to just what kind of a transfer avoids a policy under such a condition.

Where given words of a contract may have a liberal or a narrow sense, other things being equal, that meaning is generally adopted which is most beneficial to the promisee; and courts have very generally narrowed as much as possible, without doing violence to the language used, the effect of conditions and clauses of forfeiture in limitation of the principal obligation. But where the condition or proviso has seemed to have a reasonable basis, to be consistent with the nature of the contract of insurance and to find its origin in a proper motive on the part of the company, the courts generally have not hesitated to give that construction which will carry out the reasonable purpose of the condition.

The nature of the contract in view of conditions as to alienation is well stated by the court in Burnett v. Eufaula Home Ins. Co. (46 Ala., 14), where, in commenting on certain decisions on the subject, it says: "The principle sustaining these adjudications is that there is a purely personal contract by which the insurer undertakes a conditional indemnity of the insured alone, dependent upon certain duties to be performed by him, into which enter his personal character and fitness. The property does not draw with it the contract, because its probable destruction is the foundation of the agreement. The essence of the contract is taken away by the transfer of the proprietary interest to persons not parties to it."

It has been held in a number of cases that it was a violation of a clause against alienation or sale that one partner of an insured firm had sold his interest to another member of the firm. The argument was that the insurance company relied on the firm as constituted when the policy was issued for the performance of the conditions of the policy and it did not appear but that the person whose interest had been sold, was the person whose membership in the firm was the motive for trusting it; Hartford Fire Ins. Co. v. Ross, 23 Ind., 179; Western Mass. Ins. Co. v. Richer, 10 Mich., 279.

Later decisions, however, have been more liberal in the construction of such conditions. The leading case is Hoffman & Place v. Aetna Ins. Co. (32 N. Y., 405), in which it was held that the retiring of one member from the partnership by sale of his interest to the remaining members was not within the clause avoiding the policy "if the insured property should be sold or conveyed." The court says: "They (the insurance company) testified their confidence in each of the assured by issuing to them a policy, but did not choose to repose blind confidence in others who might succeed to the ownership. It is suggestive that the proviso might have been designed to secure the continuance in the firm of the only member in whom the insurers reposed confidence. The only evidence of their confidence in either is the fact that they contracted with all, and the theory is rather fanciful than sound that they may have intended to conclude a bargain with rogues on the faith of a proviso that an honest man should be kept in the firm to watch them. * * * * It was intended by the proviso to protect the company from a continued obligation to the assured, if the title and beneficial interest should pass to others, they might not be equally willing to trust." * * "The design of the

provision was not to interdict all sales, but only sales of proprietary interests by parties insured to parties not insured."

This language of the New York Court of Appeals has been adopted and approved by our Supreme Court in West v. Citizens Ins. Co. (27 O. S., 1), which was a case very much like the New York case. It is true that neither of these cases is the one at bar, but the distinction made by which these cases were decided makes them authority on the facts here presented. Judge Johnson says in the West case: "The chief reason for requiring such a stipulation is to guard against the introduction of a stranger who may not possess the fidelity or watchfulness required by the insurers." The change should increase the hazard, and then proceeds to hold the conveyance in that case to be not within the stipulation because it did not introduce a stranger and so did not increase the hazard.

It follows that when a stranger is introduced, the policy under such a stipulation is void. In the case at bar, when Blackwell sold to Blackwell & Horman, he transferred out of himself his sole proprietary interest to a separate and distinct entity, the partnership. The company did not agree to insure or trust the partnership. They did not agree to insure goods in which any other than Blackwell had a propriety interest. Horman by the conveyance became an owner per my et per tout of the stock insured. He became a principal owner with as much control as Blackwell. The conveyance necessarily introduced Horman into that position in which the company required fidelity and watchfulness. Horman was a stranger to the company. He was introduced into the position without the company's knowledge or consent. That fact, the absence of which in the West case took the conveyance out of the stipulation, is present in the case at bar. We can see no escape from the conclusion that Blackwell's sale to the partnership was such a sale or transfer as avoided the policy.

The distinction made in Hoffman v. Aetna Ins. Co. supra, and in West v. Ins. Co., is also found in Pierce v. Ins. Co. (50 N. H., 297), Dernani v. Ins. Co (26 La. Ann., 69), and in Burnett v. Ins. (46 Ala.) It is true that in all these cases the distinction made saved the insured from a forfeiture of the policy; but it would be disrespectful both to the Supreme Court of our own state and to the other eminent tribunals making it to suppose that the distinction is not to apply as well in behalf of the insurer as the insured.

Now, as to cases whose facts present the exact question at bar. The Supreme Court of Iowa in the case of Cowan v. Ins. Co. (40 Iowa, 551), decided that a conveyance by the insured to a partnership of which he was a member, was not a violation of a clause that "in case of any transfer or change of title in the property insured, the insurance shall be void." But that case nowhere notices the distinction made in the cases cited as to the introduction of a stranger. Judge Drummond, in Scanlon v. Union Insurance Co. (4 Bissell, 511), presenting the same facts, took the same view, but without the citation of authority. In the case of Malley v. Ins. Co. (51 Conn., 222), a case just like the Iowa case, the Supreme Court of Connecticut expressly declined to follow the Iowa court; and Justice Miller of the Supreme Court of the United States on the circuit, in the case of Drennan et al. v. London Assurance Co. (20 Fed. Rep., 657), presenting precisely this question, in most vigorous language supports the view we take of the case at bar. In this state of the authorities in cases on all fours with the one before us, we have no hesitation in following those which use the reasoning adopted by our Supreme Court, although applied in a case where the facts rendered it necessary to sustain the policy.

The judgment of the special term will be affirmed.

Peck and Moore, JJ., concur.

Jordan & Jordan and Jos. G. O'Hara, for plaintiff.

Ramsey, Maxwell & Matthews and Sylvester G. Williams, for defendant.

Note.—The case of Drennan v. London Assurance Company, cited above, was reversed in the United States Supreme Court, (113 U. S., 51:) but upon the express ground that from the nature of the agreement between the parties in interest, in reference to the formation of a partnership, it appeared that a partnership was in fact not contemplated and none was ever established. The Supreme Court limited its consideration to the question whether or not there was a new partner introduced, and having determined that there was not, but that the negotiations to that end were only preliminary, and had not been consummated when the loss occurred, the judgment of the court below was reversed without going into any consideration of the effect which such a change would have had upon the validity of the policy had it been consummated. The opinion of Justice Miller, therefore, upon the question at bar remains unaffected. S. G. W.

## 105 LEASE—PARTNERSHIP.

[Superior Court of Cincinnati, General Term, 1887.]

WILDER v. BLOCK.

**Where premises are leased to a firm for the carrying on of its business, and with the privilege of renewal at the end of the original term, notice of renewal is given in the firm name at the end of the term, and the business continues under the firm name, all the partners remain liable for the rent, although one of them had previously withdrawn from the firm without the knowledge of the landlord.**

PECK, J.

Mr. Wilder leased certain premises to a firm, B. Benjamin & Co.; the members of the firm are named in the lease, and Mr. Block is named as one of them. It is also stated in the lease that these gentlemen were doing business under the firm name of "B. Benjamin & Co." The lease was for two years with the privilege of renewal for eight more.

It is in evidence that at some time during the two years, before the time came for the renewal of the lease, Mr. Block withdrew from the firm of Benjamin & Co. But it does not appear that Mr. Wilder had notice of Block's withdrawal. At the end of two years Benjamin notified Mr. Wilder that they intended to avail themselves of the privilege of renewal to the firm in order to retain possession of the property and transact its business there; and the firm continued in possession as before, which under the law amounted to a renewal of the lease. Taylor on Landlord and Tenant, sec. 332. The question now is as to the liability of Mr. Block for rents under the renewed lease. It is a question upon which I have been able to get but little light from the authorities except by way of analogy; that is, I have been able to find no case directly in point, and none has been cited to me, but upon principle I think Mr. Block is liable. He was a member of the firm, so named at the time that this lease was made. Wilder knew it; the firm continued right on under the same name until after the renewal, and Wilder had a right to assume that the firm was the same unless he was notified of the change. All the reasons, which apply to the dealings of the firm, with persons extending credit to it in the ordinary course of its business, without knowledge of the change of partners, apply to this case. So I think that Block is liable for this rent, and a judgment may be taken against him as well as against the other members of the firm.

Ferris & Wilder, for plaintiff.

D. Heinsheimer, for Block.

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## 106 GUARDIANS.

[Superior Court of Cincinnati, Special Term, June, 1886.]

MARGHERRA HABIGHURST v. HENRY N. STEVENSON ET AL.

**A foreign guardian, ineligible to an appointment as such in Ohio, will not be permitted to collect money due the ward in this state.**

PECK, J.

This is an action by Mrs. Habighurst to compel the executors of the Stevenson estate to pay over to her, as the guardian of her children, their proportionate share of the income of that estate; being an estate which was left in trust by will to the executors, the income to be paid over to certain designated persons of whom the children of Mrs. Habighurst are two.

The answer to the petition admits that she was the wife of a son of the testator, and that her children are entitled to a share of the income claimed; but it alleges that since the death of Stevenson, her first husband, she has married again, and it is claimed by reason of that fact she is not entitled to act as guardian of these children. Such is the law of Ohio. The statutes provide that where an unmarried woman is the guardian of children and marries, the fact of her marriage vacates her position as guardian. Section 6292.

The reply made to this is that the lady and her children are residents of the city of Baltimore, Maryland; that there is no such statute in Maryland where the matter is governed by the common law; and that she was duly appointed and qualified to act as guardian in Maryland. The question here is whether, under the circumstances, she can demand and receive the rents of this estate in Ohio. Foreign guardians are only recognized by the comity of the states, and where there is a foreign guardian appointed under circumstances in contravention of the policy of the laws of this state, she can hardly be permitted to exercise her powers in Ohio. Story on Conflict of Laws, secs. 504, 504*a*.

The statute being plain and positive that the marriage of a lady who has been appointed a guardian vacates her position as such, and this lady coming within the exact language of the statute, I am inclined to the opinion that she is not entitled, notwithstanding she is a non-resident, and the children are non-residents, to the relief which she here prays for. In order to collect these rents another guardian should be appointed. Judgment for defendant.

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## LANDLORD AND TENANT. 106

[Superior Court of Cincinnati, General Term.]

DORSE V. FISHER.

1. A landlord is charged with the duty of keeping in repair, and free from danger, a common passage-way for a number of his tenants, where he has control of the passage-way, subject only to the tenants' right to use the same as a passage-way.
2. He cannot escape liability for injury to his tenants, caused by the dangerous condition of the passage-way, on the ground that its condition was produced by the negligence of an independent contractor to whom he had given the contract to make improvements on or near the passage-way.

TAFT, J.

Plaintiff in error, defendant below, was the owner of a tenement house fronting on the west side of Race street, above Findlay, in this city. He had in the house fifty-two tenants, among whom were the defendant, his wife and two sons. The yard back of the house extended to an alley parallel with Race street, and opening into Findlay street. In

the yard was a privy for the use of the tenants of the house. Plaintiff in error desiring to improve his property, contracted for the erection of a second large tenement house in the yard. The cellar of the new building extended some little distance under the privy, which required the removal of the privy and of the vault three or four feet. On the trial, there was evidence tending to show that by reason of removal from its former position the wall of the vault had given way under one of the doors, and a large hole was made by the caving in of the earth adjacent to the wall. There was also evidence that the plaintiff in error knew of the dangerous condition of the approach to the privy for several days preceding the accident. The defendant in error, the plaintiff below, going out to the privy at two o'clock at night, in attempting to enter, fell into the hole above described, and was injured. There was much conflicting evidence on all the points given above. We have stated the case as it appears from the testimony for the plaintiff. The landlord had made a contract for the erection of the new building without retaining any control or supervision over the manner of doing the work. A verdict was rendered against the defendant below for two hundred dollars and judgment followed the verdict. Counsel for plaintiff in error complain of the charge of the court to the jury, on the ground that while the rule exempting the owner from liability for the negligence of an independent contractor was correctly stated, the court added: "If it came to Dorse's knowledge, that in fact there was something dangerous there in the condition of the work, then it would have been his duty to take reasonable care, by giving notice, if notice was necessary, if the danger itself was not apparent to every body, or by adopting proper safe-guards, to protect people from injury."

We think that, as applied to this case, the exception to the rule was proper. The way to the privy was common to the fifty-two tenants of the defendant. Any obstruction or excavation in that way gave the tenants injured thereby a ground of complaint analagous to the right that the public has to complain of an obstruction or excavation in the highway if injured thereby. Such an obstruction or excavation as that in the case at bar, bears close resemblance to a nuisance. In the case of Clark v. Fry, 8 Ohio St. 358, the court exempted an owner from liability for the negligence of an independent contractor engaged in making a sewer connection from the house to the sewer in the middle of the street. The negligence consisting in leaving the trench unguarded. But the court state this qualification of the rule applied in that case: "Where, however, the owner of real estate willfully suffers a nuisance to be created or to be continued by another on or adjacent to his premises, in the prosecution of a business for his benefit, when he has the power to prevent or abate the nuisance, he would be liable for an injury resulting therefrom to a third person." We think that the qualification so stated justifies the exception complained of in the charge. If the landlord knew of the existence of the hole, and that it was dangerous, and took no steps to protect persons entitled to be at or near the place of danger, he may clearly be said to "willfully allow to be continued a nuisance."

The rule freeing the owner from liability for the negligence of an independent contractor, is subject to the exception, that where a person has a duty to perform, he can not escape the liability for negligence in the performance of that duty by shifting its performance upon an independent contractor. See Kuhn v. Remmler, 9 Dec. Re 693; Canal Elevator Co. v. City, 9 Dec. Re., 774. This exception is very generally admitted in cases where a municipal corporation lets out to an independent con-

tractor the construction of some work in the streets by which the public will be exposed to danger, unless the work is properly guarded. See Circleville v. Neuding, 41 Ohio St., 465. It seems to us that the case at bar is precisely analogous to such cases. The tenants were lawfully entitled to use the approaches to the privy. The evidence shows that they shared this right with each other and with the landlord. The landlord had, and exercised control over the yard and approaches to the privy, subject to the right of use by the tenants. Under these circumstances, the ordinary rule as between the tenant and the landlord, that the tenant shall make repairs, is changed, and the obligation to keep in repair such common way, as controlled by the landlord, is upon the landlord. See Taylor on Landlord and Tenant, 175 *a*; Watkyns v. Goodale, 138 Mass., 533, and Looney v. McLean, 129 Mass., 33. We are aware that this principle has been disputed in the case of Purcell v. English, 86 Ind., 34; but as there is no adjudication by our own Supreme Court upon this point, we follow the Massachusetts authority as being in accordance with reason and justice. It should be said that the Massachusetts rule has been adopted by statute in several of the states. The landlord, therefore, had a duty imposed upon him of keeping this common way in repair, and could not avoid that duty by shifting it on to an independent contractor, who, for purposes of the landlord, was given by him control over a part of this common way.

In some cases the question of the liability of a person charged with a duty like that at bar, has been made to turn upon the fact whether in the contract with the independent contractor, the person did or did not provide for the exercise by the contractor of that care and the use by him of those precautions which it was the duty of the person to provide for. Sulzbacher v. Dickie, 51 Howard's Practice Reports, 500. In this case, a landlord in New York entered upon the premises leased, for the purpose of putting on a new roof. He let the work to an independent contractor, who failed to use precautions over night against the leaking of rain. The goods of a subtenant were injured by rain, and he was allowed to recover from the landlord, in spite of the independent contract, because the latter had not inserted in the contract a provision that the contractor should protect against the leaking from rain. Without approving this statement of the rule, we call attention to the fact that in the contract at bar there was no provision that the contractor should use any precaution to prevent injury to the fifty-two tenants who were constantly using the yard and common way, where it was intended by the contract that excavations should be made, and that even under the limitations given in the New York case cited above, the liability of the landlord might still be asserted at bar. See also Water Co. v. Ware, 16 Wall. 566.

Counsel for plaintiff in error also urge that the verdict was against the weight of evidence. While the evidence was conflicting, there was ample to support the verdict under the law as given by the court. We do not think that for this reason the verdict should be disturbed.

Judgment affirmed.

PECK and MOORE, JJ. concur.

Albert Bettinger, for plaintiff in error.

Richard Werner and M. W. Conway, for defendant.

## 119 ATTORNEY FEES.

[Superior Court of Cincinnati, General Term, 1887.]

†E. W. KITTREDGE v. I. J. MILLER AND GUSTAVE TAFEL, TRUSTEES.

1. A lawyer rendering legal services to an assignee for the benefit of creditors can hold such assignee personally liable therefor, but has no right of action against the estate even if the services are such that if the assignee pays for them he will be entitled to a credit for such payment in his account as assignee in the probate court.
2. It seems that if the services are in the conduct of litigation resulting in the recovery of money or property for the estate, and the assignee is insolvent, a court of equity will charge upon such fruits of the litigation in the hands of the assignee or his successors an equitable lien for the value of such services in favor of the person rendering them.

ON RESERVATION from Special Term.

TAFT, J.

This case was reserved from special term on demurrer to the petition. Plaintiff avers that John B. Mannix was qualified and acted as statutory assignee of John B. Purcell, for the benefit of creditors, from March 11, 1879, until January 4, 1886, when Mannix resigned, and the defendants, I. J. Miller, and Gustave Tafel, were appointed and qualified as trustees, and came into possession of the estate; that on April 15, 1882, plaintiff, as a member of the law firm of Stallo & Kittredge, was employed by Mannix, assignee, to assist in the trial of a certain cause then pending in the courts of this county, wherein Mannix, as such assignee, was plaintiff, and divers and sundry persons were defendants, whereby and thereafter during his management of said trust, the said assignee, for and on behalf of said estate, became indebted in $5,500.00 to the plaintiff for work rendered by him as attorney in and about prosecuting said action in the common pleas court, the district court and the Supreme Court of Ohio, and performing other business as such attorney, and in consulting and advising said assignee, for and in the interest of said estate; that he was discharged from further employment by the defendants on or about January 15, 1887; that the services so rendered, were necessary in the administration of the trust, and were reasonably worth the sum above stated; that $500 of the sum had been paid; that due demand for the balance has been made and refused, and that the firm claim has been assigned to plaintiff. Plaintiff prays judgment against the defendant for $5,000, with interest from January 15, 1887, and that they be compelled to allow and pay the same out of the estate in their hands, and for all proper relief. The question presented by the demurrer is, whether an attorney rendering services to an assignee for the benefit of creditors, can recover a judgment for such services against the trustees succeeding such assignee, to be satisfied out of the trust estate. The duties imposed by the statute upon assignees are such as are quite likely to render necessary the employment of counsel. Authority to employ counsel in the discharge of their duties, if necessary, is undoubtedly implied by several sections of the statute as to insolvent debtors. See 82 Ohio L., 14, and 83 Ohio L., 236. Section 6357 provides that the assignee

† This judgment was affirmed by the Supreme Court without report, January 10, 1893. Spear, J., dissented. The case is cited with approval in Hurd v. Railway Co. 6 S. & C. P. Dec., 545, 546.

may be allowed by the probate court, in the settlement of his accounts, attorneys' fees necessary for the proper administration of his trust, but not unless a bill of items is filed showing such attorney's fees, together with the affidavits of the assignee, and the attorney performing the service, that the service was necessary, that the amount charged was reasonable, that they were performed under the direction of the assignee, and that the full amount has been paid to the party performing the service. It is, therefore, perfectly plain, that if the sum of $5,500.00 had been paid plaintiff by Mannix, before his resignation, and the allegations of the petition are true as admitted by the demurrer, the probate court would have been required under section 6357 to allow Mannix a credit in his account with the estate, for such an expenditure. But nowhere in the statutes is there any mode provided by which the attorney rendering the services may apply to the probate court for payment out of the estate.

The question therefore arises, is this a claim which makes plaintiff a creditor of the estate so that he can bring his action in this court against the trustees in their representative capacity and recover a judgment to be made out of the trust estate. The question is to be determined from the common law, for nothing in the statute answers it. Assignees for the benefit of creditors and administrators, have similar duties in regard to their estates, and for the purpose of this discussion, may be treated as occupying exactly the same position. Kilbourne v. Fay, 29 O. S., 264. Our Supreme Court, in Lucht, adm'r, v. Behrens, 28 O. S., 229, 237, recognizes and adopts the principle that contracts of executors, although made in the interest and for the benefit of the estate they represent, if upon a new and independent consideration, as for services rendered, goods or property sold and delivered, or other consideration moving between the promisee and the executors as promisors, are the personal contracts of the executors and do not bind the estate, notwithstanding the services rendered, or goods, or property furnished, or other consideration moving from the promisee, are such that the executors could properly have paid for the same from the assets and been allowed for the expenditure in the settlement of their accounts. The principle is, that an executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator.

The principle thus laid down, would make plaintiff at bar the personal creditor of Mannix, and in no sense the creditor of the estate. When plaintiff performed the service, by law he must have looked personally to Mannix for his pay; and because Mannix, if he paid him, might have reimbursed himself from the estate, does not establish any privity of contract between plaintiff and the estate, because Mannix had no authority to contract for the estate.

But it is said that there are exceptions to the rule as stated above, and that in some cases an executor or assignee has been held in his representative character for debts arising after the death of the intestate, and by the act of the executor or assignee. This is true. The creditor in these exceptional cases has an election to hold the executor personally or the estate. The Cincinnati Ice Co. v. Pfau, 6 Dec. Re., 969, is an exception. That was where assignees had been authorized to continue the business of their assignor, and plaintiff had furnished ice for use in that business. The plaintiff was allowed to recover of the assignee in

his representative character for the value of the ice. This was on the principle stated in the leading case of *Ex parte* Garland, 10 Vesey Jr., 109, by Lord Chancellor Eldon, that where persons render service or furnish goods to a business, they have something very like a lien on what is embarked in the trade.

The case of Conger, adm'r, v. Atwood, 28 Ohio St., 134, presents another exception to the general rule. That was where an administrator had collected rents from the mansion house which, belonged to the widow of his intestate and had used them to pay debts of the estate. The widow was allowed to recover judgment to be made out of the estate, on the ground that the rents so applied had become assets of the intestate, and that by payment of the debts, the widow had succeeded to the rights of the creditors whose debts were paid. But in the case of Lucht, adm'r, v. Behrens, in the same volume, our Supreme Court in commenting on Conger v. Atwood, say that in making that exception to the general rule as to the non-liability of the estate for the contracts of its personal representative, they have gone far enough, which seems to be an intimation that they will go no further. If they would go so far as to make an exception in a matter of a claim for services rendered the representative in the administration of his trust, then the rule would be swallowed up in the exceptions, for there would be nothing else left to which it could apply.

The general principle given above, and stated in Lucht, adm'r., v. Behrens, is quoted from the case of Austin v. Munro, 47 N. Y., 360, where it was applied, and presumably from its use by our Supreme Court as an authority, correctly applied. That was a case where an attorney sought to hold executors in their representative capacity for services rendered to said executors in litigation for the estate, and judgment was given for defendants on demurrer to the petition. See also Devane v. Royal, 7 Jones (Law), 426; Lovell v. Field, 5 Vt., 221; Fitzhugh v. Fitzhugh, 11 Gratt, 300; Luscomb v. Bullard, 5 Gray., 404; Taylor v. Mygatt, 26 Conn., 184, in each of which the principle has been applied to claims for services rendered to the trustee or administrator. The principle has been stated to be applicable to such claims by this court in Hallam & Hallam v. Maxwell & Jordan, 2 Sup. Ct. Rep., 384, although the question there was as to the personal liability of the assignees, and the remarks of the judge deciding the case, which are in point here, were not necessary to its decision. There are two states, Alabama and Texas, where the person rendering the service is allowed to charge the estate with the value of services rendered to the administrator. See Coopwood v. Wallace, 12 Alabama, 790, and Price v. McIvor, 25 Texas, 769. In the first case, one of the two administrators had left the state, and the other was insolvent. Neither non-residence nor insolvency of the assignee is alleged at bar. In the second case, the court holds by virtue of the statute of Texas that the administrator may either pay reasonable fees out of the assets or contract a debt for them, and for either the payment or the debt he may be allowed in his account. Under our statute he is allowed only for payments of cash and not for his debts, and so it was at common law. Even if these cases are directly applicable at bar the weight of authority is against them. They are based on the ground, that as the state is ultimately liable for the fees, in equity, circuity of action may be avoided by a direct action of the attorney against the estate. The premise that the estate is ultimately liable is, we think, not supported by authority elsewhere. We can not see, if the

contract of the assignee does not bind the estate, how the estate can be charged in equity unless by the assertion of a right in the nature of a lien. If there are no funds in the hands of the assignee, and he advances money to pay expenses, he would have a lien on the fund afterwards acquired for his advances, but that is only when he has no assets of the estate to use. In such a case, we presume, he might by agreement with the person rendering service to him, assign his lien on the assets to secure payment for the services and thus give an equitable right to such person to hold the estate. See New v. Nichol, 73 N. Y., 131; Noyes v. Blakeman, 6 N. Y., 567. But no such case is cited in the petition before us.

In Field v. Wilbur, 49 Vt., 157, the defendant Wilbur, residing in Georgia, held in trust a small farm in Vermont. He employed the plaintiff to build a barn on this farm. The bill was brought to charge the property with the cost of building the barn. The court say: "Usually third persons, making such improvements at the request of the trustee, are confined to their personal security against the trustee. There are exceptions to this rule. When the trustee resides abroad, as in this case, and has no property that the orators can reach, and when the trust property has been enhanced in value, and made more productive, by the expenditure and labor of the orators thereon, we think the orators have the right to have their improvements on the property made a charge on the property and its income."

And the court decreed that the trust property be charged, not for the cost of the barn, but "only for such sum as the trust property has been enhanced in value by the erection of the barn."

So, at bar, if the allegation had been that the assignee was insolvent, and the trustees had now in their hands the fruits of the litigation, that to the extent of them the assets were enhanced through the services of the plaintiff, a court of equity might assist him to charge upon such fruits an equitable lien for the services rendered by him in obtaining them. Such a form of action is suggested by the court in Austin v. Munro, 47 N. Y., 360, cited above and would seem to be in accord with the spirit of the remarks by Judge Okey in Diehl v. Friester, 37 Ohio St., 473, 477. No such case, however, is presented on the petition, and it is not necessary for us to consider it until it arises. For the reasons given, we hold that the petition does not state a cause of action against defendants, and that the demurrer must be sustained.

J. W. Warrington and Joseph Wilby, for plaintiff.

I. J. Miller, for defendants.

## 121 WRITTEN OPINION OF COURT—CUSTODY OF CHILDREN.

[Hamilton District Court, December, 1884.]

Buchwalter, Connor and Maxwell, JJ.

†WILLIAM F. AND LIZZIE M. GRAY V. HESTER FIELD.

1. The provisions of sec. 5205, Rev. Stat., requiring the court, on request, to state in writing the conclusions of facts found, separately from the conclusions of law, are not satisfied by the signing and filing of a written opinion of the court, which does not state the conclusions of all the vital facts, necessarily involved in a determination of the issues, separately from the conclusions of law; but when a bill of exceptions is taken of the whole proceeding, and such opinion is attached thereto as an exhibit, the reviewing court on examination of such record will not reverse the judgment for such error, unless it appear that plaintiff in error was prejudiced by such omission to comply with said statute, citing 38 Ohio St., 87.
2. The father and mother living together, are jointly entitled to the custody of their child; when living separate the father has a *prima facie* right thereto, but if he abandon the mother and child, then the mother has the custody to the exclusion of the father, and she has the power to make a valid agreement, either verbal or written, binding on both parents, parting with the parental right of custody of such child, whether binding on the child or not; and if the child be adopted according to the provisions of sec, 3137, Rev. Stat., such mother will be bound thereby.
3. That under such an agreement, either verbal or written, by the parent, with actual custody given thereunder to a third party, without statutory adoption, neither party has a reserved right of revocation on their own behalf; on a proper application, however, the court will have a regard for the natural rights of the parents, the rights of the foster parents arising out of their contract and actual custody, but will look chiefly to the best interests of the child, and if it be of years of discretion, will consult its wishes, in determining its future custody.

ERROR to the Court of Common Pleas of Hamilton county.

BUCHWALTER, J.

This cause is here upon proceeding in error to review the order of the court of common pleas in an action by the mother, Hester Field, to recover the custody of her minor child, Hester Field, by writ of *habeas corpus*, issued, with summons, to Wm. F. Gray and Lizzie M. Gray, his wife, in custody of the child.

The trial court upon the hearing found that said child was illegally restrained by said Wm. F. and Lizzie M. Gray, and that said Hester Field's mother was wrongfully deprived of her custody, and the court ordered that the said child be forthwith restored to the custody of said mother, with judgment for costs.

The respondents, Gray and wife, filed their motion for a finding of facts separate from the conclusions of law, and also filed a motion for a new trial on the day of judgment. A bill of exceptions was also taken and made part of the record, covering the testimony and the whole proceedings; the opinion of the court was attached as an exhibit, and made part thereof. No other findings of fact were made than as appeared in the written opinion of the trial judge, to which exception was taken by

† This decision of the district court reverses the decision of Judge Robertson in the Hamilton county common pleas, published in 9 Dec. Re., 286. Judge Johnston, on the new trial in the common pleas, ordered by the district court here, awarded the custody of the children to Mr. and Mrs. Gray.

counsel for Gray and wife, for that it was no such a finding of facts as required by the statute.

The child was not delivered in open court; Gray and wife filed their petition in error in this court, a *supersedeas* bond was given and the execution of the judgment was stayed. The child, therefore, has remained in the custody of her foster parents pending the original trial and this hearing.

By sec. 5205, Rev. Stat., it is the duty of the trial court, on the request of either party, to state in writing the conclusions of fact found, separately from the conclusions of law. We hold, that while it is true that the written opinion of a trial court may be a compliance with the statute, yet on examination of the opinion in question, we are satisfied that it does not state the conclusions of all the vital facts necessarily involved in the determination of the issues, separately from the conclusions of law, so as to entitle either party to raise solely the issues of law upon the record, without taking a bill of exceptions of the testimony.

Had the plaintiffs in error relied upon this exception, and prosecuted error upon the record of so much of the proceedings as would present that issue, we are of opinion, we would necessarily have had to reverse the judgment; but they demanded a complete bill of exceptions of all the testimony, and therefore it requires an examination of the whole record to determine if respondents have been prejudiced by this error; for if not prejudiced, such error is not cause of reversal. See 38 Ohio St., 87, Oxford Township v. Columbia. On an examination of the record, we are in doubt if the error is prejudicial, and with the view we entertain upon other vital issues of law involved herein, and of more concern to the parties in any further proceedings, we deem it unnecessary to determine the question.

The child, Hester Field, was born February 5, 1877. About twenty-one months thereafter, a second child, Jennie, was born, but before its birth, the father deserted the mother and child, Hester, and thereafter continued to abandon them at the time of this trial. The mother and children lived with her widowed mother, keeping boarders in her house in this city. In March, 1880, the grandmother, mother and both children moved to East Liverpool, this state.

After the birth of Jennie, little Hester was living most of the time with Mr. and Mrs. Gray, in this city, till her mother moved to East Liverpool.

Mrs. Gray and Mrs. Field were school friends, and when the latter was deserted by her husband in her second confinement, Mrs. Gray frequently called, and began keeping Hester by day time, and finally by both day and night.

When the mother moved from the city, Mrs. Gray reluctantly gave up the child, and then upon the promise of frequent visits.

About October 1, 1880, Mrs. Field came to the city with both children, with the purpose to find permanent homes for them. She finally left Jennie at the Children's Home, of this city, with authority to bind it out till of age, making the usual affidavit, and assigning her poverty as the reason for her giving away the custody of her baby, and thereupon gave back Hester to Mrs. Gray to raise, to adopt, baptize and change name. The gift or transfer was verbal, but it appears that Mr. Gray, an attorney, had doubt of her power to give away the child, and Mrs. Field had agreed that upon the expiration of three years she would apply for divorce for willful absence, and with an order of the

court awarding to her the custody of the child, would thereupon give a formal agreement of transfer of custody of the child, and assent to its adoption. No divorce has been procured. The husband has never asserted a right of custody of, or control over the child since his abandonment.

The mother, for some years has worked in a pottery, and is now earning wages sufficient to support herself and child. The principal reason assigned for giving away both children was, that while the mother was absent during the day at work in the pottery, the grandmother became annoyed by the noise of the children, and their care was too much of a burden on her. The mother, soon after leaving her baby Jennie at the Children's Home, had such remorse that she returned, took it back home and kept it until its death in November, 1883. On January 28, 1884, Mrs. Field, by letter, made her first intimation of reclaiming the child, Hester, or "Celia," her baptismal name, as recognized by the mother in her letters.

The grandmother has now about the same property in value as owned when Hester was given to respondents. Mr. and Mrs. Gray have a pleasant, well-provided home, in this city; they are childless; they have treated Hester and care for her as if their own; a tender affection has grown up between them and the child; he is a lawyer at this bar in competent circumstances.

These facts appear by the bill of exceptions, and are substantially found as conclusions of fact in the opinion of the trial court.

The trial court as conclusion of law held:

1st. That the mother did not have legal capacity to make the contract in question.

2d. That the contract was revocable at the option of the mother, she appearing to be a suitable person to have the child's custody.

By the common law of England in early times, the father had such superior and primary right over that of the mother, that however vile his character, it was impossible to deprive him of the custody of his infant child in a contest with the mother. Section 184, Tyler on Infancy and Coverture.

But the common law doctrine has been greatly modified, both in England and the United States, by legislation, and the authorities under such legislation show a steady growth in the rights of the mother and her powers in the case and custody of her children.

When living together, father and mother are jointly entitled to the custody; when living separate the father has, *prima facie*, the right of custody; but when the infant is of tender years, the court will award custody to the mother, and in all controversies between father and mother as to the custody of minor children, the court will look to the best interests of the child, and even disregard the legal right of either parent, and if need be of both parents; the care and custody of minors is frequently given to the mother and an order made against the father for its support. 4 Ohio St., 615, Gishwiler et al. v. Dodez, 32 Ohio St., 299, Clark v. Bayer. If the father agrees that the mother may have the custody of a minor child, he cannot as of legal right reassert his custody as against the mother; the court will consider the rights in law and by contract of its parents, but above all the rights and interests of the child. 6 Greenleaf, 462-3, State v. Smith; see also, 8 Paige Ch. 46; 25 Wend., 64; Mereim v. Barry.

If the father abandon the mother and child, then the mother has the exclusive right of custody, and she may make a valid agreement giving away and transferring her right of custody of such child. In 10 Allen (Mass.), 170, Dumain and wife v. Gwynne, the father had been sentenced for a term of three years to the state penitentiary, for the crime of burglary, and the wife thus abandoned made an agreement parting with her right and custody of the child, and the court held the agreement and the adoption under it valid, as binding on both parents, and not revocable.

Upon the facts in proof in this case and stated in the opinion of the court, we are of opinion that the father, by his abandonment of the child, Hester Field, and its mother, forfeited his right of custody of the child, and the mother then having its control and actual custody, succeeded to its legal custody; that the continued abandonment by the father up to the day of the trial of this cause but strengthened such title in the mother and her transferees as against him.

It is manifest that were the same facts given in proof in an action between the father and mother, considering the child's tender years and his abandonment, the court in good conscience would award its custody to the mother.

The tendency of the legislation in this state has been to curtail the common law rights and powers of the parents over their children, and giving to the state, in certain contingencies, the right to assume their custody; at the same time legislation has enlarged the comparative powers of the mother.

By sec. 3111, Rev. Stat., the wife when deserted by the husband, or when he from intemperance or other cause, becomes incapacitated, or neglects to provide for his family, may contract in her own name, for her own and her minor children's labor, and may in her name sue for and collect her and their earnings, and by sec. 3137, Rev. Stat., where an application is made for the adoption of a minor child, the written consent of each of the living parents is required to be given, unless he or she is hopelessly insane, intemperate, or has abandoned such child.

We are clearly of opinion that the mother of Hester Field, minor, under the facts in proof, had the power to make the contract in question with Mr. and Mrs. Gray, and the mother was authorized to give a written consent, and that Gray and wife could on their application with such consent from the mother have procured a valid statutory adoption of the child. It appears that it was the purpose of all parties to the agreement to procure letters of adoption as soon as the mother could legally give consent, it being erroneously considered by Mr. Gray that it was necessary for Mrs. Field, on the termination of the three years abandonment by her husband, to procure a divorce, and an order from the court awarding the custody of the child to her.

The agreement, as clearly proven and found as matter of fact by the trial court, giving the child to Mr. and Mrs. Gray, to raise till of age as their own, with right of baptism, and change of name, though verbal was valid, and in our opinion of binding obligation upon the child's parents, and Mr. and Mrs. Gray.

The authorities are numerous where transfers of the custody of children have been made under verbal agreements and held to be valid as between the contracting parties. 54 Geo. 10, James v. Gleghorn; 59 Geo., 555, Bently v. Terry; 1 Legal Gaz. Rep. (Pa.), 65, Terry v. Dougherty; 4 Brewster, 409, Goerlitz v. Barnitz; 12 Howard, Pr., 338. In the

matter of Jos. Murphy; 61 Iowa 199, Bonnett v. Bonnett; 1 Jacobs, 244 (English), Lyons v. Blinkin.

But see contra: 44 N. H., 321, Hodgdon v. Libby; 1 Halstead, Ch., 454, Mayne v. Baldwin; 1 Harr., 419, State v. Clover; 16 Eng. L. & E., 224, Regina v. Smith.

We have carefully considered the numerous authorities as to the effect of contracts, either verbal or written, not made in strict conformity with the statute, either of apprenticeship or adoption, made for the purpose of transferring the custody ot minors from parents to third parties; and while we find conflict of authority as to the right of revocation by the parent, we are of opinion that clearly the weight of authority is that such agreement with actual custody given under it, is binding upon the *adult* parties to it; that there is no legal right of revocation reserved in the parent. That against the will of the foster parent, he can have revocation of his contract only by the decree of the court, and that it is not enough to prove that such parent is a suitable person to have custody of the child; he must also establish to the satisfaction of the court, that the best interests of the child require the revocation of the contract; for while the court should regard the natural rights of parents, and the rights of foster parents growing out of contract, and actual custody, yet it will look chiefly to the best interests of the child. 32 Ohio St., 299, Clark v. Bayer; 10 Allen's R. (Mass.), 270, Dumain v. Gwynne; 5 Gray's R. (Mass.), 535, Curtis v. Curtis; 54 Geo. 10, Janes v. Cleghorn; 59 Geo., 555, Bently v. Terry; 45 N. H., 15 State ex rel. Jewell v. Barrett and wife; 45 Iowa, 435, Drumb v. Keen and wife; 61 Iowa, 199, Bonnett v. Bonnett; 9 Barb., 309, Fowler v. Hallenbeck; 57 Barb., 291 (S. C. 43 N. Y., 40), People v. Gates; 59 Ind., 369, Kerwin v. Wright; 4 Brewster, 409, Goerlitz v. Barnitz; 1 Phia. 194, Gilkeson v. Gilkeson; 9 Phia., 571, Barnes v. Orphan Asylum; I Leg. Gaz. R. (Pa.), 63; ex rel. Terry v. Daugherty; 6 Greenl., 463; State v. Smith; 14 Law Rep., 269, Pool v. Gott; 8 Johns., 328, McDowle's case; 13 Johns., 419, In re Waldron; 12 How. pr, 513, In re Jos. Murphy; 19 N. Westn. R. 617 (1884, Neb.), Sturtevant v. Havens; Tyler on Infancy and Cov., p. 283; 19 Wis., 247, In re Stillman Goodnough, Jr.; 42 Mich., 509, Corrie v. Corrie.

And in 77 Mo., 565, In re Scarritt, minor, while the court announces the principle of the parental right of revocation, yet find the right of custody in the father on the facts in proof, viz.: that there was no contract of surrender of the child, and its best interests will be conserved by giving it to the father.

Also, the 26 Kan., 650, Chapsky v. Wood, states the same principle, yet on the facts—looking to the best interests of the child, the court refused to revoke the agreement or to return the child to the father, but left it with its aunt.

But to contra, see 44 N. H., 321, State v. Libby, 34 Conn., 259; 1 Halstead Chy., 454, Wayne v. Baldwin; 1 Harr., 419, State v. Clover.

We think the court erred in its application of the law to the facts in proof. First, in holding that the mother had no legal capacity to make the contract in question, and secondly, in holding that such contract was revocable, at the option of the mother, if she proved herself at the time of the trial to be a suitable person to have the custody of the child.

We think the correct rule of law on the last proposition to be that such contract, with custody for years acquired thereunder, is binding upon the *adult* parties thereto; that neither party has a reserved right of revocation, on his or her behalf, though the parent may apply on

behalf of the child for an order of court as to its custody; but the court will not revoke the contract if the child be under years of discretion (generally at the age of fourteen years), unless it affirmatively appears to the court to be for the best interests of the child, nor against the wishes of the child if it has reached years of discretion. If the transfer of the child has been made in accordance with the statute providing therefor, then it is binding on the child as well as the parent, and can be set aside solely for good cause as may be provided by law.

The above rule of law is founded on authority and well grounded in wisdom looking to the public good; it has been the incentive and security to charity in establishing and maintaining homes for children and to foster parentage in giving comfortable and affectionate homes for them who either through misfortune or lack of natural affection upon the part of parents, would otherwise be deprived of the care, education, and affectionate surroundings, to which helpless childhood is entitled, and which the interest of the state demand.

Nor do we see in this case any reason for deviation from the rule thus sustained by the weight of authority.

The mother asks that she may have the comfort of her child's affection and society, and a daughter's care in her declining years; but if she herself did not make sacrifice for it in its helpless babyhood—ought we now (if it in fact be against the best interests of the child), order it to make sacrifice for the happiness of the mother?

Shall we treat the child as shuttle-cock weaving affection here and there with no permanency any where? For when it arrives at years of discretion, it may then select its own home.

The trial court not having stated specifically as a conclusion of fact that the best interests of the child would be subserved by giving its custody again to the mother, nor found facts from which we can with certainty infer such conclusion, and from the proof in the record before us, we can not assume that the court did so find as matter of fact, and this court being of opinion that the vital conclusions of law, as stated in the record, were erroneous, therefore the judgment will be reversed with costs.

Counsel for respondents has asked us in the event of a reversal of the judgment that we proceed to render such judgment or decree as should have been made on the facts.

The facts, however, were not all found and stated separately from the conclusions of law. The vital fact, "what is for the best interests of the child," was not found by the court, at least not stated in what purports to be the conclusions of facts in the opinion of the court. The nearest approach to it in these words: "The child has been most tenderly and lovingly cared for by Mr. and Mrs. Gray; every advantage offered by social position and affluent circumstances prompted by the most generous impulses has been bestowed upon the child, and would no doubt continue;" and again, "they regard the child as their own, and everything the most devoted parents could have done, they did for the child's best interests."

Some facts are stated through the opinion, as to the conduct of the mother, which would tend to show either unfortunate circumstances which the mother could not control, or lack of affection in her care for her children during their babyhood, and "on the other hand," the court states: "It appears that Mrs. Field is now fairly able to provide for the

child's wants and education, and is in every regard a suitable and proper person to be entrusted with the education and care of her child."

From this it can not be said that the court stated as a conclusion of fact, whether its best interests were to be subserved by giving the child to its mother or leaving it with its foster parents. Looking to the bill of exceptions we find it to be a controverted question.

This is peculiarly a question for the discretion of the trial court, and not the reviewing court. See 68 Geo., 650, Smith v. Bragg; 59 Geo., 555, Bently v. Terry, and Hurd on Habeas Corpus, 467. And a reviewing court reversing a judgment can not make up a new one from the evidence. 25 Ohio St., 360–9, Emery's Sons v. Irving Bank; 10 Law Bull., 109, Cavanaugh v. Jenkins.

There must either be finding of facts, or no material conflict in the evidence, and where but for error in the application of the law to the facts, the decree or judgment would have been for plaintiff in error, then the reviewing court may not only reverse, but render such decree or judgmentas is required from the facts. 17 Ohio St., 471, Stein v. Steamboat, and 40 Ohio St., 339, Yeoman et al. v. Laslie.

The judgment will be reversed, and cause remanded for further proceedings.

Chas. W. Baker, for plaintiff in error.

W. T. Porter, for defendant in error.

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## 137 REFORMATION OF CONVEYANCE.

[Superior Court of Cincinnati, General Term, 1887.]

†ROTHSCHILD v. BELL.

1. The party seeking to reform a conveyance or written contract, for the sale of land, is bound to prove beyond a reasonable doubt, that there was an agreement between the parties, different from that which was embodied in the instrument.
2. Where a lot is sold as being forty-five feet wide, by an instrument containing no reference to existing monuments, and it turns out that the lot covered by the conveyance which both parties supposed to contain forty-five feet, was only forty-four and one-half feet in width, and the seller owns the adjoining property, he cannot be permitted to reform the conveyance so as to limit it to the smaller quantity.

RESERVED on the pleadings and evidence.

PECK, J.

This is an action to enjoin Bell from taking possession of part of a lot of ground, which he claims to have bought from the plaintiff. Rothschild was the holder, by perpetual lease from one Kinker, of a lot of ground known as lot 7, fronting on the east side of Main street, and described as being forty-five feet front and one hundred and thirty feet deep next north of Whetstone alley. Rothschild subsequently sold this lease to Bell and conveyed it to him by a deed of general warranty. After the conveyance was made, the ground was measured, and it was

†This judgment was affirmed by the Supreme Court, without report, January 27, 1891. Minshall J., dissented.

discovered that instead of there being forty-five feet between the alley and the building next north of the alley, there was only forty-four feet and a half. Rothschild, while he was the owner of this lease from Kinker, had also acquired lot 8, which lay next north, and on which is the wall which extends six inches into what was lot 7, as originally laid out, and owned that property in fee at the time he made this conveyance to Bell.

It is claimed on behalf of Rothschild, that what was actually conveyed, and the real intention of the parties, was to convey the ground that lay between the wall and alley.

It is claimed on the other side that the property bought was forty-five feet by one hundred and thirty; that Mr. Rothschild has that much ground there to be conveyed, and that Mr. Bell is therefore entitled to what his deed calls for.

In order to maintain the claim of the plaintiff, it became necessary to so amend the pleadings as to pray for a reformation of the conveyance; for the conveyance plainly, on the face of it, gave Bell the title and right of possession of the property, and we are therefore asked to reform the deed.

Before the deed was made there was a contract for the sale of the property signed by the parties, and it contains the same description, a lot forty-five feet in front. No reference to any monument is to be found in any of the conveyances, or in the contract, unless we call the street and alley monuments; and there is no reference to the wall on the north or to any monument indicating the northern boundary of the property. The reformation, if it is to be made, must extend not only to the deed, but to the written contract which was entered into; for the description, as I have said, is the same in both.

The plaintiff then undertakes to establish by parol testimony that he is entitled to a reformation. The rule is well established—and counsel for plaintiff in another case recently and forcibly argued to the satisfaction of the court, that, in order to entitle a party to reformation of an instrument of this sort, the proof must establish, beyond a reasonable doubt, that the instrument is, in effect, other than the agreement actually made.

Now, in this case, there is no testimony to show that there was an agreement as to the lot between the wall and the alley. The parties that sold the property have testified that they thought there were forty-five feet of ground between the wall and alley; but that they contracted only for that, nobody states. Bell testifies that he bought forty-five feet of ground by one hundred and thirty, and that he had no other agreement with Rothschild than that which was embodied in the written contract; and the agent who made the sale, testifies that the statement he made to Bell was that the lot was forty-five feet in width. Rothschild testifies that he thought there were forty-five feet there at the time that he sold, and that the forty-five feet lay between the wall and the alley. If there was a mutual mistake as to the amount of land which lay between the wall and the alley, it does not necessarily show that the parties agreed upon that as the property conveyed. The consideration would perhaps have been quite different if the parties had agreed upon that as the property to be conveyed, and understood the quantity of ground so situated.

The basis of a claim for reformation is that the parties did agree upon something not correctly set forth in the paper signed by them.

The mistake above mentioned does not of itself show that such an agreement was made as is claimed, and there is an utter absence of any other evidence to support the claim. In this particular the case differs from that of Fuchs v. Treat, 4 Wis., 440, relied on by the plaintiff.

It is urged that Kinker, who made the lease, did not own lot 8 on the north as Rothschild now does, and that when he made the lease to Rothschild he could only have leased to him that lot which lay between the wall and the alley, because that was all he had. But Kinker's lease, whatever he had, was the same on its face as the deed to Bell; it describes the property in the same way. Whatever Kinker had at that time, the conveyance on its face would show to Mr. Bell or any other person examining the title that he claimed to have forty-five feet; so we cannot perceive that the plaintiff gains anything by reference to that conveyance.

There was much discussion by counsel as to the claim of plaintiff to have the deed reformed so as to substitute a covenant of special warranty for the general warranty now contained in it. The original contract called for a deed of special warranty; but there is evidence to show that plaintiff assented to the substitution of the covenant of general warranty, and such being the case, we cannot say that the deed should be reformed in that respect. In the view of the law applicable to the case taken by us, it would not affect the result if a special were substituted for the general warranty. The question here is not one depending upon covenant or estoppel, but goes to the subject-matter of the contract. Whatever was sold, that the defendant is entitled to have, and no more, whether there was or was not a warranty of any sort.

The petition is dismissed.

FORCE and HARMON, JJ., concur.

Long, Avery, Kramer & Kramer, for plaintiff.

Oliver B. Jones and Cahill, for defendant.

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139 **PARTERSHIPS.**

[Superior Court of Cincinnati, General Term, 1887.]

FISHER v. LANG.

Real property purchased with partnership funds and used for partnership purposes, is thereby equitably converted into personalty, and continues to be such after the death of one of the partners and the discontinuance of the business, and until there has been a complete settlement of the affairs of the firm and final division of assets.

RESERVED on the pleadings and evidence.

PECK, J.

This is a petition for partition. The plaintiff alleges that she is the daughter of Herman Wanner, deceased, one of his devisees, and as such entitled to a sixth interest in various pieces of property described in the petition, for which she prays partition; making the other devisees of Wanner defendants, and also Julius Lang.

The answer of Mr. Lang sets up that he and Herman Wanner, deceased, were for many years in partnership as tanners, operating a tan-

nery in this city, and that the property was purchased with partnership funds for partnership purposes, and was so used for many years prior to the death of Mr. Wanner, and has continued to be so used since his death; that it constitutes the property on which the tannery is situated.

Mr. Wanner left a will, by which it was provided that the business should be continued for a period of five years after his death, his son Julius to take his place in supervising his interest in the business, and that at the end of five years his property should be distributed among his children. The five years expired; and then there was a statement made and an account taken of the affairs of the firm, and Julius Wanner, son of Herman Wanner, deceased, made a written agreement with the other parties interested to purchase all the interest of the devisees in the personal property of the late firm at an appraisement to be made by appraisers to be appointed by the parties, which was done, and the business of the firm to a large extent, wound up.

It was further made a part of the agreement between Mr. Lang and Mr. Wanner and the other devisees, that the reality should be sold at public sale, at an appraisement to be agreed upon by appraisers to be appointed by the parties. This part of the agreement was never carried out, because the appraisers disagreed. Thereupon the plaintiff here filed her petition for partition of the property.

It is also asserted by the answer of Mr. Lang that the affairs of the late partnership of Lang & Wanner are not entirely settled; that there is an outstanding claim to a considerable amount against that firm.

The defendant urges as against the alleged right of partition that the real estate is partnership property; that as such it is treated in equity as personalty and would pass to the personal representatives of Wanner, deceased, and not to the heirs or devisees as realty.

It is contended by plaintiff that when there are no creditors intervening, and the firm is dissolved, the property is to be treated as realty, and that the English doctrine of conversion out and out, as it is termed does not prevail in Ohio.

There is a good deal of conflict in the authorities on this subject of conversion. In the majority of states of the Union the doctrine of conversion out and out does not prevail, but it obtains in England and in the states of Virginia and Kentucky, and as we understand the decisions, it is the law of Ohio. The case of Greene v. Greene, 1 Ohio, 535 seems to announce the doctrine of total conversion into personalty, and though there is a case in the 5 Ohio, 264, Greene v. Graham, which seems to look the other way, yet in that case it simply appears that the property was purchased with partnership funds; it does not appear to have been purchased for partnership purposes; and it was there held that the interest of the deceased partner descended to his heirs. But in a case in the 8th Ohio, 364, Sumner v. Hampson, there is a very clear opinion by Judge Lane, where a widow claimed dower in property which had been purchased and used for partnership purposes, and the court denied her claim, saying that it continued to be personalty notwithstanding the death of the partner.

In Ludlow v. Cooper, 4 Ohio St., 1, the court held the property which was purchased for partnership purposes to be converted into personalty out and out, though there is a distinction between that and ordinary cases. In that case the partnership was for the purpose of dealing in real estate, and the property was purchased for speculative purposes; and it was agreed, as a part of the partnership agreement, that the prop-

erty should be sold and the proceeds divided between the parties from time to time, and the court held that that was an agreement by which the parties bound themselves to treat the property as personalty, and the court so regarded it.

But the case that is decisive, in our judgment, is that of Rammelsberg v. Mitchell, in the 29 Ohio St., 22. There Judge McIlvaine, in a very forcible opinion, announced that the doctrine of conversion "out and out" prevailed in Ohio, and the court applied it to the case then under consideration. In that case one of the parties had taken advantage of the provision in our statutes which permits a surviving partner to purchase the assets of the late firm at an appraisement under the supervision o the probate court; and the Supreme Court held that in the appraisement the realty of the firm was to be treated as personalty, and that the assets of the firm included the realty.

So there does not seem to be any doubt that in a case of this sort where there is partnership realty purchased and used for partnership purposes, and one of the partners dies, that the property is still to be treated as personalty. The reasons given are various. There has been a good deal of discussion as to the ground of the doctrine, and it has been denied in many states of the Union. Speaking for myself,—I do not know that I should speak for the court on this point—but speaking for myself the reasoning seems to be in favor of conversion out and out for that doctrine seems better adapted to the preservation of the business and good-will of the firm, whereas if the heirs may come in the moment one of the partners dies, and apart the realty upon which the business is situated, the latter may be broken up, destroyed. At any rate, whether the reasons upon which it rests are satisfactory or not, the doctrine is established in Ohio, and for that reason, as well as for the reason that in this case there is an outstanding unsettled claim of large amount against the firm which is not disputed, that is, it is not disputed that there is such a claim, for both those reasons we all agree that the petition of the plaintiff will have to be dismissed.

Force and Harmon, JJ., concur.

Kittredge & Wilby, for plaintiff.

Von Seggern, Phares & Dewald, Kramer & Kramer and A. Bettinger for defendant.

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## 149 MARRIED WOMAN.

[Hamilton Probate Court.]

IN THE MATTER OF JOSEPHINE FAGIN, EXECUTRIX AND TRUSTEE.

**While sec. 6022 Rev. Stat., does not prevent a woman already married being appointed an administrant, yet where a *feme sole*, executrix marries, and here authority is in consequence extinguished by that section, it is not revived by her becoming a widow, without a new appointment.**

GOEBEL, J.

The respondent was, by the will of her father, named, and appointed by the probate court of this county executrix and trustee, together with her brother Peter. At the time of the death of the testator, and of her appointment, she was an unmarried woman. After she had qualified

she married; subsequently her husband died. The question arises, was her authority as executrix and trustee extinguished by her marriage? If so, did it revive on the death of her husband?

Independently of any statute, the general rule of the English law is that any person may be an executor or trustee if mentally capable of executing its duties. It seems to be conceded by authorities, in the absence of any statutory provision, that coverture in itself is no incapacity for the office of executrix, administratrix, or trustee, and a married woman may execute such trust with consent of her husband.

Nowhere in our statutes is there a provision prohibiting the appointment of a married woman as executrix, administratrix, or trustee, and respondent relies upon the common law; but it is contended on behalf of the applicants in the case, that the common law rule has been abrogated by our statute by necessary implication, and they rely upon section 6022 of the Revised Statutes, which provides that, "When an unmarried woman who is the executrix or administratrix, either alone or jointly with another person, shall marry, her husband shall not be executor or administrator in her right, but her marriage will operate as an extinguishment of her authority as executrix or administratrix; and the other executor or administrator, if there is any, may proceed in discharging the trust as if she were dead; and if there is no other executor or administrator, administration may be granted of the estate not already administered; and such administrator may proceed to discharge the trust, in like manner as if the executrix or administratrix were dead."

It was held in Stewart's Appeal, 56 Maine, 300, under a provision similar to section 6022, that when the married daughter of the testator, named in his will as sole executrix thereof, may with the consent of her husband be appointed executrix, and take upon herself and execute such trust; and that the extinguishing clause of the statute was not applicable to such a case. It was also held in the case of Barber, administrator, v. Bush, 9 Mass., 510, that where a *feme sole* became the executrix or administratrix jointly with one or more persons, and who afterwards intermarried, her power of authority is extinguished and determined; but where the wife was sole administratrix, by her marriage the husband became joint administrator with her.

In answering the question whether a married woman may be appointed administratrix, executrix, or trustee, we may ask the other question, is it forbidden? We fully concur in the opinion expressed in Stewart's Appeal, that there being no express statutory provision prohibiting it, that a woman, married at the time of her appointment, may act, and that such case does not come within the provision of section 6022. The theory upon which she was classed among the incapable was, that her existence merged into that of her husband, and thereby she was denied separate rights. Later legislation which gradually invested her with the control of her own property, and recognized her independent existence, left no reason for retaining in the law her incapacity to act, and we have no hesitancy in holding, if called upon so to do, that a married woman may be appointed administratrix, executrix, or trustee. But the question in this case is, the respondent being an unmarried woman at the time of appointment, and subsequently marrying, does she come within section 6022, whereby her authority became extinguished by such marriage? We think it did. It is evident that the legislators intended to confine this section to the case of an unmarried woman, and the object is to terminate the trust relation upon her marriage. We have a

right to suppose, as we said in Stewart's Appeal, that where the female was unmarried at the time of the making of the will, or at the death of the testator, and she afterwards marries, a new relation not known to the testator, arises, and a new party is introduced into the trust. The law says it was a *feme sole* that was originally designated by the will, and a *feme covert* with her new baron shall no longer act. Whether this presents at this time a correct reason we do not say. Suffice it however that section 6022 is not repealed, nor do we feel called upon to say that by last winter's legislation, vol. 84, page 132, this section was abrogated.

A repeal by implication must rest upon very clear and definite reasons. The repeal of statutes by implication is not favored by law, and when a later and former statute can stand together, both will stand unless the former is expressly repealed, or the legislative intent to repeal is very manifest. 52 N. Y., 84; 55 N. Y., 613.

Her authority was extinguished by her marriage. The next question is, was it revived when she became a widow? We think not. When such authority was extinguished, it was dead for all time, and it could not be revived except by a new appointment. Under section 6022, there being a co-executor and trustee, it was his duty to proceed to administer upon the estate as if she were dead.

Noyes & Fitzgerald, for applicants.

P. J. Cosgrove and George R. Topp, for respondent.

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## 150 BURGLARY OF A DOG.

[Fayette Common Pleas.]

STATE OF OHIO v. PERRY YATES AND WILLIAM BATES.

Under the present law of Ohio a dog may be stolen, and burglary may be committed by breaking and entering with intent to steal a dog.

HUGGINS, J.

This cause was heard upon demurrer to the indictment. In substance the indictment charged that the defendants, in the night season, forcibly broke and entered a stable with intent to steal two dogs, and that so entering they did steal two dogs of the value of forty dollars.

The position taken and relied on in support of the demurrer is that dogs cannot be stolen, and that therefore a breaking and entering with intent to steal a dog is not burglary. To sustain this position, the case of the State v. Lymus, 26 Ohio St., 400, is cited.

It must be conceded that if no material change has been made in the law of the state upon this matter since Lymus' case was decided, it is directly in point and settles the question here. That case is on all fours with this, it being an indictment for breaking and entering a stable with intent to steal, and the stealing of a dog of the alleged value of twenty-five dollars. It was held in that case that the larceny act of Ohio having defined what could be stolen by the words "goods and chattels," no larceny could be predicted upon the taking of a dog, because dogs were not "such goods and chattels as were esteemed at the common law to be the subjects of larceny."

"The reason generally assigned by common law writers for this rule, as to stealing dogs, is the baseness of their nature and the fact that they

were kept for the mere whim and pleasure of their owners. * * * In nearly every household in the land can be found chattels kept for the mere whim and pleasure of the owner, * * * and yet they are as much under the protection of the law as chattels purely useful and absolutely essential.

"This common law rule was extremely technical, and can scarcely be said to have a sound basis. While it was not larceny to steal a dog, it was larceny to steal the skin of a dead dog, and to steal many animals of less account than dogs. Lord Coke, in his Institutes said: 'Of some things that be *ferœ naturœ*, being reclaimed, felony may be committed, in respect to their noble and generous nature and courage serving *ob vitæ solatium* of princes and of noble and generous persons to make them fitter for great employments, as all kind of falcons and other hawks, if the party that steals them know they be reclaimed.' * * * One reason hinted at by Lord Coke for holding that it was not larceny to steal dogs was that it was not fit that 'a person should die for them'; and yet those ancient law-givers thought it not unfit that a person should die for stealing a tame hawk." Earle J., in Mullally v. People, 86 N. Y., 367.

It might be added that to hang a man for stealing a hawk and hold him guiltless for stealing a dog, is a striking illustration of that peculiar "perfection of human reason" which once was a part of the common law, and of which lingering traces yet remain.

A dog saved the life of William of Orange, and thus, probably, changed the current of modern history. Dutch Republic, (Motley), 2 vol. 398.

The faithfulness of the dog is portrayed in nearly every reading book put into the hands of school children. It has been a favorite theme in literature. We read:

"Tis sweet to hear the watch-dog's honest bark
Bay deep-mouthed welcome as we draw near home."
—*Don Juan, 1st Canto, XVIII Stanza.*

"Lo, the poor Indian! whose untutored mind
Sees God in clouds, or hears him in the wind;
* * * * * * * * *
To be contents his natural desire,
He asks no angels' wing, no seraph's lyre;
But thinks, admitted to that equal sky,
His faithful dog shall bear him company."
—*Essay on Man.*

"The tither was a plowman's collie.
* * * * * * * * *
He was a gash and faithfu' tyke,
As ever lap a sheugh or dyke,
His honest sonsie, baws'nt face,
Ay got him friends in ilka place."
*The Twa Dogs—Burns.*

"But the poor dog, in life the firmest friend,
The first to welcome, foremost to defend,
Whose honest heart is still his master's own,
Who labors, fights, lives, breathes for him alone
Unhonored falls, unnoticed all his worth."
—*Inscription on the Monument of a Newfoundland Dog—Byron.*

Yet by the common law, and the law of Ohio as declared in Lymus' case, if some scoundrel had taken the honest watch-dog, or the poet's firmest friend *lucri causa* and *animo furandi*, breaking into the mansion house in the night season for the purpose, no offense would have been committed.

At the highest point of the Great St. Bernard pass, eight thousand feet above the sea, and near the line of perpetual snow, is the hospice of St. Bernard. There for many ages pious monks have dwelt and made it the business of their lives to rescue perishing travellers caught and overwhelmed by the snow storms of the Alps. They have bred and kept dogs, whose natural and trained sagacity in finding and saving persons who, but for them, must have perished miserably has long made them celebrated the world over. Without doubt the lives of very many persons have been saved by these dogs. Yet, if the pass and hospice of St. Bernard had been in Ohio when Lymus' case was decided, and some evil-disposed person, maliciously, and for the sake of gain, had taken the whole kennel of St. Bernard dogs, no offense would have been committed, and that though a storm had been impending and many travellers on the road.

It might be interesting, if space permitted, to trace to its source this singular antipathy of the common law to dogs. I suspect it would be found in the influence ecclesiasticism had upon the common law in its early formative period, and that the cause for the exercise of that influence was found in Deuteronomy, twenty-third chapter and eighteenth verse:

"Thou shalt not bring the hire of a whore, or the price of a dog into the house of the Lord thy God for any vow: for even both these are abominations unto the Lord thy God."

These considerations are not directly in point, but may perhaps be excused because of the somewhat singular nature of the subject. The present question is, has any change been made in the law of Ohio since Lymus' case was decided, by reason of which it is no longer decisive of this case, and if so, what is such change?

As held in that case "the property intended to be stolen by the burglar must be property of which a larceny may be committed." At the time that case was decided, as before said, our larceny act, in describing property which could be stolen, used the words "goods and chattels." "These words," says the opinion, "at common law have a settled and well defined meaning, and when used in statutes defining larceny, are to be understood as meaning such goods and chattels as were esteemed at common law to be the subjects of larceny. As dogs, at the common law, were held not to be the subjects of larceny, they are not included in the words 'goods and chattels.'"

Since that decision our larceny act has been revised and re-enacted, and the words now used to describe property that may be stolen are, "*anything of value.*" These words, unlike the words, goods and chattels have no "settled and well defined meaning at the common law." We are left to find their meaning, if there is any question, by any legitimate aids in that behalf. As to the meaning of the word "anything" there is no trouble. But as to the meaning of the word value the matter is not so plain. Much labor and learning have been expended upon the question of the meaning of the word "value." Value is defined by Bouvier as: "(1.) The utility of an object. (2.) The worth of an object in purchasing other goods." These definitions are pretty evidently obtained by Bouvier from Adam Smith.

"The word 'value,' it is to be observed, has two different meanings, and sometimes expresses the utility of some particular object, and sometimes the power of purchasing other goods which the possession of that object conveys. The one may be called value in use, the other value in exchange." Wealth of Nations Chap. 4.

By these definitions value has two meanings. But later learned writers, straining for the last analysis, reject one of these.

"Value is the relation of two services. The idea of value entered into the world for the first time when a man said to his brother 'do this for me and I will do that for you.' They had come to an agreement. Then we could say the two services were worth each other." Harmonies of Political Economy. Bastiat.

"Value is the exchange power which one commodity or service has in relation to another." Science of Wealth. Walker.

Tested by the definitions of these philosophers a dog has or may have a value. Tested by the common sense of men, and even by the common law, can there be any question that dogs come within the meaning of the phrase "anything of value." By the common law dogs were property, and "although it was not a crime to steal a dog, yet it was such an invasion of property as might amount to a civil injury and be redressed by a civil action." State v. Lymus, *supra*, citing Blackstone, Bishop & Bacon's Abr.

Why trespass would lie for stealing a dog when it was no crime to steal him, is not plain to a mind unversed in that "perfection of human reason," once, as before said, part of the common law.

The indictment alleges that the dogs taken were of the value of forty dollars. The demurrer admits everything well pleaded, and this being a direct averment material to the issue, is admitted, unless the fact that the indictment discloses that dogs are the property of which the value is alleged neutralizes the averment of value.

As to the utility of dogs, opinions may differ. The flockmaster whose sheep are worried by dogs may have one opinion. The shepherd in the hills of Scotland whose flocks are herded and tended by his dogs may have another. There are commodities whose value as represented in money is very great, and which it would be a crime to steal, but which many good people think the world would be better without. Dogs are property, sold and transferred in ordinary business transactions. "Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic. In many ways they are put to useful service, and so far as pertains to their ownership, they possess all the attributes of other personal property." Mullaly v. People, *supra*. No reason is now apparent why this kind of property should have no protection in the criminal law of Ohio.

The statutes of the state as to dogs have been examined. Without any extended reference to them, it may be said that they are not believed to have any controlling effect in the disposition of this question.

Demurrer overruled.

R. C. Miller, prosecuting attorney, for the state.

J. C. Welch, for defendants.

The following remarks on this decision re-printed in the *Criminal Law Magazine* (vol. 10, p. 441), are from the *New York Daily Register*.

"The question of larceny of dogs, turning on the ancient idea that dogs have no value, if it can be deemed to be still a question, ought to be regarded as set at

rest now by the historical and poetical opinion of Mr. Justice Huggins, of the Fayette county common pleas, in Ohio, in State v. Yates, (10 Crim. L. Mag., 441). He brings the authority of Byron, Pope and Burns to the support of the doctrine of Mullaly v. People (86 N. Y., 365), where the court of appeals recognized the pecuniary value of dogs under the law of larceny. The lamented Chief Justice Folger, who dissented in that case, could he read the opinion of Huggins, J., could hardly fail to withdraw his dissent and fall into line.

"It is strange that this difference of opinion has existed through a long period while dogs have been serving mankind in earning money by dragging ash carts, propelling churns, leading beggars, herding sheep, and driving cattle—to say nothing of their usefulness in the protection of property, and the achievements of some species in saving life; and it seems curious enough that it has not been observed that if a dog is not property the sale of a dog is void, and the price cannot be recovered, because the agreement to pay it is not founded on any consideration.

"The significance in American law, of the decision of a county court of common pleas in the case of State v. Yates, arises from the fact that the Supreme Court of Ohio, in a case which has been imbedded in the well known series of the American Reports as a standard authority (State v. Lymus, 26 Ohio St., 400; s. c., 20 Am. R., 772), held squarely that dogs were not goods or chattels. The word "chattels," by the way, was originally *catela* or cattle; having been adopted into the language of the law at a time when animals of one sort or another formed a principal part of movable wealth.

"The Fayette county common pleas, thus following the doctrine of our court of appeals and the better opinion of the present day, have practically and sensibly overruled the Supreme Court of Ohio."

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## 163 MECHANIC'S LIEN.

[Superior Court of Cincinnati, 1897.]

BENDER, ASSIGNEE, v. STETTINIUS ET AL., TRUSTEES.

1. The notice of a subcontractor's lien to be served on the owner, complies with section 3193 if it contains a sworn and itemized account of the labor and materials furnished, with the name of the head contractor and subcontractor.
2. It need not contain a statement of the facts necessary to make it a valid lien.
3. An affidavit on belief of the correctness of an account does not make the account a sworn account within the statute.
4. A subcontractor or material man is charged with notice of the terms of the contract on the fruits of which he claims a lien, and can have no lien as against other subcontractors and material men for labor and materials not called for by the contract, even if he has furnished them under an express agreement with the head contractor that they are to be used in such contract.
5. In a contest between material men and subcontractors for the fruits of the contract, the failure of the head contractor to dispute the claims, of which statutory notice has been filed with the owner and by him with the head contractor is not *prima facie* evidence of the correctness of those claims as valid liens.
6. The mechanic's lien law has extra territorial effect. To entitle any person to a lien thereunder, the materials must be furnished or the labor performed within this state. Goods consigned from another state to the head contractor do not entitle the consignor to a lien as a material man.
7. The taking of a promissory note in lieu of a claim for materials is a waiver of a lien therefor.
8. An irrevocable power of attorney to collect a claim given to secure an accommodation endorser against loss by the endorsement gives him a preference in the distribution of the proceeds of the claim to the extent of the amount he has paid on his endorsement over an assignee for the benefit of creditors.

The action was originally brought by plaintiff as assignee of the H. T. Duke Company, the successors to the assets and liabilities of H. T.

Duke & Co., to compel the trustees to render an account of the amount owing by them on a contract with H. T. Duke & Co. for the steam-heating apparatus of the court house. Ten parties, defendants, were brought in as claiming an interest in the fund due on the contract. The trustees interpleaded, paid $2,530.76 into court, and were dismissed. The other defendants set up their claim to the fund by cross-petitions. Nine of them claim liens upon it under the statute securing subcontractors, laborers and material men, and one H. W. Derby, by virtue of an irrevocable power of attorney to collect what is due on the contract given by H. T. Duke & Co.

Section 3203, Rev. Stat., provides that an assignment or transfer by a head contractor of his contract with the owner shall save and be subject to the claims of persons entitled to a lien upon the contract under the mechanic's lien law. An irrevocable power of attorney has no more effect to change ownership than an assignment, if it has as much. The claim of Mr. Derby therefore must be postponed to such claims as are founded on perfected statutory liens. This brings us to a consideration of the lien claims. These are based on secs. 3193 to 3206, inclusive. The first question arising at bar, in the construction of these sections is, what must the notice to be served on the owner contain? The language of the statute (sec. 3193) is a "sworn and itemized account of the amount and value of such labor or material under the contract, express or implied, under which the labor was performed or material furnished with all credits and setoffs thereon." The notice must be an account *i. e.* it must state a debt to one person and a credit to another. It must state the name of the debtor and creditor. It must be itemized; at least the account of the first person filing notice must be. The language of sec. 3198 does not seem to require that the accounts of intervening claimants shall be itemized. It must be a sworn account. That is, it must be accompanied by an affidavit by some person that it is a true account in amount and value of the labor or material furnished according to the terms of the contract under which it was furnished. Counsel contend that the notice should contain a statement of all the facts necessary to the validity of the claim as a lien. The answer to this contention is that the language of the statute does not require it.

The word "such" before labor, undoubtedly implies that only the accounts of labor and material furnished under the circumstances described in the first part of the section may be filed with the owner, but there is no express requirement that the account shall itself show that the labor and material was furnished under such circumstances. The wisdom of such requirement is for the legislature, and it has not made it. The intention of the legislature was to make the notice as simple as possible so that the unlettered might easily secure their rights. It is not for a court to construe into the statute something which shall defeat that intention. The many cases cited by counsel from other states as authorities upon what is essential in such a notice, are not applicable at bar. In every case, it will be found what the court thought indispensable to a valid lien was made expressly necessary by statute.

The next question is, what are the facts necessary to the validity of a lien upon money detained from a contractor in the hands of the owner, by such "notice."

1st. It must appear that the labor or material, or both, were furnished to the contractor at the prices claimed.

2d. It must appear that there was an express or implied agreement that the labor or material to be furnished should be used to fulfill the contract from whose product the claimant seeks payment. See Choteau v. Thompson, 2 Ohio St., 114, and Bullock v. Horn, 44 O. S., 420.

It has been held in Beckel v. Pettigrew, 6 Ohio St., 247, and in many other cases in other states, that as against the owner, the material man has a lien upon the structure, for the material for which he contracted with the owner to furnish, whether the owner used the materials so furnished in his house or not. This was on the ground that the material man looked to the house as his security, and could not be deprived of that by the owner's violation of the contract of purchase. It follows that, where a material man furnishes material to a contractor on the faith of his contract with the owner, and to fulfill that contract, he should have, as against the contractor, the right to look for payments on the contract as security for his material, whether it was used in the contract or not. But when this question arises between material men, the material of one of whom was used, and of the other of whom was not, it has been queried whether the one whose material was used, has not a greater equity than the one whose material was diverted. See Esslinger v. Hueber, 22 Wis., 632. The estoppel, which is good against the owner or head contractor, could hardly be used against an innocent material man. However, in the view I take of the case at bar, it is not necessary to decide this difficult question. It suffices to hold that, as the material man looks to the contract for his security, he is charged with notice of its terms, and can claim as against other material men no right to share in payments from it for material which were not required by its terms, and which in fact were not used in fulfilling it. See Judge Spear's opinion in Bullock v. Horn, 44 O. S., 420; also Phillips on Mechanic's Liens, sec. 62.

Another question which arises at bar is, what proof shall be required from the contesting lien claimants of the facts so found necessary to the validity of their liens. It is claimed that certain provisions of the statute render these liens incontestable after a failure by the contractor, upon notice, to dispute them.

Within five days after receiving the account of the subcontractor, material man or laborer, the owner is required to notify the contractor; and if, within five days thereafter, he does not notify the owner of his intention to dispute the account, or commence an action to adjust the account, or begin the arbitration proceeding provided in sec. 3220, he is deemed to assent to its correctness, and thereupon the subsequent payments on the contract shall be applied by the owner to such account. Section 3200 provides that the arbitration of the account shall be conclusive upon the parties.

It is certainly clear that if the owner does not notify the contractor, the latter's assent to the correctness of the account can not be inferred from his failure to dispute it. It does not appear at bar that the court house trustees served upon the contractors, H. T. Duke & Co., or upon their assignee, The H. T. Duke Company, or upon its assignee, the plaintiff, any notice of the filing of the liens under discussion.

In some instances, the sworn accounts of the lien claimants produced, had paper slips purporting to be receipts of H. T. Duke & Co., acknowledging notice of the accounts. But the signatures were not proven in any case. In the absence of proof of notice, I cannot hold that the contractor or his assignee has waived any right to dispute the accounts.

Much less can I hold that the other lien claimants are concluded from doing so.

But if I were to take these receipts as evidence, I must say that from the same source, *i. e.*, the county commissioners' office, come, and in the same way, to my hand, papers purporting to be notices to the trustees, from the attorneys of Duke & Co., that they intended to dispute each of the accounts filed, which would seem to show that Duke & Co. did not assent to the correctness of the accounts.

But even if it were shown that Duke & Co. had not disputed the accounts, after notice, how could that affect the rights of the other claimants to dispute them?

It is claimed, first, that the statute provides no way by which one lien claimant can dispute the lien of another; that the arbitration provided is only between the head contractor and the lien claimant; that the head contractor's assent, express or inferred, or the award, saves the owner harmless in making payments on the lien claimed; that, therefore, the settlement between the contractor and a lien claimant must be as conclusive upon the other lien claimants as the judgment of one judgment creditor is upon other judgment creditors in asserting their liens upon the debtor's real estate.

To this it may be answered, first, that the arbitration is only made by sec. 3220 conclusive on the parties to it, *i. e.*, the contractor and the lien claimant. Second, that this mode of settling the accounts is not exclusive, but recourse may be had by either party to a court to adjust the account, in which the other lien claimants would probably be given a hearing if they desired. Third, that even though no statutory method is provided, a court of equity on application by a lien claimant would certainly enjoin the owner from paying to the lien claimant, whose lien was invalid, even though assented to by the owner, if by such payment the valid lien claimants were to be deprived of that measure of security which it was the intention of the statute to secure to them.

The analogy of judgment creditors is fallacious. The question whether one man is indebted to another can be settled only by them. A judgment of indebtedness is therefore a judgment in a case where all persons interested are parties. No one else could be made parties but the creditor and debtor. It necessarily settles for all the world the fact of indebtedness. In so far as establishing the relation of debtor and creditor, and the extent of it, it is, in its effect, like a judgment *in rem*. See Bigelow on Estoppel (4th edition) page 46 and pages 142 and 143. The lien attaches on the simple adjudication of indebtedness. Subcontractor's liens stand upon an entirely different footing. They are based on the equitable principle, that every man who assists the head contractor in fulfilling his contract, may look to the payments on that contract as his security for his contribution. When they file an account with the owner, they effect an equitable transfer to themselves of a *pro rata* share of the payments to be made thereafter on the contract.

When, then, the head contractor and a lien claimant are arbitrating, they are determining not that the former is indebted to the latter in a certain sum, which is the basis of a judgment lien, but they are determining that the latter contributed a certain amount to fulfill a contract in which many others were engaged, and in the fruits of which those were so engaged are entitled to share. If the fruits so to be shared are not equal to the claims, then the arbitration is an adjudication between A. and B., reducing the equitable interests of B., C., D. and E., in the fund.

Surely B., C., D. and E. cannot be concluded by such an adjudication. In the case of Wright v. Phillips, 56 Ala., 69, it was held that notwithstanding a judgment rendered in favor of one of several distributees of an estate of a decedent against the administrator, the other distributees, not parties to the action, might show that the distributee in the first suit had by the judgment obtained more than his proper share of the estate. Fortunately we have an authority from Pennsylvania presenting facts much like those at bar. By the mechanic's lien law of that state the notice of lien is filed in court as a pleading and a *scire facias* issues thereon against the owner or contractor. An answer is filed and the case regularly heard. See Brightly & Purdon's Digest of Pa. Statutes, 1. In Norris' Appeal, 80 Pa. St., 122, a mechanic had obtained jugdment against the owner on a *scire facias*. The fund was brought into court. It did not appear from the oral testimony that the labor on which the lien and judgment had been taken, had been performed within six months before the filing of the lien as required by statute. The claimant set up his judgment in a contest of claimants as conclusive of the validity of his lien. His lien was disallowed. The court said:

"In a contest between mechanics and others for a fund in court, a judgment recovered upon a *scire facias*, is as to the other claimants, *res inter alios acta* and not even *prima facie* evidence. As a judgment, it ranks merely from its date. To come in as a lien, it must be proved so as to entitle it to relate to the commencement of the building. If such judgments were even *prima facie* evidence, honest mechanics might be defrauded with the greatest of ease by the owners when involved, confessing judgments or allowing them to be entered against them, and it would be utterly impossible for strangers to controvert them." Norris' Appeal, 80 Pa. St., 122; McCay's Appeal, 87 Pa. St., 128; White v. Washington School District, 42 Conn., 545.

For the reasons given, it seems to me that, at bar, in view of the denials of the pleadings, that the burden of proof is upon every lien claimant, to establish every element necessary under the statute to the validity of his claim as a lien.

It is objected by counsel for the plaintiff that the notices for lien were filed out of time. To hold to a payment on the contract, the first account must be filed before the payment is due. The other accounts may be filed within ten days after the payment is due. The accounts so filed *pro rata* on that payment. The statute does not prevent the filing of an account after that ten days, but it will only give that account a *pro rata* share in the next and following payments. The firm of Witt & Brown filed an account in March, with the trustees, and were paid in full out of the March estimate. The failure of the lien claimants at bar to file an account within ten days after the estimate was due, prevented them from sharing with Witt & Brown, but it would be absurd to say that it prevented them from securing themselves as far as they could before the next subsequent payment. By the original contract with Duke & Co., the job was to be done December 28, 1884. The time was extended to February 20, 1886. The contract provided that if the job was done according to contract the superintendent should make monthly estimates of the completed work, 80 per cent. of which the trustees would pay, retaining 20 per cent. as security for completion. One half of the balance so kept was to be paid when the work was completed, and the other half upon April 1, 1886, after the job had been tested by winter trial. The job was not completed February 20th, and was not tested

April 1, 1886. Duke failing thus to fulfill his contract, nothing became due until the contract was completed. The first payment due subsequent to the filing of the liens in this case, was the payment due on the completion of the contract, which was months subsequent to the filing of the last account. The accounts were, therefore, all filed in time.

Again plaintiff's counsel contends that about $1,400 of the balance turned over by the trustees arises from work on the modifications of the original contract, and that only those who contributed to the work done under the modifications are entitled to liens upon that part. In the first place, the fund turned over is what remained of the 20 per cent. balance on the whole contract including the modifications. The part of it being on the modifications would only amount $1,500.

Again these modifications were only changes in the contract provided for in the original contract. They were in no sense independent contracts within the meaning of the Supreme Court in Dunn v. Rankin, 27 Ohio St., 132. They referred only to changes in the original subject of the contract, the steam-heating apparatus. It is said they were additions. That is true, but so are extras. Section 3 of the syllabus of the case cited is as follows: "When a contract for a structure provides for changes in the plans and specifications, and extra work is done in completing the structure without a new contract, a subcontractor of any part of the job may perfect a lien on the amount due from the owner to the contractor for such extra work." I am clearly of the opinion that all the liens which are valid are liens upon the whole fund.

Coming now to examine the particular claims at bar. I find that the notice of the Continental Tube Works limited, the first claim filed, is defective in the affidavit attached to the account. The affiant says that he believes the balance at the foot of the account is the balance due from H. T. Duke & Co. to the Continental Tube Works on the court house. And says further that the account is a true and correct copy of the account between H. T. Duke & Co. and the Continental Tube Works for two jobs. I do not think that this can be called a sworn account. An affidavit on belief is allowed as a verification to a pleading, but whereever else it is required in the statute, it must be a statement on oath. Especially is this the case when there is no particular person named who shall swear to the account. Presumably, it must be one who knows. Again the affiant does not swear to the account, bnt only that it is a correct copy of another account for the correctness of which he does not seem to vouch. For this reason, I am inclined to think the lien claimed by the Continental Tube Works must be held invalid.

But, if this defect seems technical, there is a still more serious defect in the merit of the claim. (The judge here discussed the evidence as to the use for which the pipe had been furnished and concluded that when the pipe was ordered, there was no understanding with Duke, either express or implied, that it was to be used in the court house and on his contract with the trustees.)

For this reason, the lien of the Continental Tube Works must be rejected as invalid.

The lien of the National Tube Works must also be rejected and for the same reason. There is no evidence tending to show that when the National Tube Works furnished the pipe contained in their account, they had any agreement express or implied as to what it was to be used for or that they trusted to anything but Duke & Co.'s promise on general account. The statement in the notice filed with the board if it can be

construed into such meaning, of course has no effect as substantive evidence in that behalf.

In regard to the claim of Morris, Tasker & Co., it should be said first that of the $582.38 charged $106.35 are dies. Dies are tools used by steam-pipe fitters for cutting a thread on pipe. They are not used up on one job but may be used on a number. They cannot be said to be material or machinery used in the construction of the house. The term machinery in the statute applies to such machinery as is used in the construction and left there. It was certainly not within the meaning of the estate that a tool merchant who furnishes a carpenter with his tools to be used by him in his trade, could assert a lien on money due him for work on a house with those tools. It has been held that a person furnishing powder for blasting may have a lien as for material. But in such case it is in the nature of the article that it can only be used on one job. The lien of Morris, Tasker & Co. should be reduced from $382.38 to $476 03. (The judge here discussed the evidence as to this claim and contended that the articles sold had not been furnished for the purpose of fulfilling the court house contract.)

For this reason, the claim of Morris, Tasker & Co. for a lien must be rejected.

But there is another objection to the three claims I have been considering. The Continental Tube Works, The National Tube Works, and Morris, Tasker & Co., have their factories and places of business in Pennsylvania. The goods charged in each of the three accounts were consigned to H. T. Duke & Co. from Pennsylvania. It is a well-settled rule of law that the common-carrier is the agent of the consignee. Where the sale is on credit, as these all were, the title changes on delivery to the consignee. Loss on the way is that of the consignee. It follows, therefore, that these goods were furnished and delivered to H. T. Duke & Co., in Pennsylvania, not in Ohio. The mechanics' lien law has no extra territorial effect. It only applies to such labor and material as is furnished in Ohio. The act of furnishing must be in Ohio to entitle the actor to this statutory remedy. At bar, Mr. Duke went out of the state and got the material and brought it into this state and used it. The claimants seek relief and remedy under an Ohio statute for what they did in Pennsylvania. Judge Gholson says in Butterfield v. Ogden, 1 Disney, 550. "The laws of Ohio must, in the absence of any express provision, be supposed to apply only to persons and things in Ohio." The thing at bar is the delivery of material. That took place in Pennsylvania. The New York statue is very much like ours in its principal section. It has been held in that state that the statute was intended for the benefit of those who performed labor or materials within state, and that therefore where material was furnished to the head contractor in the state of Connecticut, and by that head contractor placed in the owner's factory in New York, the material man could not avail himself of a lien under the New York law. Birmingham Iron F. v. Glen Cove Co., 78 N. Y., 30.

See also, Phillips on Mechanics' Liens, 34, 112: "The place where the contract is made is not material. The lien exists notwithstanding it may be made out of the state, and although statutes cannot operate extra-territorially. It is not the contract which creates the lien, but the furnishing and use of materials in pursuance of its provisions within the state."

For the reasons given, I must hold the claims of the Continental Tube Works, the National Tube Works and Morris, Tasker & Co., to a preference in the fund, invalid. Their interest is represented by the assignee.

The claim of McGarvey Bros. must also be rejected on the ground that they have accepted a note of the H. T. Duke Co. in payment of their claim against H. T. Duke & Co. I am inclined to think that in the absence of direct evidence upon the intention with which the note was taken, the mere taking of the note of The H. T. Duke Company, the successor to the liabilities of the firm could not be presumed to be payment which should release the lien. But the difficulty is, that, at bar, we have the clear statement of Jos. McGarvey himself that he took the note of The H. T. Duke Company "in lieu of his claim for brick work." This brings the facts so completely within the case of Crooks v. Finney, 39 Ohio St., 57, that I must hold the claim upon the subsequnt payments under the chief contract to have been waived.

The notice of Armstrong Bros. for the boiler and trimmings is a sworn and itemized account of material and labor which he furnished under a contract with H. T. Duke & Co., and seems to me substantially complies with the requirement of section 3193. It was proven on the trial that the boiler and trimmings were furnished by Armstrong Bros. for the court house, and that they were made under a contract for the purpose for a lump sum bid for Armstrong Bros., apparently after examination of the specifications of the original contract. The extras in the bill were, so far as I can make out, necessitated by the modifications in the contract made with the trustees with Duke & Co. It seems to me that the claim of Armstrong Bros. must be sustained. The claim will be allowed as a lien for the amount claimed $1,016.70

The notice of T. H. Brooks & Co. is a sworn and itemized statement of account of materials furnished H. T. Duke & Co., and within the statute. The contract under which this material was furnished is in writing and contains the provision that the material is for the court house job according to the specifications. It is proved that Brooks & Co. furnished all the radiators that went with the court house. The specifications call for 21,532 tubes. Brooks & Co. claim out of the fund pay for balance due on 21,780 tubes, or 280 more tubes than were called for in the court house contract. Their claim should, therefore, be reduced by 248 tubes at 26 cents a tube or $64.48 making the claim $640.21 instead of $705.69. It is objected to this claim of T. H. Brooks & Co., that this firm has already drawn money out of payments on Duke's contract that should be credited in the account. The facts appear to be that Duke gave Brooks an order on the trustees for a large payment on his contract, that Brooks drew the money, and then at Duke's request lent Duke $800.00 of this money which loan Duke secured by assigning several claims and an order on the trustees. On this second order Brooks realized $568.00 which, according to his arrangement with Duke, he credited on the loan of $800.00. Plaintiff's counsel claim that this payment on the $800.00 ought in equity, to be credited on Brooks & Co.'s claim for material furnished for the contract because otherwise he is decreasing the fund for paying those who contributed to the construction for which the fund is due. I do not think so. The statute gives no claim to material, men, subcontractors, etc., upon any part of the fund except so much thereof as remains to be paid after notice filed with the owner. Brooks received his $568.00 before any notice had been filed by

any of the claimants at bar, and made his application of it as he agreed to. His fellow material men have no more right to complain of the application of this money than of any other money paid by Duke to Brooks. The claim of Brooks & Co. will be allowed for $640.21.

The claims for labor in this case stand on the same level with subcontractors and material men. The notices of Stratton, Gallagher, Carmody and Horgan seem to have been properly served and filed. Their labor was rendered upon the court house contract. Their claims will be allowed in full.

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| The fund in court amounts to | | $2,530 76 |
| Armstrong Bros. claim | $1,016 57 | |
| Brooks & Co. | 640 21 | |
| Frank Stratton | 292 50 | |
| John Gallagher | 68 00 | |
| Daniel Carmody | 55 75 | |
| Dennis Horgan | 21 00 | |
| | | 2,094 03 |
| | | $436 73 |

There only remains now for consideration the effect of H. W. Derby's power of attorney. The question is between the plaintiff, as assignee of the H. T. Duke Co. and H. W. Derby. Unless there was collusive fraud upon the creditors by the company and Derby, I take it that the assignee's rights are neither different from nor higher than the rights of his assignor, the company. Fraud is not charged. The question is, therefore, could H. W. Derby assert his right to this fund against the corporation on the power of attorney?

The facts are that Derby had many transactions with Duke while the firm was as H. T. Duke & Co.

Sometime in February of 1886, the firm actually transferred all its assets to a corporation known as The H. T. Duke Co. The firm was ended and dissolved. The contract with the court house trustees was with H. T. Duke & Co., and the trustees declined to recognize the corporation at all, but continued to conduct its business with the firm. H. F. Frevert testifies that the court house contract was not included in the transfer of assets from the firm to the corporation. If this were the fact, plaintiff could have no claim to this firm at all. In this, however, Frevert must be mistaken because we find the correspondence in regard to the court house contract with material men, and the notes and checks given for material used in that contract, all in the name of The H. T. Duke Co. It can not be supposed that the corporation was to pay all the debts growing out of the contract, and not realize any benefit from it. What seems to have been the case was that whenever the corporation desired to act with regard to the contract, it acted through and in the name of Duke & Frevert or Duke & Co., whom the court house were willing to recognize as entitled to payments under the contract. Accordingly we find a power of attorney to Rufus B. Smith, to draw money on this contract, given by Duke & Frevert as H. T. Duke & Co., as late as April 5, 1886. This was the power upon which $568.00 was drawn. So, too, an order upon the board in favor of Witt & Brown for $2,361.00, dated March 17, 1886, was signed in the name of H. T. Duke & Co., and paid. It seems clear, therefore, that if the corporation owned the contract, the corporation permitted the payments to be made on it on the order of H. T. Duke & Co.

On the twentieth of March, 1886, Duke gave Mr. Derby the power of attorney in this case. It was dated the 19th. The power is given by H. T. Duke and H. F. Frevert, a firm doing business as H. T. Duke & Co., and authorizes H. W. Derby "to collect any and all money not to exceed $7,000, not due, or that may become due to us on the steam-heating contract in the court house," and then says: "This power of attorney is irrevocable, and is given to secure H. W. Derby of this city, the amount we now owe him, and also such other amounts as we may in future owe him, by reason of his endorsing our notes. When said Derby shall collect said money, he is to hold as security such amount as he may be liable for, and the balance, if any, to be promptly paid over to us." On the day this was given Derby, and at the same time he endorsed a note of The H. T. Duke Company for $5,000. The note was discounted, and the proceeds divided between Mr. Derby, who got $1,500, and the company, whose bank account was credited with $3,500. Derby paid this note when it fell due. It is clear from the evidence that the endorsement of this note and the giving the power of attorney were parts of one and the same transaction. It is also clear from Frevert's testimony and the bank book that this $3,500 went into the business of The H. T. Duke Company, and that the company got the benefit of it. Just what the account was between Derby and H. T. Duke & Co., and The H. T. Duke Co., it is hard to say. Plaintiff's counsel claims that the books of the company show Derby in debt to the company March 14, 1886, $1,500. Whether this refers to the $1,500 taken by Derby out of the $5,000, or is an independent matter, Derby's payment of the $5,000 note made him a creditor of the company for at least $2,000.

It is clear in my mind that the power was given to procure the endorsement. The corporation, through its president and secretary, knew of the execution of the power and took the benefit of its use. It was in accordance with its general course of business in regard to this particular court house contract. It is therefore estopped to deny that Duke and Frevert as H. T. Duke & Co. were not acting with its full consent and authority, so far as it had any interest in the contract, in giving this power. Plaintiff objects that the power is only given to secure Derby against loss in endorsing the notes of H. T. Duke & Co. The expression is: "such other amounts as we may in future owe him, by reason of his endorsing our notes." Now H. T. Duke & Co. had gone out of business, had dissolved. They were acting in giving this power really as agents for The H. T. Duke Co. They would have no more notes as H. T. Duke & Co. They were both large stockholders in the company. One was president and the other secretary. It seems to me, therefore, reasonable to construe the expression, "our notes," as including the note of The H. T. Duke Company" endorsed by Derby. The power is irrevocable. Only the death of the parties who gave it can revoke it. See Hunt v. Rousmanier, 8 Wheaton. They are both living. Mr. Derby is present in court seeking to collect in accordance with its terms. He has the right against the corporation; he has, therefore, in the absence of fraud, the right against the assignee. He will be given the balance, after the costs of the case and the valid liens shall have been paid.

Decree accordingly.

Stevenson & Day, for plaintiffs.

Harmon, Colston, Goldsmith & Hoadly, J. D. MacNeale, Thornton Hinkle, Rufus B. Smith, Frank Suire, Edward Barton, Healey & Brannan, Jordan & Jordans, for various lien claimants.

## 178 EMINENT DOMAIN.

[Superior Court of Cincinnati, General Term, 1888.]

*CINCINNATI (CITY) v. JOS. LONGWORTH ET AL.

1. Where a city appropriates private property to public use for street purposes, without making compensation therefor, and the owner is not estopped to recover the possession thereof, he cannot tender a deed of the property to the corporation, and then maintain an action for its value.
2. The mere fact that city authorities have unlawfully appropriated private property for street purposes does not estop the owner from recovering possession.
3. Circumstances which would estop the owner, in such case, from recovering possession of the land, would probably constitute a dedication thereof to public use.

ERROR to Special Term.

PECK, J.

The amended petition in this action alleged that the officers and agents of the city of Cincinnati had unlawfully appropriated a certain lot of ground, the property of the plaintiffs below, to public use without making compensation therefor, and had constructed a street thereon; that as soon as the unlawful appropriation was discovered by them said plaintiffs tendered the city a deed of the property and demanded compensation therefor, which was refused; and that they are still ready and willing, and thereby offered, to make and deliver such deed, and prayed a decree against the city for the value of the ground and interest. A general demurrer to the amended petition was overruled, a trial had and a judgment was rendered for the plaintiffs below for the value of the land and interest from the date of the appropriation.

Plaintiff in error now seeks a reversal of that judgment, and numerous causes are alleged as reasons for such reversal. The principal one of these is that the court below erred in overruling the demurrer to the amended petition.

The action is based upon the proposition that when a body corporate, clothed with the power of eminent domain, has appropriated land to public use without making compensation therefor, and under such circumstances that the owner cannot recover possession of the land itself, he may maintain an action for the value of the same.

This doctrine appears first to have been applied in the Supreme Court in the cases of Hatch v. Cincinnati & Indiana Railroad Company, 18 O. S., 92; Goodin v. Canal Company, 18 O. S., 169, both of which grew out of the conversion of the bed of a canal into that of a railway. The railroad company acquired possession by virtue of an agreement with the canal company; and the owners of the land underlying the canal, being aware of the transaction, took no steps to prevent it. They were held to be estopped from reclaiming the land, but permitted to recover, in the one case for the additional servitude to which the land was subjected, and in the other, it being an action on behalf of the stockholders of the canal company, for the value of its interest in the land.

In the case of Railroad Company v. Robbins, 35 O. S., 531, the doctrine of those cases is carefully reviewed and explained. There it was alleged by Robbins that the Railroad Company had unlawfully entered upon his land and converted the same to its own use by constructing a track thereon and using the land as an appurtenance to its road and depot grounds, and he asked for compensation for the ground taken and damages to the remainder.

The judgments of the court of common pleas in favor of Robbins, and of the district court affirming the same, were reversed by the Supreme Court on the ground that the facts alleged would not support the judgment.

In the opinion, Judge Johnson says: "Our conclusion, therefore, is that the unlawful and wrongful conversion and use of land, against the will of the owner, and under such circumstances that he is not prevented or estopped from recovering possession, will not entitle such owner, while the title remains in him, to maintain an action to recover a judgment for the value of the land." * * * *

*This judgment was reversed, and that of the special term affirmed, by the Supreme Court; see opinion, 48 O. S., 637.

"Whether the owner might, under such circumstances, tender a title to the corporation, and maintain an action for the value, and charge it upon the land, in case of an insolvent corporation, when the land had been so changed by the corporation as to destroy its value to the owner, we need not here determine. This might depend on equitable considerations not involved in the present case."

Plaintiffs below apparently undertook to make a case of the sort, the possibility of which is thus indicated. They tendered a title to the corporation, but they did not allege that the land had been so changed by the corporation as to destroy its value to the owners, nor did they aver circumstances of estoppel which would prevent them from recovering the possession of the land, such as existed in the Hatch and Goodin cases. The mere fact that the property had been used for street purposes would not estop them to recover the possession. As the basis upon which these actions rest is that where the circumstances are such as to prevent the recovery of possession, the owner would be without remedy if he could not recover compensation, it seems to follow that where the possession can be recovered the action for compensation will not lie. Speaking of the Goodin case, the court, in Railroad v. Robbins, say: "This case rests upon its own peculiar facts, and is not to be extended, by other cases, when an estoppel is not clearly established." The tender of title did not place plaintiffs below in the same position they would have occupied if they had been estopped to recover the possession, for the reason that in the one case they would have an adequate remedy by an action to recover the possession of the property, and in the other they would not. The foregoing considerations are sufficient to dispose of the case, but there is another point to which it may be proper to advert. It will be observed that all the cases, with two exceptions hereinafter to be mentioned, in which a recovery of this sort has been sustained, have been cases where the defendant was a railroad company, a private corporation, while here defendant below is a public or municipal corporation. A distinction seems to flow from this difference which is important to the result of the action. A municipal corporation may accept and control property dedicated to public use, but property can not be dedicated to the use of a railway. The latter is, in a sense, a public use, but it is not wholly such, and property can only be dedicated to a use purely public, Todd v. Pittsburg Railroad Co., 19 O. S., 514, 524.

Our Supreme Court has more than once asserted that the doctrine of dedication rests upon estoppel. Fulton v. Mehrenfeld, 8 O. S., 440; Penquite v. Lawrence, 11 Id., 274.

Such an estoppel arises whenever the action of the owner or his acquiesence in the acts of others is such as to clearly indicate his intention that the property shall be dedicated to public use. It has been held in sundry cases that acquiescence in the improvement of a street over land in dispute, and its public use as such for a period less than twenty-one years, would constitute a dedication. Gamble v. St. Louis, 12 Mo., 617; Larned v. Larned, 11 Met., 421; Knight v. Heaton, 32 V., 483; Dunning v. Roome, 6 Wend., 651; Cleveland v. Cleveland, 12 Wend., 172; Lade v. Shepard, 2 Strange, 1004; Jarvis v. Deane, 3 Bing., 447; Waugh v. Leech, 28 Ill., 492.

The question therefore arises whether such acts of estoppel to recover possession as it appears necessary for the owner to allege and prove in order for him to maintain an action for the value of land as against a private corporation, would not, of themselves, show a dedication in the case of a municipal corporation claiming a public right of way. If the owner has so far acquiesced in the public appropriation and use of the property that he is estopped to reclaim possession, has he not thereby dedicated it to the public? No case has come under our observation where it has been held that as against a public use there could be a right to compensation after the loss of the right to recover the land itself. In the case of The City v. Kemper, 2 W. L. B., 18, no circumstances which would have estopped the plaintiff from recovering the possession of the land appear, the question as to his right to recover in the absence thereof was not raised, all parties assuming, on the authority of the Goodin case, that such right did exist, and the Robbins case had not then been decided. The case of Dobson v. Cincinnati, 34 O. S., 276, is almost a counterpart of that of City v. Kemper. There the right to recover was assumed by all parties, and at the opening of his opinion Chief Justice White significantly says: "The only question raised in this case is as to the rule by which the owner is to be compensated for ground taken and used by the City in making the slope to support the street. No question is made against the right of the city to the use of the ground for the purpose. The ground appears to have been regarded on the trial, as finally appropriated by the corporation for such purpose, subject to its liability to make due compensation therefor. The case is

treated by the parties, and was so treated by the court below, as coming within the principle determined in Hatch v. The Cincinnati Railroad Company, 18 O. S., 93; and the only question now in controversy is whether the rule of compensation is the full value of the ground in fee-simple." Some of the reasons why the court so carefully limited the scope of this decision appear in the Robbins case, decided two or three years afterwards.

While we incline to the opinion that an estoppel arising from the acts of the owner to recover the possession of land in use as a public highway, is equivalent to a dedication of the same, we place our decision of this case upon the ground that the amended petition upon which the case was tried contains no averments of facts which would estop the owners from recovering possession of the land, and does not state facts sufficient to constitute a cause of action. This renders it unnecessary to consider the other alleged errors.

The judgment is reversed, and a judgment will be rendered for the city unless defendants in error wish to amend the pleading, in which event the case will be remanded for that purpose.

Taft and Moore, JJ., concur.

Horstman, Hadden, Galvin & Foraker, for plaintiff.

Thomas McDougall, for defendants.

(In this case a motion for leave to file petition in error was granted by the Supreme Court.)

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## 180 ASSIGNMENTS FOR CREDITORS.

[Superior Court of Cincinnati, Special Term, May, 1886.]

CANAL FLOUR FEED CO. v. CATHERINE SHUTE.

A creditor received securities from an insolvent debtor, in trust, to be sold, and out of the proceeds to pay her own claim and the claims of certain other creditors; held, an assignment for the general benefit of creditors.

PECK, J.

The questions in this case are principally questions of fact, and there is a conflict of testimony.

It appears that all the parties were living in one house; that Wood, who was insolvent, boarded with Mrs. Shute and had boarded with her for some years. In the course of time he became considerably indebted to her; and one evening, some weeks before he died, he sent up stairs for the box containing these securities, and delivered it to her, that she should be paid out of them; and she took the box and contents into her possession at that time. During the same evening a brother of Mr. Wood came to Mrs. Shute with a paper, which is in evidence, which he requested her to sign. She said that she read it over; that she is in the habit of attending to her own business, and can readily read and write the English language; and while it is claimed in her petition that she did not understand what she was doing when she signed the paper, she did not make any such claim in her testimony; she simply said that she read it over and signed it. It may be said that she did not understand all the legal effect of the paper she was signing, but that she did not understand the facts therein stated and the language which it contains she does not claim. And of course a party cannot be excused from the consequences of signing an instrument on the ground of any want of knowledge of the law which would prevent her from understanding all of the consequences growing out of signing it. For if that were the case, nobody could be held to any instrument that he chose to escape from.

It is contended on the other hand that the agreement was complete without this written assignment; that the action of the brother in this case was that of a volunteer without authority from the deceased. But that hardly seems probable under the circumstances of the case. It all happened in the same evening; perhaps there was an hour or two of interval between the time the box containing the securities was delivered to the defendant and the time the paper was signed; but it seems to me that it was all substantially one transaction. Mrs. Maynard on the stand testified that when this box was delivered, she being present, the statement was made that she also was to be paid. When questioned as to whether she was to be paid out of those securities, she would not say. The paper provides that these securities are to be kept by Mrs. Shute; that the indebtedness due to her—the amount being specified—is to be paid out of them; then certain debts to Mrs. Maynard are to be paid, and then another party; and then the balance, if any there be, is to be paid over to the estate of Mr. Woods. Such an arrangement is clearly within the decision which holds that it amounts to an assignment for the benefit of creditors. A man can secure his own claim, or the payment of it, if he can; but when he undertakes to secure not only his own claim but that of somebody else, he steps over the line of legality; in the one case the transaction will be carried out, in the other the law declares it to be assignment for the benefit of creditors generally.

This is the substance of the decisions of our Supreme Court (Bloom v. Noggle, 4 Ohio St., 45.)

Such being the case it must be held to be an assignment for the benefit of creditors.

Wulsin & Perkins, for plaintiff.

Clemmer, for defendant.

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## CONTEMPT OF COURT. 181

[Franklin Common Pleas.]

### *STATE OF OHIO V. FREDERICK STEUBE.

1. Constitutional courts are possessed of an inherent power at common law to punish summarily persons guilty of direct or constructive contempts of court.
2. Section 5639 of the Revised Statutes, is declaratory of the common law on the subject of contempts, and under its provisions, this court has the right to summarily punish the respondent for the contempt of which he stands charged, whether it is direct or constructive.
3. Quere: If section 5639 of the Revised Statutes was designed to limit the inherent power of a constitutional court to punish for contempts, either direct or constructive, is it not clearly unconstitutional?

PUGH, J.

The facts out of which this proceeding in contempt grew are not controverted, no evidence having been offered by the respondent. On Saturday the 25th day of February, 1888, after this court recessed, or adjourned, till the succeeding Monday morning, the respondent assaulted and knocked down Cyrus Huling, on the street in front of the Neil House in this city, about or near five squares from this court house. Before the cross examination of Cyrus Huling, although the court had a moral conviction touching the cause of the assault, and that it was con-

*This judgment was affirmed by the circuit court; see opinion 2 Circ. Dec., 216.

nected with the case on trial then and since, yet there was not enough judicial proof before the court to establish it. That cross examination, however, conclusively proved that the pretence for the assault grew out of Mr. Huling's conduct, or supposed conduct, in the case, known as the tally-sheet case which was on trial on the Saturday named and was adjourned from that day to the succeeding Monday; and that he was assailed for his conduct as an attorney in that case. There are two of the tally-sheet cases, the one then and now on trial, and another in which the respondent is one of the defendants.

Respondent was, also a witness in the former case, and had, before the assault, testified. The evidence established the fact that there was no provocation whatever, in law, or otherwise, for the attack. Respondent accused Mr. Huling of having detectives watching him; the latter denied the charge; thereupon, without warning, respondent twice struck Huling, felling him to the ground, and seriously hurting him. The preponderance of the evidence discloses that the respondent was not struck, or at least, that if he was struck by Mr. Huling, the blow was trivial, and was interposed as a mere defense. I know not what the evidence for the respondent would have shown. It was not, then, a case of mutual fighting in any sense of the term.

The attack had some of the features of a malicious and premeditated attack. There are some other facts. Mr. Huling, was then and is now prosecuting attorney; he was and is an attorney of this court, and at that time was the principal attorney in the case, then and now, on trial. All the evidence in the case for the state had been prepared by him; the other attorneys for the state knowing but little about the evidence. It was for this reason that on the following Monday the attorneys for the state were forced to ask the court to lay the case over until the next day, which was done; and by reason of the injuries received by Mr. Huling he has not since actively participated in the case.

The charge against the respondent is, that by making the assault on Mr. Huling, he was guilty of a contempt of court. Was the assault a contempt of court? This is the question that is to be determined.

The power of courts of superior jurisdiction to punish for contempt is coeval with the courts themselves. It is an inherent, common law power. It is an extraordinary power. It should be used by courts with circumspection, but when compelled to do so it should be exerted with promptness and firmness. Neel v. The State, 4 English (Ark.), 259.

It is not a power personal to the man who holds the office of judge; it belongs to the office. It is bestowed upon the courts, not for the benefit of the judges, but for the benefit of the people whose servants the judges are. It is a sort of privilege, a prerogative, it is true, but there are privileges, even in this free country, that belong to each of the three different departments of government of the states. It has been held up as a sort of terrorem in this case that such a power as has been contended for by counsel appointed by the court, would make a judge an autocrat, that such a power only inheres in courts of monarchical countries. That might be a forcible argument for a demonstrative assembly, but it is neither convicing nor impressive for courts. Besides it is historically not true, as the reports of courts will prove. A judge may be often placed between Scylla and Charybdis, as it were when a question like the one under consideration is to be determined. If he refuses to use the power, he may be charged with timidity and irresolution; whereas if he exerts it, he may be excused of usurpation and tyranny. But that is an unimportant consideration when there is the right kind of judicial courage and independence.

The reason for the existence of this power is obvious. Courts and their officers and processes must be protected from insult, and indignity; the courts and their officers must be shielded from attacks that tend to impede, embarrass or obstruct the administration of law and justice.

It is not, as was said by the Virginia court, because there is any imaginary sanctity in the judges or the officers of courts, but because it is necessary to enable them to "discharge their functions with fidelity, impartiality and effect, and to give them due weight and authority," that this power should be upheld. The Commonwealth v. Dandridge, 2 Virginia Cases, 408.

It is important that the administration of law be uninterrupted by any influence which might affect the "safety of the parties, or the judges, or officers of the court, that the court may have that regard and respect so essential to make the law itself respected, and that the streams of justice may be kept clear and pure,' declared the Supreme Court of Illinois. The People v. Wilson, 64 Ill., 195.

The sentiment of respect for and disposition of obedience to courts, their officers and processes should be cultivated by the people. But they will not be cul-

tivated when judges decline to hold the reins of authority with a firm and strong hand and to rebuke with promptitude and energy, all considerable attempts to insult or intimidate their tribunals.

The officers of the court, the attorneys, jurors and witnesses, as well as the judges, come under this protective power of the court.

Blackstone said: "Likewise all those who are guilty of any injurious treatment to such as are under the immediate protection of a court of justice are punishable by fine and imprisonment; as, if a man assault or threaten his adversary for suing him; a counsellor or attorney for being employed against him; a juror for his verdict; or a jailor or other ministerial officers for keeping him in custody and properly exercising his duties." 4 Blackstone's Com., 285.

Did not Steube assail the prosecuting attorney because he was employed against him?

In United States v. Patterson, 26 Fed. Rep., 511, the same rule was thus announced:

"But wholly aside from this consideration there is a principle of protection to all who are engaged in and about the proceedings of a court that requires preservation against misbehavior of this kind. The defendant in court whose attorney was attacked is entitled to the protection of the court against any personal violence towards its attorney while he is in attendance on the court. Otherwise attorneys might be driven from the court, or deterred from coming to it, or be held in bodily fear while in attendance, and thereby the administration of justice be obstructed. * * * * It protects parties, jurors, witnesses, the officers of the courts, and all engaged in and about the business of the court, even from the service of civil process while in attendance, and certainly should protect an attorney at the bar from the approach and attack of those who would do him a personal violence."

In the Dandrige case, 2 Virginia Cases, one of the judges said:

"If a juror is threatened for his verdict, or a witness for his evidence, or an attorney for his professional exertions, there seems a propriety in immediately punishing such conduct from its manifest tendency to affect the fairness of legal proceedings," etc. And it was also said, and with reason too, that in such instances and others, it "would be just as essential to avert the evil at once" as it would be "to fine and imprison a man, instanter, who should attempt to pull a judge from his seat on the bench, or interrupt the business by any other rude or outrageous conduct."

I refer to these cases for the purpose of verifying the proposition that this self-defensive and protective power of a court to punish for contempt not only shields the judge, but also parties, jurors, witnesses, officers and attorneys of the court from insult, assault and outrages.

The object of the punishment for contempt is to vindicate the authority and dignity of the court and of the law itself. Its purpose is not to afford a remedy to the individual or the public, as the case may be, that may have been injured by the act which is complained of as constituting the contempt. Therefore, in this case, the respondent cannot be punished for assault and battery or for striking the prosecuting attorney, with intent to maim, disfigure or kill.

The construction of the statute (section 5639) is necessarily involved in the decision of this case. What does it mean?

It was contended by the two attorneys who first addressed the court for the respondent, that the statute is exclusive; that the court has no power except that which is conferred by this section, and that it restricts the exercise of that power to contempts committed in the actual presence of the court, or about the court room, and while the court is in session. If that is the correct construction of the statute, then it is not evidently unconstitutional? This court was created by the constitution, not by legislation. It is vested, as all constitutional courts are, with the inherent power to punish summarily contempts—direct and constructive contempts. The legislature has the right to regulate the exercise of the power, but not to destroy it. The manner and kind of punishment for contempts may be prescribed by legislation, but it can not declare what acts shall constitute a contempt of court. The courts alone determine that. It has been decided by the Supreme Courts of Indiana, Kentucky, Illinois, West Virginia, and Arkansas, and New York, I think, and the Supreme Court of the United States has intimated that this is the law. State v. Frew & Hart, 24 West Va., 416; Arnold v. The Commonwealth, 80 Ky., 300; The State v. Morrill, 16 Ark., 384; Little v. The State, 90 Ind., 338; The People v. Wilson, 64 Ill., 195; Ex parte Robinson, 19 Wall., 705.

There is another rule which may have some application. No statute must be construed to operate as a repeal of the prior law, whether it is common or statu

tory, unless it is expressly commanded by express provisions or by affirmative implication. It must be plain that the new law furnishes the only rule of law for the question. It must be obvious that it was intended to cover the whole subject—the entire ground covered by the prior law. If it is simply an enactment of that which is consistent with the prior law, they will both be in force.

Besides, a statute in derogation of the common law must be strictly construed. This seemed to be the view of this statute entertained by Brother McSweeney. That is, that this statute carved out part of the common law and enacted it into statutory form. This view is as fatal to the contention of the respondent, as would be the view that the statute is unconstitutional.

But coming at once to the question, I think the proper construction of this statute is, that it is merely declaratory of the common law. It affirms the pre-existent and inherent powers of the constitutional courts of this state. It was not intended to restrict the exercise of the power to contempts committed in the actual presence of the court, and while it is sitting. It allows the courts to determine what the causes of contempt are by the rules and principles of the common law.

The words of the statute, "in the presence of the court, or so near the court," are comprehensive enough to include all the classes of contempt at common law—both direct and constructive.

How were contempts of courts classified at common law?

They were (1) those committed in the face of the court, in its actual presence, while it was sitting; and (2) those committed in the absence of the court, either when the court was sitting, or where the acts construed as contempts were done at a distance from the place where the court was sitting.

The only material difference between the two classes, say both Hawkins and Blackstone, is that in the first the court proceeds immediately to inflict punishment without formal charge or evidence, while in the other class, process must be first issued to bring the body of the offender before the court and then on the hearing evidence must be adduced to prove the charge of contempt.

The books are full of instructions on this subject. See the Dandrige case, supra.

It was argued by one counsel that Steube was not guilty simply because the judge of court happened to be in the vicinity of the assault when it was made. That is true. The court is not a perambulating institution. Nobody ever supposed it was.

It is contended that there was no contempt because the court had adjourned from Saturday to Monday.

But it was not essential that the court should be in session. The assault was a contempt of the court that was sitting on Saturday and had adjourned, and of the court that was in session on the next Monday.

This was one of the ways Judge Dade answered the same argument in the Dandrige case.

The United States statute, section 725, though somewhat different in phraseology, is identical in meaning with our statute.

In the case of the United States v. Patterson, 26 Fed. Rep., 509 the contempt was an assault on an attorney in the court room during a recess for one hour, and the respondent argued, just as it was, in effect, argued here, that for that reason there was no contempt. Upon that contention the court said: "The mistake of the respondent was in assuming that when the judge left the bench, he might, so far as the court was concerned, proceed to accomplish his purpose of making the assault, supposing that it was only when the judge was on the bench that any question of contempt could arise. But it must be apparent to every one that this is a misconception, and far too restricted to admit of approval anywhere. A court would deserve the contempt of public opinion if it permitted so narrow a view of its prerogatives to prevail."

Where is the difference in principle or reason between that case and this at bar?

How can there be any difference between a recess for one hour, and a recess or adjournment for one day and a half? Absolutely none. It is true that the assault in that case was made in the court room, while in this it was distant from the court room. But there is no difference in principle or in the effect of the two contempts, simply because one was done in the court room where no court was in session, while the other was done away from the court house. I borrow another answer to this objection from the West Virginia case.

It was contended there that the legislature could and had taken away the power of the court to punish summarily constructive contempts, just as it has been

here. Judge Johnson thereupon exposed its weakness and absurdity by demonstrating that there was just as much evil in charging a judge through a newspaper with corruption, as there was to charge the same in the court room, while he was on the bench. He reasoned thus: "Does not the reason for the existence of the power as much obtain in the one case as in the other? If an attorney at the bar should charge the court in its presence with being bribed to decide the cause under argument against his client, no one could doubt for a moment the right of the court to summarily punish him for such contempt. * * * There may not have been a half a dozen persons in the court room to hear the charge of corruption against the court, yet it would be not only the right but the duty of the court to punish such contempt. It is not absurd to say, that if the same attorney had published the same charge in a newspaper printed in the town where the court was sitting, which was read by thousands, aye, read in the court room, within view of the court it was designed to affect, he would not be guilty of a contempt of court, for which he should be summarrily punished?

So here in this case, if Steube had made the assault charged as contempt, on the prosecuting attorney in the court room no one would gainsay the power of the court to punish at once. But does not the same reason obtain for visiting punishment in both cases. The tendency of both would have been the same, namely, to embarrass and obstruct the administration of the law. The phrase "obstruct the administration of justice," is used in at least three senses by the law The authorities so show.

(1.) The administration of justice may be obstructed by the interruption of the actual business of the court or judge.

(2.) It may be obstructed by degrading the courts, by impairing or destroying the confidence of the people in the courts, and thereby destroying their efficiency and usefulness.

(3.) It may be obstructed by acts or conduct which unduly influence, overawe, or intimidate the parties, or their attorneys, or witnesses, or the jurors, or the judges. Can there be any doubt but that the tendency of Steube's act was the obstruction of the administration of justice in one or all of these senses?

It was suggested by Brother McSweeney that cases in which libels on the courts or judges were held to be contempts were not illustrations of any value in this case; because the libels were contempts for the reason that they were "imputations on the honor, the integrity" of the judges. But the authorities do not sustain that view. That is stopping the effect of the contempt on the judges themselves, whereas, the law makes the effect on the people whose servants the judges are, the contempt.

The West Virginia court declared that the court would have the right to punish the author of the libel, "because the language used was designed and calculated to destroy the confidence of the people in the court, and to degrade the court in the opinion of the public, and to corrupt the streams of justice."

In People v. Wilson, supra, the Supreme Court of Illinois adjudged that a libel on the court was a contempt because it has a tendency to embarrass and obstruct the administration of justice.

Again, the argument that the "presence of the court," terms of the statute, do not mean actual presence, is supported by other respectable authority. The language of the Illinois statute is: "The said court shall have power to punish contempts offered by any person to it while sitting."

If the duty in construing this statute was to stick to the literal, original meaning of the words, the conclusion would be, just as counsel for respondent contend for in this case, that the court must be in session, and that the contempt must take place in its actual presence. Yet the Supreme Court of that state, in the case just referred to, decided that this was not the meaning of the law.

The fourth paragraph of the syllabus is instructive and pertinent.

It is: "All acts which impede, embarrass or obstruct a court of justice, or which tend to produce such effects, whether done in or out of court, are to be considered as done in the presence of the court, and are punishable as contempts.

It was urged that no such case as this was ever heard of. That is a kind of negative argument of no merit. It means that if there ever was such a case, it never has been reported. If there never was such a case, it is just that much said to the honor and praise of the people of the state; but it is not a persuasive argument that there is no law which prohibits it. The same thing might be said of treason because of its infrequency.

Judge White, in the Virginia case cited, characterized that kind of argument as "specious and imposing."

Counsel alluded to several trivial insults or indignities that might be offered to an attorney, and urged that if this act of the respondent was a contempt, such acts would be also so considered.

But no court would take cognizance of such trifling things. The maxim, de minimis non curat lex, would govern.

Again, it was argued that the respondent ought not to be punished because he did not intend any contempt of court. But his disavowal cannot be accepted as an excuse. His meaning and intention must be ascertained by an interpretation of his conduct. If his conduct had the pernicious tendency of impeding or obstructing the law and justice, disavowal of an intention to do that is no defense. The People v. Wilson, 64 Ill., 537; State v. Frew & Hart, 24 W. Va., 467 and 468.

To re-state the position, the court being one created by the constitution, it is vested with power to punish summarily both direct and constructive contempts. The legislature has no right to abridge that power. It has not attempted to do this by sec. 5639. That section affirms the common law power of the court. But even if I am wrong in this construction; if the statute is restrictive and limits the power of the court to punish to contempts committed in the actual presence of the court, or in or near the court house; or, if it narrows the scope of the power so that the act charged against the respondent is not a contempt within the statute, it is unconstitutional, and in that case the court has ample power at common law, to punish him. The punishment for such contempts rests in the discretion of the court as to its extent. It is fine, or imprisonment in jail, or both.

The misbehavior of which the respondent stands charged is a clear, aggravated contempt of court. There is no palliation, no excuse for it. The path of duty for the court is plain. If the respondent should not be punished, ruffianism may as well be invited into the halls of justice to settle the controversies.

A failure to punish persons guilty of such misconduct as is charged, would be the indirect road to anarchy. It would inspire a contempt for the courts and the laws.

It is, therefore, adjudged by the court that this respondent pay a fine of $25.00 and the costs of this proceeding, and that he be imprisoned in the county jail of this county for four months.

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## 198 WILLS—TRUSTS—CERTIFICATE OF STOCK.

[Superior Court of Cincinnati, Special Term, February, 1888.]

### † WILLIAM G. ALLEN, EXECUTOR, v. GLOBE INSURANCE CO.

1. Where a testator bequeathed all his property to his wife to be at her absolute disposal, to sell, convey, transfer or expend as she may deem proper during her lifetime, without restraint, she to receive all rents, dividends or interest on investments, or to convert the same into money or other investments at her discretion, and after her death "the remainder of the estate unexpended by her" was bequeathed to a number of persons mentioned, the share of each being carefully designated, and the wife was named as executrix, and other persons were named to act as executors after her death, and requested to make distribution of the property "according to the terms of the will without any unnecessary delay." *Held:* That the wife took the personal property for life, subject to a trust for the benefit of those in remainder.
2. The existence of such trust is further shown by the statements contained in the will that the bequests in remainder had been made after consultation with the wife, with her full concurrence, and "recognizing her right to dispose of one-half of the estate," in connection with the fact that she took under the will as devisee and executrix, and never disputed or questioned any of the statements or provisions therein contained.
3. Such trustee could not, by power of attorney, delegate to another the discretion to sell securities, and change investments, with which she was vested by the terms of the will.

† This same ruling, made in Allen v. Amazon Ins. Co., by the same court, was affirmed by the Supreme Court without report, November 20, 1894.

4. When the certificates of stock of a deceased stockholder are presented to the officers of a corporation for transfer, and they are informed of the existence of a will, they are presumed to have knowledge of its contents, so far as they affect the title to the stock or the right to transfer the same.

5. A corporation is liable to a stockholder for the value of his stock which has been wrongfully transferred to another by the officers of such company.

PECK, J.

In the month of July, 1883, Matthew H. Coats died, leaving a will, in which, after a direction as to the payment of his debts and funeral expenses, there appears the following:

"Secondly. I hereby give and bequeath to my beloved wife, Beulah W. Coats, all the remainder of my estate, real and personal, and of every description, and all I may hereafter acquire, to be at the (her) absolute disposal, to sell, convey, transfer or expend as she may deem proper during her lifetime; without restraint; she to receive all rents, dividends, or interest on investments, or to convert the same into money or other investments at her discretion, and after her death the remainder of my estate unexpended by her I devise and bequeath, as follows." After which follow devises of the "remainder" of the estate to various persons, beginning with the following words: "All the rest and remainder of my estate, and with the full concurrence of my wife herein, I devise and bequeath as follows," then come the bequests of the remainder, twelve in number, and the will concludes: "In making the above requests I have recognized the right of my wife to dispose of one-half of the estate, regarding her as full partner with me in property as well as in affection. Lastly, I hereby appoint my beloved wife, Beulah W. Coats, sole executrix of my last will and testament, and I desire that no bond or appraisement of property be required of her and also nominate and appoint as executors after the death of my wife, Benjamin E. Hopkins, of Cincinnati, Ohio, and William G. Allen, of Covington, Kentucky, requiring no bond of either of them, and request that they will make distribution of the property, or of the money resulting from the sale thereof, at their discretion according to the terms of this will without any unnecessary delay."

The will was duly probated in the Kenton county court of Kentucky, where the deceased resided, and Mrs. Coats, then 84 years of age, was appointed and qualified as executrix July 13, 1883, and continued as such until the time of her death, January 12, 1886.

At the time of his death, Matthew H. Coats was the owner of 225 shares of the capital stock of the defendant company, standing upon its books in his name, and evidenced by certificates thereof in his possession. The certificates passed into the possession of the widow who delivered them to Benjamin E. Hopkins, who presented them to the president of the defendant company in August, 1885, and requested that they be transferred to himself. When presented for transfer the certificates had endorsed upon each of them an ordinary power of attorney to transfer, signed: "Beulah W. Coats, ex. estate M. H. Coats, deceased; per B. E. Hopkins, Attorney."

The president of the company inquired by what authority Hopkins signed the name of the executrix, and was thereupon told that she directed the transfer for the purpose of changing the investment, and was shown a power of attorney executed by her, of which the following is the part material to this action.

"I, Beulah W. Coats, individually and as executrix of the last will of M. H. Coats, deceased, late of Covington, Kentucky, have made, constituted, and appointed, and by these presents do make, constitute and appoint Benjamin E. Hopkins, of Cincinnati, Ohio, my true and lawful attorney for me and in my name, place and stead individually and as executrix as aforesaid, to collect by suit or otherwise, and upon payment to him to receipt for by release under seal, or otherwise, all debts and demands whatsoever due or owing, or that may become due or owing to me individually or as executrix as aforesaid, whether such debts and demands shall be upon bills, notes, bonds, stock, rents, accounts, judgments or claims, or upon any other kind of evidence of indebtedness; and to receive and receipt for any and all such evidences of indebtedness, or any stock, bonds, deposits, money or personal property or effects of any kind due or to become due, or belonging to me individually or as executrix as aforesaid, whether in Kentucky or Ohio, or elsewhere, to compromise and settle any and all disputed claims, to vote said stock, to draw and endorse checks and bills of exchange, to endorse promissory notes, and to waive demand, notice and protest of all such papers, to make and execute any and all contracts and leases, to assign, pledge, sell and dispose of notes, bills, stocks and bonds, to deposit money in bank and sign checks therfor, and generally to transact any and all business of mine individually or as executrix as aforesaid." The instrument was signed "Beulah W. Coats," and "Beulah W. Coats, as executrix of the last will of M. H. Coats, deceased."

Upon the presentation of this instrument and the faith of the statements made as aforesaid, the president of the defendant company caused a transfer of the stock to be made, receiving back the original certificates and issuing others to Hopkins in his own name. The latter subsequently pledged the certificates to a bank as security for a loan to himself. This action is brought against the company on the ground that the transfer was unlawful, and that the company is therefore liable to the executor to return the stock or for the value of the same and the dividends since declared thereon.

Various questions are raised in connection with the power of attorney. Taking them in the order, the first to be considered is that of power. Could Mrs. Coats by this instrument, or any other of similar tenor authorize Hopkins to transfer the stock in question at his discretion? It is clear that she could not, if acting as executrix, make such a transfer of power. When a will clothes an executor with powers requiring the exercise of discretion they cannot be delegated. Bocock v. Pavey, 8 Ohio St., 270; Railroad v. Hutchins, 37 Ohio St., 282.

So the question we have to consider relates to the power of Mrs. Coats as an individual, a devisee under the will of her husband, and this is a question not free from doubt or difficuly. It depends in large measure upon the nature of her interest in the estate devised.

Before entering upon the consideration of that question, it may be well to state that the officers of the company were bound to know of the will and its contents, in other words to know the nature and extent of Mrs. Coats' interest. The stock upon their books in the name of the deceased, they were informed by the language of the power of attorney that there was a will and that Mrs. Coats was the executrix, and knowing these facts they will be presumed to have known the contents of the will. Lowry v. Commercial Bank, Taney's Decisions 310.

Mr. Coats lived and died a citizen of Kentucky. His will was there admitted to probate, and his wife resided there until the time of her death. The power of attorney was executed there, so it seems that we must resort to the law of that state to determine the nature and extent of the powers of Mrs. Coats. It is alleged in the petition that the law of Kentucky is such that she obtained only a life estate in the personal property of her husband, and that she held the property in trust for the tenants in remainder under the will. In support of that allegation plaintiff offered and read in evidence the decision of the court of appeals in the case of Anderson v. Hall, 80 Ky., 92, in which it was determined in substance, that a will devising the estate to a wife to be at her disposal both as to principal and income, with a further devise of so much thereof as remained at her death to persons named, constituted a valid gift of the remainder, and the learned judge who spoke for the court says: "It was a trust vested in the wife for those in remainder, subject to her right to use the property for her support and maintenance during life." The court in that case place much reliance upon the decision in Smith v. Bell, 6 Peters, 67, where a will, very similar in language, was held to give the first taker a life estate only, with a vested remainder in the successor.

The will of Mr. Coats undoubtedly gave to his wife a large interest in the estate, and if we should consider only the language of that part of the will containing the bequest to her, we could not doubt that it gave to her all the rights and interests of the testator in and to the property mentioned,—and if the question were an open one it might be doubtful whether the subsequent limitation upon an estate so entirely disposed of, would be valid—but in the case first above mentioned it seems to be held that there is a valid bequest of the remainder, even though there is a power of disposition of the corpus of the estate granted the first taker. Speaking of the will under consideration in Smith v. Bell, Chief Justice Marshall, says: "It must be admitted that words could not have been employed which would be better fitted to give the whole personal estate absolutely to the wife, or which would more clearly express that intention. But the testator proceeds: "the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin." Jesse Goodwin was his son. These words give the remainder of the estate, after his wife's decease, to the son, with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son, as clearly as the first part manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence were stricken out; yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled than that the whole will is to be taken together, and is to be construed so as to give effect, if it be possible, to the whole. Either the last member of the sentence must be totally rejected, or it must influence the construction of the first so as to restrain the natural meaning of its words; either the bequest to the son must be stricken out, or it must limit the bequest to the wife, and confine it to her life. The limitation in remainder shows that in the opinion

of the testator, the previous words had given only an estate for life. This was the sense in which he used them."

I have quoted thus at length the words of the chief justice, because I deem them peculiarly applicable to the case at bar. Assuming that the will before us gives to Mrs. Coats in the earlier part of it, the whole estate, in words, substantially the same as the words of the devise to the wife in the Goodwin will, the devise of the remainder is even more clear than in that case. The estate in remainder is distributed among a number of persons, the fractional share of each being carefully designated, and the larger part of the will is taken up with this distribution, in which it is stated that his wife participated. And it is to be observed that the testator not only appoints his wife executrix of the will, but looking forward to her demise, (she was over eighty years of age when the will was executed) he appoints two of the devisees to be executors thereafter, and enjoins upon them that they "make distribution of the property, or of the money resulting from the sale thereof at their discretion, according to the terms of the will, without any unnecessary delay." In view of these minute and careful provisions, it is impossible to mistake the intention of the testator. After making ample provision for his wife, to continue during her life, with unrestrained power of control and disposition, he yet disposes of the remainder in a most careful and thorough manner. It is impossible to ignore these provisions, and in the language of Marshall, they "must influence the construction of the first bequest so as to restrain the natural meaning of its words." Yet restrained as they are, still the words conferred upon Mrs. Coats a large interest, and great power over the estate. Whether the will gave to her a life estate pure and simple so that she had only the power to dispose of the income, or whether she could at her discretion dispose of the body of the estate, is perhaps not necessary to determine, for even in the latter case, the bequest of that which remained at her death would be valid, according to the doctrine of Anderson v. Hall. If the nature of Mrs. Coats' interest in the estate was such as to authorize her to dispose of any or all the personal property at her discretion, there was still the interest of the other devisees in the unexpended remainder, of which, according to the court of appeals, she was the trustee. She could in the language of the will dispose of the property "without restraint," and "at her discretion," but subject to her will and discretion in that regard there were the interests of those who were to receive the remainder. Could she delegate this discretion so confided to her?

The law on the subject of the delegation of powers is plain in at least one respect. Powers which involve the exercise of discretion can not be delegated, in cases where persons other than the one clothed with the power are interested in the result of its exercise. "Where the power is tantamount to an ownership, and does not involve any confidence or personal judgment, and no act personal to the donee is required to be performed, it may be executed by the attorney in the same manner as a fee-simple may be conveyed by attorney. * * * It appears to be on the same ground that when an estate is limited generally to such uses as a man shall appoint, he may limit to such use as another shall appoint. The power is equivalent to the fee-simple, and is merely a species of ownership, which involves in it no trust or exercise of personal judgment." Sugden on Powers, 181. Nearly all the cases in which the delegation of a power has been upheld are of the sort thus indicated. Crooke v. County of Kings, 97 N. Y., 423; White v. Wilson, 1 Drewry,

304; Earl Vane v. Rigden, L. R. 5 Chy., 668; Russell v. Plaice, 18 Beav., 21.

In fact, when analysed, it becomes apparent that there is often no real delegation of power in such cases, but the creation of a new power. In Crooke v. County of Kings, 97 N. Y., 423, there was a will devising property to a trustee in trust for a daughter for life, but with a complete power of disposition in the daughter by grant or devise. The court held, the power to grant being inconsistent with the life estate in trust, must be construed as applying only to the remainder after the life of the daughter, so that the latter had, in effect, a life estate in trust, with power of disposition by will. She left a will devising the property to her husband in trust for the benefit of her children, with remainder to the latter, and with power in the trustee to sell and reinvest. The majority of the court, speaking per Finch, J., hold in effect, that the power of the husband was not a delegated power derived from the first will, but an original power derived from the will of his wife, who in conferring it was exercising the ownership conferred upon her by the will of her mother. Earl, J., p. 453, looked upon it as a delegated power, but held that as the power of the daughter was tantamount to an ownership, the transfer of a portion of it to the husband as provided by the daughter's will was valid.

Whether we call it the delegation of the old, or a creation of a new power, such a proceeding is only permissible, in a case where the donee is the virtual owner of the property unhampered by anything in the nature of a trust. An absolute power of disposition, by appointment or otherwise, may be equivalent to a fee-simple title, but where there are other designated persons interested in the exercise of the power, it is not so. One may have the entire power of disposition, but if it is to be exercised for the benefit or partially for the benefit, of another, the power cannot be delegated. A power to sell at such time and upon such terms as the agent may select, illustrates this point. It may be a complete power of the broadest description, yet there is the trust coupled with it. The power of Mrs. Coats under the will of her husband, if construed in the light of Anderson v. Hall, over the property bequeathed, was very broad. She had the right of possession and use, the power to sell and convert into money or other property, at will, but there were the remaindermen at all times interested in the result of her proceedings. She was, in that view of the will, perhaps, not even bound to consult their interests, for they were completely subject to her discretion, but she could not subject them to the discretion of another. Broad as her power was under such a construction, it had that limit.

The husband after making his careful provision for the other devisees, entrusted their interests to her. It is not to be presumed that he would have made such an arrangement, without great confidence in her willingness to carry out his intentions, and in her discretion and capacity to do so. If he therefore confided much to her will and judgment, it would seem to be a reason for holding that the power thus conferred could not be transferred, rather than the contrary. The reason given for not permitting the delegation of such powers, is that they involve the exercise of discretion, and if that be a good reason, it would seem to follow that the larger the discretion the smaller the ground for delegation, unless as we have seen above, the power is so great and the interests in its exercise such as to make it equivalent to complete ownership.

Recurring to the nature of Mrs. Coats' interest in the property bequeathed, there is another ground upon which it may perhaps be safely held that she took a simple life estate with power of sale and disposition so as to change the form of the property, but holding the same in trust for those in remainder. The testator states in the will that it was made with the concurrence of his wife, and in another place intimates that she had selected the devisees to whom one-half of the estate should be given, his words being, "All the rest and remainder of my estate and with the full concurrence of my wife herein I devise and bequeath as follows," and again, after the bequests in remainder, he says: "In making the above bequests I have recognized the right of my wife to dispose of one-half of the estate, regarding her as full partner with me in property as well as in affection." There are other expressions in the will of similar purport. The wife took under the will as a devisee and as executrix, and she would therefore be estopped to repudiate its provisions. Bigelow on Estoppel, 562, and there is nothing in the evidence to show that she ever disputed the statement that she had agreed with her husband as to the bequests to the persons named. From these facts I incline to the opinion that equity would imply a trust in favor of those who were to succeed Mrs. Coats. See Perry on Trusts, sec. 112, *et seq.* Words of request, confidence, or expectation, following an absolute devise in a will, have frequently been held to raise a trust in behalf of the person in whose favor the request was made or the confidence expressed; and *a fortiori* it would seem that words implying an agreement or promise on the part of the legatee that certain intention of the testator should be carried out, when assented to by the legatee, would raise a trust such as to put upon the legatee the duty of executing it.

In Nowlan v. Nelligan, 1 Bro. Chy., 489, the testator, after devising all his property to his wife, said that he did so, "Knowing it is my dear wife's happiness as well as mine, to see her (his daughter) comfortably provided for," and he requested certain designated persons, in case of the death of his wife, "to take care of and manage" the property for his daughter. Held, that the wife took a life estate with the remainder in trust for the daughter. It will be observed that the provision as to what should be done in that case after the death of the wife was very similar to the provisions of Mr. Coats' will designating executors to act after the death of his wife—and in both, such a provision could only be regarded as very significant, for why appoint executors for such a contingency if the testator did not expect some part of his estate to pass to them upon which his will should be executed? Two recent cases are Bohon v. Barrett's Ex'r, 79 Ky., 378, and Noe v. Kern (Sup. Ct. of Missouri), In the latter case there was a bequest absolutely, with the declaration that the testatrix had full faith that the legatee, her husband, would properly provide for the children whom "we have undertaken to raise and educate." In Clifton v. Lombe, Ambler, 519, the testator spoke of an absolute devise as having been made, "In consideration that the legatee has promised to give," and the court held that the promised gift was a valid trust in favor of the person for whose benefit it was intended. In various cases a promise to pay a legacy has been held to imply a trust. Gallauher v. Gallauher, 5 Watts, 200; Hooker v. Axford, 38 Mich., 454; McCormick v. Grogan, L. R., 4 H. L., 87; Russell v. Jackson, 10 Hare, 206.

In Pierson v. Garnet, 2 Bro. Chy., 38, a bequest to a legatee, "his executors, administrators and assigns," of personal property, with a

"dying request" that in case the legatee die without issue, he "dispose of what fortune he shall receive under this my will to and among the descendants of my late aunt," was held a trust in favor of such descendants. To same effect, Prevost v. Clarke, 2 Mad. Ch. 458.

In Irwin v. Sullivan, L. R. 8 Eq. 673; s. c. 17 W. R. 1083, a bequest of property absolutely with the statement in the will that the testator did so trusting that the legatee "will carry out my wishes with regard to the same with which she is fully acquainted," held that the legatee took subject to the performance of the wishes so communicated.

In many cases it has been held that mere suggestions in a will, when an absolute estate is given, and an entire discretion to give or withhold the suggested gift is vested in the donee, do not imply a trust, and it is very difficult to lay down any exact line of distinction between those cases and the others in which trusts have been implied from precatory words.

In the case at bar, however, there appear to be too many indications of an intention to provide for the persons who should succeed to the estate after the death of Mrs. Coats, to hold that their interests rested entirely in her discretion; but when we add the further fact that the will was executed after consultation with her, in the expressed confidence that she would carry out the wishes of the testator, and under circumstances from which her agreement to do so can fairly be implied there is left little room to doubt that it was intended that she should act as the trustee for those who were to come after. So we find that whether construed simply in the light of Anderson v. Hall, or of the expressions of confidence of the testator and the implied assent of his wife thereto, her relation to the other legatees was that of a trustee.

In this view of the will I am concurring in the opinion of Judge Force, who passed upon it on demurrer to the petition, and I know of no one more competent to decide such a question.

Mrs. Coats being charged with the interests of others, could not delegate to another the discretion with which she was clothed in that behalf. The power of attorney under which the transfer was executed is not one authorizing the performance of a mere ministerial act in order to carry out an intention already formed by her—it is not confined to the doing of this or any other particular act, but is plainly an attempt to transfer to the attorney all her powers under the will. For the reasons stated I can only regard it as invalid. In coming to this conclusion, I have been guided by the law of Kentucky, but I do not think the result could be different if the law of our own state were applied. Baxter v. Bowyer, 19 O. S., 490.

It was attempted at the trial to show that Mrs. Coats gave to her agent parol authority to cause the transfer of the stocks. It is not claimed that the company ever communicated with her in any way, and the only show of parol authority to its officers was the statement of the alleged agent before mentioned, that Mrs. Coats wished it to be done, so as to change the investment. The party who so stated it to the president of the company testified, on the stand, to its truth, but it was in such a way, and it is contradicted by so many circumstances, and as made, is so improbable, that I cannot believe it to be true. I forbear further comment on this part of the case.

As the company caused the transfer without due authority, it is bound to return to the present executor, the same or an equal amount of the stock, or to pay the value of the same in money, and for the

amount of the dividends declared since the wrongful transfer. Dayton Bank v. Merchants' Bank, 37 Ohio St., 208, 215; Railway v. Rawson, 16 W. L. B., 423.

Paxton & Warrington, and Orlando P. Schmidt, of Covington, for plaintiff.

Follett, Hyman & Kelly, Rankin D. Jones, W. H. Jones, and Kauffmann, for defendant.

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## 221 FORECLOSURE SALE—EXECUTION.

[Cuyahoga Common Pleas, 1888.]

PETER TETTERBACH v. NICHOLAS MEYER ET AL.

1. The court of common pleas, exercising chancery jurisdiction, may properly make all such orders and issue all such process as are authorized by well-established chancery practice as it existed before the adoption of the code, provided always, that such orders and process are not inconsistent with the provisions of the code, or of the statutes, or the constitution of the state.
2. A purchaser at a sheriff's or a master's sale under a decree of foreclosure is entitled in the same action to an equitable writ of execution to put him into possession of the mortgaged premises as against the defendants in the action, or those who have come into possession under the defendants *pendente lite*.
3. As against the mortgagor in possession the writ will be granted notwithstanding the fact that the purchaser before gaining possession has conveyed the premises by warranty deed, when it appears that the mortgagor refuses to permit either such mortgagor or his grantee to enter into possession.

SANDERS, J.

Application is made to the court for a writ of equitable execution upon the following state of facts:

The action was prosecuted by the plaintiff for the foreclosure of a mortgage given by the defendant, Nicholas Meyer. Such proceedings were had in the action that a decree of foreclosure was entered, and under such decree the property was sold, the sale confirmed by the court, and by its order a deed made by the sheriff to the purchaser at such sale, who was the plaintiff, Peter Tetterbach. It further appears, that since the giving of said mortgage, and up to the present time, the defendant, Nicholas Meyer, has been in possession of the mortgaged premises; that since the deed was executed to the plaintiff by the sheriff, he has exhibited said deed to the defendant and demanded that he surrender to him possession of the real estate herein described. Such demand the defendant refuses to comply with, and, it is claimed, announces his intention to retain by force the possession of said premises as against the plaintiff.

Upon an *ex parte* application, the court entered a rule on the defendant, Meyer, to appear and show cause why a writ should not issue to put the purchaser in possession. In response to the rule, the defendant, Meyer appears, and while not claiming any right of possession in himself, says that the relief here asked for should not be granted because the plaintiff, after receiving the sheriff's deed, without gaining possession, conveyed the premises by a warranty deed to one Berthold.

It satisfactorily appears that the defendant, Meyer, is still in possession, and refuses to surrender [illegible]r to the plaintiff or to his grantee, Berthold.

So far as we have been able to ascertain, an application of this nature has never before been made to this court, with possibly one exception, in which case we are not advised of the facts upon which the application was made, nor has the question presented either before or since the adoption of the code been determined by the Supreme Court.

We are thus called upon to determine the power of the court in the premises unaided by express precedent in this state. The fact that the practice which we are asked to adopt cannot be said to be usual in Ohio, has led us to carefully examine the question.

Has the court, in an action for equitable foreclosure, having foreclosed by its decree all rights of the defendant in the premises, and directed the execution of a deed to the purchaser at the sale, the power to place such purchaser in possession as against the defendant in the action, or those who have come into possession under defendant *pendente lite*?

Neither the code of procedure nor the general statutes of the state confer in express terms the authority to issue the process which is here asked, and if such authority exists, it must be found in the general chancery jurisdiction conferred by statute upon the court of common pleas.

Has the court, then, exercising its chancery jurisdiction in an equitable foreclosure, the power which it is here asked to exercise?

An examination of the authorities will disclose that it has long been the practice of courts of chancery, both in England and in this country, whenever a sale and conveyance of real estate has been decreed, to compel the person in possession of the property, he being a party to the action, or one who has acquired possession from a party *pendente lite*, to surrender it to the purchaser, the relief being granted by order or injunction or writ of assistance, according to the exigencies of the case.

An early, and perhaps the leading case in this country where this question was presented, is that of Kershaw v. Thompson, 4th Johnson's Chancery, 409.

The opinion in this case was delivered by Chancellor Kent, and fully states the grounds upon which courts of equity grant the remedy which is now under discussion.

In this case, as in the case at bar, a mortgage given by the defendant and wife had been foreclosed and sold under the degree of the court, and the mortgagors being in possession, refused to surrender to the purchaser who held the master's deed.

The application for the writ stated that the purchaser had shown the master's deed to the defendant and requested the delivery of the possession, which she refused. Due notice of the application for the writ was served on the defendant, and she resisted the issuing of the same, not on the ground of any alleged title or claim on her part to the land, but on the ground that the court had no authority to interfere with the possession, and that the purchaser under the decree ought to be driven to his action at law.

In the course of the opinion the Chancellor says:

"I have examined this point with a disposition not to enlarge the established jurisdiction of the court, and with an anxiety at the same time to afford the suitor the adequate and perfect relief to which he may be justly entitled. It does not appear to consist with sound principle that the court which has exclusive authority to foreclose the equity of redemption of the mortgagor and can call all the parties in interest

before it and decree a sale of the mortgaged premises, should not be able even to put the purchaser into possession against one of the other parties to the suit, and who is bound by the decree. When the court has obtained lawful jurisdiction of the case and has investigated and decided upon its merits, it is not sufficient for the ends of justice merely to declare the right without affording the remedy. If it was to be understood that after a decree and sale of mortgaged premises the mortgagor or other party to the suit, or perhaps those who have been let into the possession by the mortgagor *pendente lite*, could withhold possession in defiance of the authority of this court, and compel the purchaser to resort to a court of law, I apprehend that the delay, expense and inconvenience of such a course of proceeding would greatly impair the value and diminish the results of sales under a decree. The administration of justice would be exceedingly defective and chargeable with much useless delay and expense if it were necessary to resort in the first instance to a court of equity, and afterwards to a court of law to obtain a perfect foreclosure of a mortgage. The parties to the suit are bound by the decree; their interests and rights are concluded by it, and it would be very unfit and unreasonable that the defendant, whose right and title has been passed upon and foreclosed by the decree, should be able to retain the possession in despite of the court. This is not the doctrine of the cases nor the policy of the law."

The learned chancellor fully demonstrates in this opinion that it has always been well established equity practice to grant a writ of assistance and place the purchaser at foreclosure sale in possession.

The practice thus settled in Kershaw v. Thompson, has been followed in the State of New York to the present time, and is recognized by a provision of the code on the subject, and the courts with chancery powers have continued to issue writs of assistance whenever necessary to place the purchaser at foreclosure in the possession of the property described in the deed. Chamberlain v. Stamler, 35, N. Y., 477.

The same practice prevails in California under the code, and so far as we are advised, without special provision of statute on the subject. Montgomery v. Tutt, 11 Cal., 191; 18 Cal., 141.

The power of a court of equity to issue this process has also been recognized by the Supreme Court of the United States in Terrell v. Allison, 21 Wallace, 291.

It is there held, "A writ of assistance is an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession after he has received the commissioner's or master's deed as against parties who are bound by the decree and who refuse to surrender possession pursuant to its direction or other order of the court."

And in the course of the opinion the court say: "The power to issue the writ results from the principle that the jurisdiction of the court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties and to subject to sale the mortgaged property."

The issuing of this writ has also been recognized as proper equity practice in many of the other states.

See Jones on Mortgages and cases cited, and 13 N. J. Equity.

It would hardly be contended that the courts of Ohio, prior to the adoption of the code, and while exercising, as they did, chancery power as broad as the chancery courts of England, did not have full authority

to issue a writ of assistance in any case in which the same was authorized by established equity practice.

The courts of Ohio under the old constitution and prior to the adoption of the code, beyond question had full authority as courts of equity, to grant the relief which is here asked.

Has the code of procedure or other legislation deprived the court of this authority?

The court of common pleas is now clothed with full jurisdiction as well at law as in equity in all civil cases. So far as the code provides particular forms of process and prescribes what orders the court is authorized to make in any particular state of facts, the authority so given may perhaps be said to be exclusive and to deprive the court in the cases thus provided of power to issue other process or making other orders.

But it is by no means true that this court, exercising chancery powers, can only issue such process and make such orders as are expressly provided for by the code of procedure.

When the statute confers jurisdiction in all civil cases, it gives to the court full power, as a court of chancery, to make all such orders as are authorized by well established chancery practice, provided always that such orders are not inconsistent with the prescribed code of civil procedure, nor a violation of the constitutional or statutory rights of the citizens.

Prior to the adoption of the code, chancery practice authorized the court in a foreclosure proceeding to award execution for any unsatisfied balance of the decree after the proceeds of sale were exhausted. The code makes no such provision, except that in case where the party so desires, he may insert a prayer for a personal judgment, and upon such prayer have rendered a judgment, as in an action at law; but since the adoption of the code, the Supreme Court has expressly determined that it is still proper to follow this chancery practice, even where no personal judgment is asked for in the petition, and award an equitable execution for the balance due after the proceeds of sale are exhausted. Moore v. Starks, 1 Ohio St., 369; Maholm v. Marshall, 29 Ohio St., 611; Giddings v. Barney, 31 Ohio St., 80.

The Supreme Court, in substance, in these cases decide that the provisions of the code are not inconsistent with the chancery practice which authorizes such equitable execution. It is well established equity practice, and notwithstanding the provisions of the code, the court may still adopt it. If this court cannot issue an execution not expressly provided for in the code, it cannot issue the equitable execution for the unsatisfied balance of the decree; but, as held by the Supreme Court, it may issue such an execution by virtue of its general chancery powers and because such practice is and for long years has been authorized in courts of equity. The code expressly provides for a personal judgment and execution in foreclosure proceedings, but such provision is not inconsistent with the equitable execution which issues without a prayer for a personal judgment.

Can it be maintained that notwithstanding our courts retain this right of equitable execution, they have lost the equally well-settled power to place purchasers under their decrees into possession? If deprived of either power the court is disabled from granting the full and adequate relief for which it was established, and it is no longer true that its jurisdiction to enforce its decrees is co-extensive with its jurisdic-

tion to determine the rights of the parties before it. It is no longer true that courts of equity not only declare the rights of parties, but by appropriate decree and remedy compel complete recognition of such rights.

We should be loath to hold that in simplifying our procedure the court was thus crippled, thus deprived of the power to do full equity. But it is suggested that the court no longer possesses the power to make the order asked for, because the purchaser at judicial sale is now entitled to pursue a summary action before a justice of the peace and have restitution of the property in a forcible detainer proceeding. The remedy which is thus afforded in an action at law is in no sense inconsistent with the power of the court of equity to grant relief in the same action in which the decree was rendered. The two remedies are concurrent.

In Kessinger v. Whitaker, 82 Ill., 22, it appeared upon application for a writ of assistance to place the purchaser at a foreclosure sale in possession, that such purchaser had before that time brought an action in forcible detainer to obtain possession of the premises, and that such proceedings were still pending, and it was claimed that such action was sufficient reason for a court of equity to refuse to the party the writ of assistance. The court held that, "The remedies so provided are concurrent, either or both of which might be pursued until a satisfaction was had, which would then bar further proceeding."

We are unable to see that the power of the court of chancery to issue this process is in any way abridged or interfered with by the provisions of the statute which permit the party, if he so elect, to institute an action before a justice of the peace.

It has been claimed by counsel making this application that the provisions of our code in regard to executions substantially, in terms, provide for the issuing of this writ.

In sec. 5373, executions are defined as being of three kinds:

First—Against the property, etc.

Second—Against the person, etc.

Third—For the delivery of the possession of real property, in which case the writ shall contain a specific description of the property, and a command to the sheriff to deliver the property to the person entitled thereto, and the writ may, also, require him to make the damages recovered for withholding the possession, etc.

It is true that neither in this section, nor elsewhere in the code are the cases in which an execution for the possession of real property shall issue, expressly defined, and it may be said with much plausibility that it was the intention of the framers of the code by this section to give to the courts the right to issue a writ of execution for the possession of real property in any case where such writ had before been authorized by chancery practice.

It is also said that if it be true that there is no provision of the code of civil procedure authorizing the relief which is here asked, the facts then present a case for the application of original sec. 603.

This section, for some reason, does not appear in the revision of 1880. It has, however, never been repealed.

The substance of this section is that if a case shall ever arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this code, the practice heretofore in use may be adopted, so far as may be necessary to prevent the failure of justice

This section of the code seems, rather, to have reference to actions than to special proceedings or particular process of the court, and is not, we think, in any way applicable to the question under discussion.

Independently, however, of any provision of the code, from which the power to issue the writ here asked may be inferred, we are of the opinion that this court has full power to issue the writ, and that such authority results from the general chancery jurisdiction of the court, from the principle that, "The jurisdiction of the court to enforce its decrees is co-extensive with its jurisdiction to determine the rights of the parties and to subject to sale the mortgaged property."

In the language of the United States Supreme Court, speaking of courts of equity, "It is a rule of that court to do complete justice when that is practicable, not merely by declaring the right, but by affording a remedy for its enforcement. It does not turn the party to another forum to enforce a right which it has itself established. When, therefore, it decrees a sale of property it perfects the transaction by giving, with the deed, possession to the purchaser."

Neither by express provision, nor by implication, have our statutes placed the court of common pleas in such a position that a purchaser under its decree in foreclosure, and holding a title which such decree has created, must be denied assistance in gaining possession and turned to another forum to enforce a right which the decree has established.

As to the defendant's claim, that the writ should not now issue because the purchaser has conveyed the premises by warranty deed, it is sufficient to say that were the application made by the grantee of the purchaser, the court would have authority to grant to him its assistance.

See Van Hook v. Throckmorton, 8 Paige 33. N. Y. L. Ins. Co. v. Rand, 8 Howard's Practice, 35 and 352. Betts v. Birdsall, 11 Abbott's Practice, 222.

Having full power to grant this assistance to the grantee of the purchaser, will it deny the writ to the purchaser himself, because he has made an unsuccessful attempt to convey the title which he supposed himself to hold under the sheriff's deed?

The purchaser from the sheriff has never had the possession to which his deed entitled him, and, upon the faith of which, he has covenanted to give possession to another.

We can find in this fact of a conveyance by the plaintiff, which has never become fully operative by reason of the defendants' wrongful withholding of possession, no reason for refusing to complete the title which the court undertook to give by the sheriff's deed. By now completing this title, and placing the purchaser in possession, no right of the defendants is violated, and the respective rights of the plaintiff and his grantee, to whom he has attempted to convey, do not in any way concern the defendants.

It is, therefore, ordered that the defendants, on or before March 19, 1888, surrender to the plaintiff full possession of the premises described in said sheriff's deed, and, in default thereof, that an execution issue, directed to the plaintiff, containing a specific description of said premises, and commanding the sheriff to deliver possession of the same to Peter Tetterbach, the purchaser at such sheriff's sale.

Boynton, Hale & Horr, for the motion.

Thomas Robinson, Esq., *contra*.

## 257 FRAUDULENT ATTACHMENT.

[Hamilton Common Pleas, 1888.]

†CHARLES KIZER v. WM. B. GEORGE ET AL.

1. Where a creditor of a non-resident debtor, fraudulently and without the debtor's knowledge or consent, causes the debtor's property to be brought to the state with the intention and for the purpose of exposing and subjecting it to the satisfaction of his claim by attachment, and accordingly causes such attachment to be issued and levied thereon, the attachment will upon motion under sec. 5552 Rev. Stat. be discharged as to said property.

SHRODER, J.

At the commencement of this action the plaintiff caused an attachment to be issued and levied on the ground that the defendants were non-residents of the state. Among the chattels were two coal carts with their teams, appraised at $600. The plaintiff recovered a judgment upon the verdict of a jury for $1,707.28. Before judgment this motion to discharge the attachment was made upon the ground that the attachment was improperly issued.

It appears from the evidence that the defendants were non-residents, engaged in the coal business in Newport, Ky., and that plaintiff was their employe, among whose duties was that of attending to the delivery of coal bought or ordered by customers. Being informed that the defendants were on the point of making a general assignment by collusion with a person engaged in business in the city, the plaintiff in pretended discharge of his duties as such employe directed the delivery in this city of two cart loads of coal, and in pursuance of this direction there were brought over from Newport to some point in this city two carts and teams attached in this action. The act was done by plaintiff without the knowledge or consent of the defendants, and with the intent on the part of plaintiff of bringing this property within the jurisdiction of the court for the purpose of exposing and subjecting it to this attachment.

The motion is made under section 5562, which makes provision for the discharge of an attachment as to any part of the property attached. It is resisted by the argument that only the allegation of non-residence in the affidavit of attachment can be put in issue, and that as to this allegation the defendant makes no issue. The fact presents the question whether the issue ought to be confined to the allegation of the affidavit, or whether the court ought to retain over the property its jurisdiction obtained under the circumstances stated.

It is clear that in order to serve his interest, in antagonism to that of his employers' the plaintiff had this property conveyed to this jurisdiction. His purpose was to appropriate their property to the payment of his claim, and this without their consent. Under the pretense of serving them, he injured them by his wrong doing, in the right they had of disposing of their property toward payment of their debts in their *jus disponendi*. This act was, therefore, fraudulent, as to the defendants. And so far as he intended to make, and did make, the issuance and levy of his attachment a part of his fraudulent scheme, his act was a fraudulent obtaining of the process of this court. The order of attachment when levied on this

†This case is cited and distinguished in Rainey v. Iron Works, 4 Circ. Dec., 232.

property, was made an instrumentality of fraud, a means whereby the fraudulent purpose was consummated. This conduct was an abuse of the trust reposed in him by the defendants, and operated as a fraud, and in law he could gain no advantage or profit therefrom. By adopting judicial process to accomplish the same purpose and carry out the same intention, the taint of fraud was not removed. "Fraud is not purged by circuity." Broom's Legal Maxims, p. 228. The authority to entertain this motion would be feeble, if the court were so powerless that its orders could not cleanse its process of attachment from the direct effects of fraudulent practises. A summons whereby jurisdiction of the person of the defendant is obtained would be set aside if he is lured into the jurisdiction for the purpose of serving summons on him. The same consequences ought to follow as to processes by which jurisdiction is obtained over property wrongfully subjected to them under similar circumstances.

In Timmons v. Garrison, 4 Humphrey, Tenn., 148, a creditor decoyed the slave of a non-resident debtor into the state of Tennessee, for the purpose of having him subjected to the satisfaction of her debt by attachment, and it was held that the levy did not give the court jurisdiction, and the attachment was dismissed.

In Powell v. McKee, 4 La. Ann., 108, it was held that "where a creditor fraudulently obtains possession in another state of the property of his debtor who resided there, and brings it clandestinely into this state without the consent or knowledge of the debtor, the attachment will be dissolved. The fraudulent act of plaintiff can not give jurisdiction to our courts."

In Deyo v. Jennison, 4 Allen, Mass., 410, the court decided that "if a debtor who resides in another state is fraudulently induced by procurement of his creditor to bring into this Commonwealth, property, which, by the laws of the place of his residence, is exempt from attachment, in order that it may be attached here, and the same is accordingly so attached, the attachment is void."

See also cases reported in 5 La. Ann., 710; 24 Wend. (N. Y.), 369; 5 Vt., 241; 47 N. H., 482; also, Drake on Attachment, paragraphs 193-289; 1 Wade on Attachment, paragraph 130; Waples on Attachment, p. 180.

It follows that upon principle and in accordance with the authorities, the attachment as to the two carts and teams was fraudulent and void, and, as them, ought to be discharged. So ordered.

Lawrence Maxwell, for the motion.

W. W. Symmes, *contra*.

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## JURY TRIAL—APPROPRIATION. 258

[Washington Common Pleas, 1888.]

JASPER S. ISRAEL v. THE ZANESVILLE & OHIO RY. CO.

1. If after the jury has been sworn one party calls additional counsel into the case a new trial will not on that account be granted to the other party, unless prejudice is shown, for, although it is too late too challenge jurymen it is not too late to ascertain if cause for challenge exists. Moreover, if the record shows that the question of challenge on the ground of relationship to the new attorney was brought to the attention of the court, but the new attorney was allowed to proceed, a court of error must assume that no cause for challenge was found to exist.

2. In a condemnation case the jury having been sent to view the premises a reviewing court cannot set aside their verdict as to the amount as being against the weight of evidence when the record discloses only the testimony of witnesses, for the facts disclosed by the "view" are evidence in the case, and the "view" is not merely in order to apply the evidence. And this scope of the "view" is not unconstitutional as an abridgment of the right to a jury on the ground that twelve men are not a jury except when presided over by a court. There is no vested right in rules of evidence and the legislature can alter the common law of evidence, and Rev. Stat. sec. 6428 is not a repetition of sec. 5191, but makes the view a mode of obtaining evidence, in condemnation cases.

SIBLEY, J.

This case comes here by a petition in error, seeking to reverse a judgment of the probate court. From the record, it appears that the defendant in error instituted a proceeding in that court for the appropriation of a right-of-way for a railroad, from and upon the lands owned by the plaintiff in error; that the verdict of a jury was had for the compensation and damages to which he is entitled in consequence of this appropriation; that a motion for a new trial was made by him upon the return of the verdict, overruled, judgment entered, he duly excepting, and a bill of exceptions taken, setting out all the evidence of witnesses testifying in the case. The refusal of a new trial is assigned as error, upon various grounds, but two of which were relied upon, however, in argument, viz.:

1. The action of the court below in allowing additional counsel to appear for the Railway Co., and assist in the trial of the case, after the jury had been impaneled, sworn, and had viewed the premises in question.

2. That the verdict of the jury is not sustained by, and is against the weight of evidence in the case.

On either and both of these grounds, it is claimed that the probate court should have set aside the verdict and granted a new trial.

I. The record discloses that the proceeding already referred to, for the appropriation of a right-of-way through the farm of Mr. Israel, was begun prior to the first day of November, 1887; that at said date the parties duly appeared by their attorneys in the probate court—the Railway Co. by Judge Knowles, and Mr. Israel by Judge Loomis and J. C. Preston, Esq., and in person; that thereupon the parties proceeded to impanel a jury in the case, who were duly inquired of as to the relationship to the said attorneys, and as to having causes in any court, pending in which either of said attorneys was engaged as counsel; that Judge Knowles the attorney present for the Railway Co., was asked who appeared on the trial as its attorneys, and did not disclose that anyone but himself would, or was expected to appear; and that upon that state of facts as to who were counsel for the parties, the jury was impaneled, sworn, and on motion of Mr. Israel, sent to view the premises to which the prosecuting related. The record further shows that upon the return of the jury into court, and before any evidence had been offered, there appeared as attorneys for the Railway Co., not only Judge Knowles but also Hon. E. M. Stanberry; that Mr. Israel by his attorneys, objected to any additional counsel appearing for the Railway Co., upon the ground that "at the time the jury was impaneled it was not stated that any other attorneys would appear, except Judge S. S. Knowles, for the plaintiff"—the Railway Co.; and that he was the only counsel for the company whose name was mentioned during the impaneling of the jury. Thereupon counsel for the Railway Co. argued that Mr. Israel might challenge any of the

jury on the ground of kinship to either of said attorneys appearing for the company, or of his having an action pending in which either of said attorneys was counsel; but the record is silent as to whether a challenge was made, or cause for it existed. It does show, however, that the court "allowed" Mr. Stanberry to, and that he did appear with Judge Knowles for the Railway Co. throughout the trial, over the objection of Mr. Israel, by his counsel duly made. This action of the court below, on the facts stated, is alleged as error to the prejudice of the plaintiff here, for which the judgment should be reversed and a new trial granted. The argument is, that by this procedure Mr. Israel was deprived of a right given by the law, to a challenger for cause. Manifestly, however, that cannot be unless in fact a cause for challenge existed. The right arises only when the cause exists; and so far as the record is concerned, none is shown. On settled principles this court cannot presume its existence. But it is said that when the new counsel appeared it was too late to exercise the right of challenge. Conceding this, still it was not too late to ascertain if a cause for challenge, arising out of his presence in the case, existed. Otherwise, the court had ample authority to make the order complained of, and the company was entitled, if it so elected, to the aid Mr. Stanberry could give in the trial of the case. An obvious application of the rule, therefore, that error must be made affirmatively to appear, seems to dispose of the question arising on this part of the record. At this point, however, the case may be put on another ground, equally fatal to the claim of the plaintiff in error. The record, as already stated, shows that the question of challenge, based upon the appearance of the new attorney, was brought to the attention of court and counsel, and that afterward Mr. Stanberry was, by order of the court, permitted to appear for the Railway Co. in the case. Therefore, from what a court of error must assume as to the undisclosed grounds of the action of a court of record, respecting a matter of which it had jurisdiction, the presumption here would be that no cause of challenge was found to exist.

II. The other ground upon which a reversal and new trial are sought is, that the verdict is not sustained by the evidence. So far as relates to the amount of damages, in distinction from compensation, and tested only by the evidence set out in the bill of exceptions, I agree at this point with what is claimed for the plaintiff in error. But the record also showing that the jury had a "view" under the statute, of the premises in controversy, it is insisted on behalf of the defendant in error that they were justified in regarding what was thus disclosed to observation respecting the situation and condition of the lands taken and left, as evidence to be considered by them in connection with the testimony of witnesses in the case, in making up their verdict; and therefore, that if what the record shows to be the evidence of witnesses alone would not sustain the verdict, still it cannot be disturbed here upon that ground. This contention is made upon the authority of reported cases in a case of last resort, and on what is claimed to be the true construction of our pertinent legislation. Against this claim, however, it is insisted, that the "view" had by a jury in proceedings like these, as in other cases known to the law, is for the sole purpose of enabling them the better to understand and apply the evidence, and not with a design to show facts which, ever so clearly seen, and certainly known, they properly can regard as evidence. As the questions thus made are obviously material to a decision of the point of alleged error now under consideration, an examination of them becomes necessary.

1. That, if the jury rightfully could regard as evidence, the facts disclosed by the "view" their verdict will not be set aside by a court of review, upon a record only of what witnesses in the case afterward testified, is clearly true, and is well supported by the authorities. Kiernan v. C., S. F. & C. R. Co., 14 N. E. Rept., 18; Claflin v. Meyer, 75 N. Y., 260; *Re* Boston Road, 27 Hun. (N. Y.), 582.

2. The question of difficulty here, and respecting which the parties radically differ, is whether or not the jury can regard relevant facts made known to them by the "view" of the premises, which the law in such cases provides for, at the option of either party, as evidence. As no cases from our own courts are cited, or can be found, so far as I know, upon this point, it becomes a question as to what is the effect of our law, respecting the appropriation of property by a proceeding like this, read in the light of pertinent decisions in tribunals of authority in other states. But before entering upon the discussion thus suggested, an objection rather of a preliminary nature naturally calls for attention. Counsel for the plaintiff in error ably and strenuously insist that relevant facts disclosed to the jury by a view of premises, in these cases, cannot be regarded by them as evidence, for the reason that this would abridge the constitutional right of property owners to a jury trial. A jury, it is said, in these proceedings, means not only a "tribunal of twelve men," but also one "presided over by a court, and hearing all the allegations, evidence and arguments of the parties," according to the course of the common law. Lamb v. Lane, 4 O. S., 167.

And it is urged from this ground, (1) that at common law, and in jury trials provided for in the constitution, facts derived from a "view" were not to be taken as evidence, but solely for the better apprehension and more accurate application of evidence, otherwise obtained; and (2) that the legislation relevant here is to be read with that limitation, not only as its legal effect, but for the reason—now especially to be considered—that the other construction would render it unconstitutional. Arguing with counsel, in the general proposition that the constitutional provision in question gives a right to a common law jury and trial, still their inferences do not as it seems to me, follow. In the first place, what has by an able writer been termed "Real Evidence"—that of things themselves—was known to the common law. Best on Evidence, sec. 196 (Cham's ed.); State v. Knapp, 45 N. H., 148.

And although this special application of it may not be found in cases at common law, the principles which will authorize it, are there established, as Mr. Best and his editor, in a note to the section cited, clearly show. At this point, also, the Illinois cases hereafter cited will be authority, as resting on constitutional provisions essentially the same as ours.

But, if wrong in this, there is another answer which certainly is decisive. The exact question here is, whether assuming that at common law relevant facts certainly seen and known by a "view" of a thing to which the controversy relates, were not legal evidence, the law, as against the right to jury trial can be changed to make them so. Or, does a right of trial by jury, according to the course of the common law, carry with it a perpetual right to the common law rules of evidence? My answer, in the words of Judge Cooley is, that there is no "vested right" in "existing rules of evidence. They neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the rem-

edy, they must therefore at all times be subject to modification and control by the legislature." Const. Limitations, sec. 367, 288.

Hence, if at common law, facts obtained by a jury from a "view," were not evidence, still, if made so by statute, the right to jury trial is in no sense invaded or abridged. The final question, as to the effect of our legislation, at this point, is therefore reached.

The case of Kiernan v. Chic., S. F. & C. R. Co. 14 N. E. Reporter, 19, already cited to another point, holds that where a view of premises was had by a jury, in a proceeding of this kind, "the result of the view was competent evidence for them to consider;" and that from this evidence they "might rightfully fix the value and damages * * * even though their findings may differ from the amount testified to, and from the weight of the testimony." Syllabus, 7 and 6. The court also cite in support of their holding, a series of cases, showing that the doctrine asserted is settled law in the state of Illinois. See also: Johnson v. Chic., B. & N. R. Co., 35 N. W. Reporter, 438; Thompson v. Keokuk, 61 Iowa, 187; Washburn v. M. & L. W. R. R. Co., 59 Wis., 364; City of K. v. Ry. Co., 84 Mo., 412; Wakefield v. Bost. R. R., 63 Me., 385.

These cases are cited upon the proposition that in the states from which they come, the facts derived by a jury from a view, in proceedings of the general character now under consideration, are competent evidence; and as showing that the Illinois doctrine on that point is, therefore, not singular to that state. But it is on the authority of the cases from Illinois that I rely, largely, as the constitution and laws of that state are accessible, and a comparison can be made of them with our own. Quotation is from the Revised Statutes of Illinois, of 1880, compiled by Hurd, and the Constitution of 1870. I put the relevant provisions of their constitution and statutes in juxtaposition with ours, in order that the force of their adjudications may be seen in this case.

Our constitution provides, as a condition precedent to an appropriation of the kind in question, that the owner's "compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law." Art. 13, sec. 5. That of Illinois, says: "Such compensation * * * shall be ascertained by a jury, as prescribed by law." Art. 2, sec. 13, Hurd, 55. With us the constitution provides for "each county a probate court, which shall be a court of record;" giving it jurisdiction in "probate and testamentary matters," among others, and "as may be provided by law." Art. 4, sec. 108. With them, the constitution creates a county court for each county, with "original jurisdiction in all matters of probate, settlement of estates," etc.; declares that they shall be "courts of record," and have "such other jurisdiction as may be provided for by general law." Art. 6, sec. 18, Hurd, 65. The circuit courts of that state are given about the same general jurisdiction as our courts of common pleas. Art. 6, sec. 12, Hurd, 64. By their statute, a party may begin a proceeding like this, either in the county or circuit court. Hurd, 495, sec. 2. With us in the probate court alone. Rev. Stat., sec. 6416. They give the constitutional provision requiring a "jury" in these cases its settled legal effect Lamb v. Lane, 4 Ohio St., 167, 177, by a law which makes it a jury of twelve; with the "same right of challenge of jurors as in other civil cases in the circuit courts." Hurd, 496, sec. 6–7. The form of the oath of the jury, with us, so far as material, is: "You * do solemnly swear that you will justly and impartially assess, according to your best judgment, the amount of compensation," etc., and "further

ascertain how much less valuable the remaining portion of said property will be in consequence of such appropriation." Rev. Stat., sec. 6427. With them: "You * do solemnly swear that you will well and truly ascertain and report just compensation to the owner * * according to the facts in the case, as the same may be made to appear by the evidence." Hurd, 496, sec. 8. By their statute the jury "shall, at the request of either party, go upon the land sought to be taken or damaged, in person, and examine the same, and after hearing the proof offered," make out their verdict in writing. Hurd, 496, sec. 9. Under ours, the probate judge, on "motion" of either party issues a writ to the sheriff, commanding him to conduct the jury "to view the property or premises" in question, on a day specified, "then and there to view the premises or property," in the presence of a person named, for the corporation, and of another, for the property owner. Rev. Stat., sec. 64.8.

Now, as to "view," according to Webster, is to "look at with attention, for the purpose of examining, to inspect, to explore," and as this is also the legal import of the word (Wharton's Law Lexicon, *in locus*), the two statutes at this point must be regarded as differing in verbiage merely, and not in effect.

From this review of constitutional and statutory provisions, it seems manifest that the policy and systems of the two states, as respects appropriations of property in cases like this, are substantially the same. Or, if there be any inference to be made therefrom, as an original question, on the points decided in the cases cited, ours are more favorable to the defendant in error than theirs. For in Illinois the jury make up their verdict "according to the facts of the case, as the same may be made to appear by the evidence." Here, they assess "compensation" according to their "best judgment," and "ascertain" the loss in value to property left, in consequence of the appropriation. There also, the jury examine the premises, "and after hearing the proof offered," make up their verdict. Here, "witnesses may be examined before the jury after its return to court;" thus plainly implying that if neither party offered the testimony of witnesses, the jury lawfully might render a verdict on what was disclosed by the view. So far then as similarity in rights, in the character of the forum in which they are to be adjudicated, and the law of the procedure, in a proceeding of this nature could render it so, a case on the point in question in one state seems clearly applicable in the other; up at all events to the verdict of the jury. Nor is this result qualified essentially in what follows the verdict. With us a new trial may be granted by the probate judge "for cause"—the practice in his court being governed by the code, in that as in other respects, so far as applicable. And either party may prosecute error to this court, in such cases, to be "conducted as in civil actions." Rev. Stat., sec. 6436–37. The county court in Illinois, in addition to the jurisdiction already stated has a "concurrent jurisdiction with the circuit courts," in many cases at law; has "law terms," and a jury at those terms, precisely as do the circuit courts. Hurd, 338–40, secs. 95, 96, 200. And in common law cases it has the same process, pleadings and practices, as they. *Ibid*, sec. 202. The general law of new trials under their practice is much like ours, allowing them on the ground "that the verdict of the jury is contrary to the weight of the evidence," as well as upon other grounds. Hurd, 793, sec. 57. Furthermore, in this class of cases, whether begun in the circuit or county courts, an appeal will "lie to the Supreme Court," Hurd, 496, sec. 12, the court of last resort. By their Practice Act, ex-

ceptions may be taken during the trial to the action of the court, and to overruling motions for new trials, and a party may "assign for error any decision so excepted." Hurd, 793–4, sec. 60–62. The case cited, 14 N. E. Reporter, 18, shows that an appeal under Illinois practice carries up legal questions made by exceptions, as a proceeding in error does with us. The conclusion therefore is that in the procedure after verdict, as before, the law of the two states is not so different as to render the case relied on inapplicable. Equally in both, the practical effect would be to bar a review of the decision of the trial court, refusing a new trial on the ground that the verdict is against the evidence. in cases where the jury had a view of the premises; but not in the one state more than the other would that militate against the ordinary practice in actions at law. With us, in the particular instance, in the probate court, a code provision would be rendered inapplicable. I hold, then, that the case of Kieman v. Chic., S. F. & C. R. Co., 14 N. E. Reporter, 18, applies, and is decisive of the second ground of error relied upon by the plaintiff in error. This renders it unnecessary, perhaps, to go farther. But it seems to me that the same result must be arrived at, upon the study of our legislation, as an original question.

At common law, it was within the discretion of a court to send the jury to "examine, that is view, the premises," where an offense is "claimed to have been committed, as a help to understanding and applying the evidence." And the same rule applied in civil cases, as to a *locus in quo* deemed material to that purpose, and by some authorities, for the evidential ends contended for in this proceeding. 1 Bishop on Crim, Procedure, sec. 965; Lamb v. Lane, 4 O. S., 167, 179; Best on Evidence, sec. 196 and note. (Cham's ed.)

Our codes of civil and criminal procedure, embody the common law rule fully, in its narrower statement. Rev. Stat., secs. 5191, 7283. The law governing the practice in probate courts, in effect makes sec. 5191 of the civil code, clearly applicable in any case to which, if pending in the common pleas, it might be applied; and also gives the same power over the sheriff and his deputies which the common pleas may exercise in this and other cases in the probate court. Rev. Stat., secs. 536–541. Now, therefore, if the provisions of sec. 6428 of the appropriation act, can have no broader operation than the common law rule embodied in sec. 5191, why was it enacted? In that view they both apply, and have precisely the same effect. Even the provision as to sending persons representing the parties, in the later section, belong to the practice, and rule enacted in the earlier one. The result of the construction contended for therefore is to say that the last section means nothing, as on that theory it simply re-enacted a statute already in force, and strictly applicable—completely commensurate with its own effect. But when the other view is taken, a reason exists for sec. 6428, as well as for sec. 5191. The latter gives the rule in cases where the "view" is simply as a help to understanding and applying the evidence; while the former so enlarges the object of an examination of premises, as to make it a mode of obtaining evidence. This construction is required, consequently, by the familiar rule, that all relevant provisions of statutes must, if their language will permit, be given some effect. None other can be found for sec. 6428, it seems to me, than that held by the cases cited.

This conclusion from the construction of statutes, *in pari materia*, will be strengthened by a consideration of the presumable reasons for provisions such as sec. 6428 will have, by the interpretation I give it.

In the ordinary case, the *locus in quo* is either in dispute, as in all criminal cases, or does not in itself furnish evidential facts; as for example, in a real action, or dispute as to boundaries. But in cases of appropriation, the land taken, and that left, are not as to identity in controversy. The great questions are, value on the one hand, and damage on the other. The solution of these questions depends, as every one knows, very materially upon facts which will be patent to any sensible person of ordinary experience, on simple inspection of the premises—by what Mr. Best terms "immediate real evidence;" that is, "where the thing which is the source of the evidence is present to the senses of the tribunal; of all proof the most satisfactory and convincing." Best on Evidence, sec. 197. Now, as it appears to me, in order to enable a party who felt strongly the evidential force of facts apparent on inspection of an undisputed *locus* in question, sec. 6428 was enacted, for the class of cases to which it applies. And this view is emphasized by what our own court has said as to the evidence of "facts" as against "opinions," in proceedings of this kind.

A. & G. W. R. R. Co. v. Campbell, 4 Ohio St., 583, 585; R. R. Co. v. Ball, 5 Ohio St., 573–4.

The finding, then, is that there is no error shown by the record in this case, to the prejudice of the plaintiff in error, and the judgment of the probate court is therefore affirmed, with costs.

J. C. Preston and W. B. Loomis, for plaintiff.

S. S. Knowles and E. M. Stanberry, for defendant.

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## 268 TRADE-MARKS.

[Superior Court of Cincinnati, Special Term, 1888.]

MAURICE H. WILSON v. AUGUST NEEDERMANN.

A trade-mark intended to deceive the public as to the origin of the article in the packages upon which it is placed, will not be protected against imitation by a court of equity.

PECK, J.

This is an action for an injunction to prevent the infringement of a trade-mark. A copy of the plaintiff's trade-mark is contained in the petition. On the face of it are the words, "Superiori Macaroni Grossi," and below the letters, "P. F. J." and after that the word, "Genova," and in the centre there is a device, an anchor with a rope attached.

The other trade-mark which it is alleged infringes the one which the plaintiff claims he owns is also set out in the petition, and it is plainly an imitation of the first. It contains the words, "Superiori Macaroni Grossi," the letters, "P. J. J." and the word "Genova."

It is not denied by the answer that this is an imitation of the first trade-mark, nor is it denied that the original was invented and is owned by this plaintiff; but it is asserted, and that is the only point of dispute in the case, that the trade-mark of the plaintiff is intended to deceive the public, in that it is intended to cause the public to believe that the macaroni in the packages upon which it is placed is made in Genoa, Italy, whereas it is made in Cincinnati, Ohio.

An expert was put on the stand, and testified that he could read and write the Italian language; that these are Italian words on plaintiff's trade-mark; that they mean, "Superior Macaroni, Large," and that the word "Genova" indicates the province of Genoa.

Various witnesses, dealers in the article, were put on the stand, and they testified that such label would not deceive them; that they would know that it was not the genuine Italian macaroni; that they had often sold it as a domestic article; but no one of them would say what effect the trade-mark might produce upon the mind of the consumer; nor could they testify as to the matter in which it was dealt in by retailers, in selling to the consumers. One of the witnesses testified that he would know it to be a domestic production, but it seemed to him plain that a person who was not an expert in the business might be led by this label to believe that Italian macaroni was contained in the packages.

There is hardly room for a reasonable doubt that such was the impression intended to be produced by this trade-mark, and the plaintiff is not, therefore, in a position to demand any relief. The petition is dismissed.

John B. Boute, for plaintiff.
Howard Douglass, for defendant.

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## EXTRADITION. 269

[Superior Court of Cincinnati, Special Term, 1888.]

DEUBER WATCH CO. v. C. DALZELL.

**One who was extradited from New York to Kentucky, was served with summons in a civil action while passing through Ohio on his way home, by the party who caused his extradition, and the court on motion set aside the service.**

PECK, J.

The plaintiff company through their officers, made a charge that the defendant had committed a crime in the state of Kentucky, county of Campbell, and caused him to be extradited from the state of New York upon that charge, and brought to Newport, Kentucky, where he gave bail. Immediately after giving bail to appear at the trial of the case he came from Newport to Cincinnati, where he remained from Saturday morning until Monday evening. At the time he secured bail and was discharged from the custody of the officers in Newport, he had no money wherewith to return home; it appears that he was remaining in Cincinnati until Monday evening for the purpose of securing money to return to New York; and that late Monday afternoon he succeeded in raising the necessary money, and bought his tickets to go to New York, and about that time he was served with summons in this action.

He now appears by his counsel for that purpose only, and moves that summons be set aside on the ground that he was privileged from service of this sort of a writ while returning to his home from Kentucky, by reason of having been brought there by plaintiff's officers under the extradition process.

The Supreme Court Commission in the case of Compton v. Wilder, in the 40 Ohio St., 130, has decided that one who is brought into the state of Ohio by extradition, cannot, while here, and before he has an opportu-

nity to return, be served with a writ of summons in a civil action. That case began in this court, and was originally decided by Judge Yaple in a well-considered opinion which appears in the 7th American Law Record, page 212.

The difference between that case and the case at bar is that there the defendant was brought into Ohio. In the case at bar the defendant was brought into a neighboring state, not into Ohio at all, and an affidavit is filed to show that he might have returned to New York by rail without coming into Ohio. It is also claimed that between Saturday morning and Monday evening more than a reasonable time had elapsed within which he might have returned.

On the subject of privilege from arrest, or privilege from service of summons, there was a good deal more of discussion, in the law books of the last century, than in the more recent reports; for in those days many civil actions were begun by writ of capias, and a privilege from arrest was a matter of importance. It has been held within the last year or two in this court, in the case of Bassett v. Gunsolus, 12 Law Bulletin, 319, that the privilege extends as well to writs of summons as to writs of capias, and in that case it was held to protect a man who came here from Michigan to attend the trial of a case in this county to which he was a party, while coming, remaining and returning. *Eundo, morando et redeundo*, as the old books say.

Now, this is not precisely a privilege of that sort—but it seems to me that it is so closely analagous that we may resort to these cases for light in determining this point. I find it stated in Tidd's Practice that the courts have not been nice in scanning this privilege from arrest to persons attending upon court, but have been large and liberal in their construction. Thus a plaintiff who was attending from day to day at the sitting in expectation of his case being tried, was held to be privileged from arrest while at a coffee-house in the vicinity of the court, waiting for the trial. And where an attendant was waiting attendance on the court, and stayed at court until five o'clock in the afternoon, and then went with an attorney and witness to take dinner, the court said that he was to be held exempt. So where a court was over at four o'clock in the afternoon, and a witness was detained until about seven in the evening, when she was arrested as she was going home in a carriage, the court held that she ought to be freed, and that a little deviation or loitering would not alter it.

And there is a case where a member of Parliament was arrested two days after the rising of that body, and he plead his privilege from arrest while attending parliament; and the court held that the privilege had not expired by the lapse of two days.

Now, applying similar rules to the case at bar, it seems to me that the fact that this party was, by the agents of the plaintiff, brought from home against his own will, into a foreign jurisdiction, makes a stronger case than if he had voluntarily come to attend the trial of a civil action, and that he had a right to return by whatever route was most convenient to him. He was not bound to avoid the state of Ohio, and the delay in departing from Cincinnati, explained as it is, was not unreasonable. The motion to set aside the summons is granted.

Bowman & Bowman, of Springfield, for the motion.

Howard Douglass, *contra*.

## PLEADING—WAIVER. 270

[Superior Court of Cincinnati, General Term, 1888.]

### †JOHN HENRY ZIEVERINK v. WILLIS M. KEMPER, RECEIVER.

Where a petition was demurred to because it showed on its face that the cause of action was barred by the statute of limitations, and the demurrer was erroneously overruled, and defendant answered without pleading the statute, such defense was not thereby waived.

ERROR to Special Term.

PECK, J.

The original action was prosecuted by the receiver to set aside certain conveyances alleged to have been made by the defendant, for the purpose of placing his property beyond the reach of his creditors.

Zieverink had been a stockholder in an insolvent corporation, and plaintiff below had recovered a judgment against him upon his liability as such stockholder, whereupon said plaintiff commenced the action below to subject the property in question to the payment of the judgment. A decree in favor of the receiver was rendered by the court below and it is now sought to reverse that judgment.

One of the errors alleged consists of the overruling of the demurrer to the petition on the ground that it appeared on the face thereof that the action was barred by the statute of limitations. It did appear from the petition that certain of the conveyances which it was necessary for plaintiff below to set aside in order to obtain the relief sought, had been made more than four years before the commencement of the action, and it was averred that the receiver was not aware of the alleged fraud until within less than four years of the commencement of the action. On behalf of Zieverink it is claimed that such allegation is not sufficient because the receiver brought the action in a representative capacity, and it is urged that the allegation should have been that the creditors were not aware of the fraud until within four years of the time of the commencement of the action.

In the case of Brown v. Hitchcock, 36 Ohio St., 667, it was held that the liability of a stockholder to the creditor of the corporation commenced at the same time that the debt was incurred by the corporation. We have heretofore held in the unreported case of Vannemann v. Zieverink, that an action to set aside a fraudulent conveyance made to escape the result of such liability might be commenced by a creditor of the corporation for the benefit of himself and other creditors.

It has also been held that a receiver is a mere ministerial officer, Bank v. Buckingham 12 Ohio St., 425, and can only enforce such rights as the creditors have. High on Receivers, Sec. 455, 456, 457. From these principles it would seem to follow that when the receiver brings an action in behalf of the creditors and is only representing them, it is their knowledge of any alleged fraud which is important to the action rather than the knowledge of the receiver. Hubbell v. Medbury, 53 N. Y., 98. The demurrer to the petition should have been sustained. It is claimed, however, that the error in overruling the demurrer was waived by the defendant below, because he answered by leave after his demurrer had been overruled, and went to trial upon an answer which does not set up the plea of the statute of limitations. The objection appears to be disposed of by section 5328 of the Revised Statutes, which provides that, "when, upon the statement in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party." C. & P. R. Co. v. Stackhouse, 10 Ohio St., 567; Trimble v. Doty, 16 Ohio St., 119, 126; Tootle v. Clifton, 22 Id. 247; Weldner v. Rankin, 26 Id., 522.

But it is urged that the defense of the statute is waived by Zieverink because not set up in the answer. The question having been raised by demurrer and decided against him, it is hard to perceive any reason why it should be repeated. It is hardly permissible to repeat a defense in an amended answer which has been held bad upon demurrer, and the principle would seem to apply to a defense such as this, which may be raised either by answer or by demurrer, where the facts as to

†For another opinion in this case, see *post*, 21 B., 212. The holding in this case was affirmed by the Supreme Court; see opinion 50 O. S., 208.

lapse of time appear in the petition. Why tender a second time an issue upon which the court has held that defendant cannot prevail?

The judgment is reversed for error in overruling the demurrer to the petition, and the cause will be remanded, with leave to plaintiff to amend the petition.

TAFT & MOORE, JJ., concur.

Glidden, for plaintiff.

Avery & Holmes, for the defendant

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271 WILLS.

[Hamilton Probate Court.]

JOHN COFFEY, ADM., v. PETER BACCIOCCO ET AL.

A testator in his will devised to three of his minor children the sum of $500 each, and to his daughter Josephina $2,000, but did not direct by whom or out of what fund it should be paid. He next devised all his real and personal property to his children in equal shares. The personal property being insufficient to pay these legacies, *Held:* that the real estate so devised could not be charged with the payment of the legacies.

GOEBEL, J.

Santio Bacciocco, late of this county, made his will and died. The will was duly admitted to probate and record and is as follows:

"Second: Having already advanced money to such of my children as attained their majority or married, now in order to make like provisions for my three minor children James, Carrie and Joseph, I direct my executors to pay to the said James, Carrie and Joseph as they severally attain their majority, the sum of five hundred dollars each.

"Third: I give and bequeath to my daughter Josephina the sum of two thousand dollars in token of my appreciation of the sacrifice she has made and for the constant, faithful and affectionate attention and care she has bestowed in charge of my house and family since the death of her mother.

"Fourth: I give, devise and bequeath to my son Peter and to my daughter Josephina and the survivor of them and to their heirs and assigns, and to the heirs and assigns of the survivor, all the real estate of every kind, wherever situated, of which I die seized in trust nevertheless to enter upon each and every parcel thereof, and to hold the same and to collect the income and revenue derived therefrom, and after paying the taxes, insurance, repairs and necessary expenses of this trust, to divide and pay the residue of such income semi-annually equally to my children share and share alike, including the issue of any child that may have deceased, such issue to take its parent's share. This trust is to continue for the period of ten years after my decease, when the same cease and determine. And the said trustees shall convey the same in fee simple to my children, share and share alike, including the issue of any child that may have deceased, such issue to take its parent's share.

"All the rest, residue and remainder of my estate I give, devise and bequeath to my children share and share alike, including the issue of any child who may have deceased, such issue to take its parent's share."

The personal estate being insufficient to pay the legacy provided for in the will, the administrator instituted this proceeding to sell the real

estate of the decedent to pay such legacies. To this proceeding the heirs and devisees were made parties defendants. The question presented is this: Whether the real estate (there being an insufficiency of personal assets) is chargeable with the payment of legacies.

"The personal estate is the primary fund for the payment of debts and legacies. If the testator, therefore, gives a legacy without specifying who shall pay it, or out of what fund it shall be paid, the legal presumption is that he intended that it should be paid out of his personal estate only, and if that is not sufficient the legacy fails. Harris v. Fly, 7 Paige, 421; Geiger v. Worth, 17 O. St., 564, 568.

"Real estate is never charged with pecuniary legacies unless the testator intended it should be, and that intention must be either expressly declared or fairly and satisfactorily inferred from the language and disposition of the will. Reynolds v. Reynolds, 16 N. Y., 259; Lupton v. Lupton, 2 Johnson, Ch., 614; Eavenson's Appeal, 84 Pa. St., 172.

"The exception to the general rule that the personal estate is the first fund for the payment of legacies was made by the Supreme Court of the United States in Lewis v. Darling, 16 Howard, page 1, wherein the court held that real estate will be charged with the payment of legacies where a testator gives several legacies, and then without creating an express trust to pay them, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund, upon the theory that in such a case the residue can only mean what remains after satisfying the previous gifts. Davis' appeal, 83 Pa. State, 348.

"In the case of Harris v. Fly, 7 Paige's Ch., 348, where the testator by his will devises his funds to his son subject to the estate of his wife, and then gives to each of his daughters a legacy of $1,000, to be paid by the son in six annual payments from the death of his mother, and made the son his residuary devisee and legatee, it was held that the legacies to the daughters were an equitable charge upon the farm devised to the son, the personal estate of the testator being insufficient to pay the legacies.

"So the court in Yearly v. Long et al., 40 Ohio St., 27, where a testatator devised all of his real estate to his son, he, however, to pay the testator's daughter, a legacy in annual installment, held that the legacy was an equitable charge upon the estate devised.

"The theory upon which these cases were decided is that the legacy vested upon the acceptance by the devisee of the devise to him on condition of its payment.

"In England the doctrine is well settled that a bequest of legacies followed by a gift of all of the residue of the testator's real and personal property operates to charge the entire property with the legacies. Hassell v. Hassell, 2 Dick., 526; Buch v. Biles, 4 Madd., 187; Cole v. Turner, 4 Russ., 376; Morehouse v. Scaife, 2 Mil. and Craig, 695; 1 Vis. Ju., 436; 2 Vis. Ju., 267.

And this doctrine has been followed in McLanahan v. Wyart, 1 Penn., 96; Adams v. Bracket, 5 Met., 280; Whitman v. Norton, 6 Bin., 395; Downman v. Rush, 6 Rand., 587.

"That real estate is not as of course charged with the payment of legacies has been recognized in Ohio in Clyde v. Simpson, 4 O. S., 445, in which the court held that between the mere objects of his bounty, where he had given a pecuniary legacy resting upon and payable from the personal fund to one, and devised real estate to another, and the

personal fund proves insufficient, there can be no reason for disappointing the devisee rather than the legatees, or for shifting the loss from him upon whom the law casts it to one the law does not affect until it is made unmistakably to appear that the testator so intended. Without such clear manifestation of intention, there is great danger of interfering with his wishes.

"The language of the will ought to be so explicit as to leave no doubt in the mind of the court that the testator actually contemplated such a contingency and intended to provide against it. A mere direction of a testator that a devisee shall pay a legacy does not create a charge upon the land. There must be expressed words of necessary implication from the whole will that such was the intention. Cables' Appeal, 91 Penn. State, 327; Walters' Appeal, 95 Penn., 365.

"It must be conceded that it requires no express words to charge pecuniary legacies upon real estate. An intention to do so may be derived by implication, and will be effectual when found to exist in any form, because the law seeks only to discover and carry out the purpose of the testator.

"The legacies here are pecuniary legacies, without any provision in the will by whom or out of what fund they are to be paid. We may fairly infer from the will that the testator intended that they should be paid out of the personal estate. It was competent for the testator to make them a charge upon the real estate or not, as he saw proper.

"We may fairly assume that at the time of the making of his will he had sufficient personal assets to pay the legacies. And this is strengthened by the fact that in his will there are no direct words of charge, nor does it contain any of those expressions from which a charge has been implied. It does not direct any person to pay the legacies, nor are they coupled with a devise of real estate upon which a condition to pay is imposed. The real property is devised without conditions, except that the trustee shall hold the real estate intact for ten years, nor is the devise made subject to the legacies."

For the reasons given the demurrer will be sustained, and the petition will be dismissed.

Mallon & Coffey and O. J. Cosgrove, for plaintiff.

Myers & Fitzgerald, for defendants.

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[Franklin Common Pleas.]

## GEAREN v. BALTIMORE & OHIO RAILWAY COMPANY.

For corrected decision, see post 293.

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## CORPORATIONS—STOCK. 292

[Superior Court of Cincinnati, General Term, 1888.]

PHILIP B. SHAW v. OHIO EDISON INSTALLATION CO. ET AL.

1. An agreement between a corporation and one of its stockholders whereby the latter surrenders his stock to the former for a valuable consideration, is illegal.

2. Where a corporation has disposed of all its property for the purpose of defrauding a stockholder the latter may maintain an action to annul such transaction.

RESERVED on demurrer to the petition.

PECK, J.

Plaintiff alleges that the promotors of the defendant company agreed with him that he should have $50.000 worth of the paid up stock of the company, to be paid for by them by certain assessments, in consideration of certain valuable services by him to be performed for the company. That he performed the stipulated services and became entitled to the stock, whereupon it was agreed between himself and the company, that he should surrender to it the stock so held by him, and receive in lieu thereof a contract entitling him to one-fifth of the net earnings of the company so long as it should exist. That the company earned large profits, but instead of paying over to him the one-fifth as provided in the contract, the directors fraudulently appropriated a part of the assets thereof to their own use, and conveyed the remainder to another company of which they are the stockholders and directors, thereby depriving him of the benefits of his contract. It further appears from the petition that the plaintiff is the owner of other stock in the first named company, and that he was a director therein at the time the agreement was made to surrender the $50,000 of stock. The directors of the companies, as well as the corporations themselves, are made parties defendant, and plaintiff prays that they be required to account for the assets of the first company, disposed of as aforesaid; that an account be taken, the property restored, and for other relief.

The defendants severally demur to the petition, on the ground that it does not state facts sufficient to constitute a cause of action.

The principal contention of defendants is that the agreement to surrender the stock and accept in lieu thereof a right to one-fifth of the earnings of the company, was illegal and void, because a corporation cannot traffic in its own stock, and because the plaintiff was himself a director of the company when the agreement was made.

The former objection appears to be well taken. It is a settled law in Ohio that a corporation cannot buy its own stock, or become a holder thereof for any purpose except as security for a pre-existing liability. Coppin v. Greenlees, 38 O. S., 275, 281; Taylor v. Miami Ex. Co., 6 O. 176; Hubbard v. Riley, 8 W. L. B., 434; Wiles v. Reed, 5 *id* 79.

The proposition is sufficient to sustain the demurrer unless the argument that defendants are estopped by participation or acquiescens in the illegal action from asserting it is sound. If such an objection could avail, it is difficult to perceive how the defense of illegality could be made as against any action for the enforcement of such a contract against a party to it. The courts might be used to enforce any nefarious

transaction if the plaintiff can avoid the defense of illegality by simply retorting to the defendant. "You were a party to it, and therefore cannot plead that it is illegal." If there were any estoppel in such a case it would seem to be against the party seeking to enforce the illegal contract; but Judge McIlvaine, in the case of Coppin v. Greenlees, dismissed the doctrine of estoppel with the remark that it had "no application in the case."

If the action rested solely upon the attempt to enforce the illegal contract, the demurrer of the parties defendant would have to be sustained; but it further appears that plaintiff is an owner of stock in the corporation, and it is claimed that as a stockholder he is entitled to interfere and prevent so flagrant a misuse and misapplication of the assets of the corporation. It is alleged in substance that all the property and interests of the company have been converted, wasted, or assigned to defeat the claims of the plaintiff, and deprive him of the benefit of his interest in the company. In such case a stockholder has the right to interfere, and upon that ground the petition states a cause of action to which all the defendants are proper and necessary parties. The demurrers are therefore overruled.

TAFT and MOORE, JJ., concur.

Jordan and Jordans, for plaintiff.

Champion and Williams, for defendant.

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## 293 RELIEF ASSOCIATION.

[Franklin Common Pleas, 1888.]

GEAREN v. BALTIMORE & OHIO RY. CO.

**The Baltimore and Ohio Employes' Relief Association is an association of railroad employes, formed for the mutual benefit of the members thereof, and their families exclusively, and comes within the provisions of section 8 of the statute, as amended vol. 77, page 181.**

DUNCAN, J.

Plaintiff claims that he entered the employ of the defendant about June 1, 1884, and remained till July 1, 1885, at which time he was discharged. That he was to receive $2.00 per day for his services, to be paid on the 20th day of each month, so long as he remained with the defendant.

He claims that during his employment the defendant, under the pretense of being engaged in the business of insurance, under and subject to the laws of the state of Ohio, extorted from him, in the month of June, 1884, $4.50, and $2.25 on or about the 20th day of each month thereafter, until his discharge, as premium or compensation for said pretended insurance.

He claims that this money, amounting in all to $31.75, was taken from him without authority of law and without consideration, and asks that he may have judgment for the same with interest.

The defendant answers admitting its corporate capacity, the employment and discharge of the plaintiff, and the amount of wages to be paid, but denies each and all the other allegations of the petition.

For a second defense it alleges the existence of the B. & O. Employes' Relief Association, a corporation organized under the laws of the state of Maryland, and organized for the purpose of furnishing benefit and relief to the members thereof who are and were in the employ of the B. & O. Railway Co., and avers that plaintiff made applications to and became a member of this association. His applications, and also the constitution, rules aud regulations of said association are attached to and made part of the answer.

It is claimed that these applications were made to the association at Baltimore, Md., and were there acted upon, and that the contract thereby became one under the laws of the state of Maryland, and not under and governed by the laws of the state of Ohio. Defendant avers that the money deducted from the wages of plaintiff was under and by virtue of said contract, and that it was paid to the B. & O. Employes' Relief Association as provided therein.

To this answer the plaintiff files a reply admitting the existence of this association and that it was formed as provided by an act of the general assembly of the state of Maryland.

It admits the adoption of the constitution as attached to the answer and also attaches the same, together with a copy of the by-laws, to the reply.

The plaintiff claims that the act authorizing this organization was passed at the instance and by the procurement of the B. & O. Railway Co., and that the constitution and by-laws were drafted and adopted in its interest and for its benefit, and not for the benefit of its employes, and says that the plaintiff had nothing to do with its formation or management. That after he entered in the employ of the defendant, it caused the paper attached to the answer to be presented to him, and caused him to sign the same as a condition precedent to his remaining in the employ of the company.

That he signed the same without reading it, or its being read to him, or its contents being made known to him. He says that he was made to understand by the defendant that it was for the purpose of obtaining some sort of life insurance. He says he did not voluntarily assent to the obligations and stipulations contained in the paper signed by him, and that he signed it simply so as to retain his situation and for no other purpose and for no other consideration, and that he assented to the deductions from his wages solely for the purpose of retaining his situation and for no other consideration, and that said deductions were unlawful and wrongful. Plaintiff avers that this association is not one of those formed by railroad employes for the benefit of themselves and their families, as contemplated by the statutes of this state, but that it was formed at the instance and for the benefit of the B. & O. Railway Co.

To this reply a general demurrer is filed.

Does the reply state facts sufficient to constitute a reply to the answer, and do the petition and reply, taken together, constitute a cause of action in favor of the plaintiff?

The plaintiff admits that he signed the paper attached to the answer, but says he signed it simply for the purpose of retaining his situation. He says it was not read to him, nor did he read it. He assigns no reason for not reading or having it read to him, nor does he claim that its contents was misrepresented to him, and that replying upon such representations he signed it. He says that he was given to understand that it

was some sort of life insurance; so it is; he says he signed it not on account of any misrepresentations, but in order to retain his situation.

The signing, then, was his voluntary act, because he could have quit his engagement at any time. But for that consideration, to-wit: employment, according to his own account, he consented that the $2.25 might be retained from his wages.

One signing a contract, in the absence of fraud or want of consideration, is bound by its terms and conditions, unless it be illegal or for unlawful purposes.

Fraud is not presumed, but must be proved, and to be proven it must be pleaded.

There is no claim in this reply but what this money was deducted and paid over to the association as provided in this contract. The reply admits the corporate existence of the association, sets out its constitution and by-laws, and makes them a part thereof. There is no averment that it is a fraudulent institution.

It is averred that it was organized at the instance and request of the railway company, and for its benefit; that may be true but that is no fraud. The company by providing aid and assistance to its employes in case of sickness or accident would, undoubtedly, derive some benefit. There is no claim that the members did not receive the aid they contracted for. Had this plaintiff been injured, or had he taken sick, he, doubtless, would have received assistance in accordance with the terms of his contract; at least, there is no averment to the contrary in the reply.

The averments in the reply do not show that the signatmre to this contract was obtained by fraud.

If this money were retained and paid over to the association according to the contract, the plaintiff has no right to call upon the defendant to repay it to him in the absence of an averment that the association was fraudulent, and that the defendant knew it, and was acting for it, was benefitted by it; in other words, that the money was had and received for the use and benefit of the defendant. No facts are averred in the reply to show in what way the company is benefitted instead of the employe.

Its object as stated in its constitution, "is to provide for its members while they are disabled by accident, sickness or by old age, and at their deaths for their families." The B. & O. Railway Co., is not a member of this association, and hence is not entitled to any benefits from it. A careful perusal of its constitution and by-laws fails to show that the railway company is entitled to any benefits.

As the constitution and by-laws are made a part of the reply then in order to show that the company derives the benefit instead of the employe, some facts must be averred to controvert the facts contained in the constitution and by-laws.

I presume no such facts exist, as the pleader seems to have drawn the reply with considerable care, and I take it, drew it in this manner in order that nothing but the facts as they could be substantiated should be set out, so that this cause might be disposed of on demurrer, and avoid the expense of a fruitless litigation.

Is this association doing business in violation of the laws of this state?

It may be conceded that the railway company was instrumental in having this association formed, that it organized it, did it for the purpose

of aiding and assisting its employes, and to save itself from having suits brought against it. It derives no benefit from the assessments. No matter how great a surplus may accumulate, it cannot receive a dollar of it. It all stands there for the benefit of the members.

Whether it was organized by the railway company, or by its employes, makes no difference, so long as its object and purpose are for the mutual benefit of railroad employes who become members thereof, and their families, exclusively. Is this association for the benefit of railroad employes and their families exclusively? Its constitution answers this question.

Article 1st provides "This society shall be known as the Baltimore & Ohio Employes' Relief Acsociation."

Article 2d. Its object shall be to provide for its members while they are disabled by accidents, sickness or by old age, and at their death, for their families.

Article 3d provides that its members shall be persons in the employ of the B. & O. Railway Co., or of any other railroad company whose employes shall be admitted to the privilege of membership by a vote of the managers of this society.

It is confined, then, to railroad men exclusively, and there is no claim that any others have ever been admitted as members.

The business of this association is conducted through a committee called a "committee of management," composed of the President of the B. & O. Railway Co., and nine others; four to be selected by the railway company, and five by the contributors. None of these parties are entitled to any salaries.

The treasurer is the treasurer of the railway company, and the secretary, the only other officer, is elected by the contributors, and all the expenses of managing the association are paid by the railway company, leaving the entire funds of the association intact for its members.

Suppose we concede that the object of the railway company in forming this association was to protect itself against law-suits. Does that make of it an insurance company such as is contemplated by our statutes? Certainly not.

Does not this association come within the provisions of sec. 8 of the statute, volume 77, page 181, which provides that "this act shall not apply to any association of religious or secret societies, or to any class of mechanics, express, telegraph, or railroad employes, formed for the mutual benefit of the members thereof, and their families exclusively?"

This association, by its charter and constitution, is for the exclusive benefit of railroad employes and their families, and I think comes within that provision. But if it does not, the plaintiff's cause of action, if he has any, as the pleadings stand, is against the association and not against this defendant.

Jones & Jones, for plaintiff.

J. H. Collins, for defendant.

## 302 LIBEL—CONTEMPT.

[Franklin Common Pleas.]

### *STATE OF OHIO v. ALLEN O. MYERS.

1. Section 5639 of the Rev. Stat. is either declaratory of the common law of contempts of courts, summarily punishable, or it is partly declaratory and partly restrictive of that law, and so far as it is restrictive it is unconstitutional.

2. An article or letter, libeling, defaming, the judge, clerk of court and prosecuting attorney concerning their official conduct in a case then on trial—more particularly an article or letter falsely charging such officers with having packed the grand jury that found the indictment in the case then on trial, and sent to a newspaper for publication, the author intending it to be, and knowing that it would be, published and circulated, and then published and circulated in the county and city and court room where the trial is in progress, is a flagrant contempt of court, summarily punishable, because it tends to embarrass, obstruct and impede the administration of law and justice in such court.

3. The author of such a letter or article is as guilty of contempt as if he had been the editor and publisher of the newspaper, as if he had published and circulated it himself, and as if he had stood up and orally charged in the face of the court what he caused to be published.

4. The common pleas court of this county is a constitutional court, because it was established, created, by the constitution, and it is not, therefore, constitutionally competent for the legislature to destroy or abridge the inherent power of the court to punish summarily persons for contempt.

PUGH, J.

The length of the discussion in this case, and the importance of the questions involved, constitute the apology for the time I may consume in expressing the reasons for the conclusions which have been reached.

The questions discussed were raised by demurrer, interposed by the respondent to the charge or complaint filed on the part of the state. Respecting the criticisms on the form of this complaint, it is sufficient to say that, under the law, the respondent could have been put on trial for the contempt charged against him without any charge in writing. The statute of this state only requires that such charge shall be filed when the contempt comes within the purview of sec. 5640. But it is conceded on both sides that this case is not under that section. Besides, the circuit court, in the Steube case, which was under sec. 5639, held that a complaint or charge in writing was not essential; that it could not be demanded as a matter of right. Other questions and propositions of law have been elaborately and ably discussed under the favor of this demurrer, and I will consider them in their inverse logical order, because I have thought about, and pondered over, them in that order.

The complaint avers that on the third day of March, 1888, the respondent wrote and caused to be published in the Cincinnati Enquirer, a letter or article, in which the judge of this court, and two of the officers of this court, were libeled. The chief libel in the article is, that it falsely charges that the judge, the clerk of the court and prosecuting attorney packed the grand jury that found the indictments in the tally-sheet cases. There are other libels in it, but of minor importance. The trial of one of said cases was then pending in this court.

One contention is that the respondent cannot be tried and punished by the court, because he is entitled to a trial by jury. Only one case has been cited to support this view, an Illinois case, the Storey case, reported in 79 Illinois, 45. In the opinion delivered by Judge Scofield, the two chief reasons assigned for the decision, as I now recollect, are, first, that a judge against whom an attack is made in a newspaper would be unfit to try it; and, secondly, that the respondent in such a case is entitled constitutionally, to a trial by jury. If the first reason was a reason at all, it would compel courts to abdicate their power in every contempt case

*This judgment was reversed by the Supreme Court; see opinion 46 O. S., 473.

where the judge of the court was the person assailed, and through whom the contempt was committed. If some ruffian should step into this court room and knock the judge off his seat, upon a parity of reasoning, the judge would be unfit to try the case against him. The inconclusiveness of the argument is obvious—no diagram is needed.

The constitutional question, whether a respondent is entitled to have a case of contempt tried by a jury, has been expressly passed upon by the highest courts of not less than nine states of the Union, whose constitutions are just as jealous of the right to trial to jury, and just as explicit in guaranteeing that right as is the constitution of Ohio. Every one of these courts, except just one, has decided against the claim of the respondent to a trial by jury. One of the reasons given for these decisions, and an unanswerable one too, is, that the guaranty of trial by jury in the constitutions of the different states, only applies to cases which were triable by jury at common law.

Judge Cooley, in the last edition of his Constitutional Provisions, page 390, note 3, on this very subject, says:

"Causes of contempt were never triable by jury; and the object of the power would be defeated in many cases, if they were."

In Grandy v. The State, 13 Neb., 446, in which the charge was that the respondent, out of the presence of the court, endeavored to corrupt a jury, the court held:

"As the proceeding is solely to protect public justice from obstruction, the accused is not entitled to trial by jury."

In Crow v. The State, 24 Texas, 12, in which the act of contempt was done out of the presence of the court, the highest court of that state said:

"It is not proper to call a jury to try a question of contempt."

In Ex parte Grace, 12 Iowa, 208, in which the contempt was also done outside of court, it was adjudged:

"The power to punish contempts without the intervention of a jury is inherent in every court. * * * * "

And the court, in that case, distinctly held that a trial without a jury was not an infringement upon the ninth article of their constitution, which, with just as careful and differential choice of words as are employed in our constitution, secures to every citizen of that state the right to a trial by jury.

In Neal v. The State, 4 Ark., 257, the Supreme Court of that state, said:

"In a proceeding for contempt the party is not entitled to trial by jury."

With such reasoning as has been given by these courts, and by an eminent law writer cited, and with such an array of authority, against the claim of respondent to be tried by a jury, this court is not prepared to follow one solitary court on the question raised by that claim, notwithstanding the opinion in that court was delivered by the prospective Chief Justice of the United States, as was claimed by respondents counsel.

There being no right to trial by jury, it follows as a corollary of that, that the provision of the constitution allowing the truth to be given in evidence, has no sort of application here; because by the express terms of that provision, the right to show the truth of the alleged libel is limited to criminal prosecutions, in which there is a jury. But, as was intimated when this case was first called, I am disposed to relax this rule, if the respondent, in good faith, wishes to prove the truth of the published charge against the judge of the court, its clerk and the prosecuting attorney.

It has been seriously argued that this proceeding ought not to be entertained, because both the criminal and civil law afford adequate remedies for the alleged libel of the respondent, namely, a prosecution for criminal libel and a civil suit for damages, by the judge of the court. I do not intend to be disrespectful when I say that such an argument is a delusion and a snare. The West Virginia Court of Appeals has, in no ambiguous language, spoken on this subject, and it is so pertinent that I will borrow what is so well and tersely said. Hear what a unanimous court, through its president, says, upon this subject:

"Such a suggestion is disgusting to a man of honor. It will be a sorry day when the practice shall obtain among judges of the courts of last resort, who hold the dearest interests of the people in their hands, when in their judicial capacity, they may be grossly libelled, to leave their high positions and go before a jury in a libel suit, be subjected to the coarse criticism of defendant's counsel, and if they succeed in their suit, have it cast in their teeth, that they were influenced by sordid motives. Who should have any respect for a judge who would pursue such a course? Would he not under such circumstances deserve the contempt of every good citizen? Besides what right would he have individually to recover damages for a wrong committed against him in his judicial capacity, for an injury done the

people in his person? In such cases the individual must be separated from the judge. The court has no right to punish as for contempt one who libels an individual who happens to be judge; but it is a contempt of court, as such, and an insult to the people represented by the court, which alone the court can punish as such. Scarcely less repulsive to all sense of judicial dignity is the suggestion that the judge should play the role of prosecutor in the trial of an indictment for libel. If that day shall ever come when such shall be the only protection left the courts of justice against publications affecting the judicial integrity, none but the base and vicious can be expected to occupy judicial positions."

One of the counsel for respondent has appealed to the Judge Peck impeachment case as persuasive authority, and stress was laid on the fact that Judge Peck only escaped conviction in the Senate in the United States by one vote. And the argument of Mr. Buchanan, one of the managers of the impeachment, was commended, and the court was asked to carefully consider it. If a Supreme Court of five judges decides a case, three judges concurring the conclusion reached, and two dissenting, it is still a decision, notwithstanding there was only one majority. The senate of the United States as a court of impeachment decided by one majority that Judge Peck was innocent. It was nevertheless a decision. Lawyers are not in the habit of appealing to dissenting opinions as authority to support their views of a case, and courts are not in the habit of relying upon them for guidance in deciding cases. Touching the argument of counsel in the impeachment case, I think it would be more appropriate for the court to lean upon the argument of the counsel, Mr. Wirt, who was successful in the presentation of the defendant's case, rather than upon the argument of Mr. Buchanan, who lost his case. Mr. Wirt's argument on the topic of contempts of court, has been praise for its force as an "admirable example of logical analysis, embellished by the happiest oratory."

Frequent suggestions were made by counsel in this case, during the argument, about the power to punish for contempts being an arbitary one. It is only like every other discretion vested in a court; it may be abused. But, that is no argument against its existence, or validity, or its exercise in a proper case.

One of the counsel stated that in every case, historically speaking, in which the judiciary engaged in a conflict with the press, disaster to the court followed, and that in some cases impeachment followed. That may have been true in some cases, but in the majority of cases history does not sustain the statement. The most recent illustration of the opposite of the statement is the Anarchist's case in the state of Illinois. The possibility intended that the judge of this court may be impeached for whatever judgment he may render in this case, has no terror for him. What is conceived to be right will be done; what the court thinks is the law will be announced and enforced, and the consequences personal to the judge must take care of themselves. There is as much danger, and more danger in fact, from the abuse of the right to speak and write by scandal-mongering writers, than there is from the exercise of any discretionary power in contempt cases by an elective judiciary. There is more peril to our free institutions from the first source than from the second.

The freedom of speech and liberty of the press have been appealed to, and the contention has been made that, if this defendant should be punished upon this charge, that it would be an infringement upon that provision of the constitution guaranteeing those rights. The court is not unmindful of those great rights. But freedom of speech and licentiousness of speech are not synonymous. Freedom of speech and liberty of the press are not absolute. They are like all other rights, subject to regulation and restraints of law. As Mr. Wirt, in the Peck Impeachment Case, said, the freedom of speech and liberty of the press, like all other "human blessings, require the purifying and conservative principle of restraint."

The right to criticise courts and judges and their actions, in respectful language, either by way of argument, comment or ridicule, is undeniable. But criticism and ribaldry are not equivalents. And upon this subject, as to what constitutes the liberty of the press, I desire to read a passage from page 403 of 16 Arkansas.

In that case the court said: "Any citizen has the right to publish the proceedings and decisions of the court, and if he deem it necessary for the public good, to comment upon them freely, discuss their correctness, the fitness or unfitness of the judges for their stations, and the fidelity with which they perform the important public trusts reposed in them; but he has no right to attempt by defamatory publications to degrade the tribunal, destroy public confidence in it and dispose the community to disregard and set at naught its orders, judgments and decrees. Such publications are an abuse of the liberty of the press, and tend to sap

the very foundations of good order and well being in society, by obstructing the course of justice. If a judge is really corrupt and unworthy of the station which he holds, the constitution has provided an ample remedy by impeachment or address, where he can meet his accusers face to face and his conduct may undergo a full investigation. The liberty of the press is one thing and licentious scandal is another. The constitution guarantees to every man the right to acquire and hold property by all lawful means, but this furnishes no justification to a man to rob his neighbor of his lands or goods."

Quoting from Chief Justice McKean, in the Oswald case (Penn.), the court said:

"The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society, to inquire into the motive of such publications and to distinguish between those which are meant for use and reformation and with an eye solely to the public good and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity."

It was a contempt case in which these doctrines were expounded.

Upon the same subject I read a sentence from the argument of Gen. Hamilton in the Crosswell case. He was quoted yesterday by counsel for the respondent as a teacher of law. In Cooley on Constitutional Limitations, I find the following language, as used by Gen. Hamilton.

"The liberty of the press consists in publishing the truth, from good motives and for justifiable ends, though it reflects on government or on magistrates."

A man who speaks in a newspaper has no greater right than he who speaks out of it. A newspaper is no sanctuary behind which
for breaking the laws of the land. What Chancellor Walworth said on this subject is appropriate. In 4 Wend., 113, in the case of King v. Root, Chancellor Walworth said:

"It has been urged upon you that conductors of the public press are entitled to peculiar indulgences, and have special rights and privileges. The law recognizes no such peculiar rights, but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehood to the injury of others with impunity."

But the whole of this argument about the liberty of the press, and the freedom of speech might be disposed of by simply reading the qualification to the constitutional right, in the language of the constitution itself, namely, that the respondent is "responsible for the abuse" of this right. He is not charged here with exercising the right of freedom of speech, or availing himself as a member of the press, of its liberty; he is charged with abusing that right and that liberty.

One of the counsel for respondent argued with some tenacity, that, as this charge was, that respondent libeled this court for past conduct, he was not responsible; and he also declared that there was no case at common law where any one was held responsible in a contempt proceeding for libeling a court, and that the court had no common law power to punish a man for such act. Upon all of these subjects, the Supreme Court of Arkansas has had something to say.

In 16 Ark., page 384, in the case of the State v. Morrill, the fourth paragraph of the syllabus reads as follows:

"By the common law, courts possessed the power to punish, as for contempt, libelous publications upon their proceeding pending or passed, tending to degrade the tribunals, destroy that public confidence and respect for their judgments and decrees, so essential to the good order and well being of society, and to obstruct the free course of justice."

Blackstone also has had something to say upon this subject. In 16 Ark., 393, the following language from him is quoted:

"Some of these contempts may arise in the face of the court as by rude and contemptuous behavior; by obstinacy, perverseness or prevarication; by breach of the peace; or any willful disturbance whatever; others in the absence of the party, as by disobeying or treating with disrespect the king's writ, or the rules or the process of the court; by perverting such rules or process to the purposes of private malice, extortion or injustice; by speaking or writing contemptuously of the court or judges, acting in the judicial capacity; by printing false accounts (or even true ones without permission), of causes then depending in judgment, and by anything, in short, that demonstrates a gross want of that regard and respect, which, when once courts of justice are deprived of, their authority, (so necessary for the good order of the kingdom) is entirely lost among the people."

As to the attempted distinction between past and present or future conduct of the court, and as bearing upon that subject, what Judge Dade said in the Dandridge case is instructive. The general court of Virginia, which was the highest court of that state at that time, through Justice Dade, (second Virginia cases, 409) said:

"Upon this part of the subject, and in reference to the cases which have an indirect bearing on the present question, a distinction is attempted, for which I can find neither reason nor authority. It is said that the attaching power may be exercised for contempts touching the prospective conduct of the judge, but not for such as touch his past conduct. In reason, I see but one pretense for this distinction; threats and menaces of insult, or injury to a judge, in case he shall render a certain judgment, may be considered as impairing his independence and impartiality in the particular case to which the threats refer. And if the power of punishment would stop here, a curious consequence may ensue. A man may be attached for threatening to do that for which he could not be attached when actually done. But if (the judgment having been rendered) the insult be actually offered, an attachment no longer lies; because the contempt is in relation to the past conduct of the judge and to a case no longer pending. A recurrence to the original principles, the only true test, by demonstrating that the weight, authority and independence of the court may be equally assailed either way, will prove that this distinction is merely ideal."

In this case (the Danridge Case), the judge being about to enter the court house for the purpose of opening court, Dandridge, standing on the steps of the court house, outside of it, grossly insulted him, charging him with corruption and cowardice in delivering an opinion in a cause at a previous term of the court, in which Dandridge had some interest. Proceedings for contempt having been instituted against him, the judge fined him and the case was sent up to the general court, or "adjourned," as the term used there is, to the general court of Virginia, on account of its importance, novelty and difficulty, and after full discussion, the conduct of the defendant toward the judge was held to be puishable as contempt, and the judgment of the court below was affirmed.

Illustrations of this power at common law, and instances where it has been exercised by courts, might be multiplied.

In Bayard v. Passmore, 3 Yates (Penn.,) it was said:

"The publication of a paper to prejudice the public mind in a cause depending is a contempt, if it manifestly refers to the cause, though it does not expressly appear on the face of the writing."

In that case the charge was that "the party to a suit was a liar, a rascal and a coward."

In the case of Rex v. Clement, 4 Barnwall & Alderson, 233 (cited in Tenny's case, 23 N. H., 166), Judge Holroyd said:

"Anything done either for the purpose of obstructing justice or which may have that effect, may be punished as a contempt of court, before whom the prosecutions were held."

In another case attacks were made upon a party and his witnesses, charging them with having comitted perjury, and that was held to be contempt of court at common law.

In the Oswald case, 1 Dal., 343, it was held that a publication having a tendency to prejudice the public, with respect to the merits of a cause depending in court, was a contempt.

Printing a brief before the cause was heard by the court, was declared to be contempt of court at common law.

In King v. Clement, 4 B. and A., 233, it was said:

"It is perfectly clear as to the courts at Westminster, that contempts may not only be in the face of the court, but they may be committed out of court;" and in the argument of Wilmot, Chief Justice, in the King v. Almon, he clearly shows that publications libelling the superior courts may be punished as contempts."

The most important question in this case is: Whence does this court derive the power to punish as for contempt a person charged with libel, such as is set out in the information or complaint in this case? Is it conferred by sec. 5639? It reads as follows:

"A court, or judge at chambers, may punish, summarily, a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice."

This court is a constitutional court, because it was created by the constitution. The fallacy of the argument made by counsel for the respondent on this subject,

is that it is assumed that no court is a constitutional court unless all of its jurisdiction and powers are bestowed by the constitution. No court would be a constitutional court if that was the criterion or the measure.

It may be conceded that whatever power a legislature confers on a court, may be taken away by it. But a power which a court has by virtue of constitutional provision, or which it acquires through that instrument, directly or indirectly, the legislature cannot take away.

The right to punish summarily contempts, this court possessed before the Statute of 1834, which was the predecessor of secs. 5639 and 5640, was ever enacted into a law. It has been held in the 43 Conn., 257, that statutory provisions relating to matters of tempt are regarded rather as regulations of the exercise of that power than as grants of power. By way of illustration, I quote from the case, because in that state the statute was, that "Every person who shall in the presence of any court, either by words or actions, behave contemptuously or disorderly, may be punished by said court by fine and imprisonment as said court shall judge reasonable; but no justice of the peace shall inflict a greater fine than seven dollars, nor a longer term of imprisonment than thirty days; and no other court shall inflict a greater fine than one hundred dollars, nor a longer term of imprisonment than six months."

Upon that subject, the court says: "This is not so much a grant of power as the regulation of the exercise of an existing power. So far as it purports to be an enabling act, it is simply declaratory of the common law." Are secs. 5639 and 5640 any more grants of power than the Connecticut Statute?

In the syllabus the court says: "The statute is not to be regarded as conferring the power to punish for contempt, but as merely regulating the exercise of an existing power. The power is inherent in all courts."

Suppose secs. 5639 and 5640 should be repealed by the legislature. Would any lawyer argue, or would any court hold, that this court was thereby deprived of the power to punish summarily for contempt? The power is inherent in courts, as the highest courts of a number of states, in uniform language, have declared.

In the case of The State v. Matthews, 37 N. H., 450, the court said: "The authority to punish contempts is a necessary incident, inherent in the organization of all legislative bodies, courts of law or equity, independent of statutory provision."

In the case of Neal v. The State, 4 Ark., 259, the court declared that "the power to punish contempt in a summary manner is inherent in all courts of justice and legislative assemblies."

The proposition that this court has no power except what is conferred by statute, then, I think, is argumentatively, historically and legally not true. One-half of our laws, it is not extravagant to say, are not embraced by statutes.

What becomes of all those common-law rights, rights at law and rights in equity, that nearly every day are enforced and maintained in all courts of law and equity, if this proposition of respondent be a sound one? And, again, from that elaborately and ably discussed case, of The State v. Morrill, supra, I read a passage on this topic. The court, on page 409, said:

"It was remarked by counsel, that if the courts could, in any instance, go beyond the provisions of the statutes, their power to punish contempts would be undefined and unlimited. But such is not the case. One hundredth part, perhaps, of the great body of laws, by which our people are governed, is not embraced in our statutes. Crimes are punished, wrongs redressed, and rights enforced by such principles of the common law as are consistent with our constitution, the character of our liberal institutions, and sanctioned by the adjudications of our courts."

The statutes of this state, now, secs. 5639 and 5640, were first enacted in 1834. They were an exact counterpart of the United States Statute of 1831. Only in one case has a United States court pronounced this statute so restrictive that libels upon a court cannot be punished as for contempts, and that case I have not been able to see, and I believe counsel have not been able to see it. I mean the Poulson case, decided by a United States court in Pennsylvania.

Perhaps it may be conceded that in 19 Wallace, 505, the Supreme Court impliedly so decided; because Judge Field in the opinion, said that one of the objects of the statute of 1831 was to "insure order in the presence of the court."

But the identical question which has been discussed in this case, was not before that court, and the expressions of the court must be limited to the facts of the case before it. It may be also conceded that the words in the present sec. 5639, "in the presence of the court or so near thereto," mean the same thing in that section as they did in the act of 1834. But it cannot be conceded that the statute,

as a whole, means what it did in 1834. Very significant restrictive words have been eliminated by the revision of 1880. The statute does not now, as it did then, declare that the power to punish summarily "should only be construed to extend" to the cases enumerated in the statute. The provision, that a charge in writing should be preferred was, by the revision of 1879 repealed as to contempts that consisted of misbehavior in the presence of the court or near thereto, and was limited to the other acts enumerated in the first section of the act of 1834, but now specifically set out in sec. 5640. By the statute of 1834, it was required in all these cases, not only the cases covered by sec. 5640, but also by sec. 5639.

By the statute of 1834, and by its use of the restrictive words that I have quoted, the legislature plainly said that the courts should not construe any other act, than those specifically enumerated in it, as a contempt. By the revision of 1879, the legislature made no such declaration. Their repeal of that declaration shows, if anything, at least it tends to show, that the legislature had no power to restrict the authority of the court, and did not understand that it had any such power, and that the courts were left to exercise their power to punish summarily in other cases at common law. The change in the language, then, of the whole statute, by the revision of 1879, was so radical that I think, in the language of Judge Okey, in the 39 Ohio St., 338, cited by counsel for respondent, that it is clear that a "change in substance was intended."

But the court is not bound to stand on this sort of construction. Following the decision of this court in the Steube Contempt Case, and the affirmance of that decision by the circuit court, it will be held that the statute, section 5639, is broad enough to cover this case, as it is stated on the face of the complaint.

The words, "in the presence of the court or so near thereto," etc., are very comprehensive; but that is not all of the act; that is not all of the law of sec. 5639. It is made up of four parts: First, the power to summarily punish; secondly, the misbehavior; thirdly, the commission of the act of misbehavior in the presence of the court or near thereto; and, fourth, the obstruction to the administration of justice. The court has a broad discretion in determining whether an act is near enough to have that effect. An act, charged to be a contempt of court would not be a contempt of court, if it was even done in the court room, unless it obstructed, or tended to obstruct, the administration of justice. The requirement that the act must be done in the presence of the court, or near thereto, and the requirement that it must obstruct the administration of justice are the tests to be used in determining whether a given act is a contempt, and the second expands the meaning of the first. So that when a construction is to be put upon the act charged to be a contempt, the whole statute must be considered and applied to the act. The act of writing or of causing the letter, set out in the complaint, to be published, may have been done either in the presence of the court or near thereto, in the meaning and intent of the statute, because it was an act which impeded, embarrassed and obstructed a court of law and justice, or tended to produce such effects. Only upon the evidence can that be determined.

In Illinois the statute is couched in the following language: "The said court shall have power to punish contempts offered by any person to it while sitting." By construction, the Supreme Court of that state has held that the act of contempt must be committed in the presence of the court. In the case of The People v. Wilson, 64 Ill., 195, which was not reversed by the decision in the Storey case, decided later, the respondent, Wilson, was charged with the publication of a libel against the court. The publication was in a newspaper remote from where the court was sitting. It was concerning a case then pending in that court. In that case the court said, in the syllabus: "All acts which impede, embarrass or obstruct a court of justice, or which tend to produce such an effect, whether done in or out of the court are to be considered as done in the presence of the court and are punishable as contempts."

Now what is the meaning of this charge in the complaint? What is the meaning of the language of the publication set out in this complaint? It is an assault upon the integrity of the court and its officers. It is a false publication, so charged to be, having for its aim the inflaming of popular passion. Its publication was calculated to destroy the respect and confidence of the people in the court. It was calculated to obstruct and dishonor the administration of law and justice in this court. That is its character as it is photographed in the charge, and whether it either produced an obstruction to the administration of justice by this court, or tendered to do so, is a question that can only be determined conclusively when the case is heard upon the evidence.

The holding of the court is that, if it either produced that effect in fact, or tendered to produce that effect, it is an act of contempt within the meaning of this

statute, and must be construed to have occured, either in the presence of the court, or in the language of that statute, "near to the court."

A great deal was said by the counsel who last spoke for the respondent, about the second section of the act of 1834, which is now embodied in the crimes act of this state as a separate section; and something was said, I believe about this act set out in this complaint being punishable under that section. I do not think so. This is the section:

6207. "Whoever, corruptly, or by threats or force, endeavors to influence, intimidate, or impede any juror, witness, or officer, in any court of this state, in the discharge of his duty, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede the due administration of justice therein, shall be fined not more than one hundred dollars or imprisoned not more than twenty days, or both."

That was the second section of the act of 1834. The argument in this case has been that this respondent might be punishable under that section; but I do not think that the libel set out in the charge is such an act as was "corruptly or by threats or force" done; I do not think it comes within the meaning of that statute. Besides being an act of contempt, it is a criminal libel in appearance. When the statute of 1834 was passed, and at the time when the revision of 1879 occurred, there was, also, in the crimes act, a separate and independent section denouncing and punishing criminal libel. The position would certainly not be tenable that because an act which is charged against a man as contempt of court, was punishable under the crimes act indictment after a trial by a petit jury, that that would prevent the court from punishing him as for a contempt. A man might walk into this court and strike the judge, or strike one of the attorneys in the case then on trial, and he would be indictable for assault and battery, and under the intimidation law too; but that would not prohibit the court from punishing him for contempt. Again, under the revision of 1880, the legislature left that section out of the contempt law; and I think if that shows anything at all, it shows that they regarded that as an independent subject from that of contempt; by separating it and putting it in the crimes act, the legislature clearly expressed that thought.

On the subject of the inherent power of this court to punish for contempt, I read from the opinion of Chief Justice Watkins in the case of Cossart v. State, 14 Ark., 539:

"The power of punishing summarily and upon its own motion contempts offered to its dignity and lawful authority, is one inherent in every court of judicature. The offense is against the court itself; and if the tribunal has no power to punish in such case, in order to protect itself against insults it becomes contemptible and powerless; also in fulfillment of its important and responsible duties for the public good. It is no argument that the power is arbitrary, though indeed settled by precedents or limited by them as rules for the future guidance of the court. While experience proves that the discretion, however arbitrary, has never been liable to any serious abuse, it would be a sufficient answer to say that the power is a necessary one and must be lodged somewhere. And it is properly confided to the tribunal against whose authority or dignity the offence is committed."

Then on the subject of the power of the legislature, or the competency of the legislature, to restrict the power of courts, this same court, in 16 Ark., 390, said:

"The legislature may regulate the exercise of, but cannot abridge, the express or necessarily implied powers granted to this court by the constitution." There is no express power granted by the constitution to punish for contempt summarily; it was an inherent or implied power that grew up with this court as it was created. The court further said: "If it could" (abridge the power) it might encroach upon both the judicial and executive departments, and draw to itself all the powers of government, and thereby destroy that admirable system of checks and balances to be found in the organic frame work of both the general and state constitutions, and a favorite theory in the governments of the American people." In the act passed upon by the court, the legislature of Arkansas said, just as emphatically and explicitly as our legislature did in the act of 1834, that a court should not punish a person for contempt for certain things that he might do. And the court, on this effort of the legislature to restrict its power said: "As far as the act in question goes, in sanctioning the power of the courts to punish, as contempts the 'acts' therein enumerated, it is merely declaratory of what the law was before its passage. The prohibitory feature of the act can be regarded as nothing more than the expression of a judicial opinion by the legislature, that the courts may exercise and enforce all their constitutional powers and answer all the useful purposes of their creation, without the necessity of punishing as a contempt any matter not enumerated in the act. As such, it is entitled to great respect, but to

say that it is absolutely binding upon the courts, would be to concede that the courts have no constitutional and inherent power to punish any class of contempt, but that the whole subject is under the control of the legislative department; because if the General Assembly deprive the courts of power to punish one class of contempts, it may go the whole length and divest them of power to punish any contempt."

So, here, if the legislature could deprive this court of the power to punish one for a contempt, when the act was not done in the actual presence of the court, although it might be as injurious as if it had been done in the presence of the court, then, it would have the same right to deprive the court of power to punish a person for things done right in a court room.

Counsel for the respondent, tenaciously and ably, argued that the proposition, that this court is a constitutional court, is unsound; but the Supreme Court, I think, has decided that question against that contention.

"The constitution of the state has not limited the power of the general assembly to abolish courts created by the legislature, nor its power to vacate the office of judges of such courts." The State ex rel. Flinn v. Auditor of State, 7 O. S., 334.

The obvious converse of this decision is, that, if a court was not created by the legislature, but by the constitution, that the legislature would not possess such power; and the opinion of the court, which is interpretative of the syllabus, makes it manifest that this view is correct.

"It is superfluous to say that the Supreme Court, the district courts, and the courts of common pleas, and also the common pleas districts, and the number of judges in each were, in the first instance, established by the constitution itself. They exist independently of the general assembly. They may be, to some extent, modified, but cannot be abolished by it. And the last clause of the section above quoted clearly prohibits as to them, any such legislative interference as shall result in vacating the office of any judge of these courts."

The decision in this case, as explained by the opinion, also, makes the proposition plain and true that this common pleas court was created, "established" by the constitution. It "exists" independently of the general assembly. With the illumination from this case, how can the argument by the counsel for respondent be sound?

But "more light" from other sources may be let in.

"A judicial tribunal established by the constitution, owes its existence to that instrument alone, and is in no way dependent upon an act of the general assembly; whereas, a tribunal left by the constitution to be established by the general assembly in cities and towns where the same may be necessary, is a creature of the assembly, to be created by it in its discretion." Hawes' Jurisdiction of Courts, sec. 8.

The cases cited by the author to sustain his proposition in the text, are: State v Smith, 64 N. C., 378; Perkins v. Corbins, 45, Ala., 118; Covell v. Co. Treasurer, 36 Mich., 333.

By the constitution of North Carolina, the judicial power of the state is vested in the senate sitting as a court of impeachment, the Supreme Courts, the superior courts, justices of the peace and special courts.

The court held that these courts were "established" by the constitution, that they "owe their existence to that instrument alone, and are in no wise dependent upon an act of the legislature."

By another provision of their constitution the legislature was empowered to establish "special courts in cities and towns where the same may be necessary."

The court held that these special courts were the creatures of legislative will and discretion, and that the legislature could abolish them as well as erect them; and the court expressly said that it was a fallacy to confound these courts with the courts first named, Smith v. The State, 64 N. C., 370.

In Alabama the constitution provides that the "judicial power of the state shall be vested in the senate sitting as a court of impeachment, a Supreme Court, circuit courts, chancery courts, courts of probate, such inferior courts of law and equity, to consist of not more than five members, as the general assembly may from time to time establish, and such persons as may be by law, vested with power of a judicial nature." Article 6, sec. 1.

The Supreme Court of that state in the case cited declared that these two classes of courts were of different characters. "The former were established by the constitution itself, that is by the people. They do not depend on legislative enactment for existence. They were created at the same time with the legislature itself. They are of the same grade in the sovereign power. They are a constituent branch of the government itself. The government under its constitution is

not complete without them. These are the senate sitting as a court of impeachment, the Supreme Court, the circuit courts, the chancery courts and the probate courts. Const. Ala., 1867, Art. 3, sec. 1; Ib. Art. 6, sec. 1. These courts do not owe their existence to its legislative power, and the legislature cannot dispense with them or abolish them. They are emphatically the people's courts, and they proceed directly from its sovereign will.

In the state of Michigan there is a similar provision in the constitution, that the judicial power "is vested in one Supreme Court, in circuit courts, in probate courts, and justices of the peace." Art. 6, sec. 1.

By the same section it is ordained that, "municipal courts of civil and criminal jurisdiction may be established by the legislature."

The Supreme Court of that state has construed this section to mean that the whole judicial power is vested in the courts and officers named in the section above cited, except so far as it is qualified by sec. 16 and 23 of the same article, which do not affect the question in the case at bar. Chandler v. Nash, 5 Mich., 409; Rowe v. Rowe, 58 Mich., 353; Streeter v. Patton, 7 Mich., 341.

The exception touching municipal courts, quoted above, has been construed to be a reservation to the legislature of the state of the power to carve out of the judicial power "vested in the other courts named" (those named in the first section) "such authority as it would be proper to confer on city courts, and to create such courts for its exercise." Covell v. Co. Treas., 36 Mich., 333.

In each of the constitutions of North Carolina, Alabama and Michigan, there is also a provision—a separate section—which prescribes that the courts in which the judicial power is vested shall have jurisdiction "in all cases of law and equity," or "in all matters, civil and criminal," etc., or something like this. But, the significant feature of the cases cited, especially in the Alabama and Michigan cases, is, that the Supreme Courts of those states rest their decisions by which they declare the courts named are established by the constitution, created by it, that they are independent of the legislature, that they constitute a co-ordinate department of the government and the like, upon that provision and section of their constitutions which ordains that the judicial power is vested in such courts, and not upon any section which prescribes the jurisdiction of those courts.

Precisely like those sections of the constitutions of North Carolina, Michigan and Alabama, is section one of article four of our constitution. That section ordains, commands, that the judicial power of the state "is vested" in the courts named, and not that it "shall be vested," as the same section provided before it was amended in 1885.

The exact parallelism between section one of article six of the Alabama constitution, and section one of article four of our constitution, both in the language and meaning, makes the decision in Alabama the strongest possible persuasive authority to support the conclusion that this is a constitutional court; that it was created by the constitution, and that the fact that the constitution, by section four of the same article, authorized the legislature to "fix" the jurisdiction of the court, does not militate against that conclusion.

While our constitution vests the judicial power in the courts specified by name, and "such other courts inferior to the Supreme Court as the general assembly may from time to time establish," that of Alabama provides that it "shall be vested" in the courts specified, and "such inferior courts of law and equity, as the general assembly may from time to time establish," etc. The identity is complete. Sections three, five, seven and nine of article six of their constitution, some of the jurisdiction of the different articles are provided for.

But the Supreme Court of Alabama, in the case cited, expressly based its conclusion upon the provisions of section one article six, and section one of article three of their constitution, and not upon the sections prescribing the jurisdiction of courts. The passage quoted from the opinion so shows.

The Stevens case, 3 Ohio St., 453, is relied upon by counsel for respondent. The decision, in that case, was that the constitution did not confer jurisdiction upon the court of common pleas; that it cannot exercise jurisdiction until conferred by law, and that the constitution made courts capable of receiving jurisdiction. But that does not touch the proposition that such a court was established, created, by the constitution, or that judicial power is vested in it by the constitution, and it does not hold, either expressly or by implication, that such courts were not created or established by the constitution. Section four of article six, only provides that the jurisdiction shall be fixed by law; it does not ordain that such courts shall be created by law. "Fixing" jurisdiction has a limited meaning. It means that something which already existed should be ascertained, found out, and defined. It has the sense of discovering, and not of creating. One is asked or di-

rected to fix the boundaries of a tract of land; the land is already there; its boundaries have been described; he who is requested or directed to do the fixing, only finds out, marks and makes clear the whereabouts, the location of the boundaries. So of the power of the common pleas courts. The legislature is authorized to find out what it is, to locate it and to describe its boundaries.

What is the lesson? What is the instruction, to be drawn from all these authorities? It is this: That this court is a constitutional court; that it was created, established, by the constitution; that the legislature can neither abolish this court, nor the judge thereof; that the judical power of this court is vested in it by the constitution, and not by the legislature; that the legislature simply has the right to define the jurisdiction of this court, to regulate the exercise of its jurisdiction, to prescribe what the cases are of which this court shall have jurisdiction; that the power to punish for contempts is part of the inherent power of the court which the legislature did not confer, but which vested as soon as the court was established by the constitution.

It further follows, if this court is a constitutional court, that the power to punish for contempt cannot be abridged by the legislature, and that if sec. 5639 is to be construed as is contended for by counsel for respondent, then it is unconstitutional. But, as this opinion has been made so long already, this question will not be discussed. The authorities which sustain this holding are here cited: State v. Frew & Hart, 24 West Va., 416; Arnold v. The Commonwealth, 80 Ky., 300; The State v. Morrell, 16 Ark., 384; Little v. The State, 90 Ind., 338; The People v. Wilson, 64 Ill., 195.

Now, sentiment has nothing to do with this case. It is simply a question of law. But at the same time, I think, if the construction placed upon this statute by counsel for the respondent is a sound one, we might as well hold a funeral of the judiciary of this state at once. The demurrer will be overruled.

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On the second day of May, 1888, the case was heard on evidence and argued, and on the third of May, 1888, Judge Pugh, in deciding the case, delivered the following opinion:

The magnitude of the questions involved and the ability with which they were argued deserve from the court a fuller consideration than it is the habit of giving to cases when passed upon.

On the demurrer that was argued and discussed and disposed of some days ago, several important questions of law were elaborately discussed by counsel, and were passed upon by the court. Upon the final hearing of the case on yesterday, one of these questions were reargued; an additional argument was made, or perhaps more properly putting it, a former argument was strengthened.

It is the only question which has been embarrassing in this case to decide, namely, the question as to what is meant by the statute on contempts. Is the act charged against Allen O. Myers, a contempt within the purview of sec. 5639? That is the question.

Counsel for respondent contend that a libel on a court, or judge, or the officers of the court, is a constructive contempt, and, therefore, not within the meaning of that section; that no act is punishable, under that section, unless it was done in the sight and hearing of the court. The jurisdiction of the court is thus challenged.

By Judge Harrison, emphasis was put upon the decision in Baldwin v. The State, 11 Ohio St., as an authority that is decisive of this question of jurisdiction. If that decision had been rendered since the revision of the statutes in 1879, it would be of some value.

What was that decision? Baldwin clandestinely abstracted from the clerk's office a subpoena, and substituted for it another, on which there was a false return, for the purpose of defrauding some party. A charge was preferred against him, and the court punished him summarily as for contempt. The Supreme Court reversed the judgment, holding that he could only be punished under the second section of the act of 1834, now sec. 6207 of the Revised Statutes, after indictment by a grand jury, and trial before, and conviction by, a petit jury.

The court did not adjudge that Baldwin was not guilty of contempt. The judgment was that he was guilty of contempt, but of a contempt which under the then statute of contempts could only be punished after indictment by a grand jury and trial before, and conviction by, a petit jury.

The argument advanced by counsel for respondent that the court held in that case that Baldwin's act was not a contempt, is not sustained by either the syllabus

or the opinion of the court, and ignores the significant fact in the history of this statute, that the section under which it was held by the Supreme Court he could be punished, was one of the component parts of a statute which was entitled "An act declaratory of the law concerning contempts of court." Why did the court so hold? The answer is obvious. (1), Because the legislature had placed the act of Baldwin under the interdiction of the second section, not as a crime proper, but as a contempt; and (2), because, the court assumed that the act was not summarily punishable at common law, or that the legislature had the constitutional power to divest the court of the power to punish summarily such an act, and to prescribe that it could be punished only in a given way. But as the constitutionality of the law was not raised or expressly passed upon by the court, it cannot be claimed that that question was decided. All acts specified in the second section of the act of 1834 were characterized by the legislature of that year as contempts, and not as crimes. They were so classified. These reasons, it is true, were not assigned by the Supreme Court as the reasons for the conclusions reached in that case; but, in the absence of an assignment of reasons, they are the only explanation for the court's decision.

But, by the revision of 1879, the legislature made a radical change in the classification of the different acts mentioned in the statute of 1834. The second section was eliminated entirely from the contempt law. It was transferred to one of the classes of the crimes statutes. The unlawful acts mentioned in that section ceased at that time to be statutory contempts; they were declared by the legislature to be crimes proper. By that change, the legislature declared that the anomaly in the statute law of this state, that a man should be punished for a contempt only after indictment by a grand jury, and trial before, and conviction by, a petit jury, should be revoked. As long as that section was a part and parcel of the contempt law, of the one act of the legislature, it had an influence on the rest of the act: it contracted the meaning of the first section, the remaining section of the act, and the two sections combined, if counsel for respondent are right, contracted the meaning of the common law as to contempts. That effect on the common law of contempts the second section only had because it was part of the statutory law of contempt.

But, just as soon as this section was transferred to the crimes act, it ceased to have any influence, contracting or otherwise, on either the common law or the statute, in secs. 5639 and 5640, on the subject of contempts. Any other conclusion would lead to illogical and absurd results. For illustration, an assault upon a judge in court it is conceded, would be violative of section 5639, as a contempt of court; but, by sec. 6823 of the crimes act, such an assault is made a crime, for which the author of it can be indicted by a grand jury and tried and convicted by a petit jury. But, no respectable court could be persuaded that sec. 6823 would prevent a court from holding the same act to be a contempt of the court whose judge was thus assaulted.

Again, suppose a person should go into court, while it was in session, and threaten the judge that if he did not render a given decision, when court should adjourn he would whip him as he left the court house. Undoubtedly he would be indictable under sec. 6207 of the crimes act, being the second section of the act of 1834; but, would that section, or would punishment under that section, foreclose the court's right to punish him under section 5639 as for a contempt?

If such logic is sound there would be very few acts for which a court could punish a person for contempt, for nearly every one of them would be indictable under some section of the crimes act.

Considering the history of this law, and considering when that decision in the Baldwin case was rendered, there is no presumption in predicting that if any other lawyer should commit the act that was charged against him, and which he did before the revision, that the Supreme Court, since the revision of 1879, since the radical change in the classification of this statute has been made, would not hold that he could only be punished under section 6207.

The "sight and hearing" theory of construction, the contention that under section 5639 a person can only be punished for acts done in the sight and hearing of the court, if adopted, would bring about some absurd results, results irreconcilable with one of the fundamental canons for the interpretation of statutes. To illustrate, a material witness for a party to a suit on trial in court is in the corridor of this court house waiting to be called; the opposite party meets him there, out of the sight and hearing of the court, and engages him in a quarrel, knocks him down and disables him from further attendance at court, and the party for whom he was summoned to testify, losing his testimony, loses his case. It would be a palpable obstruction of justice. But if the "sight and hearing" philosophy is

sound, that offender could not be prosecuted and could not be punished for contempt of court under section 5639, because it was not done in the sight and hearing of the court. Besides this sort of construction would render the words of section 5639, "near to the court," meaningless and inoperative.

Touching the meaning of sec. 5639, then, it will be sufficient to reiterate the decision of the court on the demurrer, namely, that it is either declaratory of the common law of contempts, or it is partly declaratory and partly restrictive of that law, and, so far as it is restrictive, it is unconstitutional, and whichever view is adopted, the act charged against the respondent in this case is a contempt of court.

This is all that is necessary to be said, I think, upon the defense, in this case, of the want of jurisdiction in this court.

Another defense is, that the respondent, by his answer has purged himself of the contempt; and it was argued that his disavowal of an intention to commit a contempt of court is conclusive proof of that defense. No authority was cited to sustain this contention, except cases from North Carolina. There, the old common law rule was, as was said by Rapalje on Contempts, "carried to its extreme limit" upon this question. But, the highest courts of four or five other states have decided that the disclaimer of the respondent is not conclusive. It is held that the rule only obtains where language, spoken or written, is not of itself necessarily insulting and offensive, or possibly where language, spoken or written, is susceptible of two interpretations.

The Supreme Court of Illinois, in Wilson v. The People, 64 Ill., 195, and the Court of Appeals of West Virginia, in State v. Frew & Hart, 24 W. Va., 467, expressly held that the disavowal of an intention to commit a contempt of court was no defense, if respondent's acts had the pernicious tendency to obstruct the administration of law and justice. His intention is to be inferred from his conduct. In Henry v. Ellis, 49 Iowa, ——, the Supreme Court of Iowa rendered a similar decision. In Kentucky, in Re Wooley, 11 Bush (K.), 95, the Supreme Court of that state decided that the disavowal might excuse, but not justify, the act of contempt.

In the respondent's answer, he says that he wrote the article which is the basis of the case, in answer to an article in the Commercial Gazette, entitled, "A Strange Spectacle: The defendants in a Trial for a Heinous Crime, receiving the Sympathy and Support of a Political Party." I never saw or read that article in the Commercial Gazette. Mr. Myers, however, says that the headlines of that article show the nature and object of the article published in the Commercial Gazette, to which his was an answer. But, was his charge that the judge of this court, the prosecuting attorney and clerk of the court, packed the grand jury in the tally-sheet cases, responsive to the article in the Commercial Gazette? Was that kind of a charge a refutation of what was in the Commercial Gazette? No honest logic would answer that question in the affirmative. It is not pretended that the judge, prosecuting attorney or clerk of the court were the authors of the article in the Commercial Gazette, or had any art or part in constructing it. Why, then, asperse them as a defense?

The respondent has not purged himself of this contempt, even according to the old common law rule, by his answer. If he had come into court and declared that the charges he made in the article were not true; that they were made on misinformation, and disclaimed any intention to commit a contempt, the inclination of the court would have been to pass the case with a nominal fine. But, by his answer, he has aggravated his original offense, because he says in his answer that its statements of fact were made upon facts which had come to his knowledge, and information communicated to him which he believed to be true, and that he believed the inferences or deductions which he drew from such information to be correct. This is simply an aggravation and not a purging of the contempt.

Speaking now of the charge about packing the grand jury, in this article, for this is the sting in it, I say most emphatically, that no more atrocious libel was ever uttered by tongue or printed by type. As an exhibition of the want of information and truth in the statements about the grand jury, and the recklessness of such statements, I may mention as a fact that the clerk of this court was not in this county when the grand jury was drawn. The grand jury was drawn by Mr. Beck, the deputy clerk. Again, I want to say here in this public place, that under the checks and safe-guards of the new jury law under which this jury was drawn that is referred to, no man, or number of men could pack a grand jury, or any other jury, in the box or wheel without having the co-operation of the jury commissioners, and without being discovered immediately upon the drawing of the first jury. Neither the court nor the prosecuting attorney, under this law, has any more to do with the drawing of a jury, grand or otherwise, than any other person

who may be in the room at the time the drawing takes place. And all this applies to the grand jury in question.

The proposition that the libel set out in this charge is contempt, seems to me, needs no vindication. It is a familiar truth in law that the good name of every person, as well as his life, liberty and property, ought to be protected by the law. "Good fame is the outwork that defends them all and renders them all valuable," says Burke.

The same reasons which require the law to protect the good name of individuals, exact the same kind of protection for the good name of government. Scurrility and virulence have no more license to vilify and degrade government, judges and officers, than they have to vilify and degrade individuals. Any other doctrine would be dangerous. The fact that the publication was not in or near the court house, but was distant from the court house, is not in reason, material. Written slander goes further and spreads more rapidly than oral slander. Burke justly observes: "It is writing, it is printing more emphatically, that imps calumny with those eagle wings on which, as the poet says, immortal slanders fly."

There are some facts admitted in this case. There is also a finding of facts which will be handed down, some proved by evidence, and some of which the court takes judicial notice. Among such facts are these: The respondent wrote this article in this city; it is grossly false, at least so far as it affects the judge of this court, the clerk and the prosecuting attorney; it libeled them in regard to their conduct in a case then on trial; it was published in a newspaper of wide circulation; the newspaper was circulated and read, not only in this city and county, but in this very court room while the court was in session and the trial of the tally-sheet case was going on

The respondent, Allen O. Myers, set the power in motion that published and circulated the newspaper; he knew it would be circulated and read in the places named; and in the contemplation of law, he is just as responsible as if he had with his own hand published it and circulated it in these places. The tendency of all this was precisely the same as if he had stood up in the court room and orally said what he uttered in this article.

In the 16 Ark. case, cited in demurrer, the respondent charged the judge with corruption to his face. Upon this the court observed:

"Had he published the charge of corruption, etc., which he made to the face of the judge, in a newspaper, no one can doubt but that the offense would have been aggravated."

In 24 W. Va., supra, the president of the court thus reasoned, that there was just as much evil in charging a judge through a newspaper with corruption, as there was to charge the same in the court room. "Does not the reason for the existence of the power as much obtain in the one case as in the other? If an attorney at the bar should charge the court, in its presence, with being bribed to decide the cause under argument, against his client, no one could doubt for a moment the right to punish summarily for such contempt. * * * There may not have been half a dozen persons in the court room to hear the charge of corruption against the court, yet it would be not only the right, but the duty of the court to punish such contempt summarily. Is it not absurd to say, that if the same attorney had published the same charge in a newspaper, printed in the town where the court was sitting, which was read by thousands, aye, read in the court room, within view of the court it was designed to affect, he would not be guilty of a contempt of court, for which he should be summarily punished?"

The tendency of this article in question was to obstruct the administration of law and justice in this court, to degrade and dishonor the tribunal and its officers. There are three ways by which the administration of justice may be obstructed. The authorities so show. First, the administration of justice may be obstructed by the interruption of the actual business of the court. Second, it may be obstructed by degrading the courts, by impairing or destroying the confidence of the people in the court, and thus destroying their efficiency and usefulness. And third, it may be obstructed by acts or conduct which may tend to influence or overawe the parties or their attorneys, or the witnesses, or jurors, or judges.

It has been truthfully said that in this country, unlike it in the old country, the power of courts rests upon the faith of the people in their integrity and intelligence, and whenever that faith is taken away, then the moral influence of the courts is gone. Is it not clear that the tendency of the defamation in the respondent's letter was to impair that faith in the honesty of the court and its officers?

Assuming that this court has the power to punish, if this act should be passed by, it would be construed as a license to every person of irrascible temper and of turbulent propensities, against whom a court should decide a cause, under the

"exacerbation of disappointment," to rush into print with hot haste, to caricature the judge and officers, to misrepresent the rulings of the court, to distort the facts of the case, and to impute a criminal offense to the judge and officers—to array all this in a sensational suit, and thereby impair the confidence of the people in the integrity of the court and degrade and dishonor the law itself.

Such a conclusion would be justly interpreted by intelligent people to mean that courts were in favor of tolerating one form of anarchy, for such publications, of which the one in question is a type, is one form of anarchy. What was said in the Steube case is apropos here. If the judge of this court should refuse to inflict punishment in this case, he would deserve to be impeached and degraded from the bench.

If this court, ambitious to pattern after some imaginary model of forbearance, should let this act go by without punishment, would not the time soon come which Mr. Wirt so forcibly in the Peck impeachment case, described in the following language:

"Mr. President, on what times have we fallen? The time has been that the virtuous and enlightened portions of society considered it as among their most solemn and imperious duties to inculcate a reverence for the law and for the tribunals that administer them. In a republic, pre-eminently where we have no sovereign but the laws, and the peace, the order and happiness of society depend on a prompt and cheerful submission to them, this deference has been considered as a religious duty. But times, it seems, are changed, and our distinguished men expect applause by teaching from high places, violence, tumult, disorder in our courts of justice, and assassination of judges, for no other offense than the performance of their common duties."

The proceeding in this case was taken, and the judgment will be rendered in this case, not from any motives of personal resentment to the respondent in this case, but from a sense of duty. The question is not one of resentment. The question is whether the respondent shall bend to the law or the law to the respondent. The only thing that remains to be done is to pronounce the judgment. The judgment is that the respondent, Allen O. Myers, shall pay a fine of $200.00 and the costs of this proceeding, and be imprisoned in the county jail for the term of 90 days, and after the expiration of that time, stand committed until the fine and costs are paid, if not sooner paid.

Holmes, Collins and Linn, for the State.

Harrisom, Taylor and Powell, for respondent.

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## RAILWAY BONDS—PLEADING.

[Montgomery Common Pleas, 1888.]

### †R. M. SHOEMAKER'S EX'RS. v. DAYTON & UNION R. R. CO.

1. In an action against a railroad corporation to recover defaulted installments of interest on certain income bonds, S., the plaintiff, alleges in his petition: That on the sixth day of January, 1880, the defendant corporation, by its board of directors regularly convened, and duly authorized thereto, resolved that it was necessary to issue its certain income bonds, and in pursuance of such authority said bonds were issued, etc. The defendant in its answer alleges that said bonds were issued by its board of directors without authority. Plaintiff, by way of reply, avers that said bonds were issued in pursuance of proceedings duly and properly had by the corporation and its stockholders. *Held:*
2. A motion to make such reply more definite and certain, so as to show when and where such stockholders' meeting was held, and what action was taken, will not be sustained. Such motion, if proper, should have been filed to the petition. An issue has been made by the petition and the answer.

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†See *ante*, 12 for another opinion of the common pleas. Sec. 2, Circ. Dec., 270, for affirming opinion of circuit court.

3. The reply further avers that the bonds in question were issued to take the place of other similar bonds; that the corporation, with full knowledge of all the facts, has redeemed a large amount of these bonds, and has paid the interest accruing on those outstanding from their date in 1879 up to December 1, 1887, with the exception of the two years, 1882 and 1883. *Held:* Such action of the corporation may estop it to deny the validity of the bonds.

4. The act of March 14, 1876, Ohio L., vol. 73, p. 28, does not, in terms, require a vote of the stockholders to give the directors authority to issue bonds. Such authority was only required for the execution of a mortgage over the corporate property. A corporation may be estopped to deny its obligation to pay securities issued by its agents, which it is not authorized by law to thus issue, when the objection is, not that there was a want of power, but that the power was exercised without due formality.

5. Section 3313, Rev. Stat., makes the purchase of bonds of a railroad company by a director, at less than par, null and void. Where such contract of purchase has been fully executed, and the corporation with full knowledge has gone on and paid the interest on such bonds up to the purchaser's death, and has continued to pay such interest for several years since his death, is it not too late now to declare the transaction null and void? At any rate there must be an offer to return the consideration.

ELLIOT, J.

This case comes on for hearing on a motion to make a part of the plaintiff's reply more definite and certain and strike out another part of it. The object of the suit is to collect from the defendant the overdue interest on certain income bonds for the years 1882 and 1883.

The plaintiffs allege "that on the sixth day of January, 1880, the defendant, by its board of directors, regularly convened and thereto duly authorized, resolved that it was necessary to issue its certain income bonds aggregating the sum of two hundred and twenty-five thousand ($225,000) dollars to bear date of the first day of December, 1879, "each bond to be of the denomination of one thousand ($1,000) dollars and to bear interest at the rate of six per cent. (6%) per annum, payable semi-annually, etc., which bonds were to be used for the purpose of retiring certain other of its income bonds, then outstanding. That these bonds should be secured by a trust deed or mortgage covering all its property, etc. The bonds to be redeemable at the pleasure of the defendant at any time after December 1, 1910.

Plaintiffs hold twenty-eight thousand ($28,000) dollars of these bonds. Of the two hundred and twenty-five thousand ($225,000) dollars—the original issue—one hundred and seventy-three thousand ($173,000) dollars are still outstanding, fifty-two thousand ($52,000) dollars thereof having been redeemed and cancelled up to the time of the filing of the petition; the semi-annual installments of the interest had been paid for each year, excepting for 1882 and 1883. The payments include the years 1880, 1881, 1884, 1885 and 1886. It is claimed that the defendant has on hand surplus earnings applicable to this purpose sufficient to pay the defaulted installments of interest for the two (2) years in question. It is also alleged that the defendant in pursuance of the aforesaid resolution of its board of directors, did issue, place upon the market and sell the two-hundred and twenty-five thousand ($225,000) dollars of income bonds and secured them by its mortgage. The defendant in its answer substantially admits all the material facts averred in the petition; admits that the board of directors caused said income bonds to be issued aggregating two hundred and twenty-five thousand ($225,000) dollars, payable as the petition avers and to be used for the purpose stated in the petition and purporting to be secured by mortgage; admits that there are one hundred

and seventy-three thousand ($178,000) dollars of said bonds outstanding; that plaintiffs hold twenty-eight thousand ($28,000) dollars of them; admits that the interest for 1882 and 1883 has not been paid, and that the company has surplus earnings on hand sufficient to pay same, but avers that the said bonds were issued by the board of directors without authority.

The second defense admits the issuing of the bonds as set forth and admitted in the first defense, but says that said income bonds and said mortgage were never at any time authorized by a vote of the stockholders, nor was there ever a meeting of the stockholders called to give such authority as required by law. It is especially averred that at the time of the issuing of said bonds and the execution of said mortgage, plaintiffs' testator R. M. Shoemaker was a member of the board of directors, and as such joined in the wrongful and unlawful executing and issuing of said bonds and mortgage, and then illegally, without sufficient consideration, himself received said twenty-eight thousand ($28,000) dollars of income bonds. Wherefore defendant claims that the income bonds and the interest thereon and the mortgage are void and of no effect, etc.

The first reply denies the truth of the matters set up as a defense in the several causes of answer.

The second reply avers that the bonds and mortgage set forth in the petition were issued in pursuance of proceedings duly or properly had by the defendant and its stockholders and are in lieu of like income bonds then outstanding for a like amount. The defendants motion is to require this part of the reply to be made more definite and certain by setting out the facts as to the proceedings which it is alleged were duly had by the defendant acting by its directors and stockholders, so as to show when and what proceedings it is claimed were had by the directors and stockholders authorizing the execution, etc., of the bonds and mortgage.

I do not see upon what ground this motion should be granted, while there are many reasons against it. In the first place the reply is wholly unnecessary. In its true meaning it is no broader than the petition.

The petition avers that the board of directors were duly authorized to do that what they did, to-wit: to issue the bonds and execute the mortgage. The reply in effect is only a repetition of the petition. The answer of defendant, controverts the assertion of the petition and says the bonds and mortgage were not properly authorized by the stockholders as the law requires. Here is an issue and it seems to me no reply is needed. Apart from this, an issue will not be made up for trial between the answer and reply. If the motion was proper it should have been filed to the petition. At any rate there seems no good reason for the motion in as much as the defendant has all the books and records, and can inform itself at all points.

The further purpose of the motion is to strike out the remaining part of the reply which sets up matters tending to show that defendant is estopped to repudiate the income bonds, the interest thereon, or the mortgage to secure the same. That long prior to the issue of the bonds in controversy, other income bonds had been issued and were still outstanding, and that the present issue was for a like amount and to take up the former ones. That the defendant has paid all the interest on the income bonds in controversy as it accrued from 1879 to the present time, with the exception of that of 1882 and 1883, and has also since said issue redeemed and paid $52,000 thereof, with full knowledge of all the facts concerning the issue thereof and the consideration therefor, and that the

last payment of interest on said bonds including those held by the plaintiffs, was made on December 1, 1887.

Defendant for ground of motion to strike out this matter relies on the statutes, sections 3286 and 3313. The act of March 14, 1876, O. L., Vol. 73, p. 26, in force at the time these bonds were issued, provides that a railroad company incorporated under the laws of this state, for certain purposes, amongst them for the purpose of "paying its unfunded debts or redeeming its bonds, may issue its bonds convertible or otherwise, bearing any rate of interest not exceeding eight per cent." and sell the same at such times and places at such rates as the directors may deem for its best interests; such company may secure such bonds by mortgage on its property, etc., if authorized by a vote of the stockholders. Now it is claimed in the answer that the stockholders were not called upon and did not in fact authorize the issue of the bonds or the execution of the mortgage. The point sought to be made in the reply is that the railroad company, stockholders and all having full knowledge of all the facts, has failed to rescind or attempt to rescind or repudiate the action of its directors or the bonds so issued, but on the contrary has fully paid the interest due thereon (except the disputed interest of 1882 and 1883) from December 1, 1878, to December 1, 1887, a period of eight (8) years, and in the same time has redeemed and paid off $52,000 of them, even paying the accruing interest punctually since the commencement of this suit and since the filing of the answer.

There are several things to be considered in passing upon this part of the reply and motion thereto.

1st. The statute does not in terms require any action of the stockholders to give the directors authority to issue the bonds; it is only as to the mortgage that such authority is required. Hence the failure to secure such authority from a vote of the stockholders would not be a defense to the suit on the bonds. It is only as to the securing same by mortgage that a vote of the stockholders is required.

2d. It is not a question of *ultra vires*. The corporation has full authority to issue the bonds and to secure the same by mortgage on its property. The board of directors, as the agents of the corporation, are authorized to issue and sell these bonds; and when authorized by vote of the stockholders, may mortgage the company's property. Nothing has been done in this regard except what the defendant might lawfully do, but it is claimed that the power has been irregularly exercised and without due formality. The reply says this irregularity, if any there was, has been condoned by the defendant. With full knowledge it has acquiesced in the contract, got the bondholders' money and at all times recognized the obligation by paying off a large portion of the bonds and meeting the interest.

Under certain states of facts a corporation may be holden on obligations issued by it or its agents, which it is in law not authorized to issue when the objection is, not that there was a want of power, but that the power was not exercised with due formality.

The facts set up at least tend to estop the defendant, and upon trial may be found by the court sufficient to entitle plaintiffs to recover, even though there was informality and irregularity in the matters set forth in the answer. Upon the whole case it looks very much as if there was a sort of dalliance on the part of the defendant with the plaintiffs. Protesting vigorously that it never will be embraced by the bondholders defendant unhesitatingly rushes into their arms. Protesting especially

that the eminent railroader R. M. Shoemaker, deceased, was very naughty, and bought the bonds, when he should not have done so, it goes on, without compunctions of conscience, for it has none, being soulless, punctually paying his interest. Verily the defendant should be required to repudiate or pay. It cannot go on, as an eminent English judge has said eating the cake and then claim the right to return it.

3d. Conceding that it might be estopped as to innocent holders of the bonds defendants say Shoemaker took his knowing the illegality of their issue, and knowing also that he was forbidden by law to take any such bonds at less than their par value.

What I have already said sufficiently answers the objection that he took them with knowledge of the informality in their issue. The defendant by its acts may not now be permitted to repudiate, having in various ways for years recognized the obligation and assumed it with full knowledge.

As to the claim that Shoemaker being a director, could not take the bonds of the company at less than par, we are referred to sec. 3313, Rev. Stat. This section provides that all bonds, etc., purchased of a railroad company by a director for less than the par value thereof shall be null and void. There is no offer here to return to plaintiffs the consideration he did pay for the bonds.

Does the defendant propose to repudiate the bonds and at the same time retain the consideration?

After taking from R. M. Shoemaker the consideration for these bonds which was presumably as great as other purchasers paid, and retaining it for eight (8) years, long after his death, and in addition recognizing the obligation, the defendant now proposes to rescind. Even in such a case, facts may exist upon which defendant will not be heard to repudiate its obligation. The authorities are very clear upon the point. See Pollock on Contracts, pp. 507, 508 and 512; Hotel Co. v. Wade, 97 U. S., 13; Parmlee v. Adolph, 28 Ohio St., 10; Rummington v. Kelley, 7 Ohio, (pt. 2), 97; Morawetz on Cor., (1 ed.), secs. 86, 97, 98, 100, 107.

The motion is overruled.

Paxton & Warrington, Matthews & Greve, George O. Warrington, for plaintiffs.

H. H. Poppleton, R. D. Marshall, for defendant.

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## 341 CRIMINAL LAW.

[Franklin Common Pleas, 1888.]

STATE OF OHIO EX REL., CLARK V. POLICE BOARD OF COLUMBUS ET AL.

1. One of the duties of the police board of the city of Columbus is to "enforce" the criminal laws of the state.
2. The statute which prohibits the keeping open of saloons for business, and the sale of intoxicating liquors, on Sunday, is a criminal law of the state.
3. The police board, in bad faith and by the abuse of their discretion, having refused to enforce this law, the common pleas court may, by mandamus, order the board to enforce it. But the court has no power to prescribe how the law shall be enforced.

PUGH, J.

In one sense the issue in this case involves the Sunday question. Upon this, as on most important questions, there are extremes of opinion and sentiment. It was Aristotle, I believe, who said that "all extremes are wrong." But it is not necessary that one who favors the execution of the Sunday law, which the relator in this case seeks to have enforced, should join the religious extreme on the larger, broader question, as to how the Sunday should be observed.

After John Stuart Blackie, I believe that a good government is the "balance of opposites and the marriage of contraries;" that in all well regulated democracies the minority has rights as well as the majority. The recognition of such rights, however, can only be obtained by an appeal to the sense of fairness of the majority, or by the guarantees of organic law. The majority has the right to enact the laws by which both are to be governed, and the minority has no right to nulliy the laws by disobedience to them.

There is hardly any question of fact to be passed upon in this case, nearly all of the facts being agreed to; it is only a question of law. The petitioner in this case, as in duty bound, prays that this court will require the police board of Columbus to enforce the law of the state which forbids saloons to be kept open for business on Sunday, and the sale of intoxicating liquor on that day.

There is a plain unequivocal statute which prohibits saloons from being kept open for business on Sunday, and the sale of such liquor on that day (85 Ohio L. ——). It is popularly styled the Dow Law, and was enacted March 26 and April 14, 1888. It is a re-enactment of the Statute of 1886 (see 83 Ohio Laws, 160 and 161). It is one of the criminal laws of the state.

There is another equally plain and explicit statute which enjoins on the police board a plain and specific public duty to "enforce" the "criminal laws" of the state. Revised Statutes, sec. 1934. This section is made to apply to this city by sec. 2022.

The complaint of the relator is, that the board, in bad faith, and by the abuse of their discretion, have refused, and still refuse, to perform this public duty. Upon the hearing of the demurrer it was not necessary, nor is it necessary now, for the court to determine whether the duty named is ministerial in its nature, or whether the board is invested with discretionary power concerning that duty; because it is too well settled in this state to need further discussion that some public officers, although invested with discretionary powers, are not exempt from being "spurred" to a performance of their public duty by mandamus from a court, if they, in bad faith, or by the abuse of their discretion, fail or refuse to discharge their duty. Insurance Co. v Moore, 42 Ohio St., 103.

If the duty of the board to "enforce" the criminal laws of the state is ministerial, the jurisdiction—the power of the court—to order it to move in the discharge of the duty cannot be challenged. If the board is clothed with discretion as to whether they will discharge the duty, or with discretion in the performance of it, under this authority, the court can stimulate the board—can compel it—to move, in the line of duty, if in bad faith, or by the abuse of discretion, it refuses to move.

By a statute, justices of the peace in England were required to enforce the statute of forcible detainer. Three justices refused to put it in execution and did nothing. Upon this fact being established, a man-

damus was awarded ordering them to execute the statute. King v. Montague, I Barn. K. B. 72.

Jurisdiction was bestowed by statute on justices, in some cases, to receive an information and make their determination, upon a seizure of brandy. An officer exhibited information, but the facts did not, even in the opinion of the justice, warrant the seizure; yet, in favor of the officer, he refused to dismiss the information, so the owners might have their brandy. By mandamus he was compelled to determine the matter. Rex v. Tod, et al. I Strange, 530.

In Beghul v. Swan, 89 Cal., 411, a lower court declined to entertain jurisdiction of a case of which it really had jurisdiction by virtue of a statute. It was ordered by mandamus to act, to take jurisdiction of the case.

In Nevada, a district court refused to hear and determine a case, on the ground that jurisdiction was lacking. The higher court held there was jurisdiction, and ordered the district judge to hear and decide it. Federal Spring Water Co., v. Henry Rivis, District Judge, 14 Nev., 431.

In these cases the duty was, to take jurisdiction; in the case at bar the duty is, that the board, the defendants, should enforce a certain law. In principle where is the distinction?

The writ of mandamus is one of the recognized modes by which a superior court exercises a superintending control over inferior tribunals. It can be used in criminal as well as civil cases. When addressed to a subordinate *judicial* tribunal, it only commands it to proceed to exercise its jurisdiction. The State ex rel. Harris v. Laughlin, 75 Mo., 356.

"Mandamus is frequently an appropriate remedy against inferior courts, judges, and officers to compel the performance of duties." 4 Waits Actions and Defenses, 361.

Upon the hypothesis that our police board is a quasi judicial body, I appeal to these authorities as precedents, as guides, for the disposition by the court of the case at bar.

The power of this court by mandamus, to order the police board to enforce the law may be placed upon this broad proposition. Whenever a statute directs, commands, something to be done by subordinate officers, whether ministerial or judicial, the latter through bad faith or abuse of discretion, refusing to act, a court, a superior court, possesses the power to, and will, enforce the doing of it by mandamus. Rex v. Everett Co., temp. Hardw., 261.

The power is wisely lodged. One of the objects of its exercise is to prevent a miscarriage of justice.

Local interests might prevail over a public good; local officers might decline to do what good government and justice exact. Is it not wise, then, that courts should have the power to prevent such manifest wrongs? An analysis, or review, of all the cases in which courts, by the virtue of mandamus, have compelled ministerial officers to perform their duties, pointing out specifically, the act to be done, and have corrected the "masterly inactivity" of inferior judicial officers, the orders being limited to setting them in motion, would transcend the reasonable limits of an opinion. A careful study of most of them, however, convinces me that the court has the power to award the mandamus prayed for by relator. Municipal officers belong to the classes of officers who come within this superintending control of the courts.

The evidence adduced on the hearing of this case established the fact that the police board of this city, without any good and sufficient

reason, had failed and refused, and still fails and refuses to perform the public duty mentioned. The fact that no adequate reason for such failure and refusal to execute the law has been assigned, proves, in contemplation of law, want of good faith, and the abuse of discretion. Of course, I do not mean that the board has intended to do anything criminal. At the same time words should not be minced, and it should be said that the board has committed a plain dereliction of duty.

Three defenses were made in this case.

The first is, one of law, challenging the jurisdiction of this court.

The other two cannot be classified. They are remarkable. They are reprehensible.

One is, that the execution of the law was not practicable, and that was one of the reasons why nothing had been done; and to sustain that view it was said that a number of cases involving violations of the Sunday law, and sent to court by a former mayor, had been nollied. This court takes judicial notice of the fact that those cases are still on its docket, and have not been tried for want of time, since the present incumbent has been on the bench. Neither the board nor the mayor had the right to decide that the execution of the law is not feasible. They should do their duty, and let the failure to execute the balance of the law, if any should occur, rest where it shall belong. Besides, in certain contingencies and certain cases, the mayor has the power to try the cases under this law, and, with or without the aid of a jury, determine them finally.

The other defense mentioned is, that the law had not been enforced because there was a diversity of sentiment touching the wisdom and rightfulness of the law. But whence does the board or the mayor derive the power to decide that laws may be repealed, as it were, because they think some people, even a large number of people, are opposed to their execution? Nowhere does such power exist. Upon a parity of reasoning, nearly every law might be nullified by executive and judicial officers. It would be a suspension, a repeal of law, by those who have not the power to do such a public act, by those whose duty it is to enforce the law. I know of only two cases where even judicial officers have a right to confine, to limit, the laws in the enforcement of them. That is where, as Lord Bacon said, penal laws are "sleepers of long," or where they have "grown unfit for the time." But the law sought to be enforced here is not of either class. It was enacted in nearly its present form a few years ago, and only a few weeks ago re-enacted by the supreme law-making authority of this state.

The logic of these two last named defenses is the logic of nullification, though I do not use this term in a political sense at all.

The personal or private opinions of the judge of this court, or of the mayor, or of the members of the board, touching the expediency of the Sunday law, under consideration ought to have no influence upon their official action. Where their duty is clear, they forswear themselves if they do not perform it. They have taken an oath to faithfully discharge their duty; one of these duties is to carry into effect the laws of the state and enforce their solemn mandates.

It may be superfluous to say that the law should be impartially enforced; some should not be required to obey, and others permitted to disobey it; all should be treated alike.

If the law is unpopular, if it is an unwise law, if it is not sustained by public sentiment, as is claimed, the quickest way of discovering these facts is to rigidly enforce it.

It should be said that this court can only order the board to enforce the law. It does not possess the power to prescribe how it shall be enforced. The execution of details under the statute which may involve matters of judgment and discretion, have to be left to the board. High's Ex. Rem. sec. 152. Whether there are such details or not I do not now decide.

A peremptory writ of mandamus will issue, commanding the police board to enforce the statute which forbids the saloons from being kept open for business on Sunday, and the sale of intoxicating liquors on that day.

C. J. Clark, for the relator.

Jas. T. Caren, city solicitor for police board.

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## 369 BOARDS OF EQUALIZATION.

[Franklin Common Pleas.]

A. D. HEFFNER, TREASURER, v. W. A. MAHONEY.

1. The Board of Equalization of Columbus, when acting within its sphere as prescribed by law, acts judicially; its decisions are judgments, adjudications.
2. Generally, the decisions of the board are final and conclusive.
3. A court of equity is not a court of errors to renew the decisions of the board. But when a case comes under either of the heads of equity jurisdiction; such as the prevention of a multiplicity of suits, removing a cloud from the title to property, fraud; or when the board has in fixing the burdens of taxation, unjustly discriminated against the petitioner for relief; or, when the board has acted arbitrarily without evidence or knowledge of its own of the facts in making additions to a tax return, a court of equity will award relief.
4. The board must act and decide either upon evidence, or knowledge of its own, of the facts.
5. A court of equity will go behind the records of the board far enough to inquire and ascertain whether it acted and decided within its jurisdiction, and in the scope of its authority; but, the court will not set aside its decision simply because it differs from the board as to the weight, force and credibility of the evidence upon which the latter acted and decided.
6. The board has power to take and hear evidence and to administer oaths to witnesses; and if a person required to testify before it refuses to answer pertinent questions, when the board is investigating whether particular property has been returned for taxation, he is liable to be indicted, and after conviction, fined or imprisoned, or both, under sec. 6906 of the Rev. Stat.
7. Quere: Does not sec. 167 of the Rev. Stat., afford an adequate remedy to one aggrieved by a decision of the board by which property was added, erroneously and illegally it is charged, to his tax return?

PUGH, J. (orally.)

In this suit, the plaintiff as treasurer of this county, sues the defendant, W. A. Mahoney, to recover the sum of $2,022.78, which, it is averred, stands charged against him on the grand duplicate of the county as the aggregate of taxes on personal property and the penalty added by law.

The petition is brief, made so by statute. The answer of the defendant purports to give a history of the facts from which the controversy in this suit sprang. They are about as follows:

For more than ten years defendant has been a real estate agent and loan broker in the city, making investments of the money and means, of others, in notes or mortgages or both. Many of these notes and mortgages he had made payable to himself, which, either contemporaneously with their execution, or soon after that, he assigned and transferred to their owners, his customers, or caused to be paid or delivered to the mortgators who were also his customers.

He had no interest or title in any of said notes or mortgages, save his fees for doing the business. About August 2, 1886, there was standing on the records of the recorder's office of this county, in his name, and made to him, mortgages unsatisfied and uncancelled, that amounted to $76,395.00. On or about July 29, or 30, 1886, the Annual City Board of Equalization of this city requiring him to do so, he appeared before them, when, without having first administered an oath to him, the board demanded that he should furnish them with a list of all persons for whom he loaned money during the preceding year, together with the amount furnished to him by each. The defendant refused to comply with that demand, which, I say, in passing, and to save further comment, he had a right to do. Several days afterwards, August 2, 1886, appearing before the board again, at their request, after administering an oath to him, the demand was made that he should give the names of the persons who furnished the money with which he effected the loan represented by said uncancelled mortgages on record; which he refused to do, and which, I say in passing, as I will hereafter explain, he had no right to do. It is alleged that on that occasion no personal tax return of any person was then under inquiry or under investigation before or by the board; that his own personal return for the year 1886 was not then in question, or in any wise under investigation before or by the board; that no complaint concerning any return or omission to return property for taxation was then being inquired into by the board, (which was immaterial), and that he refused to answer all interrogatories put by the board, and to disclose to them whose money it was with which he effected the loans that were secured by the said uncancelled mortgages on record. The defendant, also, avers that he told the board under oath that he had no beneficial interest or title in the uncancelled mortgages on record, or in notes secured thereby, and that the board, and its members, then and there, knew that he was not the owner of either mortgages or notes, or any or either of them.

Thereupon the board, it is said and alleged in the answer of the defendant, had entered upon its journal the following order:

"W. A. Mahoney, refusing to give names of parties furnishing money for him to loan, the same appearing in his name on the mortgage records to the amount of $76,395.00, the board ordered that said amount be added to W. A. Mahoney's personal return for taxation."

The auditor of the county added this amount to the personal tax return of the defendant on the tax duplicate. Prior to this addition the amount of personal property charged to him was $8,345.00. The aggregate of property, therefore, taxed to him was, after the addition was made, $84,740.00. The sum sued for, $2,022.73, is the tax on that aggregate, with the penalty added.

It is charged that these proceedings, actions and order of the board were illegal, in excess of authority; and hence that the levy and assessment on the sum of $76,395.00 were void. Then it is said that the defendant offered to pay his taxes on $8,345.00, for the year 1886, being $181.08, and that he then tendered that amount in gold coin to the treasurer, which the latter declined to accept; and that he has been ready and willing always to pay that sum.

The defendant protests that he refused to make the disclosures demanded, and refused to answer the interrogatories propounded by the board, in good faith, believing that the latter had no power to inquire generally into his private business, when such an inquiry did not relate to the tax return or omission to make return, of some definite person or individual; and he says that he is willing, if the court so holds, to answer the questions put, and make the disclosures sought, by the board, to the county auditor. The court is besought to enjoin perpetually the treasurer from collecting the taxes on the excess of the amount taxed against him above $8,345.76, and to authorize the treasurer to receive the taxes on that amount for the year 1886.

To this answer of the defendant the plaintiff demurs.

An extended consideration and explanation of the powers of the board of equalization, would, perhaps, not be exactly pertinent; but, it is made so by the request of both parties in this suit.

The board of equalization, when acting within the scope of the power and authority given to it by statute, acts judicially. Its orders are adjudications, judgments. Generally its orders are final and conclusive. The board may commit errors, but whether the error exists in the valuation of property at too high a rate, or upon a wrong principle, its orders cannot be assailed collaterally in court. The remedy for one wronged by such an error, is by appeal to that tribunal, provided by statute, where it is so provided, or by a writ of certiorari, where that writ may be used by the laws of any particular state. Welty's Law of Assessments, sec. 158 and notes.

As a general rule, equity has no power to correct erroneous assessments made by such boards. Independently of any statute, public policy. demands that the public taxes should be promptly assessed and collected by those officers and through the agencies which the law has specifically provided for that purpose. It is only where a case, by reason of its particular and peculiar facts, is brought under some head of equity jurisdiction; as, the preventing of a multiplicity of suits, fraud, mistake, removing a cloud upon the title of property, or where, as the Supreme Court has said, there is a "fraudulent conspiracy or combination or rule adopted by those whose duty it is to fix the taxable values of property, for the purpose of imposing upon some property, or class of property, more than its just share of the public burdens," or where the tax is illegal—it is only in such cases that equity will interfere by injunction or otherwise. 1 High on Injunctions, secs. 488, 492, 493; Stewart v. Maple, 70 Pa. St., 221; Hughes v. Kline, 30 Pa. St., 227; Macklot v. Davenport, 17 Iowa, 379; Merrill v. Gorham, 6 Cal., 41; Porter v. Railroad Co., 76 Ill., 564; 2 Desty's Taxation, 661; Bank v. Lawler, 46 Conn., 243; Seeley v. Town, of Westport, 47 Conn., 194; Glass Co. v. McCaleb, 81 Ill., 556; State Railroad Tax Cases, 92 U. S. 575; Cooley on Taxation, 542.

Judge Cooley said: "These boards act judicially in equalizing, and their decision is conclusive." Cooley on Taxation, 422.

Again he said: "The courts either of common law or equity, are powerless to give relief against the erroneous judgments of assessing bodies, except as they may be specially empowered by law to do so. And this principal is applicable to statutory boards of equalization, which are only assessing boards, with certain appellate powers, but whose action, if they keep within their jurisdiction, is conclusive, except as otherwise provided by law." Id., 478.

In Wagoner v. Loomis, 37 Ohio St., 571, the Supreme Court held:

"As a general rule, the decisions of officers and tribunals, specially created and charged, in tax laws, with the duty of valuing property for taxation and equalizing such valuations, are final and conclusive."

It was also held that inequalities in the valuations of property, made under a valid law, do not constitute grounds for enjoining the tax, in the absence of fraudulent discriminations by the agents and officers charged by the law with the duty of making such valuations.

The board exercises judicial power, but being created by special legislative enactment, its jurisdiction is limited and special. Hirschman v. Fratz, 6 Dec. Re., 1109.

It was adjudged by the District Court of Hamilton county, in the case just cited, that the record of the board, unlike that of a court, did not import absolute verity, and that a court could go behind its records and inquire whether the board has acted within its jurisdiction.

If the decisions of the board, as a general rule, are final and conclusive, as the Supreme Court has declared, what does that mean?

In Fratz v. Mueller, 35 Ohio St. 397, the Supreme Court held "that if the board added to the valuation of a person's personal property arbitrarily, without evidence or knowledge of the facts to support the same," a court of equity would give relief.

In Hirschman v. Fratz, 6 Dec Re 1109, it was decided that the board of equalization must, in the absence of personal knowledge, have some evidence before it can change the personal return of a person, verified by his oath; that less than a majority of a board cannot lawfully do any thing which the law requires it to do, or authorizes it to do; and, that it can act either upon personal knowledge of the facts, or upon evidence, in making additions of property to returns or lists, for taxation.

Guided by the instructions of the text-writers mentioned, and by the authorities cited, this rule may be formulated. A court of equity can not, and will not, award relief against a decision of the board of equalization, either by injunction or otherwise; it will not review the board's decisions; unless under some head of equity jurisdiction, it is necessary to prevent a multiplicity of suits; or to remove a cloud from the title to property; or to defeat fraud; or to correct a mistake; or, in a case where the board has acted arbitrarily, without evidence or knowledge of the facts; or where the board has discriminated against the person seeking relief.

The defendant in this case, invokes the aid of a court of equity by injunction and by decree.

It cannot be contended that his case comes under any of the old heads of equity jurisdiction, or that it is one where the board has discriminated. His title to relief, if he has any, can only be placed upon the ground that the board acted "arbitrarily, without knowledge of the facts, or without evidence." Is that case made out by his answer?

If the board acted upon any evidence at all, or upon knowledge of its own of the fact, and its judgment was honest, this court cannot give

relief. The fact that a court may disagree with the board touching the force, weight, value and credibility of the testimony before it, and upon which it acted, would not warrant the court in setting aside the decision of the board. 1 High on Injunctions, 493.

The court can go behind the records of the board just far enough to determine whether it acted upon any evidence at all, or knowledge of its own of the facts.

Upon such an inquiry, if it should be ascertained that its action, its decision, was not based upon any evidence at all, or knowledge of its own of the facts, the duty would be to nullify its decision; but, if it was found that it did act upon some evidence or knowledge of its own, the decision could not be disturbed, although the court might conceive that the evidence was not quite strong enough to authorize the decision. This must be true. If it was not, there would be no finality and conclusiveness in the decision of the board, which the Supreme Court has declared it possesses. Milwaukee Iron Co. v. Schubel, 9 American Rep., 597.

Mr. High, speaking of boards of equalization, says: "And questions of much practical importance frequently occur in determining how far the action of such boards or officers may form the foundation for relief by injunction against the enforcement of taxation. The fundamental principle applicable to such cases is, that a court of equity is not a court of errors to review the acts of public officers in the assessment and collection of taxes, nor will it revise their decision upon matters within their discretion, if they acted honestly. * * * So the fact that the tribunal fixed by law for determining and equalizing the value of property for purposes of assessments, has assessed it too high, will not warrant an injunction, since the action of such officers is judicial in its nature and will not ordinarily be reviewed in equity." 1 High on Injunctions, sec., 493.

One of the powers of the board, under the statute, was "to add to the valuation of the personal property, or moneys, or credits of any person, returned by the assessor, or county auditor, or which may have been omitted by them, or add other items upon such evidence as shall be satisfactory to the board, whether the return has been made upon the oath of such person, or upon the valuation of the assessor, or county auditor." Revised Statues, sec. 2807.

It will be observed that the law only requires the evidence to be satisfactory to the board in the first instance; and unless it transcended its jurisdiction, or fixed valuations, or made additions of property "through prejudice or reckless disregard of duty, in opposition to what must necessarily be the judgment of all persons of reflection," the court cannot interfere. 1 High on Injunctions, sec. 494, (note 3).

The law also required the board to set out in its journal the facts upon which the addition to the personal return or list of a person, verified by his oath, was made.

Before that provision was added to the law, the Supreme Court, in Hambleton v. Dempsey, 20 Ohio, 168, adjudged that the presumption of law, rebuttal however, would be that the board acted upon satisfactory evidence. Did that amendment of the law supersede that presumption?

The District Court of Hamilton county, in the case of Wise v. Kromberg, 7 Dec. Re., 541, thought it did. But, that conclusion is not in harmony with the decision of the Supreme Court in Fratz v. Mueller, *supra*. See what Judge Johnson says, at the bottom of page 403.

The board was authorized by law to administer oaths to witnesses or other persons; (Revised Statutes, sec. 2805); it was empowered to take evidence, while pursuing an inquiry concerning the valuation of personal property, or the omission to return such property, for taxation.

Following the classification in Fratz v. Mueller, *supra*, the first question is, what force and effect are to be given to the order of the board copied into the answer? Is it sufficient to invalidate the decision of the board of equalization? And that must, following that decision, be decided without regard to any extrinsic facts stated in the answer.

The law did not require the board to set out in its journal the evidence by which it was governed; it was only the ultimate facts. See 35 Ohio St., page 403. The journal entry I have already read. It declares that the board added $76,395.00, to the return of W. A. Mahoney, for two reasons.

1st. Because he refused to give the names of the persons for whom he loaned the money (I presume it is the $76,305.00, and another averment in the answer shows that to be so); 2d. Because the mortgages for the money stood on the record in his name. These are statements more of evidence than of ultimate facts, perhaps, but the journal does not state that this was all the evidence before the board. Hence it must be presumed that the board had sufficient other evidence before it. Hambleton v. Dempsey, 20 Ohio, 168.

The journal does not state that Mahoney disclaimed and denied all title and interest in the notes and mortgages; that appears from one of the averments of the extrinsic facts. Expressly, it is only shown by the journal entry that the board acted and decided as it did, upon two facts.

(1.) The mortgage record proving that the mortgages were recorded in the name of Mahoney as mortgagee; (2.) That he refused to tell who owned them. They do not convince me that the decision of the board, to charge Mahoney with the taxes on the $76,395.00, was arbitrary. While the journal statement is not such an one as a lawyer would have drawn, it is a substantial compliance with the law. In the case of Fratz v. Mueller, *supra*, the entry in the journal of the board was not as full in statement as the one in this case, but the Supreme Court held it was sufficient, and the argument by analogy from that case persuades me that this one is sufficient.

Is the answer, considered upon its extrinsic facts, or as a whole, invulnerable to the demurrer? It is averred that Mahoney denied any and all title and interest in the mortgages. The averment that the board knew that he had no interest or title in them is only tantamount to a denial that the board had any knowledge of its own of the fact of ownership; but it does not mean, in the law of pleading, that the board had no evidence before it to warrant its decision. This is true, because the board could act and decide upon either evidence, or knowledge of its own, of the facts. There is no averment that there was no other evidence before the board besides that of Mahoney denying ownership in the mortgages, and that of the mortgage record showing that they stood there in his name as mortgagee. According to the answer, thus construed, these were the only two matters of evidence before the board. But the court must assume, on demurrer, in obedience the rule enunciated in the Dempsey case, *supra*, that there was sufficient evidence to authorize the board's decision. Whether the board should have believed and found that Mahoney was the owner of the mortgages, because they were recorded in his name as the mortgagee, or whether it should have

believed and found that he was not their owner because he testified that he was not, is not before the court now; for it cannot be assumed that there was no other evidence before the board.

But assume that there was no other evidence before it. The board started with the undisputed and indisputable fact that the mortgages were on record in his name as mortgagee. The obvious, reasonable presumption, upon which the board had a right to act, was, that he was their owner, and that they would not have been on the record, thus, if that was not true. If the money they represented had not been returned for taxation, would it not have been returned if Mahoney had not consented to let the records show that it was his property?

Again, may there not have been something in the manner of his denial, the language used by him, and his manner while testifying which convinced the board that he was the owner of the mortgages in spite of his denial? Therefore, even if there was no other evidence than that of the mortgage record and the denial of ownership by Mahoney, before the board, how can the court, after the answer is amended so as to show that fact, in the absence of a charge in the answer that the board decided arbitrarily, without evidence at all, or knowledge of its own, of the facts, pronounce, before a hearing upon the evidence, that the board judged erroneously or illegally?

The answer is, also, obnoxious to the demurrer; because it does not state that the personal return of Mahoney was verified by his oath. The statute only required a statement of facts in the journal of the board when the return was so verified. In the Mueller case, *supra*, the allegation in the petition, which was a petition praying for relief in equity, as here the answer does, was express, that the return was verified by oath; and this is true of the Hirschman-Fratz case, *supra*.

Another question was agitated by the prosecuting attorney. It was, whether the defendant had not an adequate remedy at law under sec. 167 of the Rev. Stat. That section authorizes the state auditor "to remit such taxes as he may ascertain to have been illegally assessed, * * * and to correct any error in any assessment of property for taxation, or in the duplicate of taxes in any county." The term "error" is a very broad one. Whenever the amount to be remitted shall exceed $100.00, he is required to proceed to the governor's office and take to his assistance the governor and attorney-general, where, after investigation, any proposed or sought for, remission of taxes must be agreed to by the majority of such officers. If that section afforded a remedy to the defendant against the decision of the board, this court cannot exercise any equity power in his behalf. He should, in such case, have utilized the remedy provided by that statute. And if that position be sound, then this demurrer would have to be sustained on that ground, if on no other. That question, however, was not very fully argued by counsel, and I do not propose to pass upon it now; because I hold that the demurrer is good upon other grounds. If counsel desires to amend, that question can then be raised and be more fully discussed; for if that statute provides a remedy then, the demurrer would have to be sustained again.

What follows is not relevant to a decision of the demurrer, but is responsive to the request of both parties, that the court should define the powers of the board and the rights of witnesses brought before it and testifying, in an investigation touching property not returned for taxation. The board has power to administer oaths to persons who may be required to testify before it, and to take evidence; and, being a ju-

dicial tribunal, while engaged in making valuations and additions to property for taxation, it logically follows that no person who may be required to appear before it and testify can refuse to answer any question pertinent to the inquiry on hand. If at the time Mahoney refused to answer the questions of the board, the $76,395.00 was not assessed to any person for taxation; if it was subject to taxation; if it did not belong to Mahoney, the board had the right, and it was its duty to find out to whom it belonged, so that it could be assessed to the owners. The law required it, and justice to people who returned all their property for taxation required it. And the questions propounded to Mahoney were evidently put for the purpose of discovering who the owners were; they were pertinent, plainly so; and Mahoney had no right to take refuge behind the claim that it was an inquisition into his private business, as a reason for refusing to answer. This proposition is so obvious that a discussion of it would be irrelevant. Very little money would be taxed, if such an excuse for refusing to answer questions about the ownership of property was defensible. A person asked by an assessor what was his property subject to taxation might say it was none of his business, because it was an inquiry into his private affairs, but it would be an inexcusable answer. *A fortiori*, would not such an answer to an inquiry put by a board in respect to some other person's property not assessed be equally untenable? Taxes are necessary. Government could not exist without them. All citizens owe them for the protection given in return to their lives, liberty and property. Taxes may not be equally distributed, but the distribution would be made more unequal, if persons who have information about the ownership of property not taxed, should be allowed to withhold such information from officers or boards, whose duty it is to inquire about such matters, upon the pretext that it was an inquisition into their private business.

There is no privilege which exempts a person from imparting such information. The taking of testimony by the board is required to be governed by the rules of evidence which are in force in courts. But no rule of evidence made the information, or communication received by Mahoney from his customers privileged from disclosure. Business agents not lawyers are not exempt from answering all questions in a legal proceeding which ordinary witnesses are compelled to answer. But, even if Mahoney had been an attorney, his information about the ownership of the $76,395.00 was not within the attorney's privilege. Communications made or information given by a client to his attorney with a view to prospective violation of law is not within the line of privileged communications. To refuse to return property which is subject to taxation is disobedience to law: it is a violation of law. If the $76,395.00 was subject to taxation and was not returned by the owners, and if their object in having it invested in mortgages, made to Mahoney, was to evade the return of it for taxation and the payment of taxes on it, the law was violated. The vicarious evasion of the payment of legal taxes is no more allowable than a direct evasion by the person owing them.

That no particular person's tax return was then under investigation was not material. If the board was required to have some particular person's return under inquiry before it could question any one, take evidence from him, one purpose of the law would be defeated. If knowledge of who was the owner must precede investigation, then investigation would never be made in cases where the owner of property not assessed was not known to the board.

What is the remedy provided by law when a person refuses to answer such interrogatories as were put to Mahoney with reference to the ownership of the notes and mortgages for $76,395?

Has not the board all needful implied power to enforce the express powers conferred upon it by statute? Has it power to punish a person for contempt who thus refuses to answer pertinent questions? It must be remembered that the power to punish for contempt is not confined to courts. It is possessed by legislative bodies and by quasi judicial tribunals. 2 Bishop's Crim. Law, sec. 247 *et seq.* But, I will not now decide whether the board is vested with such power. There is, however, a remedy. It is created by statute. It is comprehensive enough to punish a person who refuses to answer pertinent questions in regard to the ownership of property, which has not been returned for taxation. Section 6906, of the Revised Statutes, declares the law which is applicable. It provides that "whoever, having been lawfully served with a subpœna, legally issued, * * * in any cause pending in any court or in any matter before any legal authority, or being present before any court or authority, and called upon to give testimony, refuses to take an oath, or, being sworn, refuses to answer any question required by such court or authority, to be answered, shall be fined," after indictment of course, not more than $500.00, nor less than $10.00, or imprisoned not more than 90 days or both. But, it is expressly provided that this section shall not prevent summary proceedings for contempt. This section has an abundance of provision for cases where persons decline to answer questions relative to the ownership of property not returned for taxation, and which the board is seeking to have assessed for that purpose.

The board has neither right nor power to question a person generally about his business, as was done by it on the thirtieth day of July, 1886, when it required the defendant to give the names of all the persons for whom he loaned money during the year 1886. The inquiries, in any given case, should be limited to some particular property or persons, the property not assessed, or the person who may own such property.

The demurrer to the answer will be sustained.

Cyrus Huling, Prosecuting Attorney, for plaintiff.

Col. J. T. Holmes, for defendant.

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## 375 PARTNERSHIP.

[Superior Court of Cincinnati, Special Term, February, 1888.]

†JOHN B. KEYS v. FRANK H. BALDWIN.

In an action between former partners to wind up the affairs of the firm, one of them who had free access to the books and occasionally inspected them, will be presumed to have knowledge of the entries in such books affecting his account with the firm.

PECK, J.

The defendant and John S. Baker formed a partnership in the year 1870, purchased the assets of the firm of C. F. Wilstach & Co., and

† This case and that following were tried together, and both opinions should be read to gain a complete understanding of either.

transferred them to a new firm consisting of themselves and said Wilstach, and under the firm name of Wilstach, Baldwin & Co., continued in business until the death of Mr. Baker. Into that firm the sum of $30,000 was paid by Mr. Baker as his contribution to the capital stock. Mr. Baldwin paid in the sum of $10,000 in cash for the same purpose. The $30,000 paid in by Mr. Baker was received by him from the "Baker estate," which has always been kept together, and administered by the heirs as a unit, and by agreement interest was paid to "the estate" at the rate of seven per cent. per annum. The interest was paid by the firm and charged to Mr. Baker or his heirs, for each quarter extending from 1870 down to 1886. Mr. Baker died in 1878, but the business was continued after his death by Mr. Baldwin under the same firm name, and with the consent of the heirs, down to a recent period. One of the purposes of this action is to wind up the affairs of Baker & Baldwin, and to do that it is necessary to determine whether the plaintiff, the successor in interest of the heirs of Mr. Baker, is entitled to be credited with $20,000 surplus of capital which the plaintiff claims was put into the firm by Baker and to interest thereon. Defendant denies that there was any surplus or any agreement to pay interest, but avers that he had a claim against Mr. Wilstach for a very large sum at the time the assets of Wilstach & Co. were turned over to Wilstach, Baldwin & Co., and that he agreed to waive his claim so far as it could apply to those assets, in order that they might pass to the new firm relieved thereof, and that in consideration of such action on his part, Mr. Baker agreed that he should have a credit of $20,000 as for capital paid in. The interest on the $30,000 paid the "Baker estate" was not paid as interest on surplus capital, but on the whole amount contributed by Mr. Baker, and it was regularly charged to him on the books, which were open to his inspection, and frequently inspected by him. If that interest had been charged to Baker and Baldwin, as contended, it would have been equivalent to the payment to Mr. Baker, by the firm of Baker & Baldwin, of the interest on the whole $30,000, which would hardly be consistent with the claim to interest only on the surplus of $20,000. Yet Mr. Keys insists Baldwin agreed that the interest should be paid by them equally, though upon final argument, plaintiff's counsel claimed interest only on the surplus.

It is incumbent upon plaintiff to establish by a preponderance of the evidence one of the two propositions, viz.: that there was a surplus of capital contributed by Baker, and an agreement by Baldwin to pay interest upon the surplus, or that he, although contributing to the capital equally with Baker, agreed that Baker and Baldwin should pay interest on the whole amount contributed by Baker. On both propositions three witnesses only have testified—Mr. Keys, the father of the plaintiff, and the brother-in-law of the late Mr. Baker; Mr. Baldwin, the defendant; and the book-keeper, Mr. White. Both Mr. Keys and Mr. Baldwin are intelligent men of high standing, and both are intensely interested in the case, though in different ways. Mr. Baldwin's interest is pecuniary as well as one of personal feeling. Mr. Keys, in addition to his close relationship to the plaintiff and the deceased, has taken an active part in the affairs of the firm from the time of its formation down to the present time, as creditor, as friend, and adviser of Mr. Baker, and afterwards as representing the Baker heirs. At every step of negotiation he appears to have been quite as prominent and active as any of the parties in interest. For a long time his relations with the defendant

were of the most friendly sort, but recently his position has changed, and his entire testimony shows a strong feeling against the defendant, and in favor of the plaintiff. Mr. Keys testifies that it was agreed between Baker and Baldwin in his presence that the interest upon the $30,000 received by the former from the Baker estate should be paid by them jointly and presumptively in equal proportions. Mr. Baldwin denies the making of any such agreement, and asserts that he paid in the sum of $10,000 in cash as capital, and that in consideration of the waiver of his claim against Wilstach, so far as it applied to the assets received from C. F. Wilstach & Co., it was agreed between himself and Mr. Baker in the presence of Mr. Keys that he should have a credit of $20,000 additional on capital account, so as to equalize the amounts paid in by them. Mr. Keys denies that any such agreement was made in his presence or to his knowledge. The testimony of one of these witnesses is almost, if not altogether, balanced by that of the other, and if there were no other evidence the party having the burden of proof would be in a bad way. The burden is on the plaintiff, and unless he can produce other evidence in his support, or circumstances corroborating his claim, the judgment will probably be against him.

The only other testimony is that of Mr. White, the book-keeper. Considering his high character, his opportunities for knowledge, and his generally accurate recollection, his testimony seems decisive in favor of the defendant. His statement that when the partnership was formed, he made an entry of $20,000 to the credit of Mr. Baldwin on capital account, by direction of Mr. Baker, has been said to be argumentative, but I do not so find it. He was sharply examined on the subject and pressed upon the difference between an inference and a recollection, but insisted that it was a matter of recollection with him, and it is clear that he is firm in the belief as to its accuracy. It further appears without question that during the whole of Mr. Baker's life-time the interest paid to the Baker estate was charged to him; that he frequently examined the books and took a lively though not a continuous interest in the business, had a desk in the office to which he went when at home, asked a great many questions about its affairs, and seemed to be well informed about them in a general way, though he did not take any regular part in the conduct of the business, and was frequently absent from the city for months at a time. He appears to have made no objection to the charges of interest against himself, and made no claim against the firm for interest on any amount. A partner is presumed to know of the entries in the books of the firm, Lindlay on Partnership, 991; Dunnel v. Henderson, 23 N. J. Eq., 174; Stuart v. McKichan, 74 Ill., 122; and although it may be a presumption easily overcome by proof of facts showing the contrary, yet here the evidence seems rather to confirm the presumption than to overthrow it. The testimony of Mr. White and Mr. Baldwin, and the undisputed facts as to the conduct of Mr. Baker, form a mass of evidence in favor of the defendant much greater than that offered by plaintiff, who has failed to establish either of the propositions before mentioned, and judgment must be rendered accordingly.

I have not found it necessary to review, in this opinion, the testimony as to the destruction of the older books of the firm, for it is comparatively unimportant. There is some conflict in details, but the principal facts are so well established as to show that they were destroyed as useless and according to custom, after having been in the cellar for a

number of years, and at a time when defendant could hardly have anticipated the present controversy.

King, Thompson, Richards and Thompson, Kittredge & Wilby, for plaintiff.

Sayler & Sayler, Harmon, Colston, Goldsmith & Hoadly, for defendant.

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## PARTNERSHIP. 376

[Superior Court of Cincinnati, Special Term.]

### †JOHN B. KEYS ET AL. v. FRANK H. BALDWIN.

1. A partner who knowingly permits another to conduct the business of the firm for a series of years, on the basis of an equality of interests between them, will not afterwards, in winding up the affairs of the firm, be permitted to assert that the original agreement provided for a different mode of dividing profits and losses.
2. Where parties interested in the business of a firm have for a series of years received annual statements of its business, charging them with a certain proportion of the losses, and made no objection thereto they will be presumed to have acquiesced in the accounts stated.
3. And such presumption of acquiescence is not affected by the fact that they made no objection to the accounts because they were mistaken as to a fact about which they had ample opportunity to be fully informed, and which mistake was not caused by or known to the other parties.

PECK, J.

The object of this action is to wind up the affairs of the firm of Wilstach, Baldwin & Co., a partnership first formed in the year 1870. The partners then, were C. F. Wilstach, Frank H. Baldwin, and John S. Baker, and the partnership agreement then executed, provided that the profits and losses of the firm should be distributed among its members in the proportion of fifty per cent. to Baldwin, thirty per cent. to Baker, and twenty per cent. to Wilstach. In 1872, one Theodore H. Lee was admitted to the firm, and the articles of the partnership were changed so as to provide that the proportion to Baldwin should be forty-five per cent. to Baker twenty-five, to Wilstach fifteen, and to Lee fifteen. The partnership continued business under that agreement until the year 1878, when Lee withdrew, and it is at this point where the controversy between the parties begins. About the time of the withdrawal of Lee, the form of a new agreement was prepared by adding a clause to the articles of 1872 and on the same sheet of paper. This proposed agreement provided for a distribution of profits and losses in the proportion of forty per cent. to Baldwin, forty to Baker, and twenty to Wilstach and provided for a continuation of the business for a period of about two years. The paper, as modified, was signed by Baldwin and Wilstach, and by Baldwin handed to Mr. Samuel B. Keys, the father of the plaintiff, and at that time, on most friendly terms with all the parties, for the purpose of securing the signature of Mr. Baker, who was then confined to his residence by illness. The paper was never presented to him, because Mr. Keys found him too ill to talk about business matters, and in a few weeks Mr. Baker died.

† See previous case.

Soon after his death, the paper with a slight modification, to adapt it to the purpose, was presented to the heirs with the request that they sign it, but the heirs declined. They, however, sent a verbal message by Keys to Baldwin, that the business might be continued for a time, but as to the tenor of the message there is much dispute. Mr. Keys testifies that he told Mr. Baldwin that the business was to be continued on the same terms as before the death of Mr. Baker, and Mr. Nathan Baker, one of the heirs, testifies that he, in substance, told Mr. Baldwin that such was their intention. Mr. Baldwin testifies that Keys brought the paper back to him with the statement that the heirs were unwilling to sign it because they feared being held as partners in the concern, but they were willing that the business might be continued on the terms therein contained, until a time when it could be conveniently wound up. Whatever terms may have been stated to Mr. Baldwin, it seems obvious that he understood that the heirs agreed to the proposition for a division of profits and losses upon a basis of equality between himself and Baker, for the statements of account thereafter rendered annually to the Baker heirs, show that he was conducting the business upon the theory that Mr. Baker's interest, or rather that of his successors in the firm, consisted of forty per cent. interest in the profits and losses, and each statement rendered after the death of Mr. Wilstach, which occured in 1882, showed an equal division of the losses between Baldwin and the Baker heirs. These accounts were regularly rendered, and no objection was made to them by the Baker heirs up to and including the last, which was rendered in April, 1886. It is claimed on behalf of the plaintiff, that Mr. Baldwin mislead Mr. Keys and Mr. Nathan Baker into the belief that the business was being conducted on the same basis as before the death of John S. Baker, but that claim appears to be conclusively refuted by admitted facts. The paper which Mr. Baldwin placed in the hands of Mr. Keys, and which the latter had in his possession for several weeks, contained the original agreement, and the proposed modification. Mr. Keys is decidedly of the belief that he did not read the original agreement, although it was on the same sheet, but the addition to it signed by Baldwin and Wilstach, and to which he originally undertook to procure the signature of Mr. Baker, and afterwards, of the Baker heirs, contained the provision that the partnership should continue "on the same terms and conditions as before, except that the profits and losses shall be shared as follows instead of as heretofore, viz.: By said Wilstach twenty (20) per cent. by said Baldwin forty (40) per cent. and by said Baker forty (40) per cent."

Mr. Keys admits that he read the proposed addition, and Mr. Baker says that the paper was read over to the heirs. With this paper before them, and knowing the contents of the portion above quoted, it seems remarkable that they should not be aware of its most important provision; but, assuming they were not, it can hardly be claimed that Mr. Baldwin deceived or misled them on the subject, when it is admitted that he placed in their hands a brief document, setting forth on a single sheet the exact facts of which they claim to have been ignorant. If he had intended to deceive them, it is hardly conceivable that he would have proceeded in such a manner; nor is it creditable that while delivering to them such a document, he should make statements of facts at variance with its contents. Whatever they may have known, there is no ground for the claim that they were misled by Mr. Baldwin as to the point in question. I do not doubt the sincerity of their declaration that they did

not know, yet it is very difficult to believe it correct. About nine years elapsed between the death of Mr. Baker and the giving of the testimony of Mr. Keys and Mr. N. Baker herein; and I think it much more probable that through lapse of time they have forgotten the knowledge they then had on the subject, and through change of circumstances, they have come to believe that they never had it. The firm then was earning money, and an increase in the proportion of profits would not have been objectionable to them. The proposition to change from twenty-five to forty per cent. would not produce the disagreeable impression upon them which would have resulted from it if made a few years later, when the business was a losing one. On the whole, I cannot believe that they did not know of a state of facts which they admit was placed before them in a written document, the language of which is not open to doubt, and is comprehensible to any one having an ordinary knowledge of the English language, upon which they were requested to act, and upon which they did act by declining to execute it. In addition to the other improbabilities which beset plaintiff's claim on this point, it seems unreasonable to believe that they would decline an important business proposition without being aware of its principal provision.

If they were aware of the change proposed, which proposition necessarily implies that they knew the arrangement was different from that which has existed during Mr. Baker's lifetime, their subsequent action renders the message delivered to Mr. Baldwin in response to a request that they execute the proposed agreement, comparatively unimportant. They permitted Mr. Baldwin to go on for eight years conducting the business on the basis of an equality of interest between them and himself. The accounts rendered to them regularly show that to have been the case. Mr. Keys' letter of September 23, 1880, expressly states that to be the fact. Whatever may have been their original intention, it seems that, having acquiesced for such a length of time, with full knowledge of the facts in the conduct of the business by Mr. Baldwin on that basis, it is now too late for them to object to a settlement on terms of equality. On the plainest principles of equity, they cannot now be permitted to come in and undo an arrangement which they have knowingly permitted to exist so long without objection. Heart v. Corning, 3 Paige Chy., 566; Higgins v. Burkam, 10 Wall., 14; Lockwood v. Thorne, 11 N. Y., 170; Terry v. Sickles, 13 Cal., 427; Tharp v. Tharp, 14 Vt., 105.

For a large collection of authorties on the subject see the note to Lockwood v. Thorne, in 62 Am. Decisions, 85.

Let us, however, assume that the statements of Mr. Keys and Mr. Nathan Baker, that they did not know what the percentage of interest of Mr. J. S. Baker in the firm originally was, and did not know that there had been any change since the admission of Lee to the firm, are correct. Their claim then resolves itself into this: They acquiesced in the equal division between themselves and Baldwin because they believed the arrangement was the same as it had been during the lifetime of Mr. Baker. The charge that their error in that respect was due to Mr. Baldwin is, as we have seen, without foundation. There is no ground of fraud or misrepresentation, upon which the results of their acquiescence can be avoided. The mistake of fact under which they rested was brought about by their failure to inform themselves, when the means of knowledge was placed before them and remained at all times within their reach. It was purely their own, and was not such a mistake as would avoid a contract if they

had entered into one because of it. There is no evidence that Mr. Baldwin knew of their mistake, but his open and avowed conduct of the business on the new basis when he knew they had in their possession a paper showing the change, is very strong evidence to the contrary. Not being aware of their mistake, he could have taken no advantage of it, and they could ask no relief in equity or elsewhere from any engagement with him, entered into by them because of such mistake. Wald's Pollock on Contracts, 429, 480; Smith v. Hughes, L. R. 6 Q. B. 597.

Having all the necessary information placed before them, in connection with a request to act upon the subject, it is not too much to say that they were negligent in obtaining knowledge of so important a fact. Where a party has the means of information, and does not use diligence in making use of it, equity will not relieve him from the consequences of mistakes committed because of lack of such information. Story Ex. Jur. secs. 146 to 151.

And where a party, objecting to an account stated, has been guilty of negligence in detecting the errors therein, he will not be relieved of the consequence of acquiescence for a long time in the correctness of the account: Bruen v. Hone, 2 Barb. 586.

Nor, as held in Evans v. Smallcombe, L. R. 3 H. L. 256, from long acquiescence, even if without full information. See also Lindlay on Partnership, 902.

It is sometimes said that parties are not precluded from impeaching an account stated, unless the principle of estoppel is applicable, or an obligatory agreement, such as a settlement is shown. See Lockwood v. Thorne, *supra*. If that be the law, there are not wanting elements of estoppel in this transaction. Mr. Baldwin might very well be willing to go on for a time with a losing business in the hope of something better when liable for only half the losses, but unwilling to do so if liable for a much larger proportion of the same. The failure of the Baker heirs to object at the proper time to his method of distributing the losses has permitted him to go on with the business under the impression that he was only assuming a certain proportion of the risk, when he might have put an end to it years before, if aware of the claim now made. Not having spoken when they should, they may not now speak when they will. To permit them to do so would be to sanction their placing themselves in a position where they could claim a half interest in a profitable business, or admit only five-fourteenths interest in a losing one.

If their acquiescence was without knowledge of the terms of the contract with Mr. Baker, it is, for the reasons stated, too late for them to undo what has been done because of it, and if with knowledge, as the fact appears to be, the result is the same.

The affairs af the late firm will be settled on the basis that plaintiffs and defendant had an eqaul interest in the profits and losses of the firm.

King, Thompson, Richards & Thompson, Kittredge & Wilby, for plaintiffs.

Sayler & Sayler, Harmon, Colston, Goldsmith & Hoadly, for defendant.

## GAMBLING. 387

[Superior Court of Cincinnati, General Term, 1888.]

ALEXANDER ROULSTONE v. ALBERT MOORE ET AL.

**Under sec. 4276, Rev. Stat., which gives the person losing money in gambling or betting, a right of action to recover the same from the winner thereof, no action lies against the broker who paid out the money so lost under the direction of the person losing.**

ERROR to General Term.

TAFT, J.

Plaintiff sued to recover from defendants $4,750.50 which he had given them as brokers to buy and sell cotton for him for future delivery. He alleged that the buying and selling were on margins, and were mere gambling transactions, and in addition that the defendants so manipulated the prices and accounts as to show, on paper, losses which never occurred, and thereby fraudulently made debits to the plaintiff which exhausted the money he had deposited. The money was paid and transaction had in 1881 before the law of 1882 making dealing in margins unlawful. The case was tried before a jury in the court below. It appeared from the evidence of the plaintiff that all the money deposited by him with the defendants was expended by them as his brokers in the purchase and sale of cotton futures, and in the necessary and usual commissions. There was no evidence whatever to show any fraudulent manipulation of accounts or prices. The court, upon the close of the plaintiff's case directed the jury to return a verdict for the defendant. Plaintiff sought to recover under sec. 4276 Rev. Stat. "If any person, by playing at any game, or by means of any bet or wager, loses to any other person any sum of money or other article of value, and pays or delivers the same, or any part thereof to the winner, the person who so loses and pays or delivers may at any time within six months next such loss and payment or delivery, sue for and recover the money, or thing of value so lost and paid or delivered, or any part thereof, from the winner thereof, with costs of suit, by civil action founded on this chapter, before any court of competent jurisdiction." The single point presented to the court on defendant's motion for judgment on plaintiff's evidence, was whether this section of the statute gave a person who had expended money through a broker for gambling, could recover from the broker who had paid out the money, to the winner thereof. This question the court below very properly, we think, answered in the negative. Authority hardly seems necessary to sustain the ruling, but it can be found in White v. Barbour, 123 U. S., 392, where the Supreme Court of the United States in construing a similar statute of the State of Illinois expressly held that the action could not lie against the broker who had paid out the money for the plaintiff and at his request.

Judgment affirmed.

PECK & MOORE, JJ. concur.

Jordan & Jordans, for plaintiff.

C. K. Shunk and Kittridge & Wilby for defendants.

## 388 TITLE TO A NOTE.

[Superior Court of Cincinnati, General Term, 1888.]

JAMES MOORE v. FRANCES M. A. CURTIS AND JOHANNA HAMANN.

C. entrusted to K., an attorney, several notes for safe-keeping only. K. was agent for H. to invest her money, and being called upon by H.'s nephew, at her request, exhibited one of C.'s notes not yet due and endorsed in blank, as one of his purchases for H. The note was left in K.'s custody after being so exhibited. After K.'s death, the note was found in K.'s safe deposit box in a bundle marked as H.'s property. *Held:* That H. had no title to the note as against C.

ERROR to General Term.

TAFT, J.

Plaintiff below filed a petition in interpleader, alleging that he was the maker of a note for $912.24 dated November 29, 1883, payable to Oliver, Stewart & Boyce, Trustees, and by them endorsed in blank and without recourse; that the said note was secured by mortgage, and that he was anxious to pay it, but that Frances M. A Curtis and Johanna Hamann each claimed to own the same, and were threatening to bring suit. The two claimants were made parties and the case was heard upon their evidence. The court below found that the notes belonged to Mrs. Curtis, and entered a decree in her favor. Mrs. Hamann prosecutes this proceeding to reverse that judgment. It appears from the evidence that Wm. A. Goodman, president of the Lafayette National Bank, who was a friend and agent of Mrs. Curtis, in December, 1884, bought the note in controversy for her; that he held the note for her until its maturity in November, 1886, when he renewed it for one year. Shortly after that time, he delivered the note to Mrs. Curtis, who put it with several other notes and securities into the hands of Charles Kebler for safe keeping. On May 31, 1887, she visited the Safe Deposit Company with Kebler and was shown her notes. She says that this Moore note was among them and that she thought all was right. A few days later, he handed her a tabulated statement of her notes, eleven in all, with the names of the debtors, the amounts of the notes and their dates. Upon this list, the name of Moore as a debtor does not appear. Mrs. Curtis says that she did not notice the absence of Moore's name until after Kebler's death, which occurred in November, 1887, when she saw several names among the makers of the notes which she did not know; that at the time of receiving it, she saw that the amounts were correct, and made no other examination. She says that several months after receiving this list, she had a conversation with Kebler in which he alluded to the renewal of the Moore note, and the time of its maturity, and spoke of it as belonging to her. Mrs. Curtis is very emphatic in saying that she never consented to a sale or transfer of the Moore note and that Kebler had no power given him to sell any of the notes. Kebler was Mrs. Hamann's agent to invest her money and to hold her securities. In August, 1887, she was in Europe, and hearing nothing from Kebler, sent her nephew, Brasher, to him to inquire in regard to her affairs and to get from him such mortgages as he had. Kebler went with Brasher to the safe deposit company and exhibited to him a great number of notes and mortgages as Mrs. Hamann's, among which was the Moore note.

The notes were replaced in Kebler's box. When Kebler's box was opened after his death, the Moore note was found in a package marked as containing Mrs. Hamann's papers. Kebler told Brasher that he had bought many of the notes with Mrs. Hamann's money.

Mrs. Hamann can claim that the title to the note passed to her in only two ways, either by the intention of Mrs. Curtis to transfer the title to her or by a delivery of the note to her for value without notice to her of the infirmity of the title of her transferer. We think it very clear from the evidence that Mrs. Curtis never gave Kebler any authority to sell the note. Therefore up to the time when he exhibited the note to Brasher, Mrs. Hamann's agent, he, in fact, held the note as Mrs. Curtis' agent, because as between him and Mrs. Curtis there had been no change of title in it. Now what was the effect of Kebler's interview with Brasher. It amounted, at most, to a declaration by him that he held the note in trust for Mrs. Hamann. By such a declaration, it could not be held that Mrs. Hamann received a possessory title as against Kebler's other *cestui que trust.* What of value did Mrs. Hamann part with at that time, or think she was parting with? Kebler told her he had purchased the note with her money some time before. That was untrue because he then held the note for Mrs. Curtis, as we have found. In her mind, the transfer of title to her and her payment for it had taken place some time before and in both respects she was deceived by Kebler, who used the property of another in his possession to lull her suspicions and delay her proceeding against him. This delay and continued trust was not a valuable consideration upon which to found a title against the real owner. Kebler's intention that Mrs. Hamann should have the note as shown by his placing it among her papers can have no bearing upon the rights of the parties, any more than his exhibition of the note to Brasher as Mrs. Hamann's property.

Judgment affirmed.

PECK and MOORE, JJ., concur.

Follett, Hyman & Kelly, for Mr. Curtis.

Thos. McDougall, for Johanna Hamann.

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## SUNDAY LIQUOR LAWS. 389

[Hamilton Common Pleas, 1888.]

### †MUNZEBROCK v. STATE.

1. A conviction upon an arrest without a warrant the day after the commission of an offense, is not within the jurisdiction of the court except in those cases where such arrest is expressly authorized by statute; hence such conviction for selling liquor on Sunday in violation of the act of 1888 is void.

2. In the law against selling liquor on Sunday (85 L., 260), the prohibition against keeping "open" means open in such a manner as to induce the public to enter, as on other days, and does not make penal the opening of the door under any and all circumstances.

† See Molitor v. State, *post*, 20 B., 323.

ERROR to the Police Court of Cincinnati.

Abstract of opinion of Robertson, J.

Henry Munzebrock was convicted and sentenced in the police court of Cincinnati for keeping his saloon at Central avenue and George street, Cincinnati, open on Sunday, April 29th.

Three principal grounds of error were alleged by counsel for the petitioner:

1. The court erred in not quashing the information. It is under this allegation of error that Judge Robertson reverses the judgment. No warrant was served on the accused, nor was any ever issued for his arrest. Judge Robertson in his opinion says:

There can be no legal arrest without due process of law. An arrest without a warrant has never been lawful except in such cases as is expressly authorized by statute, on the ground that public security required it under certain circumstances. The power given under our statute is to arrest and detain until a legal warrant can be obtained, and as our Supreme Court has said, "The power is measured by and ends with the necessity on which it is based," namely, to prevent the escape of criminals until a warrant can be obtained. After a reasonable time in which to procure a warrant, the detention under such an arrest is illegal; and during detention the legal custody of the prisoner is in the custody of the officer holding him, and not in any court or other tribunal.

Again, Judge Robertson says: Our Supreme Court has practically passed upon this precise question in Inskeep v. State 36 Ohio St., 144, where the language used is as follows: "A fair construction of our statutes requires us to say that the legislature has never authorized proceedings in a criminal court unless such information was based on a warrant issued upon oath or affirmation charging the person informed against with the commission of a crime, * * * and a fair construction of the various statutes relating to the subject requires us to say that such jurisdiction (that of the police court) must be invoked in the same way (as that of justice of the peace), that is by warrant founded on complaint made under oath or affirmation. * * * The rules of practice and procedure of the police court does not have any effect of dispensing and for the reasons already given could not dispense with the warrant found upon oath or affirmation required by the constitution and laws."

Such is the language of our Supreme Court, and I see no escape from its conclusion: That the warrant is essential to the jurisdiction of the court. The law of the land must be accepted by every one as the only rule which can be allowed to govern the liberties of citizens, whatever may be their ill desert. If the bars are once let down, and the plain requirements of the statutes are allowed to fall into disuse, the result can only be official illegality, which, if anything, would be even more to be regretted than individual law breaking.

2. The second assignment of error was that the court erred in its charge to the jury. Although not bound under the circumstances to pass upon this question. Judge Robertson did so for the guidance of the police court officials in future trials for the same offense. The language of the statute is that "whoever makes any such sale, or allows any such place to be open or remain open on that day (Sunday), is guilty," etc. The controversy was as to the construction which was to be given to the word "open." Judge Caldwell's instruction to the jury was "That if you find that the said defendant allowed said room or place to remain open for the public to come in and go out on the twenty-ninth of April,

1888, at any time between the hours of 6 A. M. and 12 P. M., and you are satisfied of this beyond a reasonable doubt, you will find the defendant guilty." As to this Judge Robertson says:

"Manifestly the word 'open' in this connection is used in a metaphorical and not in a literal sense. It does not mean to make penal the opening of the door of such room or place under any or all circumstances. An illustration of the construction to be given to words used in a figurative sense is given in Blackstone, Vol. 1, page 60, where Blackstone in turn quotes from Puffendorf, the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held not to extend to a surgeon who opened the vein of a person who fell down in the street with a fit; and such has been the rule construing the operative words of penal statutes ever since. The word is to be construed reasonably in view of all the circumstances; and so construing the words in this statute, it would seem that keeping open such places on Sunday in such manner as to induce or permit the public to enter on Sunday as on other days of the week, or opening the place so as by implication to hold out that the place was open for the conducting of business or the sale of liquor, is within the prohibition of the act."

8. The remaining assignment of error which received consideration was that the court erred in sustaining a demurrer to a plea in abatement. The plea in abatement was that the Owen law is not a valid act, because it did not pass both branches of the general assembly, as required by the constitution. Following the decision of the Supreme Court in the case of Herron v. Smith, (44 Ohio St.), Judge Robertson holds that the court below did not err in sustaining the demurrer.

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## APPROPRIATION. 404

[Hamilton Common Pleas, May 16, 1888.]

CINCINNATI (CITY) v. NEFF ET AL.

In actions to appropriate private property to public use under sections 2... 2261, Revised Statutes,

1. The property owners are not entitled to separate juries for each separate lot or parcel, and are not entitled to demand struck juries for each separate lot or parcel.
2. The property owners are only entitled to two peremptory challenges.

MAXWELL, J.

In the case of the city of Cincinnati v. Neff et al., a proceeding to appropriate property for the extension of the grounds of the city hall, a number of objections have been made to the proceedings by the property owners; technical objections to the form of acts giving the authority to appropriate the property, and also to the proceedings in so far as they have been taken.

Section 2559 of the Rev. Stat. provided: "The council of any city or village may erect, enlarge, improve and complete any public hall which shall be used for the public officers of the corporation, and such public and other purposes as the council may authorize."

For the reason, I suppose, that this original sec. 2559 made no provision for raising money to construct buildings, unless they might be constructed out of the building or general fund of the city or village, the legislature thought it necessary to pass what is called a supplement to sec. 2559 of the Rev. Stat., which supplement was passed March 21, 1888, and it was provided that this supplement should be numbered 2559 *a*, and under this heading, 2559*a*, there were fifteen subdivisions numbered consecutively from one to fifteen.

This supplement began by providing:

"In cities of the first grade of the first class, the board of public affairs of such city may, by resolution, declare the necessity for the erection, completion and furnishing of a new city hall for such city, to be used for the public officers of the corporation * * * " and so on.

And then the several subdivisions went on to provide not only that the city hall should be constructed, but that the board of public affairs should, upon the passage of such resolution, declaring the necessity for the construction of the city hall, certify the same to the board of trustees of the sinking fund of such city, and thereupon the trustees of the sinking fund were to appoint a board of trustees composed of four citizens of such city, upon whom devolved the power, authority and responsibility of erecting and furnishing the hall. This board was to be known as the "board of city hall trustees."

The first objection taken in this proceeding was as to the form of this act, the question raised being whether or not this act repeals the original act, or whether it is an amendment, or how it is to be taken. It appears clear to me that we may call it either an amendment or supplement. It is substantially as if the original act, 2559, had had added to it the provision that in cities of the first grade of the first class a fund of seven hundred thousand ($700,000) dollars might be raised by issuing bonds, and with that fund a city hall might be constructed. Of course, after the city hall were once completed and furnished, then the power of the board that constructed it would become *functus officio*, and the power to construct it being at an end, the provisional section would be at an end also. It was not a provision, which, by its nature or in its nature, was to continue as the original section continues, but it is clearly what may be called a temporary supplement or amendment to the original section.

This supplement or amendment went on to provide that the board of trustees, that is, the city hall trustees:

"Shall have power to appropriate, enter upon and condemn for public use, for enlarging any grounds already used by any such city for city hall purposes, and in connection therewith, any private property which shall be adjoining to and not separated by a street or alley more than thirty feet in width from any property already used as aforesaid, or in connection therewith; and when said board shall determine to appropriate property for such use, a resolution to that effect shall be passed by the board and entered upon its minutes, declaring the intention to appropriate such property and the necessity therefor, with a pertinent description of the property to be appropriated, which resolution shall be certified to the solicitor of such city, whose duty it shall then be to apply in writing, in the name of such city, to the court of common pleas of the county, or a judge thereof in vacation, or to the probate court of the county, for the impanelling of a jury to assess the compensation to be allowed the owner of property appropriated."

Now, this section fifteen, as will be plainly seen, contemplates the appropriation and condemnation of this very property on Central avenue, about which this controversy now exists. The proceedings of the board of city hall trustees with reference to this matter, are not before the court in such form as that they could be offered in evidence, perhaps, in the trial of a case; but enough has been said about them to warrant the court in noticing what has been said.

It would seem that in the opinion of the city hall trustees the fund of seven hundred thousand ($700,000) dollars was not sufficient to construct the city hall and complete and furnish it, and condemn or appropriate this property, besides; for, as it was estimated, it would take in the neighborhood of, or upwards of, three hundred thousand ($300,000) dollars to pay for this property. And thereupon some action was taken by the city hall trustees either by way of an expression of an opinion or possibly by some formal action, part of which, at least, seems, from remarks made by counsel, to have been entered upon the minutes, the result of which was that they deemed it inexpedient to condemn and appropriate this property. The reason is obvious, and the matter was again brought before the legislature at its last session in this form: "An Act Supplementary to sec. 2559." In other words, it was proposed to add a further supplement or amendment to sec. 2559, which was in fact a supplement or amendment to the first supplement or amendment; and in that it was provided that for the purpose of raising additional funds for the appropriation of property for the purpose of such city hall and for building the same, the board of public affairs of such city should issue the bonds of such city in an amount not to exceed the sum of three hundred thousand ($300,000) dollars in the manner and on the terms and under the provisions provided for issuing the original seven hundred thousand ($700,000) dollars. But it was decided that this question ought first to be submitted to the vote of the qualified electors of such city at the next city election, and finally it provided that it should require a majority of all the votes cast at such election before the bonds were issued. That was submitted to the electors at the last election held in this city—the spring election. It seems to have been agreed upon all hands that if all the votes cast at that election, irrespective of whether they were cast for or against this proposition, were reckoned, then the proposition did not have the majority of the votes cast, but did have probably a majority of the votes cast upon that particular question, yeas and nays, but it certainly did not have the majority of all the votes cast at the election. Thereupon the matter was again brought before the legislature and another supplement or amendment was passed, which may, perhaps be called "An Act to Quiet Titles," which provided that this paragraph which had been amended should again be amended and supplemented in this way: It provided for the issuing of three hundred thousand ($300,000) dollars, without any conditions except that the board of city hall trustees should appropriate this particular property. In other words the legislature said to the city hall trustees, or to the qualified authorities, "you shall issue this three hundred thousand ($300,000) dollars of bonds, but you shall use it for the purpose of appropriating the property situated upon Central avenue and for no other purpose except so far as there may be a surplus after appropriating that property." It provided that such surplus, if any should be put with the original fund of seven hundred thousand ($700,000) dollars provided for completing the building.

Now, these two acts, which are supplemental and additional to the original, do not seem to me to be either inconsistent with each other, nor do they seem in any way to repeal directly or impliedly the original act; in other words, they may all stand together, and although it may be said that the proceedings were of as special a nature as they could be, still, inasmuch as they are general in terms, and inasmuch as our Supreme court has by two or three decisions upon questions arising in the Cincinnati Southern Road Act, approved of this form of general special legislation, if one may use such a term as that. I am of the opinion that this legislation is in proper form, and qualifies the board of city hall trustees to proceed to appropriate the property sought to be appropriated in this case.

The objection made that council should have passed upon the question is met by the fact that the legislature has vested the power in this matter directly in the board of city hall trustees. Now, that has been done by the legislature before, in two cases, two quite marked cases; one was the matter of the Cincinnati Southern Railway, in which, for some purpose, good, we may presume, all power was taken from the city council and vested in the trustees of the Cincinnati Southern Railway. Council have never had anything to do with the Cincinnati Southern Railway, either directly or indirectly, but the power of appropriation and condemnation was vested in the trustees as well as the other powers connected with the management of the road; and it was only necessary for them to pass the resolution confirming the necessity for condemning the property for the use of the road.

The same thing was done with the paving law. The power with reference to that, and the control of it, was taken away from council and vested in the board of public affairs or the board of public works, as it was at the time. The provisions with reference to the Cincinnati Southern Railway have been under review by the Supreme Court, and we may assume that they believe this provision to be constitutional together with the other provisions. I am not aware that any question has been raised with reference to the paving act in the Supreme Court. Its validity has been decided upon, however, by the lower courts. So that that objection, it seems to me, must fall to the ground.

Another technical objection is made to the petition in that it begins by reciting, although the city is the plaintiff, the existence of the city hall trustees, and that they have passed a resolution finding it necessary to appropriate this property.

The objection as to that was taken upon two grounds; first, that the city hall trustees having once found it inexpedient to take this property, were estopped or foreclosed from taking any further action in regard to the matter, as if a judicial decision had been rendered which could not be re-opened. That might be true so long as the circumstances existed just as they did when they took their original action, but after the legislature had amended the act under which they took their first action and had directed them under new conditions to proceed to appropriate and condemn this property, then it was competent for them, and there was nothing left for them to do but to take new action and proceed to appropriate and condemn property; for the provisions of this last act are virtually mandatory, mandatory upon the board and possibly mandatory upon the court, unless the court should find it was an abuse or an excess of power of the legislature to pass this supplement.

As to the objection to the form of the petition, the original act which was passed, as I have said, in March 31, 1867, provided that the board of public affairs should immediately upon passing their resolution certify the same to the board of trustees of the sinking fund, and that the trustees of the sinking fund should thereupon appoint a board of trustees composed of four citizens, and so on, which board should be known as the board of city hall trustees.

The statement in the petition that the board of city hall trustees exists, necessarily carries with it the statement that it had been appointed. The objection that could be taken to the petition, possibly, would be that the statement was not definite and certain enough in the petition as to the time of their appointment, but in as much as the act provides for their appointment, and as the courts must always presume that public officers discharge duties of this kind, especially those which are in their nature mandatory, and which they might be compelled by mandamus to discharge, we may presume that they have discharged those duties; we may presume fairly that the board of city hall trustees have been appointed as averred in the petition itself. So that I think, upon both grounds, the objection must be overruled.

We come, then, to the questions raised by counsel as to the manner of trial. Two of the separate property owners have demanded struck juries. The city has also demanded a struck jury, but by its counsel has expressed a willingness to waive or withdraw its demand. The question that arises is whether the court can allow each of the defendants to have a struck jury, which is virtually to concede to them a separate and distinct trial from each other; and to determine that question, we have to resort to the construction of the statutes.

Beginning with sec. 2232 of the Rev. Stat., we find various provisions with reference to appropriating and condemning property for public purposes including the construction of city halls.

Section 2235 provides that, "When it is deemed necessary by a municipal corporation to appropriate private property, the council shall, by resolution, declare such intent, defining therein the purpose of the appropriation, and setting forth a pertinent description of the property designed to be appropriated."

That, as I have said, has been superseded in this act, by vesting in the city hall trustees the power here vested in the municipal corporation.

Section 2236: Upon the passage of the resolution by the requisite majority, application in writing shall be made to the court of common pleas of the proper county, or to a judge thereof in vacation, or to the probate court of the county, which application shall describe as correctly as possible the property to be taken, the object proposed, and the name of the owner of each lot or parcel of the property.

Section 2237: Notice of the time and place of such application shall be given personally in the ordinary manner of serving legal process to all the owners or agents of the owners of the property sought to be appropriated, resident in the state, whose place of residence is known, and to all others by publishing the substance of the application.

Section 2238: If it appear to the court or judge that such notice has been served five days before the time of the application, or has been published as has been provided in the preceding section, and that such notice is reasonably specific and certain, the court or judge may set a time for the inquiry into and assessment of compensation, by a jury of

twelve men, unless all the parties agree upon a less number, who shall be duly sworn to discharge that duty.

Now, taking this section with the preceding ones, which provide for one application to the court, it is clear that there is to be but one jury of twelve men, or a less number, as recited in this act, if the parties agree upon a less number; and here it may be said that proceedings to appropriate property under the right of eminent domain are different from other civil proceedings, unless where the statute provides that they shall be conducted in the same manner as civil proceedings. In other words, there is no issue, as it is commonly understood. The government puts its hands upon the property and then makes provision for assessing the compensation to be paid to the owners. There can be no issue as to whether the government is entitled to take the property. There is no issue between the government and the owners. The twelve men, or jury, as it is called in this case, might, by the legislature, be reduced to six or three. The legislature has chosen to call it a jury in this case, but they are really commissioners to assess compensation; for the practice is that each of the jurors shall sign the so-called verdict assessing the compensation.

Section 2239: If the application be in the court of common pleas, and such court is not in session on the day fixed for the inquiry and assessment of the compensation * * * the judge of the court of common pleas shall hold a special term of court for the purpose of hearing and determining such inquiry and assessment and shall direct a jury to be summoned for the purpose of making such inquiry in the same manner that petit jurors are summoned in the court of common pleas for other purposes.

And that is the only provision in this act which throws any light on the question of how courts shall summon a jury and what rights the several parties are entitled to under the proceedings; and that is, that petit jurors shall be summoned in the court of common pleas the same as for other trials.

Now, if a petit jury is to be summoned in a case of this character in the same way that a court summons petit jurors in the trial of other cases, then we have to look at the manner in which the court summons petit jurors in other cases.

The statute in reference to petit juries provides the challenges that may be had for cause, and then at the end provides that each party shall be entitled to two peremptory challenges; and with those words it becomes necessary to construe the word "party."

Now, the word "party," as used in that sense, has always been construed to mean the person or aggregation of persons upon one side of the issue, and the persons or aggregation of persons upon the other side of the issue. It is true we sometimes use the word "party defendant" in the wrong sense, since we use it with reference to one person out of a number. We may say a person defendant, properly, but when we say a party defendant, then we mean all the defendants on one side of the case, or if we say plaintiff, party plaintiff, we mean all the plaintiffs on the one side of the case. If that construction be correct, then a party, either plaintiff or defendant, can have, under the statute, but two peremptory challeges; and that is true in civil actions, for whether there be, three or four or a dozen parties defendant to an action, if they are properly there as parties defendant, in civil actions they are only entitled to two peremptory challenges. And so obvious was that to the framers of

both the civil and criminal codes, that in criminal cases a special provision is made upon that subject, and it is provided that where two or more defendants are tried together upon a criminal charge, that each of them shall be entitled to two peremptory challenges. That was, of course, to remove the construction to be placed upon the use of the word "party," or to remove the possible doubt upon the subject.

Section 2240: If the application be in the probate court, the clerk of the court of common pleas of the county shall, on the day fixed in the application, in the presence of the probate judge, draw twelve names from the box containing the names of persons selected as jurors for the county, and the persons so drawn shall be summoned and serve as the jury, unless excused or set aside by the court for good cause shown.

That provision is almost like the provision with reference to struck juries. I think there can be no question but that the principle or rule would prevail that if, in the probate court, twelve persons be drawn from the box and appear in the panel, and there be no challenge for cause or excuse, that then neither side can have any peremptory challenges, just as in a struck jury. If there be twelve out of a struck jury appear and go into the jury box, and none of them be challenged for cause, or be excused, that deprives both sides of their peremptory challenges.

Now, this section with reference to the probate court, while it is separated from the other section, shows that it clearly was the intent to deprive the parties defendant of their challenges in the probate court, that is, their separate peremptory challenges; and assist, perhaps in construing the rest of the act:

Section 2245: The assessment shall be in writing, signed by the jury, and shall be so made that the amount payable to each owner may be ascertained either by allotting it to each owner by name, or on each lot or parcel of land; the owners shall have the right to open and close the case in the introduction of evidence and argument, but not more than two counsel shall be heard for the city or the owners of any separate lot or tract, etc.

There it will be observed that the statute reserves to property owners the right each to be represented by counsel, not only in the proceedings in the case, but in the argument. So that provision also throws light on the general question of what rights they may have. Then, sec. 2246 provides that:

"The jury shall be sworn to make the whole inquiry or assessment, but may be allowed to return a verdict as to part, and be discharged as to the rest, * * *" giving power which was not at common law vested in the jury and which now does not exist with reference to a criminal jury; for they must find upon the various charges against the defendant, either for or against him, upon all of them; and can not be allowed to disagree upon one point and find against him upon another.

As to the other question which was raised as to the several rights of persons in one piece of property, I think that is covered fairly by sec. 2247 and the section following that.

Section 2247: When the assessment has been made by the jury the court shall make such order as to payment or deposit by the corporation as may seem proper. Such order shall designate the time and place of payment or deposit, the persons entitled to receive payment, and the proporion payable to each; and the court may require adverse claimants for any part of the money or property, to interplead, and fully determine their rights in the same proceedings.

I can put no construction on the words "same proceedings," except that the court may require all parties interested in each separate piece of property to appear in such proceeding and determine how much of the money which the jury may find to be the value of each separate piece of property shall be paid to each separate claimant of that piece of property, whether he shall be owner of a fee or lease; and that question was passed upon, as may be remembered by some of the counsel, in the appropriation of the property now covered by the United States Custom House in 1874. In that case the jury did find—I remember especially as to one piece of property which was complicated by a good many leases, known as the Bodman property—the value of the fee, and they found the value of the separate interests of every one of the several defendants who had leases from Mr. Bodman upon portions of the property, some on the first story, some on the second, some in different ways. Of course after the first question had been determined as to the value of the fee of the property, the city could then withdraw leaving the owner of the property to introduce further testimony as to the value of their separate interests in proportion to the amount offered for the fee or the whole value of the property.

With respect to this question of separate challenges and separate proceedings, some light may be obtained from the appropriation of property by private corporations. In the case of Giesy v. The Cincinnati, Wilmington & Zanesville Railroad Company, (4 Ohio St., 308), which was cited by counsel upon the hearing, the court, without necessarily passing on the section of the statute which would seem, upon its face to give to each party the right to a separate trial, and a separate jury, did comment on other provisions of a like nature.

Section 6422 provides that the owners of each separate parcel, right or interest, shall be entitled to separate trial by jury, verdict and judgment. Now that, although not in this same form, existed substantially as it is now. The Supreme Court decided in that case that there should be one jury and one view of the premises; but that each property owner was entitled to have his case submitted to the jury separately and distinctly, so that there might be no confusion in the minds of the jury as to two or more pieces or two or more interests; and in any case, as in this case, the clearest and certainly the most convenient way would be to submit to the jury the question as to the value of each piece of property separately from that of the other, so that there would be no confusion in the minds of the jury.

*Held*, that defendants collectively were entitled to only two peremptory challenges, but with the consent of the city solicitors, the court gave each owner two peremptory challenges.

Theodore Hortsman, L. M. Hadden and J. R. Foraker, for the city.

T. D. Lincoln, Chas. H. Stephens, Judge Jacob Burnet, E. Cort Williams, Milton Sater, Elliot H. Pendleton Jr., Judge J. W. Price, J. B. Boutet and J. L. Bogardus, for the property owners.

## INJUNCTION—CORPORATIONS. 5

[Superior Court of Cincinnati, General Term, 1888.]

F. B. LOMIS v. JULIUS DEXTER ET AL.

Sales, by the directors, of stock in a railroad which had been purchased with the funds of the road and are held in trust for it will not be enjoined, because of the admitted desire and intention of the directors to sell to persons who will vote to sustain their management, where the sales are to be at public auction and to the highest bidder.

RESERVED on motion for a restraining order.

MOORE, J.

The allegation of the petition is that the directiors of the C., H. & D. R. R. Co. threaten to, and are about to sell or otherwise dispose of 4,182 shares of its common stock, purchased with its funds and held in trust for it by certain of the defendants, and threaten to, and will, unless restrained by order of the court, so arrange the sale or the terms thereof in some unlawful way unknown to plaintiff; that the stock will become the property of persons who will vote the same at the coming annual election of the directors, in favor of the members of the present board or others whose election is favored by them.

Plaintiff claims that he and other stockholders of the company are entitled to an equal opportunity of bidding on the stock whenever the same is offered for sale, and that such offering should be made at public auction.

In support of his application for a restraining order, the plaintiff relies on the testimony of Mr. Dexter, president of the company, who stated that the board and himself representing it, intended to sell or transfer the stock to persons who will vote to sustain the present management, provided such purchaser will pay as much for the stock as can be obtained for it from any other person.

It may be very unsatisfactory to plaintiff and other stockholders that their views or policy may not be represented by the present management, and that the latter propose to see that the stock is placed in hands friendly to them if it can be done and full value obtained for it, but we can see no legal objection to that course of procedure. Such sale, if made, will result in no pecuniary loss to the company and no invasion of plaintiff's rights. Until such showing is made, there is no ground for the relief asked. Mr. Dexter disclaims the intention to sell otherwise than at public sale, and if that intention be carried out, plaintiff can certainly have no ground of complaint. It is only where the proposed action of the directors is plainly illegal, that a court of equity will interfere with their management of corporate affairs at the suit of a stockholder. Cook on Stock, sec. 677, *et seq.*, Morawetz on Corporation sec. 240 *et seq.*, State v. Smith, 48 Vt. 268. 290, and this is not a case of that sort.

The temporary restraining order refused.

PECK and TAFT, JJ., concur.

E. A. Ferguson and Harmon, Colston, Goldsmith & Hoadly, for plaintiff.

Ramsey, Maxwell & Ramsey, for defendants.

6 **SEWER ASSESSMENTS.**

[Superior Court of Cincinnati, Special Term.]

KIRSCHNER AND ASHMAN v. CINCINNATI (CITY.)

Where the city of Cincinnati agreed to give a contractor for sewers an assessment equal in amount to the contract price of the work upon the property assessable for the improvement under the laws of the state and the ordinances of the city in relation thereto, which assessment it was agreed should be in full for all demands of the contractor, who further agreed that in no event should the city be liable beyond the delivery of such assessment, Held, that a judgment for defendants in suits by the contractor to collect the assessments on certain lots, on the ground that these lots were already provided with local drainage, and were exempt by sec. 2380, Rev. Stat., was a breach of the city's contract, damages for the breach of which should be measured by the difference between what the contractor has received on the assessment, and what he would have received had the assessments been valid, together with the costs of the lost suits and attorney's fees.

TAFT, J.

Plaintiffs contracted with the city authorities to construct a system of sewers in the streets and alleys between Race street on the west, Ninth street on the north, Eggleston avenue on the east, and the river on the south. The expense, $78,468.84, was assessed upon the abutting property owners, and the assessment delivered in payment to the contractors. The contractors collected all of the assessments except $3,528. In suits brought by them to recover this amount, they were defeated by abutting lot owners on the ground that their property was already provided with local drainage and so not subject to assessment for the sewer constructed by them.

This is an action to recover from the city damages for a breach of contract in not delivering to the plaintiffs valid assessments in which damages plaintiffs seek to include the amount of the invalid assessments, the costs taxed to them in their unsuccessful suits for the same, their attorney fees therein expended and interest.

The defense of the city is, that under the contract plaintiffs received the assessments as made, in full payment of their contract, and agreed to release the city from any further liability, and that failure by them to collect all of the assessment for any reason, gives them no right to call upon the city for any deficiency. The question in the case is upon the construction of the contract, and the proceedings of council with reference to which the contract was made. The resolution to improve under which the work was advertised and let to plaintiffs, contained following clause:

"The expense of said improvement to be assessed per foot front upon the property abutting thereon, according to law, and the ordinance on the subject of assessment, and such assessment to be certified to the contractor in payment for the work." Part of section 56 of the contract is as follows: "When the assessment for any sewer or sewers covers the total cost of said sewer or sewers and appurtenances, the contractor shall accept such assessment as payment in full."

This is in print and part of the general specifications in the regular form of the city sewer contracts.

Section 64 of the contract is in writing and is as follows:

64. The party of the first part (the city) hereby agrees and binds itself upon the production by the party of the second part of a certificate

of the chief engineer of the board of the city commissioners, that the contract has been completed in a good, substantial and workmanlike manner set forth in the agreement, and that each and every one of the stipulations hereinbefore mentioned have been complied with, to give to the party of the second part an assessment upon the property assessable for such improvement under the laws of the state and the ordinances of the city in relation thereto, which assessment shall be in full for all demands of the party of the second part against the city, but the production of the certificate of the chief engineer as aforesaid shall be a condition precedent to the delivery of such assessment, and in no event shall the city of Cincinnati be liable beyond the delivery of such assessment.

I presume that it will be conceded, first, that section 64 in writing amplifies and explains section 56, and that the construction of the former governs, and second, that in construeing section 64, reference may and should be had to the resolution to improve, and other parts of the contract.

It will not be disputed that such a reference shows that the assessment to be given by the city to the contractor, is an assessment for the whole cost of the work according to rates and prices in the contract. In view of what the work did so cost, therefore, the agreement of the city was to give to the contractors an assessment for $79 468 84 upon the property properly assessable for such improvment under the laws of the state and the ordinances of the city in relation thereto. The obligation of the city to fully carry out this agreement is not qualified or modified in any way by what follows. The clauses, "which assessment shall be in full of all demands, etc.," and "in no event shall the city be liable beyond the delivery of such assessment," have the effect only of limiting the city's liability to the performance of the agreement above set out. There is nothing which by the widest latitude in construction can be made to mean that the city is to be in any way relieved from the liability to damages for a breach of the contract to deliver the assessment as agreed. Has she then under the facts as admitted performed that agreement? She delivered to plaintiffs what purported on its face to be an assessment for $79,468.84 upon the property properly assessable for such improvement under the laws of the state and the ordinances of the city in relation thereto. It now turns out that it was an assessment for $75,940 94 only, on property properly assessable, and that $3,528 had been included as assessed upon property which was not under the law assessable. The city failed thereto to comply with her agreement in not furnishing an assessment for $3,528 on property legally assessable. This is a breach for which the contractors are entitled to damages. It is merely the question of the construction of a contract, and I confess myself wholly unable to see the possibility of any other construction.

To give the contract the construction contended for by counsel for the city, is to make it a contract in violation of sec. 2380 of the Rev. Stat., which provides that where lots are exempt from assessment because they already have local drainage, the assessment otherwise to be paid by such lots shall be paid out of the general fund of the city, and is to inflict an unjust burden upon the other lot owners who are liable, because such construction would tend to increase the nominal cost of the work, the contractors taking such deficency into account in making their bids and increasing the same above the real cost. These considerations would not relieve the contractor from the effect of his contract to stand the loss

from such deficiency. Welker v. Toledo, 18 O. S., 452. But they are certainly strong reasons for not construing the contract to be illegal and even if the language will reasonably bear other constructions. Counsel for the city however have cited a number of cases, which, it is claimed, support the construction contended for.

In the case of Greighton v. Toledo, 18 Ohio St., 447, the contractor agreed to receive the assessment in full of all labor and materials in doing the work. The assessment was valid, but the property did not pay the assessment, because it sold for less on execution. If the plaintiffs were seeking to recover at bar a deficiency in the amount realized from valid assessments because the property was not valuable enough to secure full payment, they would have no standing, because in such case the city would have fully complied with its contract. It does not guarantee the security of the assessment, but only its validity.

In Welker v. Toledo, *supra*, the assessment was invalid to the extent of its excess over fifty centum of the value of the property, but the contractor, having expressly agreed not to hold the city for such excess, the court held that though such a form of payment was illegal because it tended to throw a burden on the owners of valuable property which, by law, should have been put upon the city, it was one which the assessment payer alone could complain of and that the contractor must stand the loss which he had expressly agreed to stand.

In Ryan v. City, Ohio Dec., 1 Sup. Ct. R., 245, Ryan agreed to receive in full payment an assessment made in accordance with the ordinance of 1850 which provided for an assessment upon all the abutting property, and agreed that the city should in no event be liable to the contractor for any part of the work or material. The assessment was in excess of the fifty per cent. limit as to value, and there was a deficiency. There was no agreement that the assessment should be upon property properly assessable, as at bar, but only that it should be upon abutting lots. The city gave the assessment it agreed to give, and if it turned out to be invalid, it was at the risk of the contractor.

In Goodale v. Fennell, 27 Ohio St., 426, the question was, whether the law which reduced the limit of assessment, in so far as it affected a contract of the city (made before its passage) with a contractor who had agreed to receive an assessment in full payment, was a law impairing the obligation of a contract and void. The court held that it was, because under the contract if the assessment exceeded the limit made by statute, the loss would be the contractor's. An examination of the case shows the contract to have been exactly like the contract in the Ryan case, and to have received the same construction, and, therefore, to differ from the case at bar just as the Ryan case has been shown to differ.

The only case which conflicts at all with the construction of the contract given above is the case of City v. Crowley, 7 Dec. Re., 596. There the contractor agreed to receive in payment of the sum due an assessment upon the property made liable by law to pay the costs and expenses of the improvement, and there was a deficiency arising from the fact that the assessment upon some of the lots exceeded the limit of 25 per cent. of the value of the lots after the improvement was made. The district court, reversing the judgment of this court, held that the contractor should not recover from the city for such deficiency. Perhaps a distinction might be made between that case and the one at bar in that there the lots assessed all were made liable by law to pay the cost and expenses, but the deficency occured in the amount of assessment, which depended

upon the value of the land, a fact presumably as well known to the contractor as the city; whereas, at bar, the deficiency arose from an assessment upon property not legally liable for assessment at all, which arose from a state of fact not known, to the contractor as is agreed and not, it seems to me, presumably within his knowledge. But whether this distinction is well founded or not, I do not agree with the reasoning in that case or the conclusion reached, and unless it is an authority binding on me, I should refuse to follow it. I am glad, therefore, to find from a manuscript copy of the opinion of the circuit court in the case of John Keszler v. the City, 2 Circ Dec., 127, to find that the authority of the Crowley case is wholly destroyed. In the Keszler case the term of the contract as to the payment was exactly like that in the Crowley case and the deficiency sued for by the contractor arose from the same cause. The court say, "But the case of the City v. Crowley, 7 Dec. Re., 596, is relied upon by the city solicitor as substantially holding that a contract similar to the one in this case does prevent a recovery by the contractor from the city when it turns out that the assessment is too large. The doctrine of the syllabus of the case, "that when under a contract by the terms of which the contractor was to receive and look for payment only to the assessments to be levied for the improvement without recourse upon the city for the balance remaining unpaid" is undoubtedly correct. But our view is as before stated that this contract is not of that character, and if the case referred to intended to hold the contrary that it is incorrect."

The case at bar has once been before the general term of this court upon a different state of facts 9 Dec. Re., 463. At that time, by the ruling of this court, the whole assessment was declared void because it included an item of $10,000.00 of board sheeting which had not been advertised for. The court held that the assessment being invalid, the city had not complied with its contract (the same contract was under discussion) to deliver an assessment because what purported to be an assessment was no assessment. It is true that the judgment then rendered by the general term was reversed, but it was by consent, such reversal being made necessary by the fact that the Supreme Court had reversed the ruling of the general term in the suit by the contractor against the property owners, holding that the board sheeting need not to have been advertised for, and being included in the assessment did not invalidate it. The decision of the general term is, therefore, upon the question being considered, binding authority. I am unable to distinguish between the invalidity of an assessment arising from the fact that it includes too great an expense and its invalidity arising from the fact that the property upon which it is levied is not legally liable therefor and upon the principle of that decision, therefore, the liability of the city to the contractor in the case at bar necessarily follows.

The measure of damages must be the difference between what the contractors would have received had the city complied with its contract and had the assessments lost been valid, and what was received under the assessment as delivered and the costs of the lost suits and reasonable attorney's fees. See Kirschner v. City, *ante*. If the assessments had been valid, they were due August 17, 1887. Presumably they would have then been paid; and if not, the contractor might have recovered interest thereon. The damages to be estimated therefore are first, the amount of invalid assessments $3,528.00; second, the interest thereon from August 17, 1881 to the first day of this term June 4, 1881; third, the costs in

the lost suits agreed to be $301.71 and attorney's fees agreed to be $650.00.

| | |
|---|---|
| Invalid assessments | $3,528.00 |
| Interest from August 17, 1881 to June 4, 1888 | 1,438.68 |
| Costs | 301.71 |
| Attorney's fees | 650.00 |
| | $5,918.39 |

The total is $5,918.39, for which plaintiffs may take judgment.

Drausin Wulsin and Judge Worthington, for the contractor.

Theodore Horstman, City Solicitor, for the city.

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## 8 APPROPRIATION OF PRIVATE PROPERTY.

[Hamilton Common Pleas, 1888.]

### †CINCINNATI (CITY) V. NEFF ET AL.

**In a proceeding to appropriate private property for public use, the following rules for measuring damages may be considered by the jury in arriving at the amount to be awarded owners.**

1. The owner is entitled to such price as an owner would ordinarily take, i. e., the fair and reasonable but full value ascertained by the evidence of experts.
2. The rental derived in the past with such regularity as gives reasonable expectation of continuing the same is a valuable test, taking into account with it the probable life of the buildings and the effect of their depreciation on the rent, and considering the rent of all, so that adjoining properties having the same improvements may not be unequally valued by reason of varying rent charges.
3. In so far as the prospect of a public improvement adjacent has already advanced the value, this must be allowed to the owners.
4. Buildings are not to be valued as so much old material, but as if they were to remain in use on the lots.
5. Lessees are entitled to the extent that the value or rent for the unexpired term exceeds the ground rent, keeping in mind the convenants as to repairing, etc.
6. Movable fixtures are to be valued by the difference in value between where they are now and elsewhere.
7. Probabilities are not to be considered except as they effect present value.
8. The owners have the burden of establishing the values.

#### CHARGE OF THE COURT.

MAXWELL, J.

*Gentlemen of the Jury*—The object of this proceeding is to determine the compensation to be paid to the owners for the taking by the city of the property fronting two hundred feet, more or less, on the east side of Central avenue, between Eighth and Ninth streets, and extending back one hundred feet to Craven alley, which lies between the property in question and the city property.

The measure of the compensation to be allowed to the owners in proceedings of this nature is the fair and reasonable market value of the property, when that can be ascertained, at the time of the condemnation or taking, which was in April last. I presume that for practical purposes there would be no difference in value between that time and the time of this hearing.

†See also Cincinnati v. Neff, *ante* 279.

The word "market" conveys the idea of selling, and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay. The owner in parting with his property to the city is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. Of course real estate is not like grain and other commercial products—it cannot be sold upon an hour's notice. When I say the owner is entitled to receive the price for which he could sell the property, I do not mean the price he would realize at a forced sale upon short notice, but the price he could obtain after a reasonable time, such as would ordinarily be taken by an owner to make a sale.

Market value is not what a piece of property may be bought at by taking advantage of the necessities of the seller, nor by bringing the property to sale under foreclosure or similar proceedings. Such situations have a tendency to diminish the value of property. Nor, on the other hand is it fair to take as a standard the case where the buyer may be compelled to take the property by reason of some unusual surroundings. Sales which fix market value imply a buyer and seller both of whom are free to act, and neither of whom act under any compulsion or pressure of circumstances.

The market value of real estate must, as a general rule, be ascertained from sales either of property out of the tract the value of which is sought to be ascertained, or of property in the immediate vicinity having substantially the same surroundings, and the same conditions.

The sales which tend to fix the market value of the property are not put in evidence. The reason is that sales at different times and of different parcels, involve details of comparison which it requires experience to make, and the jury might not be able to keep in their minds such details.

Therefore the witnesses who are called are first qualified by showing they have a general knowledge of such details sufficient to form an opinion upon, and then they may be asked what their opinion is, and upon cross examination they may be asked about the details so that the jury may judge whether or not the opinion of the witness be well-founded. It is evident that the weight of the opinions of such witnesses, where they are free from bias, must depend upon their experience and knowledge of actual transactions, or knowledge of the elements that go to make up value, the soundness of their reasoning, and the good faith with which they give their opinions.

It may be, however, that the jury will be of the opinion that there has not been suficient testimony as to sales or actual transactions in property, either of this particular property, or property in the vicinity, to establish a market value. In this respect real estate differs from those things which are the subjects of daily consumption, as to which it may be said there are always buyers and sellers to be found, and hence a market value can always be arrived at. In the older portions of the city, where there is a settled condition of affairs, and property is held as a paying investment, there is often very little buying or selling of property, and almost nothing upon which to base a market value.

If, in your opinion, that be the state of fact, in this case, you should then allow the property owners the fair and reasonable, but full, market

value of their property, as you may find it to be from the testimony, under the methods of determining value.

In addition to those witnesses who have undertaken to fix a market value on the property from their knowledge of sales in the vicinity, other witnesses having experience in dealing in real estate, and a general knowledge of the values of property in the city, some of them owning property and having knowledge of values in the vicinity, or within a few squares of the property in question,—have given their opinion as to the value of the property. They have made use of the experience and knowledge to which I have referred, and have also based their opinions, to some extent, on the character of Central avenue as a street, on the location of this property near the city hall, and on its surroundings.

The value of their opinion depends on their experience, their knowledge, their opportunities for knowing and forming an opinion, and on their fairness and good judgment.

Still another mode of ascertaining the value of improved real estate is by taking testimony as to the amount of rent it produces. By this I mean the rent which the owner may have derived from the property for so long a time that it may be called a steady, permanent rental, and may reasonably be expected to continue in the future, always provided that the conditions are likely to be of such a character as that the rent will continue to be substantially the same. In this connection, you must take into account the probable life of the improvements, and the effect of their depreciation on the rent. If the property be adapted to and be put to a continuous use, if the rental be a permanent one, with reasonably good tenants, if the life of the improvements be fairly allowed for, and the same condition of things be likely to continue, I can see no reason why the rental test should not be one of the best in determining the fair, reasonable, and at the same time, full value of improved real estate.

But in using the amount of rent produced as a test of the value of the ground, the rent produced by each parcel of property, and all the property in question, should be taken, not using only the highest rent or the best producing parcel of property, but giving a fair consideration to all; for any other rule might make two pieces of property, being side by side and having the same improvements, very unequal in value.

Some of the witnesses in giving their opinion as to the value of the property, testified that they fixed values without any reference to the construction of the new city hall, and that, in their opinion the prospect of having a new city hall adjacent to the property enhanced the value of the property. If you find from the testimony that the prospect of having a new city hall adjacent to the property, as that property was on April 17th, last,—taking into account whatever either of plan or work had been made or done on that date,—enhance the then value of the property any, the property owners are entitled to have that reckoned in as one of the elements of value. As that, however, is speculative in its nature, you should be careful about the weight you give to it.

For convenience in taking testimony, evidence was first offered as to the value of the ground per front foot excluding improvements, and then evidence was offered as to the value of these improvements by themselves. When you have arrived at a conclusion as to the value of each lot or parcel of ground and the improvements thereon, you will then add the two values together, for each lot or parcel, and return one verdict for each lot or parcel with the improvements thereon.

As to the improvements, it cannot be said that there is any market value for them, estimated separately from the ground, and you will therefore allow the property owners the full value of the improvements on their respective lots or parcels.

The improvements have been valued by the several witnesses as they now stand. Though the inquiry was not confined to the value on April 17th, last, I presume the value of the improvemnts is practically the same now as it was then. The main thing to be considered by you is the credibility of the witnesses.

You observed perhaps that the court, outside the property owners, permitted only those witnesses to testify as to the value of the improvements who first qualified themselves as architects or general builders. That may be a guide for you in judging of the credibility of witnesses. Where they appear to be without interest or bias, the witnesses with experience and knowledge of the general construction of a building were competent to testify, and their testimony should be carefully weighed and considered, and the discrepancies reconciled if possible, for there ought to be much greater certainty about the value of the building than there can be about the value of a lot of ground where there is no market to fix the price. The buildings are not to be valued as so much old material, but as standing on the lots, and as if they were to remain there and be put to the use for which they would be most reasonably adapted.

In using the rent receipt to determine the whole value of the Neff property, ground and buildings, you are not confined to the rent paid Mr. Neff by the company, if you find from the testimony that the property produces and may reasonably be expected to produce more than the so called ground rent, but you may add to the ground rent the profit, if any, which the company makes and may reasonably be expected to make. The life of the improvements must be taken into account in this also.

So also as to the two parcels belonging to Mr Smith next north of the Neff lot, upon which John W. Legner and Thomas N. Buchanan have leases. If the fair and reasonable rent of the buildings occupied by them respectively, exceed the rent they are now paying, then you may allow each of them such excess for the unexpired term of his lease,—keeping in mind the terms of their leases as to repairs, etc., and return it in a separate verdict. As to their movable bar fixtures, you may allow them for the difference, if any, between the value of the fixtures where they are now, and their value in another place to which the fixtures may reasonably be adapted, and return a separate verdict for that. They are not to be allowed anything for the cost of removal nor possible breakage.

You may apply the same rule and return the same verdict as to the fixtures of P. G. Harrison. There being no testimony as to the value of his lease, you need not consider that.

Bear in mind, that no matter what test you may apply, the thing to be ascertained is the present value of the property, or its value on the seventeenth day of April last. Future probabilities are not to be taken into account unless they affect present value, whether of location, surroundings, or future probabilities, that you are to consider.

Upon the question of value, the burden of proof is upon the property owners; they must establish the value of the property by a fair preponderance of the evidence as in ordinary civil trials.

Finally be as patient in going over the details to form your judgment as you have been in listening to the testimony, and let the verdict be the result of your cool and deliberate judgment.

## 25 SPECIFIC PERFORMANCE.

[Superior Court of Cincinnati, General Term, 1888.]

†MARY F. HOPPLE v. B. H. OVERBECK.

A person who has contracted to purchase property will not be compelled to perform, where a suit affecting his grantor's right is pending, although the court believes the suit to be groundless, and the claimant to be estopped. The proposed purchaser will not be burdened by having to defend even an unjust claim.

TAFT, J.

These are four suits by this plaintiff against different defendants to compel specific performance of contracts of purchase of real estate made by defendants with the plaintiff. Substantially the same point is raised in each case.

The plaintiff is the widow of Joseph Hopple. The lots contracted for sale are lots in the subdivision of Joseph and Richard B. Hopple in Camp Washington. James, Matthew, Richard and Joseph were the sons of Casper Hopple, who owned two and a fraction acres of land in Camp Washington. After their father's death, in the absence of the probate of a will, the sons by mutual deeds divided his real estate into two portions. This Camp Washington property was the part conveyed to Richard B. and Joseph. Richard B. and Joseph subsequently subdivided this property, and conveyed to each other by mutual deeds the lots of the subdivision so that each owned half the lots in severalty.

Joseph died childless, leaving all his property by will to his wife. At his death he was living in Pennsylvania, where his brothers James and Richard B., and Casper, a son of the deceased brother, Matthew, at once brought suit to contest the will. At the same time a suit was brought in this state to recover the land willed by Joseph to his wife, on an allegation that the father, Casper, had left a will, in which he gave to James, Richard B. and Matthew, each a fee in one-fourth of his real-estate, and to Joseph only a life-estate in the remaining one-fourth, with remainder in fee to his brothers or the children of those deceased; that when the will was opened in the presence of the brothers, Joseph protested against the disgrace cast upon him by such a provision, and in his fury destroyed the will; that after a heated discussion, in consideration of Joseph agreeing to will all his property as his father had intended it should go, they agreed not to set up a spoliated will, but to divide the property as if their father had died intestate.

The case of the contest and the suit to recover the real estate were settled by an agreement between James, Richard B. and Casper, son of Matthew, and the widow of Joseph Hopple, by which she gave them a quit-claim to the rest of the property received by her from her husband. The suits were accordingly dismissed, the quit-claims were given by her to the brothers and nephew, but none were given by them to her.

The auction sale at which the contract sued on were made, was held April 20, 1885. The terms of the sale "were title perfect." Time was given to examine title. Title was reported perfect to the purchaser, but the report was accompanied by a statement that a claim was made to the property by James, Richard B. and Casper Hopple. The attorney

†See also Hopple v. Hopple, 2 Circ. Dec., 89.

for Mrs. Hopple then brought suit to quiet the title against these persons and a decree was entered by default in this court April 20, 1883.

May 14, 1886, after tender of deeds had been made and refused by the purchasers, a suit was brought against the widow of Joseph Hopple to recover this property by Casper V. T. Hopple, the son of James who is still living. Casper, son of Matthew, was dead. This suit alleged the same facts about the destruction of the will which had been set out in the suit of James, Richard B. and Casper against the widow, except that it described the spoliation of the will as the result of the agreement, and not the unauthorized act of Joseph, and said that the agreement into which Joseph entered was to devise not according to the tenor of his father's will, in fee to his brothers, but only a life estate to them and a fee to their children. This the petition claimed gave Casper V. T. Hopple a remainder in fee to one-sixth of the real estate left by Joseph, after the death of his father, James Hopple.

The suit was tried in the common pleas court, and no evidence being offered after plaintiff's demurrer to certain defenses had been sustained and the case set down for trial upon the facts, judgment was given for defendant. The case was appealed to the circuit court where it was decided on demurrer to a defense of the answer pleading the statute of frauds, and upon a demurrer to the first defense which searched the record and presented the sufficiency of the petition. The circuit court overruled the demurrer to the defense, and the plaintiff not replying, the judgment was against him. On cross-petition all the other children of all the brothers were made parties and the title of the widow quieted against all of them, as also against Casper V. T. The case has been taken on error to the Supreme Court and its pendency in that court is pleaded as a defense to the action at bar. It is said that until the Supreme Court decides the case all doubt will not be removed, and as defendants were entitled to a perfect title, the litigation in the Supreme Court prevents it from being so.

At the hearing of the case I was of the impression that the relief sought for should be granted. I was of the impression for the three reasons stated by counsel for plaintiff: First.—That the decision of the circuit court was right. Second.—That, upon the fact, even if that decision was not right, no case could have been made for the plaintiff in that case, because he admits upon the stand that the only evidence which he has of his claim is the evidence of his two uncles, who, having testified in the case in their own behalf, would, if called upon in his case, probably hold to the truth of their statements in the original case, namely, that the agreement of the deceased, Joseph Hopple, at the spoliation of the will, was to convey his interest according to the tenor of his father's will; and, third—that, from the facts shown here, all the defendants, in the action against them, could plead that Casper V. T. Hopple was estopped by his conduct to set up a claim, because he knew that the sale was going on and because they had no notice of his claim.

The impression I got from the evidence was that this suit by Casper V. T. Hopple was not a suit in which he had confidence, and certainly, by his own testimony, a suit in which his counsel did not have confidence; and, furthermore, if I were to refuse relief in this action, I should probably be accomplishing the purpose which he had in bringing this suit. Certainly the evidence before me has conveyed that impression. And, therefore, as I said, when I heard the case, I was of the opinion that I ought to enforce the contract as against these defendants.

But, in the consideration of the case since that time, in the examination of the authorities which are overwhelmingly in favor of the conclusion which I have reached, I see that that impression was erroneous.

My impulse at the time to enforce this relief, was for the purpose of defeating what, if it be the object, though it was not proven conclusively, but which there were strong grounds for believing, was the object of Casper V. T. Hopple's suit.

But Casper V. T. Hopple is not a party to this case. My judgment as to what the nature of his suit is, is not binding upon him, and, if I should enforce this contract at this time, I should put upon the defendants here the necessity of defending their title in the litigation now pending—the title which I should enforce them to take. That, by all the authorities, and I have found none against it, though there are a great many upon the subject, is a reason for refusing a performance of the contract, which refusal is based not on the strict rule of law, but on the discretion vested in the chancellor.

Therefore, while from the evidence before me I think that this title is good, and while I think that the action of Casper V. T. Hopple is mainly for the purpose of accomplishing that which will be accomplished, perhaps, by the decree of this court, I am obliged to respect the rights of these defendants and to put upon the owner of the property the burthen, unjust as I think it to be as between her and Casper V. T. Hopple, of defending this action against him, and must therefore refuse to put that burthen upon these defendants of whom it is sought to compel the performance of the agreement made in this case.

For that reason the petition in this case—in each of these cases, will be dismissed without prejudice.

W. L. Avery, for plaintiffs.

Von Seggern, Phares & Dewald and A. S. Longley, for defendants.

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## 26 MISTAKE IN MORTGAGE.

[Stark Common Pleas.]

JOHN S. YOUTZ v. CHARLES L. JULLIARD, ASSIGNEE, ET AL.

1. A mortgage which contains a description of the wrong property may be corrected in equity; but not to the prejudice of the rights of a subsequent mortgagee without notice.
2. The recorder has no authority to change a record of a mortgage after it has once been duly recorded, even if requested and authorized to do so by the parties.
3. An alteration on the record of a mortgage, made by a recorder after the mortgage has been duly recorded, or a memorandum made by him on the margin of such record as to such alteration, is void.
4. A record is constructive notice only when is a true copy of an instrument subject to record, copied on the record by an officer authorized to record it.

RALEY, J.

Simon Flickinger, and Emily his wife, on April 1, 1876, duly executed and delivered to John S. Youtz, their mortgage deed to secure a note of $516.00 of the same date. In the mortgage, as written, the property was described as lot B, in Daniel Chappin's addition to the town of Louisville, Stark county, Ohio. It was duly recorded May 24,

1876. About Nov. 1877, the parties to said mortgage discovered that a mistake had been made in writing it; that Simon Flickinger did not own said lot B. but did own lot A. in said addition, and that lot B. had been written in said mortgage instead of lot A. by mutual mistake of all parties; that soon thereafter Simon Flickinger and John S. Youtz signed and sealed a written request directed to the recorder of Stark county, authorizing him to correct said mistake on the record of said mortgage; the signatures of said parties were duly certified to be genuine under the hand and seal of the justice before whom said mortgage had been originally acknowledged. Upon receipt of this writing the recorder erased the letter "B" from the record of said mortgage, and in its place wrote the letter "A," and at the same time wrote a memorandum on the margin of the page upon which said mortgage was recorded, and signed the same officially, in which he stated when, why and by what authority he had changed the said record from B. to A.

On the twenty-fifth day of December, 1879, Simon Flickinger duly executed and delivered a mortgage to Daniel Baker on said lot A. to secure the payment of a large sum of money, which mortgage was duly left with the recorder of said county of Stark for record on the same day.

Daniel Baker did not see said record of Youtz's mortgage either before or after it was corrected, and had no actual notice that Youtz held a mortgage until long after his own mortgage was recorded.

Neither of said sums so secured by said mortgages has been paid; the land is not sufficient to pay both, and the question arises which shall be paid first. In other words, had Baker at the time he took his mortgage constructive notice of plaintiff's mortgage?

It is claimed by the plaintiff that Baker had constructive notice of all that the record contained when his mortgage was left for record—that it was his duty to examine the record—that if he had examined it when he took his mortgage, he would have seen that plaintiff had a mortgage on lot A.—that if he did not examine it, it was his own negligence—a neglect to do his duty, and, therefore, he will be held in law to have the same knowledge he would have had, if he had examined it. Or, in the language of the books, the law presumes him to know what he might have known by examining the records.

In considering this argument it becomes necessary to examine carefully the several propositions upon which it rests.

The record of a mortgage is constructive notice of its contents to all subsequent purchasers and mortgagees; a mortgage duly recorded is notice not only of its existence, but of all its contents. Jones on Mortgages, sec. 557.

Constructive notice is that which is imputed to a person of matters which he necessarily knows, or ought to know, or which by the exercise of ordinary diligence, he might know, and it can not be controverted. The most familiar instance of constructive notice is that which under the registry laws is afforded by the registry of a deed. Every subsequent inquirer is bound to know the existence and contents of such deed. Jones on Mortgages, sec. 591.

These propositions are familiar and well established law, but there are others which modify or explain them, which are just as familiar and well established.

What is a record which binds everybody?

First.—It must be a record of an instrument legally executed; it must be duly signed; it must be witnessed by two witnesses, and it must

be properly acknowledged, or it is not subject to record, and if not subject to record the recording of it by the recorder will not make it either actual or constructive notice to anybody. Strang v. Beach, 11 Ohio St., 283, 288; Erwin v. Shuey, 8 Ohio St., 509; Bloom v. Noggle, 4 Ohio St., 45; White v. Denman, 1 Ohio St., 110; White v. Denman, 16 Ohio, 59; Jones on Mortgages, sec. 527.

Second.—It must be a record of an instrument required by law to be recorded, otherwise the record of it will not be constructive notice either of its existence or of its contents. Wade on Notice, sec. 98-119; Devlin on Deeds, vol 1, sec. 665.

Third.—It must be a record copied on the records by one having authority to do so, or it is not constructive notice. Wade on Notice, sec. 144.

Fourth.—It must be a true copy of the original, and properly recorded, or it is not constructive notice. Story's Eq., sec. 404; 2 Pomeroy Eq., sec. 654.

If the defendant Baker had read the corrected record it would have been notice to him; but he did not, and the question remains what was he bound in law to know? What does the law say he did know?

He must be held to know all that was properly on the records, but he can not be held to have constructive notice of anything that was not properly on the record, unless there was enough there properly to put him on inquiry.

What then was properly on the record when he took the mortgage?

The original mortgage as signed, witnessed and acknowledged, was properly on the records.

Was anything more? Had the recorder any authority to change "B." to "A." or to write his memorandum on the margin? Was the written request an instrument subject to record? These questions must certainly be answered in the negative. The recorder as soon as he recorded the mortgage just as it was when left with him for record, was powerless to change it. As is said in the case of Doe v. Dugan, 8 Ohio 87, 108, it is incompetent for a public officer to undo what he has once done; when he has done his duties, he is *functus officio* and has lost his power over the subject.

Again, he could not write the letter A in place of the letter B, for the reason that it was not a copy of any instrument subject to record; in fact it was not a copy of anything. The same may be said of the marginal memorandum; it was not a copy of anything, much less an instrument subject to record. In the case of Doe v. Dugan above referred to, the court say, a marginal note made by the recorder on the registry, can not be admitted in evidence to affect the validity of a deed.

If this change was made without authority; if this marginal memorandum was a copy of nothing; then they were a nullity; they had no effect in law, and the records stood in law precisely as though the recorder had written nothing. As constructive notice it was a blank. The law says that he knew all that was properly recorded, whether he did in fact or not; but to him, all that might be written on the records, beyond that, was a blank. The original mortgage, and nothing more, was properly recorded. It was a mortgage on lot B alone; it did not in any manner inform him, or contain any information that would put him on inquiry, as to any claim of plaintiff on lot A.

Plaintiff having no mortgage on lot A. and defendant having no notice that his mortgage was intended to be taken on lot A., the same

can not be corrected so as to affect defendants mortgage. A decree is entered correcting the description in plaintiff's mortgage, and ordering that Baker's claim be first paid out of the proceeds of the sale of said premises.

Baldwin & Shields, for plaintiff.

John Lahm, for defendant Baker.

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## SETTLEMENT OF ESTATES. 101

[Guernsey Common Pleas.]

### DAVID MITCHELL v. NANCY B. ALBRIGHT, ADMX.

1. The giving of a bond by an administratrix is not a jurisdictional requirement, and failure to give such bond does not, per se, render her appointment void.
2. If one who is eligible be actually appointed, receive letters of administration, and enter upon the duties of the trust, a judgment against her as such administratrix will not be vacated upon her motion, based upon the fact that she had not given bond as required by law.

PHILLIPS, J.

Letters of administration were issued to the defendant, by the proper probate court, and she qualified in every respect, except that no bond was given. The omission was discovered after verdict and judgment herein against her; and she now moves to vacate the judgment and set aside the verdict, on the ground that she never qualified by giving the required bond.

In support of the motion, it is claimed that because no bond was given, the appointment of defendant was a nullity, the estate is not represented, and the judgment herein has no validity.

If Mrs. Albright is the administratrix of her husband's estate, she is such by virtue of the appointment made by the probate court; and the question presented is to be solved by determining the effect of what the probate court actually did in the matter of her appointment. There is a well settled distinction between irregularites, which render a proceeding voidable, and the absence of facts that are made conditions precedent. If, in the appointment of an administrator by the probate court, the taking of a bond is a condition precedent to appointment, its omission renders the appointment void. In other words, if the giving of a bond is jurisdictional, the appointment in question was *coram non judice*, and void; otherwise, it was voidable only, and can not be attacked collaterally.

The authority to appoint administrators, and to grant letters of administration, is conferred in general terms, and is a part of the exclusive jurisdiction of the probate court. (Stat. 524, 5994). The requirement of a bond is in these words: "Every administrator shall, before entering on the execution of his trust, give bond," etc. (Stat. 6006). This language clearly implies that there is to be an administrator before bond is to be given—it is to be the bond of an administrator. In fact, the court must act upon the application, and designate its appointee, before the bond can be given.

The usual recital in the bond is, that "whereas the said A. B. has been appointed administrator," etc.

The giving of the bond is not made a condition upon which the court is to hear and determine the application for appointment; it is to be given

by way of qualifying the appointee of the court, and must therefore follow the hearing and the determination of the application. Only an appointee can give bond—only an appointee is required to give bond.

If the probate court, when it made the appointment, and issued letters of administration, had jurisdiction, its action was not void. It is admitted that there was no defect of jurisdiction, unless it arose from the want of bond. There is nothing in the language of the statute, and there is nothing in the nature of the proceeding, that makes the bond jurisdictional; and therefore the failure to take a bond was a mere irregularity, and did not invalidate the appointment and the grant of letters.

In New York, an attempt was made to deraign title obtained through an administrator's sale by attacking his qualifications. There was but one surety to his bond, the statute requiring two or more. It was held, that as the Surrogate had jurisdiction and authority to appoint, the omission to take a proper bond did not go to the foundation of the proceeding; it was an error, to be corrected on appeal, and not a defect of jurisdiction which would render the grant of administration void. Bloom v. Burdick, 1 Hill, 130; 37 Am. Dec. 299.

Similar holdings have been made in Kentucky, and in Minnesota. Peebles v. Watts, 33 Am. Dec. 531; Mumford v. Hall, 25 Minn., 347; Schouler's Exr. 142.

In Ohio, in an action by an administrator *de bonis non* upon the bond of his predecessor, it appeard that there was but one surety on the plaintiff's bond. The court say: "The omission to give a bond with the requisite number of sureties upon it can not defeat his right to recover in this action, so long as the title conferred by his letters from the probate court remains unrevoked. It is voidable, but not void, and therefore can not be collaterally impeached." Slagle v. Entrekin, 44 O. S., 637.

In Alabama, one had been appointed administrator, and had letters of administration, but had not given bond. Another applied for mandamus to require the probate court to appoint him, claiming the former appointment to be void. The requirement of the Alabama statute was this: "In all cases, before granting letters of administration, the administrator shall enter into bond," etc. It was there held, that the bond was not jurisdictional, that its omission rendered the appointment voidable, but not void; and the writ was refused. *Ex parte* Maxwell, 37 Ala., 362.

I think it is clear, upon both reason and authority, (1)that the failure of the defendant to give bond did not render her appointment void; and (2) that the judgment herein is valid, and may be enforced.

Motion overruled.

Taylor & Scott, for plaintiff.

Anderson & Locke, for defendant.

## SURETIES. 102

[Stark County (O.) Common Pleas, 1888.]

T. C. McDOWELL, CASH., v. JOHN REESE ET AL.

1. Sureties are favorite subjects of legal protection; their agreements are to be strictly construed, and can not be extended beyond the very letter of their contracts.
2. An agreement that the time of payment of a note may be extended from time to time, does not authorize an unlimited number of extensions, nor would it authorize thirteen different extensions from July, 1884, to November, 1885.
3. A. signed a note as surety for B., calling for $500, due in ninety days, with interest at eight per cent. B. took the note to C. to get the money on it. C. refused to let B. have the money at eight per cent., but agreed with B., that he could have it if he paid twelve per cent. in advance. B. gave the twelve per cent. and got the money, leaving the note with C. as security for the debt. A. knew nothing of this transaction, and C. knew A. was surety. Held: A. was not liable on the note.
4. A verbal agreement between the payee and the principal on a note, to pay 12 per cent. interest in advance for a certain time on a note calling for eight per cent. interest, and the payment of the same, is a valid contract, and if made without the knowledge or consent of the surety, releases him.
5. Section 5832 of the Revised Statutes was intended to permit sureties, who were such in fact, and known to the banker to be such at the time, but who were falsely stated in the note to be principals, to show the truth, and then have all the rights of sureties.

RALEY, J.

This action was tried to the court by consent, on an agreed statement of facts, as follows:

T C. Mc Dowell, cashier of the Farmers' Bank, Canton, Ohio, had taken a cognovit judgment against the defendants. Two of the defendants obtained leave to answer claiming they were not liable on the note, by reason of the following fact, to-wit:

The defendants, John Reese, John H. Whitmer and Jacob F. Shaffer, executed and delivered to plaintiff a note, of which the following is a copy:

Canton, Ohio, April 9, 1884. $500.00 Ninety days after date, without grace, we jointly and severally, as principal debtors, promise to pay to T. C. McDowell, cash, or order, Five Hundred dollars at the Farmers' Bank, with interest at the rate of eight per cent, payable annually after due, and we consent and agree, that after this obligation shall have become due, the time of the payment thereof may be extended from time to time by any one or more of us, without the knowledge or consent of the other or others of us, and in case of such extension and notwithstanding the same, we shall and will continue liable thereon, as if no such extension had been so made; and we hereby authorize and empower any attorney of any court of record in the state of Ohio, or elsewhere, in our name and behalf, or in the name and behalf of either of us, to appear before any such court of record, at any time after the above obligation shall have become due, waive the issuing and service of process, and at the suit of such payee or any indorsee or legal holder of said obligation, without notice to us, confess judgment against us or either of us, in favor of said payee or indorsee, or legal holder of said obligation, for the amount that may appear due thereon, for principal and interest and also costs of suit, and also release all errors in judgment so confessed, and waive all right

and benefit of appeal, and any and all proceedings to set aside, vacate, open, suspend or reverse such judgment or any execution issued thereon.

JOHN REESE, (L. S.)
JOHN WHITMER, (L. S.)
JACOB F. SHAFFER, (L. S.),

on which note the following indorsements were made. Interest paid to August 28, 1884. Interest paid to October 7, 1884. Interest paid to January 7, 1885. Interest paid to February 7, 1885. Interest paid to March 7, 1885. Interest paid to April 7, 1885. Interest paid to May 7, 1885. Interest paid to June 7, 1885. Interest paid to July 7, 1885. Interest paid to August 6, 1885. Interest paid to September 6, 1885. Interest paid to October 6, 1885. Interest paid to November 6, 1885.

The defendant John Reese, was principal on said note, and the defendants, John H. Whitmer and Jacob F. Shaffer, were only sureties for him thereon; that said plaintiff knew when said note was delivered to him that said defendants, Whitmer and Shaffer, were only sureties on it; that when said Reese took said note to plaintiff to get the money thereon, it was verbally agreed between them that interest on said amount mentioned in said note, should be paid in advance at the rate of twelve per cent., and that in pursuance of said agreement said Reese did pay interest on said $500, at the rate of twelve per cent. per annum in advance; that when said note became due said John Reese and plaintiff verbally agreed that if the interest on said note of twelve per cent. should be paid until August 28, 1884, the time of payment thereof should be extended until that time; that said Reese did pay said interest at said time to plaintiff which was credited on said note, and said time was so extended; that again on the twenty-eighth day of August, 1884, a like agreement was made to extend the time of payment until October 7, 1884, and the interest was paid and the time extended; that on the seventh day of October, 1884, a like agreement was again made to extend the time of payment until January 7, 1885, and the interest was paid and the time extended; that on the seventh day of January, 1885, and each month thereafter until the sixth day of November, 1885, a like agreement was made to extend the time of payment for a month at a time; and the interest was paid each month in advance at said rate, and the time was so extended from month to month until November 6, 1885,—at each of said dates the interest was credited on said note; that said Whitmer and Shaffer had no knowledge of either of said agreement between Reese and plaintiff, or of said payments of either of them, and never consented to the same or either of them, farther than by signing said note as the surety of said Reese.

On this agreed statement of facts, the only question to the court is, are the defendants Whitmer and Shaffer liable on said note? They claim that they have been released by the action of the plaintiff, first, by extending the time of payment without their consent, and next by changing the rate of interest without their consent. The plaintiff claims that the time of payment was extended by their consent, expressly given in the note, and that the rate of interest on the note was not changed, but whatever payment of interest above the rate mentioned on the note, were made, should be credited on the note.

It is clearly settled in this state, that a verbal contract made between the holder of a note and the principal debtor, to extend the time of payment for a definite period, for a valuable consideration, without the consent of the surety, will release that surety.

It is likewise well settled that an agreement to pay a greater rate of interest, the same rate, a less rate, or even an usurious rate, is, in either case a sufficient consideration to support such contract. McComb v. Kittridge, 14 Ohio, 348; Blazer v. Bundy, 15 Ohio St., 57; Wood v. Newkirk, 15 Ohio St., 295; Ide v. Churchill, 14 Ohio St., 372; Fawcett v. Freshwater, 31 Ohio St., 637; Andrews v. Campbell, 36 Ohio St., 361.

But it is claimed those rules do not apply to the case, because whatever extension there was in the case, was given by the consent of the sureties—which was embraced in the note and signed by them. The language in the note is, "We consent and agree that after this obligation shall have become due, the time of the payment thereof may be extended from time to time, by any one or more of us without the knowledge or consent of the other or others of us, and in case of such extension, and notwithstanding the same, and we shall and will remain and continue liable thereon, as if no such extension had been made." This is printed in fine print in said note along with other matters, such as that, "both are principal debtors," and "we waive all right and benefit of any and all proceedings to set aside, vacate, open, suspend or reverse judgment thereon." The legislature has seen fit to interfere as to the first matter. See sec. 5,832, Rev. Stat., and the courts have wholly disregarded the last agreement, and, although the courts have not yet said the formal agreement to permit an extension of time, is void, yet they have said, and it is a rule well established, that as such agreements of sureties shall be strictly construed—they shall not be extended beyond the very letter of the contract—courts are jealous of the rights of sureties—they are favorite subjects of legal protection. State v. Cutting, 2 Ohio St., 1; Raymond v. Whitney, 5 Ohio St., 201; Hall v. Williamson, 9 Ohio St., 17; Smith v. Huesman, 30 Ohio St., 662; Helt v. Whittier, 31 Ohio St., 475.

This rule applies with especial force in the case, for the plaintiff has secured all the benefits of usurious interest for a long time, while the sureties, without reward or benefit, are asked to take all the risks.

It is claimed by the defendants, that notwithstanding the agreement, or of any such agreement that may be made, and placed in the note itself, they are not and would not be bound by it, by reason of sec. 5, 832 of the Rev. Stat.

That section provides that, "In contracts for the payment of money to banks or bankers, sureties in fact, known to the parties to be such at the time such contracts were made, may be proved, and shall be considered in all courts to be sureties, and have all the privileges of the sureties, anything in the contract expressed to the contrary notwithstanding."

That section was intended to permit sureties, who were such in fact, and known to the banker to be such at the time, but who were falsely stated in the note to be principals—to show the truth—and then have all the rights of sureties, to have all the rights they would have had, if it had been written in the note that they were sureties. One of the rights of a surety is to waive any objection to, or consent to, an extension of time, and he can do this as well before as at the time of the extension, or he may waive an extension afterwards as well. Brandt on Suretyship, sec. 299; Miller v. Spain, 41 Ohio St., 376.

It can not be fairly claimed that the object of that statute was to deprive a surety of a right he had before—a right to agree to an extension of time. Instead of that, its object was to give a surety other rights, the right to show the truth, notwithstanding his written agreement.

Having the right to make this agreement, and having made it, what is the true construction in view of these rules? Does it authorize thirteen distinct and separate extensions of time, from July 7, 1884, to November 6, 1885?

It says, "the time may be extended from time to time." It does not say once, nor does it say as often as may be desired. If the time should be extended from July 7th to August 28th, it would be extending it from time to time, from one time to another time ,and if it were again extended from August 28th to October 7th, it would be extending it from time to time. Again it says in case of such "extension;"it does not say "or extensions." If it were meant that there might be as many extensions as could be agreed on, some words clearly indicating the same should have been used, and the words used being susceptible of a more favorable construction to the surety, is it not the duty of the court to so construe them?

The words used in the note in the case of Miller v. Spain, 41 Ohio St., 376, are, "And it is understood that the liability of neither of us is to be affected by further time being given for payment," and the court say, "While we do not hold that this stipulation would apply to a second agreement for still further time, a majority of the court decide that it authorized principal and payee to agree upon one extension without affecting the liability of the surety."

The language used in the note in this case will undoubtedly admit of two different constructions, and the rule being, that the one most favorable to the sureties shall be adopted, we are inclined to think that we would not be justified in holding, as against a surety, that this language would authorize thirteen different extensions, month after month, from July, 1884 to November, 1885.

The second claim, that the surety is released because there was a change of contract as to the rate of interest, without the knowledge or consent of the surety, presents a question that so far as appears, has not been directly settled in Ohio.

If the note itself had been altered, after the surety signed it, and a different rate of interest written in it, in pursuance of the agreement between the payee and the principal, the surety would have been released beyond a doubt. Harsh v. Klepper, 28 Ohio St., 200; Jones v. Bangs, 40 Ohio St., 139.

The note itself has not been changed. It still remains as it was when signed by the surety. But did the plaintiff ever accept that contract? When the principal took the note which he and the surety had signed, to the bank, and offered it, the bank said no, we will not accept that contract—you can not get the money at eight per cent. but you can have it for twelve per cent. if paid in advance. The principal then agrees to the offer of the bank—gets the money, pays the interest, and delivers over the note; but the surety knows nothing of this contract, and never consented to it, and the bank knows he did not. The contract the bank did make, and the only one it made, was a contract with the principal, and not with the principal and surety. The minds of the plaintiff and the surety never met; there was no agreement between them; the offer to make a contract, which the surety signed and authorized to be taken to the bank, and which the bank might have accepted and thereby made it a binding contract, was rejected by the bank, and hence the surety and the bank never had a contract between them.

But supposing there was a valid contract, will a verbal agreement between the payee and the principal, to pay twelve per cent. interest on a note drawing but eight per cent., and the payment of it in advance, without the knowledge or consent of the surety, release him?

The plaintiff claims that it will not, because the contract is void, and hence the written agreement in the note has not been changed; that whatever payment of usury has been made will be applied on the principal of the note, for the benefit of the surety. There are several authorities which sustain this view, more or less. Coates v. McKee, 26 Ind., 223; Huff v. Cole, 45 Ind.; 300; Richmond v. Standcliff, 14 Vt., 258; Davis v. Converse, 35 Vt., 503; Mitchell v. Cotton, 3 Fla., 134.

But it will be observed upon an examination of these cases that their conclusions are based on the peculiar statutes of these states. In each one of these states a contract for usurious interest is void—and hence it was held that the verbal contract was void—being without any consideration. On the same ground, in these states it has been uniformly held, that an agreement to pay usurious interest would not support a contract for extension of time—while in Ohio the contrary has been as uniformly held.

In the case of Mitchell v. Cotton, the court says, "usurious contract to pay interest does not release surety, because it reduces the liability of the surety, the statute providing in such cases that all interest is uncollectible." In the case of Richmond v. Standcliff, the court says: "The agreement to pay nine per cent. interest, was not a valid or legal agreement; neither increased the risk or responsibility of the surety—was void under the statute and was never attempted to be enforced." And in the Indiana cases no authority outside the statute is referred to.

The defendant claims that whatever it may be elsewhere, the rule in Ohio is, that a contract to pay usurious interest is not void,—but voidable to a certain extent only,—that the court will pare it down to six per cent. if called on to do so before the entire debt is paid; but if it is paid it can not be recovered back, or recouped out of any other claim or demand.

This seems to be well settled law in this state. McComb v. Kittridge, 14 Ohio.348; Smead v. Christfield, 1 Disney Rep., 18; Munson v. Woodruff, 2 Handy Rep., 97; Wood v. Newkirk, 15 Ohio St., 295; Hulbert v. Cist, 3 Bull., 868.

It is also well settled by a long line of decisions in Ohio, that an agreement to pay usurious interest is a good and valid consideration to support a contract to extend the time of payment of a note—which is held not to be binding unless founded on a valid consideration. McComb v. Kittridge, *supra*; Blazer v. Bundy, *supra*; Wood v. Newkirk, 15 Ohio St., 295.

And if a valid consideration to support a contract for extension of time, then of necessity it must be a valid consideration for any other contract.

It is also well settled in Ohio that a verbal agreement between the payee and the principal to extend the time of payment of a note after it becomes due, is a valid contract, which will be enforced, and eleases the surety. See all the authorities above cited.

It is true that such subsequent verbal contract must rest on a new consideration, or must have been executed or acted on, and must be definite in its terms. Thurston v. Ludwig, 6 Ohio St., 1.

It is immaterial whether surety sustains any injury by change of contract, or whether it may have been for his benefit, if without his know-

ledge, he is released. Miller v. Stewart, 9 Wheaton, 680; Brandt on Suretyship, sec. 338, 345.

It has been decided in some places that a parol contract cannot vary or change a specialty, but it is held in same places that if executed, it will. Brandt on Suretyship, sec. 328.

The foregoing rules have been held good law in many places outside this state, and have been approved on principle by the leading text-writers. Brandt on Suretyship, sec. 302, 327, 336, 363; Burks v. Monterline, 6 Bush., (Ky.) 20; Shaver v. Allison, 11 Grant Chy., 335.

In the light of these authorities, how does this case stand?

After the note was given, the principal and payee, without the knowledge of the surety, made a verbal agreement to pay twelve per cent. interest for thirty days, and executed it by paying the interest in advance, and extending the time accordingly.

This contract was certainly valid. It was between two parties competent to make a contract; it was definite in its terms; it was founded on a valid consideration, and besides it was executed. It was a different contract from that written in the note,—from the one the surety executed. It was concerning a material matter—the rate of interest is just as material as the time of payment. This being a valid contract—changing a material part of the contract made by the surety, and made by the principal and payee without the knowledge of the surety. why does it not release the surety? If it had been a contract concerning the time of payment, it is conceded it would have released the surety, and why not, when it is concerning the rate of interest? There seems to be no difference in principle, and the same rule that releases in one case, ought to release in the other.

If it be said that the contract to pay twelve per cent., is usurious and therefore not binding, that will not avail, for the reason that the contract that the surety made was to pay eight per cent. interest, and if this new contract was usurious, then it would change the rate of interest to six per cent.; in any event the contract is changed, and it makes no difference whether the new contract is better for the surety than the one he made, or worse; whether the rate of interest is higher or lower; he can truly say this is not the contract I made, and the contract I did make having been changed, there is no contract existing that I did make.

These several conclusions all pointing in the same direction renders the finding more satisfactory, which is that the defendants Whitmer and Shaffer have been released from any liability as sureties on the note; that they each have a good defense to said judgment; that said judgment as to them will be set aside, and that they recover their costs.

Day & Lynch and Baldwin & Shields, for plaintiff.

Frease & Son and J. M. Myers, for defendants Whitmer and Shaffer.

## CONSTRUCTION OF A CONTRACT. 151

[Franklin Common Pleas.]

### †STATE OF OHIO EX REL. V. ALBERT NETTER.

1. The par value of the bonds, or certificates, under the peculiar terms of the contract in this case, meant only the principal of such bonds.
2. A stipulation that the defendant should receive, in return for the payment of the principal of the old bonds, new bonds, as provided and in accordance with the act of the General Assembly and the advertisements made thereunder, in view of the peculiar provisions of the contract, meant that he should receive such bonds as were described in the contract—that is to say, bonds dated July 1, 1886, and bearing interest from that date.

Pugh, J.

Plaintiff on the relation of the attorney-general sues to recover from the defendant $27,323.00, with interest from January 1, 1887. On the twenty-fourth day of March, 1886, there were $2,240.00 of Ohio six per cent. canal bonds (or certificates), estimated by their face value, outstanding. The legislature, by an act passed April 14, 1885, authorized the commissioners of the sinking fund of the state of Ohio to fund these bonds, either by selling new bonds and employing the proceeds to purchase the old bonds, or by exchanging new bonds for the old ones, in either case the new bonds to draw not over five per cent. interest.

On the twenty-ninth day of August, 1885, the commissioners advertised that on the sixteenth day of March, 1886, they would receive proposals from the holders of said outstanding bonds for the exchange of any portion or all of said bonds for the new bonds authorized by the act of legislature, the process to be a surrender by the holders of the old bonds, and the delivery to them of new bonds payable at times specified in the advertisement. On the sixteenth day of March, 1886, Netter proposed to the commissioners to deliver to them the old bonds and receive in exchange new bonds to be issued in accordance with the terms of the advertisement, the new bonds to draw interest at the rate of three per cent., and Netter to pay $21.35 on each $1,000.00 of the new bonds. This proposal, being the lowest, was accepted. Thereupon the commissioners and Netter entered into a written contract, a copy of which is exhibited with the petition. By the first stipulation of the contract Netter agreed to deliver to the commissioners the old bonds and receive in exchange for the same the new bonds to be issued and to be payable as hereinbefore specified. It was also provided by this stipulation that the new bonds should bear date July 1, 1886, and bear interest at the rate of three per cent. per annum, payable semi-annually on the first days of July and January of each and every year, and that Netter should pay to the state a premium of $21.25 on each $1,000 of said new bonds. By a second stipulation of the contract it was provided that the said $2,240,000.00 of bonds should be delivered to the commissioners on or before January 1, 1887, "if practicable," but in case any part of the bonds should be withheld by the owners or holders of the same so that Netter could not get possession or control of them on or before January 1, 1887, then, he should pay to the commissioners on that day, at the American National Exchange Bank in New York city, the par value of said outstanding old bonds, and receive therefor new bonds, as provided and in accordance with the act of the legislature mentioned and the advertisement made thereunder. Omitting other immaterial stipulations, by the next material stipulation it was provided that the commissioners should, and they bound themselves, to give immediate notice, to the holders of the old bonds that the state of Ohio, on the thirty-first day of December, 1887, would redeem all the said bonds, and that interest on them would cease at that date. Then, by the last stipulation of the contract, it was provided that whenever Netter should deliver any of said outstanding bonds to the commissioners, he should be entitled to receive the full interest on the same at six per cent. to their maturity, namely December 31, 1886, and that he should pay to the commissioners the interest at three per cent. on the new bonds up to and including December 31, 1886.

†This judgment was reversed by the circuit court; see opinion 2 Circ. Dec., 207. The circuit court was affirmed by the Supreme Court, without report, or dismissed for want of preparation; see note to 2 Circ. Dec., 207.

The petition gives an outline history of the facts, and then avers that prior to December 31, 1886, Netter delivered to the commissioners bonds of the face value of $418,425.00 and received new bonds, pursuant to the contract, of the same face value, bearing date July 1, 1886; that he wholly failed to deliver the residue of the bonds which amounted in face value to $1,821,575.00; and that this residue of said bonds, being on the first day of January, 1887, held and owned by others, were by them presented to the bank named, where they were payable at that date, and payment of principal and interest was then dmanded by said holders and owners; that, on January 1, 1887, the commissioners tendered to Netter the residue of said new bonds, and also a deposit of $50,000 which had been made to indemnify them against any damages which might accrue to them by reason of his failure to perform the contract on his part; that they demanded of him the payment of $1,860,465.00; that said Netter refused to receive the bonds, but did offer to take the bonds and certificate of deposit and pay to them $1,833,140.00. To save the credit of the state, and its securities from dishonor, it is alleged, that the commissioners complied with the demand of Netter; but, at the same time, that they protested that the real amount due was $1,860,465.00, and that they reserved the right to sue for the difference. To recover this difference, the difference between the two sums, $1,860,465.00 and $1,833,140.00, is the object of this suit.

By his first defense, Netter answers that it was not practicable for him to obtain and deliver any more of the bonds than were acquired and delivered by him, and that by the exercise of due diligence he could not procure any more of them; because some of the holders and owners of the bonds lived in distant and foreign countries; and because others refused to part with them before maturity. Then he appealed to that stipulation of the contract which made provision for such an event, and which I have recited, and says that on the third day of January, 1887, the first day of the month being a legal holiday, and the second day being Sunday, he tendered to the agents of the state the sum of $1,833,142 being the par value of all the rest of said old bonds, together with the agreed premium of $21.35; on each $1,000 of said bond; and that said agents, having deferred, with his consent, action till January 4, 1887, received the money tendered and delivered to him new bonds of the same face value, to-wit: $1,833,142. It is also averred in this defense that Netter fully performed the contract on his part.

There is another defense, and a counter claim, but they will not be considered now.

The answer of the defendant, the plaintiff has assailed with a general demurrer. Under the issue thus made on the first defense, the question is, what was meant, and what is meant, by that stipulation in the contract which provides that in case it was not practicable for Netter to deliver the bonds by January 1, 1887, then he should pay the par value of such undelivered bonds and receive new bonds as provided and in accordance with the act of the general assembly and advertisements made thereunder? The theory of the petition is, that Netter should have paid to the agents of the state the principal of the undelivered bonds and the premiums, and received new bonds equal to such principal, but no interest on the bonds. In argument, however, counsel for the plaintiff rather abandoned this and adopted another theory which, they say will make it needful for them to amend their petition; and that theory is, that Netter should have paid the principal of the undelivered bonds and six months interest thereon, and premiums, and received therefor new bonds equal to the principal without any interest. If that theory is sound, the state should have sued for $54,647, instead of $27,323. It might be sufficent to say that by whatever process such a result may be reached, it would involve an unreasonable construction of the contract, and would be grossly unjust to the defendant.

The theory of the defense is, that under the stipulation mentioned, Netter was only obliged to pay the principal of the undelivered old bonds with the premiums, and was entitled to receive in return new bonds equal to such principal with six months interest at the rate of three per cent.

The stipulation named will have to be interpreted because its meaning and intent are doubtful. Bishop's Contracts, sec. 379.

The most conspicuous rule for the construction of contracts is, that a contract must be interpreted so as to carry out the intention of parties. Id. sec. 380.

Another is, that the parties are bound by the language which they voluntarily use, there being no privilege to plead ignorance of the effect of their language. Id. sec. 381. Another is, that the entire writing, (if the contract has been written) must be considered and looked at in order to reach the correct interpretation.

Another is, that a meaning should, if possible, be assigned to every clause and every word. Id. sec. 384.

And still another rule, which is especially applicable to this case, is, that where the state is a party to a contract and an individual is the other party, the entire contract must be construed most strongly against the individual, and most favorably to the state.

At first I was impressed that the particular stipulation in the contract, which is doubtful in its meaning, was so uncertain and indefinite as to render the contract void, but further reflection convinced me that, by interpretation, it could be made certain.

The commissioners advertised that they would receive proposals for the exchange of all, not some, of the bonds. Netter's proposal was to deliver all, and not some, of these bonds. The commissioners accepted that proposal. The contract was made pursuant to such advertisement, proposal and acceptance. It might be plausibly inferred from these facts that the thought, the intention, the expectation of both parties was that most, if not all, of the bonds would be so exchanged, and that only the smaller number of them would not be. The first stipulation in the contract which contains anything of detail is the one that provides what shall be done when the bonds cannot be procured by Netter, while that which puts down what the obligation of the parties should be, in case the bonds should not be delivered, is last in order. Although the order of the stipulations in the contract is "utterly destitute of practical value," (Bishop's Contracts, sec. 389), yet the fact is that provision was made in the contract for the non-delivery of the bonds as well as their delivery. Whether the parties expected that the larger or smaller number of the bonds could not be procured and delivered, is unimportant. Provision was made for both events. The provisions mean the same whatever the expectation may have been.

The stipulation relative to what each party was to pay and receive, what each was to do, in the case of bonds which might be delivered, is elaborate in detail and fastidiously specific. There can be, and there is, no controversy about its meaning. How and by whom the interest on both the old and new bonds was to be paid are definitely prescribed. The state agreed to pay the interest at the rate of six per cent. on the old bonds to Netter up to and including December 31, 1885, while Netter agreed to pay the interest at the rate of three per cent. on the new bonds up to and including the same date. If he delivered the old bonds before or by July 1, 1886, he was entitled to receive one year's interest at the rate of six per cent., although presumably, he had only paid to the holders of the bonds which he had to buy six months' interest. But he would only have to pay six months' interest at the rate of three per cent. to the state on the bonds, because they were dated July 1, 1886, and did not draw interest back of that time. The opportunity for him to make the most profit out of the transaction was when he had bought and delivered bonds before July 1, 1886.

The stipulation in respect to what each party's obligation was in the case of bonds not delivered by Netter is couched in less definite phraseology. It is entirely silent about the interest on both old and new bonds. Netter was to pay to the agents of the state the par value of such bonds. What did, and what does, that mean? He was to pay it on or before January 1, 1887, and not on or before December 31, 1886. The difference in time is mentioned, because it is important in the process of construction. If the obligation had been to pay the par value on or before December 31, 1886, par value might have meant principal and interest of the old bonds. In significant explicitness of language another provision of the contract obliged the state to give the holders of the bonds immediate notice by publication, or otherwise, that the state of Ohio would "redeem on the thirty-first day of December, 1886" (not January 1, 1887), "all the outstanding six per cent. canal bonds, and that the interest, should cease on that date."

On demurrer it cannot be assumed, as a help to discover the intention of the parties, that it was well known to both parties that the state was not expected to redeem, and that it was understood between them, as was argued, that the state would not redeem, the bonds till the money was obtained from Netter. If this had been alleged in the pleading it could not have been considered, or, at least, it might have been struck out on motion on the ground that it was a parol stipulation that varied and contradicted the written contract.

It is clear that the day of redemption was December 31, 1886. That meant that the state was to pay the interest on the old bonds at that time. This stipulation was part of the contract. Netter had a right to rely upon its performance. Hunting for the intention of the parties, it cannot be assumed that they expected that the state would make default in the payment of the interest; nor can a court avoid concluding, at least on demurrer, that the parties used the term, "par value," upon the hypothesis that the interest would be paid then. But

Netter was not bound to pay to the state the par value of the bonds until on the next day. This was carefully and clearly expressed. It was the par value of the bonds on January 1, 1887, and not December 31, 1886, which he was to pay. Their par value on that day did not, in view of the obligations of the state under this contract, mean their par value on December 31, 1886. Upon these considerations the conclusion is, that the par value of the bonds, according to the contract, was only the principal of the bonds, and that that was all Netter was required to pay. The fallacy of the argument, that par value, in this case, meant, and means, principal and interest, might be illustrated, as was done by Judge Harmon in the discussion. The argument presupposes that the state would not, and did not, pay the six months' interest due December 31, 1886. The right to make default then implied the right to default in the payment of the six months' interest due July 1, 1886. If the state had committed two defaults, instead of one, then Netter would have been bound, carrying out the argument to its logical result, to pay one year's interest. Such a result, and the construction to produce such a result, would shock the conscience. It cannot be adopted.

Independent of these considerations founded upon the particular language of the contract, I should be inclined to hold, upon authority, that the par value of the bonds means the principal and accrued interest. Nominal worth, apparent value, of the bonds, are the definitions of par value given by lexicographers. If interest is stipulated to be paid on the face of a bond, if it is not a coupon bond—and if it appears from the face of the bond that a given amount of interest has not been paid on it, the interest would be part of the apparent value, of the nominal worth, of the bond, providing there was nothing in the contract to evince that the words, par value, were used in a different sense.

There is another reason, which I borrow from counsel, that supports my construction of the words, par value. In the case of the delivered bonds, the contract expressly provided how interest should be paid on them. But the silence of the contract touching the interest on the old bonds, which might not be delivered, begets the presumption that no interest was to be paid by either party. The maxim, expressio unius est exclusio alterius, may be invoked.

The remaining question is what was Netter to receive in return for the payment of the par value of the undelivered old bonds?

It is the more difficult of the two questions that arise upon the doubtful stipulation; upon its decision hangs the whole case made by the petition and the first defense of the answer. The language of the stipulation is, that Netter should "receive therefor" (that is for the payment of the par value of the undelivered bonds) "the new bonds of the state of Ohio, as provided and in accordance with the act of the general assembly of Ohio hereinbefore referred to and advertisements made thereunder." What does this mean? There is no mention of the payment of interest, and in obedience to the maxim quoted before, it might be said that it was not intended that interest should be paid. It is necessary, however, to look further at the language employed and at other provisions of the contract. It seems that some word or words were omitted after the word "provided." But the omission of a word, or "even a clause, plainly meant to be inserted" will not be "permitted to defeat the intention of a contract, when it can thus be distinctly ascertained." Bishop's Contracts, sec. 383.

Was it intended that the new bonds should be such as were by the act of the general assembly and advertisements made thereunder "provided?" Or such as were "provided" by the contract? Or by both? It is expressed that they were to be such as were "in accordance with the act of the general assembly and advertisements thereunder." If that was the purpose in using the word "provided" what follows? The act of the general assembly did not provide when the interest should begin on the new bonds; nor did the advertisements thereunder made by the commissioners so provide. The act of the legislature only prohibited the commissioners from issuing bonds drawing more than five per cent. interest; that is all. Neither the act nor the advertisement prescribed the details of the contract of exchange or sale of bonds; that was left by the first to the discretion of the commissioners, and by the latter to be specified in a written contract. Nevertheless, what was meant was that the new bonds should be provided, or agreed upon by the commissioners, following and keeping within the purview of the act of the general assembly. If the commissioners had not acted, there would have been no new bonds; no one else could issue them; they could only issue the bonds by and through some kind of a contract. Therefore, obviously, the stipulation in the contract, which makes the dispute, meant that Netter should receive new bonds that would not only be in accord with the statutes but also bonds that were provided by the contract made by and with the commissioners. In express

terms the bonds provided for by the contract were bonds bearing date on July 1, 1886, and bearing interest at the rate of three per cent. per annum, payable semi-annually on the first days of July and January in each and every year until their maturity. That was the kind of bonds it was agreed that Netter should receive. They were not bonds without any accrued interest. It is so nominated in the contract.

If there was any doubt, whatever, that the bonds provided for by the contract were to draw interest from July 1, 1886, it is dissipated by the bonds themselves which were issued by the commissioners. A blank bond of the issue is attached to and made part of the instrument. It expressly promises the payment of three per cent. interest from July 1, 1886. This is a practical construction of the contract by the duly authorized agents of the state. Familiar to lawyers is the rule that a practical interpretation of a contract by the parties, when it does not subvert its plain terms, is entitled to great weight, and often is a controlling guide in construing it. Bishop's Contracts, sec. 412.

It is not perceivable how the accrued interest on these bonds, which Netter was to receive, can be separated from the bonds themselves. They are "one and inseparable." The contract does not separate them.

It might be said, and indeed it was suggested, that it was intended by the parties that Netter should receive the new bonds with an endorsement on them, that the six months' interest had been paid or released; but is not so nominated in the contract; and the court cannot make a new contract. If the contract had simply provided that Netter should receive new bonds without the addition of a description of the bonds, then, undoubtedly, they would have been bonds without any accrued interest, and, perhaps, though not necessarily, of even date with the time they were to be received.

The holding of the court, then, is, that, under the contract, Netter was entitled to receive new bonds with the accrued interest thereon for six months at three per cent., after having paid the principal of the old bonds and the premium of $21.35 on each $1,000.00.

It was insisted in argument that the stipulation discussed should be so construed as to bring about the same results to the state as if the bonds had been delivered. If this was intended, why did not the parties use appropriate language to express it. There would have been no need of two independent stipulations in the contract, if that was the purpose; the last stipulation in the contract could have been, by the use of a word or two, made applicable to both delivered and undelivered bonds; and if the design of both parties was to bring about the same result to the state something equivalent to that would have been done. Without inverting and perverting rules of language, the court could not fasten the same construction on both of these stipulations—stipulations so diverse.

Something was said about Netter having premeditated the failure to deliver the bonds so that he might make more profit out of the transaction, and something was also said about rewarding him for failure to deliver them. But that suggestion is met by this consideration. The contract expressly exempted him from delivering the bonds, if it was not practicable to do so, or if he could not obtain them for delivery; and in his first defense, he affirmatively avers that he used due diligence, all that was required of him, to obtain the bonds and failed to get them. The demurrer admits the truth of this averment. Hence, even if it were true that Netter purposely failed to deliver the bonds, it cannot be considered now; it can only be made available by a reply from the plaintiff. The demurrer to the first defense is overruled; and as the demurrer searches the record, and as the plaintiff does not desire to amend his petition, it will be dismissed.

The second defence of the answer is, that the agents of the state agreed with the defendant, at the time he tendered the money, that all questions of dispute between him and the commissioners touching the contract and its true meaning, should be reserved; and that afterwards they agreed to submit such questions to arbitration, these questions embracing all the questions now in dispute in this case; and, therefore, he pleads this agreement in bar of the plaintiff's action. The agents of the state had no authority, no power, to agree to the arbitration. There is no need, in my judgment, of discussing this question or appealing to any authority to sustain this conclusion. The demurrer to the second defense is sustained.

The defendant also interposes a counter-claim to the petition of the plaintiffs. The gist of it is, that the agents of the state failed and refused to deliver to the defendant the new bonds when they should have done so pursuant to the contract; that at that time the rates of interest were low and he had opportunities to, and did make contracts for their sale at very advantageous prices; that before they

were actually delivered the rates of interest increased, reducing the value of the bonds to him; and that he thereby lost all of the profits which he would have made had they been delivered according to the contract. He claims, therefore, that he was damaged by their conduct to the amount of $30,000.00. Assuming all of the averments of the counter-claim to be true, it affords no cause of action to defendant for damages. The state is not responsible to the defendant for such damages; it is not answerable for the consequences of the imputed misconduct of its agents. No discussion of this proposition seems needful. The demurrer to the counter-claim is sustained.

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## 156 BOARDS OF EDUCATION—CONTRACTS.

[Franklin Common Pleas, 1888.]

STATE OF OHIO EX REL. KELLY v. BOARD OF EDUCATION (COLUMBUS.)

1. When a board of education advertises for bids for heating and ventilating apparatus for a school building it may either: (1) first select the kind of system, and invite bids for that kind alone, thus confining competition to those offering to furnish the one kind of system selected; or (2) invite bids for all apparatus which will accomplish the desired result, thus also putting in competition the various kinds and systems.
2. The board is not required to select the kind of system for which the bid is pecuniarily the lowest, but may adopt that which in its judgment is the best. But the statute (sec. 3988, R. S.), requires that the contract shall be awarded to the lowest responsible bidder for the system adopted, who has the lawful power to perform his undertaking, unless the board rejects all bids.
3. The discretionary power to select the system of heating and ventilating to be used in the public schools is vested by law in the board of education, and when the power is exercised by the board lawfully, and in good faith, its decision is final and is not the subject of judicial investigation.

This is an action to enjoin the defendant from executing a contract with Isaac D. Smead & Co. for placing the Smead Heating and Ventilating Apparatus in certain public school buildings in the city of Columbus.

The defendant, without first adopting a particular system, advertised for plans and sealed proposals "for heating and ventilating" the buildings, and received the following bids:

| Bidders. | Buildings. | |
|---|---|---|
| | 2d Ave. | Park. |
| Voglesang Furnace Co., Columbus | $890 00 | |
| Kelley & Jones Co., Pittsburg | 2,083 00 | $2,091 00 |
| Kelley & Company, Columbus | 2,092 00 | 2,516 00 |
| Potts & Read, Columbus | 2,355 00 | 2,425 00 |
| Andrew Schwartz Plumbing and Steam Heating Co., Columbus | 2,350 00 | 2,350 00 |
| Isaac D. Smead & Co., Toledo | 2,765 00 | 2,765 00 |

The bids of the Voglesang Furnace Co. and Isaac D. Smead & Co., were for entirely different systems of warm air heating. All other bids were for steam heating.

The committee to which the bids were by the Board referred recommended the acceptance of the bid of Isaac D. Smead & Co. The committee's report calls attention to the fact "that the advertisement authorized by the board distinctively calls for plans as well as proposals for heating and ventilating the buildings, neither the Board nor its committee furnishing any data or suggestions as to any particular system," and this was

done in order that a variety of plans might be secured. The report also directed attention to the guarantees included in the bid of Smead & Co., to heat the building to seventy degrees Fahrenheit in the coldest weather, of perfect ventilation, and of entire freedom from cost of repairs for the entire apparatus (except grates and linings) for ten years; while no indemnity against repairs was offered by any other bidder; and stated that the repairs of the existing heating apparatus in the two buildings named had cost during the past ten years $3,878.56. The committee's report was approved by the Board and the president was authorized to execute contracts with Smead & Co.

D. N. Kelley (a member of the firm of Kelley & Co., who were unsucessful bidders for the work), as a tax-payer, brought this action asking an injunction on the grounds that the Board had not, prior to receiving bids, determined upon any system or furnished to the bidders any plan for heating and ventilating any of said buildings, and that the contract had been by the Board awarded, not to the lowest, but to the highest bidder.

Upon an *ex parte* application a temporary injunction was allowed. Trial was had at October Term, and decision rendered November 14, 1887.

Nash & Lentz, for plaintiff. Earnhart, Hunter & Butler, James Caren, city solicitor, and Brown, Geddes, & Jackson of Toledo for defendant.

EVANS, J.

On the sixteenth day of July, 1887, the defendant advertised in the Ohio State Journal and Columbus Evening Dispatch for plans and specifications for heating and ventilating the Central German, Park street and Second avenue school buildings of the city of Columbus, the Board reserving the right to reject any or all bids and plans submitted. In response to the advertisement six bids were received, each bidder having his own plans and specifications and his own system of heating the various buildings named. The Board awarded the contract to Isaac D. Smead, of Toledo. His bid was the highest in a pecuniary sense. D. N. Kelley, as a tax-payer of the city, brought suit to restrain the defendant from carrying out the award to Isaac D. Smead, claiming that Smead was not the lowest responsible bidder and did not separate labor and materials in his bid, and that his bid was not responsible to the advertisement.

The Board in its answer claimed that the advertisement was broad enough to put the various kinds or systems of heating and ventilating into competition, and that it had a right to advertise for the various kinds of heating and ventilation, and, after the various kinds had been submitted, to select therefrom the kind or system that in its judgment was the most efficient for the purpose intended, and Smead's system being the only one of that kind, that in awarding it to him, it had awarded to the lowest responsible bidder.

The court is not prepared to say this award is not in the interest of the public. The Board awarded it to the highest bidder if we look only to the amount of money. The lowest bidder, however, means the lowest in reference to the thing bid for; it is not the price alone. The heating and ventilation of the school buildings is not alone a question of economy; it is a question as well of the health and comfort of the scholars committed to the care of the Board. Smead is the lowest bidder for the thing he proposes to furnish. His is the lowest and only bid for the kind of apparatus selected by the board. The court takes judicial notice that

there are various systems and methods of heating and ventilating buildings. The Board selected the Smead system as the best. The statute is not to be construed so that the award must be made to the lowest bidder in price independent of utility, durability or the value of the apparatus. The Board must exercise its best judgment. The court cannot interfere with the honest exercise of this discretion. If it act unwisely, the remedy is not with the judiciary. It is not for the court to determine, nor does it determine, what system of heating or ventilating is superior for the public schools. There is evidence that the Smead system has been adopted by some eighty schools of this state. So the Board is not acting upon a mere experiment.

It may further be said in the Board's behalf that this system is guaranteed for ten years from cost of repairs. The Board in its advertisement did not limit the competition to one system of heating or ventilating, but invited the owners of the various systems to submit their respective claims. This gave the widest opportunity for observing the various merits of respective kinds, and their comparative cost and merits. The purposes of the advertisement were to give the Board the benefit of having presented for its consideration the various systems, and the respective costs of the same. The advertisement was for plans and specifications for heating certain school buildings then erected. The bidders could inspect the buildings and see what systems were required to properly heat and ventilate those buildings. The thing sought for was the heating and ventilation of certain buildings.

The advertisement was broad and comprehensive enough to give every system an opportunity to come in and compete with every other. Unquestionably the Board had a right to select from the various systems that one which was modern and which would best accomplish the objects desired. The Board, in making its advertisement, was required either to advertise for one system and run the risk of the objection that the advertisement was for one kind and excluded competitive bidding, or to advertise for plans and specifications for heating and ventilating certain buildings, and from the various kinds submitted award the contract to the apparatus in its judgment best adapted for the purposes intended,—the board by the advertisement not determining the kind of apparatus before putting the various kinds of apparatus into competition.

It was legal under sec. 3988, Ohio Rev. Stat., to call for proposals for heating and ventilating certain school buildings without discriminating in the call for the kind of apparatus that would be selected, and the Board had the legal right, after thus putting in competition the various systems, to select the system which, in its judgment, was most meritorious, and to award the contract to the person who was the lowest responsible bidder for the system thus selected. The advertisement calls for means to accomplish certain specified ends without specification of the means or instrumentalities by which, or the manner in which, those ends are to be attained, and the Board under the advertisement as made had the broadest latitude possible to determine from the various systems thus brought into competition, which system was best calculated to accomplish the ends desired.

The Board might legally have confined in the advertisement the bidding to certain specified systems, or specifications, but if it had done so, the best method would not have been adopted to secure the broadest competition and get the lowest responsible bids. The broader the competition, the greater the number of those who will watch the proceedings and

see that just awards are made and impartial judgments pronounced. If there is danger of corrupt understandings and combinations when there is a number of bidders, there is greater danger when a particular system is advertised for and when the door is thus closed against all competition but for the particular system the Board has seen fit to adopt. It is lawful to invite competition in this manner, and it is equally lawful in passing upon bids to have regard to the relative value of the thing bid for, and the rejection of the system for which the bid is the lowest is not necessarily erroneous. But if there were two systems of the same kind submitted, it would be the duty of the Board to select the lower bidder therefor. The Attorney-General on the relation, etc. v. The City of Detroit and others, 26 Mich., 263.—Dillon, Municipal Corporations, (3d ed.) 468.

By sec. 3988, Rev. Stat., the Board of education is vested with discretionary power to determine what system of heating and ventilating shall be used in the public schools under its charge, and the Board may exercise this discretion before the advetisement for bids is published or after the bids are opened. The case of Ross v. The Board of Education, 42 Ohio St., 374, is not in conflict with this decision. But after the Board has finally adopted a system and is proceeding to award the contract, the doctrine of Ross v. The Board of Education applies, and the lowest responsible bidder for the system thus adopted, if there be more than one bidder for such system, who has the lawful power to perform his undertaking, has the absolute legal right to have the contract awarded to him, unless the Board in the exercise of its discretion rejects all of the bids.

It is stated by counsel that there are eleven thousand pupils attending the public schools of this city, and their health, comfort and education are, in a measure at least, committed to the Board of education, and it is eminently proper that the Board should have and employ the broadest discretion authorized by law to bring into competition before it the various systems for heating and ventilating now in use. In this case it has pursued the course best calculated to enable it to discharge its duties intelligently and faithfully, and consequently for the best interest of tax-payers, pupils and teachers and without injury to the bidders.

Whether the Board in the exercise of its discretion selected the best system, all things considered, the court does not undertake to determine. The discretionary power to make the selection and award the contract is vested by law in the Board and not in the court, and when the power is exercised by the Board lawfully and in good faith, its decision is final and conclusive and is not the subject of judicial investigation. Hulbert v. Mason, 29 Ohio St., 562.

And the court in the absence of a charge of fraud made in the pleadings, or proof thereof on the hearing, will presume that the Board acted in good faith in all that it did. Injunction dissolved.

181 **EVIDENCE.**

[Hamilton Common Pleas, 1888.]

ELLEN SPERRY ET AL. V. JOHN F TEBBS, GUARDIAN.

1. The general rule is that identity of persons may be proved by the concurrence of several characteristics. The tendency of the courts is to release parties from the onus of proving identity, it being generally more easily disproved than established.
2. But in this case the facts being exceptional—showing the defendant at greater disadvantage than plaintiffs in procuring testimony, the ordinary rule—that plaintiffs must sustain their case by a preponderance of evidence—will prevail.
3. From identity of names identity of persons may be presumed when the name is not common, and this presumption is strengthened by the fact that the surnames and given names are identical.
4. The declarations of a deceased testator concerning his personal history and family are admissible for the purpose of establishing identity.
5. The standard for comparison of handwriting must be proved by some one who had seen the party write or sign the paper.

SHRODER, J.

This cause was submitted to the court without the intervention of a jury.

It was an action for the possession of real estate brought by Ellen Sperry and others, children of Joseph P. Cloud, of Harrison, who died in 1872.

The defendant is John F. Tebbs, guardian of Martha Griffith Cloud, the widow of Joseph P. Cloud. She is an imbecile and has been such since a number of years prior to the decease of Joseph P. Cloud.

Both parties claim title under said Joseph P. Cloud.

It appears that in 1839, Joseph P. Cloud came to Lawrenceburg and took employment as a yard hand in what was then known as Craft's Distillery. In 1843 he married Martha Griffith, and shortly thereafter removed to Harrison where he went into buisness as a distiller, and continued in that business until 1861, operating a flour mill in the meantime. After 1861 he went into the manufacture of furniture and was engaged in that business until a few years before his death. At his death he left a large estate consisting of real and personal property. He had no children by his marriage and was not known to have any children. When his will was probated, it disclosed that he had bequeathed for the maintenance of his widow, who was an imbecile, the sum of $27,000, and had devised and bequeathed the residue of his property as follows, "to my children William and Ellen."

The executor, from the time he undertook the administration of his trust until 1877, for a period of five years, prosecuted diligently an inquiry for these persons whom he had named in his will, "William and Ellen," and whom he had therein acknowledged to be his children.

Failing to discover anybody by that name, proceedings were instituted in the probate court for the disposition of this real estate. The result was a decree whereby the real estate was conveyed to this defendant as guardian of the imbecile widow.

In 1886 these plaintiffs appeared in the probate court of this county by petition in which they sought to have these proceedings set aside as having been taken without jurisdiction in the probate court. The pro-

bate court upon a hearing had refused to grant the relief prayed for in the petition.

These claimants then instituted proceedings in error in this court; and this court since the trial of this action has by Judge Matthews reversed the order of the probate court.

In the case at bar, the defendant has denied that the plaintiffs are the children of this Joseph P. Cloud; has pleaded a general denial of any right to possession of this property and has introduced as evidence this decree of 1877 and order of 1886, of the probate court which at the time of this trial had not been decided in the error proceedings.

Whatever might be the effect of the proceedings before Judge Matthews, he has decided that the probate court had no jurisdiction and that the decree of the probate court in 1877 was void for want of jurisdiction. In this case, involving the same transaction between the same parties, I shall follow his opinion without any further question or investigation.

That disposes of the defense presented by the decree and order of the probate court.

It leaves then for decision the question of fact: are these plaintiffs the children of Joseph P. Cloud, of Harrison, the testator?

It has been held in Mullery v. Hamilton, 71 Ga., 720, citing and quoting from Habbach's Evidence of Succession (48 Law Library, ch 6) "that identity of persons may be proved by the concurrence of several characteristics. The tendency of courts is to relieve parties from the onus proving idenitity, it being generally more easily disproved than established."

I apprehend that this case requires an exception to be made to this rule. The plaintiffs may be said to be at this disadvantage: They are called upon to prove the identity of their father, who, as will appear in the history of the case, abandoned them almost fifty years ago, when they were yet young, one of them at the time about five or six years old, and the other only one or two years old; they had heard no word of or from him, whose whereabouts was a mystery, and who himself had almost every motive that can influence a man to keep his past record in the depths of secrecy. On the other hand defendant is a guardian; and the only person who has a direct interest in the matter is his ward, light of whose mind has gone out. He is at as great a disadvantage in respect to knowledge as are the plaintiffs; and the reason that lies at the foundation of the rule laid down in the Georgia case and in Habback's Evidence of Successions, not existing in this case, the rule itself is not applicable.

The rule of decision ought to be, that the plaintiffs must sustain their case by a preponderance of the evidence.

Now, there were a number of questions presented to the court on the admissibility of evidence, which, when the jury was withdrawn, the court was called upon to consider on its review of the whole case upon all the oral evidence and upon the depositions.

The identity of these children of Joseph P. Cloud is sought to be proved by the fact that there was a Joseph Cloud, who in 1828 or 1829 at Harrisburg marred a woman by the name of Mary Ann Stevenson, by whom he had two children, the one married William and the other married Ellen.

Testimony has been offered of the history of this Cloud of Harrisburg. This testimony has been criticised as unreliable and insufficient upon the ground that the witnesses narrate transactions which are said

to have taken place half a century ago—occurrences as to which they could at the time have had little apprehension, being then children.

We have some details, for instance, as to the occupations of the Cloud of Harrisburg, and of his son William; as to where they resided when in Philadelphia; as to the years he left and returned to Philadelphia.

The witnesses in the case are Anna Updegraf, niece of Mrs. Cloud of Harrisburg, age 74; Mary A. Brady, age 65; Paul Wunder, age 71; Eleanor Clark, a niece, age 73; Frances W. Servine, a grand-niece, age 52; John C. Craig, age 74; John Sortinell, age 70; Hannah A. Marshall, age 59; W. F. Sonks, age 57; the youngest of them 52 years old and the oldest 74. A majority of them are women.

They are old people who remember well the transactions of remote periods while they fail to remember recent occurrences.

These witnesses are entitled to the credit of remembering what took place in their early days.

Another circumstance is to be borne in mind that what they testified to are matters of domestic interest; for instance, the marriage of this Harrisburg Cloud, the birth of his children, the removals of his family—things which to a girl in her teens are of great interest, and apt to be impressed so upon her mind that they will likely be remembered in her later days.

I have no hesitancy in saying that on a subject of domestic interest an old lady's testimony is more reliable than an old man's, and in matters of business interest an old man's testimony is more reliable than that of an old lady We shall consider the evidence in that light.

Evidence has been offered as to the personal appearance of the Harrisburg Cloud to compare it with that of the Cloud of Harrison.

The testimony is that of Anna Updegraf, age 74, who was in her teens at the marriage of the Harrisburg Cloud. She describes that man as he then appeared to her. We must remember the difficulty of recalling the features of some of our intimate friends after the lapse of a period of time, and we must bear in mind that this testimony is sought to be introduced for the purpose of comparing the appearance of Cloud when at Harrisburg with the appearance of Cloud when at Harrison in his later days. This evidence is entirely too unreliable in a case of this nature and therefore all evidence upon this point is rejected.

The handwriting of Joseph P. Cloud, of Harrison, in the shape of promissory notes, made in the course of his business, deeds executed by him, signatures affixed to them—have been offered; also the family record in an old Bible claimed to have come from the family of the Harrisburg Cloud. It was sought by comparing the hand writing of these documents—the family record and the notes and deeds—to show such a resemblance between them as to constitute sufficient proof of identity between the writers.

At the trial there was a great deal of discussion as to what writings were admissible when introduced for the sole purpose of using them as a standard with which to compare some other writing in order to prove identity of persons by means of a resemblance of the signatures.

Bell v. Brewster, 44 Ohio St., 690, was cited as bearing upon this point.

The Supreme Court cited in Calkins v. The State, 14 Ohio St., 222-228, that the standard writing must be shown by positive and direct testimony.

In subsequent cases the court held that it must be proved beyond a reasonable doubt. (Bragg v. Colwell, 19 Ohio St., 407, 412; Pavey v Pavey, 30 Ohio St., 600.)

In Bragg v. Colwell, *supra* it was said that it must be proved beyond a reasonable doubt.

Judge Ranney, who was of counsel in the case, stated in his brief, when it was to the interest of his cause to argue the other way, that the decision in Calkins v. State, *supra*, means that it must be proved by some one who had seen the party write the paper offered as the standard for comparison.

A reference to the report (14 Ohio St.) shows that Judge Ranney was a member of the court that decided Calkins v. State.

I take it then that in his brief he declares what the court meant by the expression positive and direct testimony of that sort. This conclusion leaves in this case as a standard of comparison only one deed—that of Mr. Cloud to Mr. Davidson dated ——— 1850.

It was sought to compare the family record in the Bible with the signature to this deed in order to show the identity between the Harrisburg Cloud and the Lawrenceburg Cloud; but by reason of the fact that the witness who testified to the custody of this Bible was a party in interest, a party plaintiff as against the guardian, that testimony was excluded. We therefore have the Bible without any evidence as to whence it came. It leaves the family record as a certain writing found in an attorney's office in the course of taking depositions, to which some witnesses had made reference. Therefore that much of the evidence by means of which it was sought to prove the identity of the two Clouds, by the resemblance of signatures, was excluded.

It leaves the writing in the case for whatever it might be worth to prove that the Cloud of Harrison might have written what is in this family record, so that there might be brought home to him some knowledge or some recollection of the facts therein recorded.

The next point is the identity of names which raises the presumption of identity of persons. Identity of names, when the name is not common, is evidence tending to prove identity of persons, and when both the surnames and given names are identical, it strengthens that presumption.

In this case the name is Joseph Cloud. Cloud is not a common name. It is less common in this part of the country than in eastern Pennsylvania.

The identity of name might be received as evidence of the fact that the Cloud who lived in Harrison with the given name of Joseph was at some time or other in eastern Pennsylvania and that if there was a Joseph Cloud in eastern Pennsylvania, it is evidence tending to prove the identity of the two men. If the time at which a Cloud first appeared at Lawrenceburg is close to the disappearance of a Cloud from Philadelphia, that circumstances will also strengthen the inference of identity. Evidence has been offered tending to prove such identity, such a coincidence, and such a consistency between the histories of the two Clouds, the one of Harrisburg and the one of Lawrenceburg and Harrison, as afford the court sufficient proof that they are one and the same man.

In the case of the Queen v. Castro, the Tichborne case, the Lord Chief Justice in charging the jury said that they would have to form an estimate of the knowledge and recollection of the defendant of the events in the life of Tichborne in coming to a conclusion as to their identity.

He further said that there cannot be a better test of identity than his recollections—that is, Castro's—recollections of Tichborne's life. He further instructed the jury that,—"If you are acquainted with what has passed through the mind of a man, and another man were to come forward and say, 'I am that man,' you have only to ask him as to the events of the other mans' life, those at least which must have remained impressed upon his mind and upon his memory, and which therefore, if he be the man, he must of necessity retain, to enable him to demonstrate that he is the man that he says he is, or enable you to pronounce that he is not. If his memory is not the memory of the man he seeks to personate, if he does not know the events of that man's life, he cannot be the individual."

We may say that if he knows what would likely be buried in the thoughts of the man he is claimed to be, it would be evidence of his being that man.

That brings us down to the history of the Clouds.

The evidence discloses that in 1828 a Joseph Cloud married Mary Ann Stevenson, of Harrisburg. Within a year thereafter they moved to Philadelphia, where a son whom they named William was born. Shortly after that, Cloud and his wife left Philadelphia. Evidence has been offered for the purpose of showing that they went to Florida, but that evidence is hearsay, and is ruled out. That leaves the case showing that they left Philadelphia for parts unknown. Sometime afterwards they returned to Philadelphia, and within a week or two after their return to Philadelphia another child was born, whom they called Ellen. And a short time after the birth of this child Cloud abandoned his family and never returned again.

Paul Wunder testifies that William was born in 1830, and Ellen was born in 1836 or 1837. Mary A. Brady testifies that in 1832 she saw William; he was two years old. That brings William's birth in 1830. She says that Ellen was born two or three weeks after the return of the Cloud's to Philadelphia the second time.

Henry B. Carr, in his deposition says, that in 1847 he saw Ellen and William; that Ellen was then ten years old. That brings her birth in 1837. He further says that William was five or six years older than Ellen.

Eleanor Clark testifies that Ellen was born in 1836 or 1837.

Francis Servin says Ellen was born in 1836; William 1832.

The weight of the testimony is that William was born some where in 1830 or 1831, and that Ellen was born in 1836 or 1837. That the Cloud family left Philadelphia the first time when William was a child a year or so old. That fixes their departure in 1832. They returned to Philadelphia a short time before Ellen was born, and that fixes their return to Philadelphia as of some time in 1836.

Cloud left Philadelphia when Ellen was a child a year or so old, and that places his departure in 1837 or 1838. In 1839 a Cloud appeared in Lawrenceburg; in 1842 he married Martha Griffith. He engaged in Lawrenceburg in a distillery business as a hand. In Harrison he went into the distillery business. The Cloud in Philadelphia when he had returned the second time was in the liquor business. The evidence is that Cloud of Harrison confided to several intimate friends that he had two or three children; to some of them that he had a son and a daughter; to one of them that they were not born in wedlock. He never mentioned his daughter by name. He spoke of his son as William and of his being a butcher. Four of the witnesses testified that William had been a

butcher all his life-time. Cloud of Harrison never mentioned his wife. The witness Walker testified that he and his brother knew Cloud because they all had come—the Walkers and Cloud—from eastern Pennsylvania. Cloud also declared that before coming to Lawrenceburg he had been at Pittsburg and Johnstown.

What Cloud did say and what he did not say is material in this connection. He did speak of two children, and he did speak of a son William who was a butcher; and of having two children, one of whom was a son and one a daughter. He said that they were in the east. He spoke of his son by name but not so of his daughter.

It seems to me that the affections of a man who abandoned two children, one of them a boy five years old and another a girl yet a child in arms would be attached to the boy a great deal more strongly than to the girl. He would for that reason think more of the boy and speak of him more in after days than of the girl. He did not mention his wife, having a powerful motive for bridling his tongue, for if he did not feel the disgrace of deserting a wife he certainly would have the fear of the law before his eyes in having committed the crime of bigamy.

If he did not speak much of what he did in Philadelphia, he yet did mention that he had just come from Pittsburg and Johnstown, and that will account for what he had done, if he was the same man, between the departure from Philadelphia and his arrival at Lawrenceburg.

Now, there is another fact about which the court will take judicial knowledge. There is no evidence whether in 1832 he moved from Philadelphia with his family, nor whence he came from in 1836, when he returned to Philadelphia. But the Cloud of Harrison did make the statement to his friends that he had been in Flordia and had a sawmill there; had been driven away by the Indians in the Seminole War; that he bore a great grudge against General Scott for not protecting his property.

The history of the country, of which we can take judical knowledge is, that in 1832 the Goverment made a treaty with the Seminole chiefs for the removal of their tribes from Florida. It turned out, however, that the tribes repudiated the treaty of their chiefs and that a great deal of discontent ensued. General Scott was placed in command of that district in 1832 or 1833 to enforce the treaty, and in December, 1835 the first blow was struck by the Indians, and that in the spring of 1836, the war was flagrant and continued so for seven years.

We have Cloud, of Philadelphia, evidently a restless spirit, leaving in 1832, about the time when it is most likely that he would have gone there. Again we find him returning about a week or two before the birth of Ellen, sometime in 1836 or 1837.

We are told of Cloud, the testator, informing some persons in Harrison and Cincinnati in later days that he was in Flordia in the Seminole War and that the Indians drove him away destroying his property.

Placing these facts together as far as the human evidence can bring to our mind facts of fifty years ago, I am persuaded by them that this Cloud of Harrison was the same Cloud of Philadelphia, who went with his family to Flordia in 1832 when that country was likely to be opened to settlers, and who in 1836-7 was driven away by the Indians just at the time the Indians began their depredations.

There is another point, the comparison of the writing in the family record with that of the deed.

Experts in handwriting have been before the court. They do not profess to say much. The court is authorized to make his own comparison.

By comparing the signature of J. P. Cloud to this deed, with the family record "Eleanor Cloud, daughter of Joseph and Mary Ann Cloud was born October 16, 1836," the "J" in Joseph is like the "J" in J. P. Cloud, of the deed.

The word Cloud, of "Mary Ann Cloud," bears very close resemblance to the word Cloud in J. P. Cloud in the deed. The general character of both handwritings, both being written in a sort of running hand, (while all the other entries upon this family record being in the artificial style which might be adopted for the purpose of inscribing a record in a Bible), this writing in the Bible as of 1836, and that of the deed in 1850 being in a plain business hand are similar. I am satisfied that this entry on this family record was written by the man who signed himself J. P. Cloud to this deed. This conclusion is that J. P. Cloud of the deed, the testator, knew of the following event in the life of the Harrisburg Cloud, that Eleanor Cloud, a daughter was born in 1836, an event proved by the testimony of a number of witnesses.

In addition to these circumstances is the material fact that the testator in his last sickness acknowledged that he had two children by the names of William and Ellen; and further in his last will not only furnished solemn proof of his recollection of them as children, but also of his obligation to them as their father in making provision for them out of his estate; and it seem to be a corroboration of what has already been said, that he should name them in the will in their natural order,—the oldest first—by mentioning first William and then Ellen—thus also evincing the knowledge on his part of the order in which they were born.

The case has been one of unusual interest. The circumstances are such that I have felt it more than an ordinary duty to examine the evidence closely since the judgment would affect the property rights of an imbecile. I have struggled with my sympathies in coming to my conclusions. It is not for us to say whether it is right or wrong that this man should dispose of his property as he did. That is not our concern, and was his right.

Disregarding all such considerations and taking the case upon the evidence, I am satisfied that these plaintiffs are the children and grandchildren of Joseph P. Cloud, testator, and that they are entitled to a judgment.

Milton Sater, J. A. Jordan, attorneys for plaintiff.

P. W. Francis and Judson Harmon, for defendant.

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323 **POLICE COURT-LIQUOR LAWS.**

†J. F. MOLITER v. STATE OF OHIO.

[Cuyahoga Common Pleas.]

1. R. S. sec. 1802, authorizing the mayor to appoint a person to act as police judge in the temporary absence of the duly elected judge, is not in contravention of constitution, art 4, secs. 10, 13. For such temporary absence is not a vacancy. The regular judge is still the judge, and these provisions, therefore, do not apply.

†This judgment was affirmed by the circuit court; opinion 3 Circ. Dec., 445. The circuit court was affirmed by the Supreme Court without report. See note to circuit decisions.

2. R. S. sec. 1804, permitting warrants for arrest to be issued by the clerk of the police court, is not unconstitutional, for the act is a ministerial and not a judicial one.

3. Where the accused in a police court demands a jury and requests to be present when it is drawn, and was present, but on the trial seven persons not in the venire in his case, but in another case at the drawing of which he was not present, were called on his jury, and his challenge to them overruled, his conviction will not be set aside for this irregularity, no prejudice or want of impartiality in the jury being shown.

4 It is not error prejudicial to the accused to charge that reasonable doubt is not a mere captious or ingenious or artificial doubt, but such a doubt as would guide in business affairs or ordinary pursuits. If anything, the charge is too favorable to the accused.

5. Section 11 of the Dow liquor law (85 L., 260), makes the keeping open on Sunday, of the doors of a place where liquor is sold a distinct offense from selling on Sunday, and it is proper to charge that if the doors were open or any place of ingress available to the general public, the accused must be convicted unless he proved by a clear preponderance of evidence that it was for another purpose than selling liquors.

6. Such legislation is valid under the police power, even though it may be an injury to innocent property.

ERROR to Police Court of the city of Cleveland.

NOBLE, J.

The plaintiff in error, the keeper of a place where intoxicating liquors are sold, was arrested for a violation of certain provisions of the Dow law, the imformation charging him with keeping his place open on Sunday, with intent to sell. The errors insisted on at the hearing are:

First—That the police court had no jurisdiction over the plaintiff in error, for the reason that the person occupying the bench of that court and acting as police judge, C. W. Coates, Esq., was not the duly elected judge, nor a justice of the peace, mayor, or person duly elected to exercise judicial power and functions. That sec. 1802 of the Rev. Stat., which authorizes the mayor to select a person to act and perform the functions of a police judge in the temporary absence of the regularly elected police judge, is unconstitutional and void, inasmuch as it delegates to the mayor a power which belongs to the people, to-wit, the power of electing their own judges; and that the only power of appointment that can be exercised in a judicial office is that of the governor for a judicial vacancy.

Second—That the issuing of the warrant for his arrest was illegal, in that it was not issued by the acting judge of the police court, but was issued by the clerk of the court, and that sec. 1804 of the Rev. Stat. as amended, which authorizes the issuing of a warrant by the clerk, is unconstitutional.

Third—That he demanded a jury trial and requested to be present when the jury was drawn; that he was present when it was drawn; that a venire was issued for twenty persons then drawn; that on September 20th, when his case was called for trial, and the jury was impaneled, the clerk called the name of seven persons not in the venire of his case, but in one issued in the case of State v. Annie Minzer, theretofore tried in that court; and at the drawing of which he was not present; that the seven so called took their places in the jury-box, and, with five others called from the venire in his case, composed the jury that tried him; that he challenged the above seven men, on the ground that neither he nor his attorneys were present when said seven jurors' names were drawn from

the wheel, and said venire issued; that his challenge was overruled by the court, and the seven men allowed to sit as jurors.

Fourth—That the judge of the police court erred in his charge to the jury in the following respects:

(a) After first instructing the jury that if the state failed to prove any or all of certain propositions theretofore given the jury, beyond a reasonable doubt, it was their duty to return a verdict of not guilty, he went on to say: "The term 'reasonable doubt' is not a mere captious or ingenious or artificial doubt, but such doubt as would guide them in their business affairs or in the ordinary pursuits of life."

(b) He further charged the jury that if the doors of the saloon were opened on the Sunday in question, or any place of ingress thereto available to the general public, with the knowledge and consent of the defendant, the same being a place where, upon other days of the week, distilled, malt and vinous intoxicating liquors were sold, they would be justified in returning a verdict against the defendant, unless he should, by a clear preponderance of the evidence, show that it was done for some other purpose, and not for the purpose of engaging in the sale of distilled, malt and vinous intoxicating liquors.

We will consider these several alleged errors in the order named: First—Was there want of jurisdiction over the defendant by reason of the fact that the bench of the police court was occupied by C. W. Coates, Esq., in the absence of the regularly elected police judge. There is no question made but that Acting Judge Coates was a reputable member of the bar residing in this city, regularly appointed by the mayor, and took the oath required by law, and that Judge Kelly was absent. The appointment is made by virtue of sec 1802, Rev. Stat., which provides that during the absence, inability or disability of the police judge, the mayor may hold the court or may select for the purpose a reputable member of the bar, or a justice of the peace, residing within the city, who shall have the same jurisdiction and power conferred upon police judges. It is claimed that this section is unconstitutional, for the reason that it delegates to the mayor a power which belongs to the people, that power being especially given to the people in section 10, article 4, of the constitution. The constitution vests judicial power in the supreme, circuit, and common pleas courts, and justices of the peace, and in section 10, article 4, provides that all other judges shall be elected. Section 13 provides that in case the office of any judge shall become vacant before the expiration of the regular term for which he was elected the vacancy shall be filled by appointment by the governor. Does sec. 1802 just read violate these provisions? If it does, it is unconstitutional. In the first place it will be well to bear in mind the well-known rule, that an act of the legislative body passed in due form is not to be held invalid by reason of its being supposed to be in contravention of the provisions of the constitution in a merely doubtful case; and in that case the doubt should turn the scales in favor of the validity of the law. It is only when a legislative enactment is clearly unwarranted by, or repugnant to the constituiton that it will be so declared.

Now, how do sections 10 and 13 of the constitution restrict the power of the legislature? In the first place it requires the regular judge to be elected. In the second place if the office becomes vacant it is to be filled by appointment by the governor. Section 1802 is covered by neither of these. It simply provides for cases arising out of the absence, inability, or disability of the judge. The office does not become vacant,

and the section 1802 does not attempt to provide for any such thing. All that it seeks to accomplish is to provide against the temporary blocking of business of the court arising out of the absence, inabilty, or disability of the judge. The regularly elected incumbent of the office still holds it, and can at any time take up its duties. I am inclined to believe that these requirements of the constitution have no application to casual temporary absences and appointments, but rather to permanent vacancies. The case in our Supreme Court, reported in the case of Ex Parte Strang, 21 Ohio St., 610, where the point was raised, throws very little light upon it, as the court merely held that the acts of an acting police judge, under a law similar to the one in question, could not be questioned collaterally. The court therefore holds that the police judge did not err in overruling defendant's objection to the jurisdiction of the court.

The second error complained of is, that the warrant should have been signed by the acting judge instead of the clerk of the court, and that sec. 1804 of the Rev. Stat., as amended, which authorizes the issuing of a warrant by the clerk, is unconstitutional, in that it clothes the clerk with judicial powers in calling upon him to decide whether an offense has been committed. Section 1804, as amended, gives power to the clerk of the police court when an affidavit is filed with him charging any person with the commission of an offense to issue a warrant under the seal of the court to arrest the accused. It is claimed that this violates the fourth amendment to the constitution of the United States, and also section 4, article one, of the constitution of the state of Ohio. They are substantially alike, and guarantee security to the people in their persons, houses, papers, and effects against unwarrantable searches and seizures, and against the issuing of warrants but upon probable cause, supported by oath or affirmation. The solution of this depends entirely upon the question whether the issuing of a warrant is a ministerial or judicial act. If it is ministerial, this act of the legislature is not in conflict with these provisions of the constitution. If it is judicial, it is. The question is by no means new and it hardly seems necessary to spend much time on it. In Cooley's Blackstone, second revised edition, page 253, note, the issuing of a warrant is placed among the ministerial acts of a justice of the peace. Our own Supreme Court in the 22nd Ohio State; page 317, distinctly holds that the issuing of a warrant of arrest in a civil case is a ministerial act. And in May, 1878, in the case of O'Brien v. City of Cleveland, the district court (Judge Tibbals delivering the opinion, reported in 4 Dec. Re., 189,) held that a warrant from the police court could be issued by the clerk, and this ruling was made long before the passage of the act in question, and when the law provided that justices, the mayor and police judge might issue such process, if an affidavit were filed with such magistrate, charging an offense and he had reasonable ground to believe that the offense charged had been committed. The act is clearly ministerial, and this court so holds, and affirms the action of the police court, in overruling the motion to quash the information and all proceedings thereunder, on this account.

The third cause of complaint is a more serious one and about which the court is in much doubt. This is an extremely technical objection, and in times past courts have been inclined to go very far in sustaining technical objections in criminal cases, but there is much less reason now than formerly, when comparatively trivial offenses were punished with the greatest severity. There is no claim made here of want of competency of the jurors challenged or that any fraud was practiced, or that any

great and flagrant wrong was committed in the drawing of the seven men, that would, or did work a great injury to the rights of the petitioner in error. The bill of exceptions shows merely that the defendant challenged seven men (naming them) as not having been properly summoned as jurors in his case, but were summoned as jurors in the case of the State v. Annie Minzer theretofore tried in that court; and that neither said defendant nor his attorney was present when the names of said seven jurors were drawn from the wheel and said venire issued. There is no complaint as to the other five men, they having been properly drawn and summoned in defendant's case. The provisions of the city ordinance touching jurors in the police court, and bearing upon the question in this matter, provide in section 733 that whenever the clerk shall be directed by the court to cause to be summoned any number of persons as jurors in said court, he shall at once, in the presence of the judge and an officer of the force not lower in rank than lieutenant, and in the presence of such persons interested in the cause for which the jury is drawn as may desire to be present, proceed to turn the wheel until the pieces of paper therein are thoroughly mixed, and he shall then, in the presence of said persons, draw from said wheel one by one the number of names specified in the order, etc. Section 735 provides that jurors selected, drawn, and summoned as aforesaid, for the trial of any cause in said court, may be required to serve as jurors in the trial of any other cause during the term at which they are summoned, but no person shall be required to serve as a juror more than six days in any one year.

Now, what is the object of these provisions? Evidently to secure a due and uniform system of drawing jurors, and to prevent fraud or favoritism in their selection. These ordinances, with others, like our similar state statutes, establish a mode for these ends, and are directory to those whose duty it is to select, draw, and summon. By this system the police court is supplied with jurors. Now, does the challenge to these seven men allege anything more than a defective working of the drawing machinery prescribed in the city ordinance, without, in its terms, imputing a perversion thereof to the injury of the accused, or fraud or misconduct prejudicing him, or any misconduct save and excepting a neglect to strictly observe the prescribed regulations? Authorities are numerous that when this is all there is to it, a conviction will not be disturbed. The Court of Appeals of New York has held that way repeatedly, the last case I find reported being that of Cox v. The People 80 N. Y., 511, affirming a previous case decided by that court, reported in 85 N. Y., 125. The Supreme Court of Louisiana, in the case of the The State v. Watkins Smith, reported in 33 La. An., 1414, holds that alleged irregularities in the drawing of jurors cannot invalidate the panel, unless some fraud has been practised or some great wrong committed that would work a great and irreparable injury. This doctrine is also laid down in Wharton's Crim. Law. Our own Supreme Court has spoken very plainly on the subject. In the case of Huling v. The State, reported in the 17th Ohio St,, 583, the prisoner set up as error certain irregularties in selecting and drawing the grand jury by whom the indictment was found, but did not allege any want of competency in the jurors themselves. After first holding that the objection should have been made by challenge instead of by plea, the court says, on page 589:

"It is important to the defendant that he should not be subjected to a trial except upon an indictment found by a jury composed of good and lawful men; but, provided they are such, it is a matter of no interest to

him in what manner they are selected and drawn. The manner of selecting and drawing jurors concerns the public rather than the parties in a case, provided only that irregularities therein do not result in placing in the jury-box jurors who are disqualified. It seems to us, therefore," the court says, "that the provisions of law for the selection, distribution and drawing of jurors should be regarded as directory, rather than as mandatory and indispensable."

And, even if error is committed, it does not necessarily follow that a judgment will be reversed in cases of this character. In the case of Scovern v. The State, 6 Ohio St., 288, our Supreme Court says, that in order to justify the reversal of a judgment on error the record must affirmatively show not only that error has intervened, but that it was to the prejudice of the person seeking to take advantage of it. In the 42nd Ohio St., 154, 158, in the case of McHugh v. The State after affirming the above doctrine, the court says: "Ordinarily if a statutory provision or principle of the common law applicable to the case is disregarded on the trial of a person charged with crime when its enforcement would tend to preserve his right to an impartial jury, he is to be regarded as prejudiced in his substantial rights, as he is always to be deemed so prejudiced, when he is deprived of a constitutional guaranty designed for the protection of the person; still, if there has been a failure to observe a mere matter of form, when the officer or other person charged with the duty acted in good faith, the court must determine whether the failure to observe such form tended in any way to deprive the accused of a fair trial; and whether, looking to the statutory provisions for criminal procedure, it was intended that such a failure should necessarily require a reversal of the judgment.

The accused is entitled to an impartial jury. There is nothing to show that the jury which tried him was otherwise, or that his rights were in any manner prejudiced. He simply was not present when seven names of the men composing the jury were drawn, and these seven men were then in attendance upon the court, and regularly drawn in another case, and serving the time required by the ordinance. Following the spirit of the above decisions, I hold that the mere fact that the plaintiff in error was not present when the names of these seven men were drawn from the wheel, in the absence of fraud, misconduct, or material injury to his rights, is not such an irregularity as will be sufficient to reverse the decision of the police court.

We come now to the errors claimed to have been made in the charge of the court. (a) As to the definition by the court of "reasonable doubt." The expression is one which has received definition at the hands of perhaps every criminal court in the land, and is now substantially conceded, that proof is to be deemed beyond a "reasonable doubt," when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction, on which they would act in their own most important concerns or affairs of life. There must be some reason for the doubt; not a doubt arising from a mere caprice or groundless conjecture, but such a one as would cause a reasonable, prudent, considerate man to hesitate and pause before acting in the grave and more important affairs of life. It will be observed that the charge on this point was much more liberal than this, and more favorable to the defendant. It was one of which he cannot complain, and an error, if it was one, of which he cannot take advantage. It was an error of which the state might complain, but not the plaintiff in error. (b) The next error is the one upon which the

counsel for plaintiff in error relied, and argued with much ingenuity and skill, and it is one in which there is much force, if it is necessary under the law, to allege any intent at all. The section under which the proceedings were instituted is known as an amendment to section 11 of an act entitled "An act providing against the evils resulting from the traffic in intoxicating liquors, passed May 14, 1887," and is found in vol. 85, page 260, of the Session Laws. It is as follows: "That the sale of intoxicating liquors, whether distilled, malt or vinous, on the first day of the week, commonly called Sunday, except by a regular druggist, on the written prescription, of a regular practicing physician, for medical purposes only, is hereby declared to be unlawful, and all places where such intoxicating liquors are, on other days sold or exposed for sale, shall on that day be closed, and whoever makes any such sale or allows any such place to be open, or remain open on that day, shall be fined in any sum not exceeding $100, and not less than $25, and be imprisoned in the county jail or city prison not less than ten days, and not exceeding thirty days. In regular hotels and eating houses, the word 'place' herein used shall be held to mean the room or part of room where such liquors are usually sold or exposed for sale, and the keeping of such room or part of room securely closed shall be held, as to such hotels and eating houses, as a closing of the place within the meaning of this act."

The rest of the section it is not necessary to read, as it does not bear upon the question here. In the opinion of the court there are two distinct offenses provided for in this section. One is the sale of intoxicating liquors on Sunday except on prescription of a physician by a regular druggist, and the other the keeping open on that day of all places where such liquors are sold on other days, and this construction is fully borne out by the latter part of the section which I have just read, which provides that in regular hotels and eating houses, that part which is devoted to sales of such liquors shall be securely closed. It is not a mere attempt at the first, but a distinct and separate offense. We think there can be but very little doubt as to the correctness of this construction. But it is claimed that when a charge is made under that part of the section requiring such places to be closed (as in the case at bar), the intent must also be charged, to-wit, the intent to sell such liquors; on the ground that such place may be open with a lawful intent, and there is no presumption from the mere fact that it was open, that it was so open with an unlawful intent. That otherwise, that part of the act would be unconstitutional, as interfering with a man's constitutional right in acquiring and possessing property, and also in violation of the fourteenth amendment of the constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law. It is too late at this day to attack the constitutionality of laws regulating the sale of intoxicating liquors. It is a settled law that a state has a right to prohibit and regulate the manufacture and sale of intoxicating liquors within its borders, and that statutes passed in furtherance thereof are not in contravention of constitutional provisions. And this on the ground that it is a police power that cannot be taken away. All rights and privileges arising from contracts are subject to regulation for the protection of public health, public morals, and public safety. Rights of property are subject to such reasonable restraints and regulations as are established by the legislature under the constitution. The police power of a state is a power which may be exercised to secure, promote, and protect the welfare, comfort, peace, and good morals of the people. And in regulating

and prohibiting the sale af intoxicating liquors, the use of all means to accomplish this end not expressly forbidden by the constitutional restrictions rests in the discretion of the legislature, and, while the state may not deprive the citizen of his property without compensation, it may regulate the use of that property. As aptly said by the Supreme Court of Massachusetts, in the case of Commonwealth v. Alger, reported in 7 Cush., 84, and cited with approval by the Court of Appeals of Kentucky about a year ago. "Rights of property, like all other social and convential rights, are held subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature may constitutionally think necessary and expedient.

This class of legislation is valid, although to more effectually accomplish its purpose it does incidental injury to innocent property or business, or even wholly destroys it. It is for the legislature to say, in its discretion, whether such injury or destruction or prohibition sufficiently tends to further the exercise of the police power, and, to justify a court in declaring such legislation unconstitutional, it must appear that the purpose of the legislature was not to accomplish a purpose within its police power, but solely to injure, destroy, or prohibit property or business. The most recent decisions upon this subject, and fully sustaining the above doctrine, are Powell v. Commonwealth, 127 U. S. Rep., 678; Mugler v. Kansas, 123 U. S., 623; Pearson v. International Distilling Co., 32 Ia., 348; Butler v. Chambers, 36 Minn., 69; Stickron v. Commonwealth, Ct., of App. of Ky., reported in 36 Alb. Law Jour., 503–4; and State v. Kane, 15 R. I., 395.

Our own Supreme Court has also travelled a great way in the same road. In a case which went up from the police court of this city, that of Bergman v. The City, and reported in 39 Ohio St., 651, the constitutionality of what is known as the "Waiter Girl Ordinance" was brought in question. This ordinance made it unlawful for any keeper or proprietor of any saloon or restaurant or room or place wherein ale, beer, porter, wine or liquor were sold, to employ any girl or woman, other than the wife of the proprietor, either with or without pay in waiting on customers, or furnishing ale, beer, porter, wine or liquor, or any article of any kind, or to perform any service whatsoever. And it made it unlawful for any woman other than the proprietor's wife, to render service of any description whatsoever, either with or without pay, as waiter, bartender, or in any other capacity. This was claimed unconstitutional, because it violated the constitutional provisions already referred to and others, both of the federal and state constitutions. The Supreme Court did not think so, and held that the power to regulate such places where intoxicating liquors are sold is expressly delegated to incorporated cities and villages, and that the ordinance was within that power, and violated no constitutional provision. Now, who will say that, if it violates no constitutional provision to prohibit by legislation the employment of certain persons in a place where intoxicating liquor is sold, although that employment may be for a perfectly lawful purpose, that it does violate when it prescribes the time when such place shall not be open. If it is not necessary in the one case to charge and prove the intent and purpose of the employment, it is not necessary in the other to charge and prove the intent and purpose of the opening. The offense is complete in the one case when a person is employed, and in the other when the place is

opened. If one is constitutional the other is. The power of the legislature in each case is based on the same principle.

And there is a good reason for the omission by the legistature of any provision as to the intent to sell, as a substantial part of the crime. Ever since the passage of the laws prohibiting the sale of "intoxicating liquors to be drank on the premises" the great difficulty has always been to "prove that the liquor sold was intoxicating." It was always attempted to make it out something that was similar but not intoxicating, and not just the kind of liquor or the strength charged to have been sold. This provision was intended to cover just that difficulty.

And there is still another reason. If all persons engaged in the business of selling intoxicating liquors are allowed to keep their doors open, human experience teaches us that many will use the permission as a blind and keep open for selling such liquor, and that it would be exceedingly difficult to detect the deception. Considerations of this kind always have influence in prohibitory legislation. Following the spirit of the decisions I have cited, and for the reasons given, the court holds that in order to make the offense charged in this proceeding complete, it is necessary to charge an intent to sell. What, then, becomes of that part of the information charging intent, and of the portions of the charge of the court under consideration? The part of the information charging intent is now surplusage, and the charge of the court in regard to it, if it is an error, is one favorable to the accused, and under all established principles, one which he cannot take advantage of. My attention has been called to the opinion of Judge Robertson of the common pleas court of Hamilton county, Munzebrock v. State, ante 277, whose ruling was different upon this point. While having the greatest respect for the opinion of that court, I am constrained to believe that the line of the decisions referred to must have been overlooked by the learned judge. The report of his decision is very meager, no authorities are referred to, and I am led in this instance to a different conclusion.

This disposes of all the grounds of error complained of, I believe, and the petition in error, therefore, is dismissed.

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## 360 APPOINTMENT OF GUARDIAN.

[Superior Court of Cincinnati, Special Term, 1888.]

† ISAAC M. JORDAN, GUARDIAN, v. CHARLES T. DICKSON ET AL.

1. In the hearing of an application for the appointment of a guardian of an imbecile before the probate court, notice to the alleged imbecile is not jurisdictional, and a failure to give notice is an irregularity which can be complained of only in a direct proceeding to set aside the order of appointment in the probate court or to reverse it on error.
2. If notice is jurisdictional, presence of the alleged imbecile at the hearing, with actual notice thereof, in the absence of any express statutory requirement is sufficient to confer jurisdiction.

TAFT, J.

Plaintiff as guardian of Harry R. Dickson, an imbecile, seeks to recover from Charles Dickson, Harry's brother, real and personal estate in Chicago and this city which he claims was obtained by the defendant

†See also, Jordan v. Dickson, ante 147.

through fraud and undue influence from his ward who has always been of unsound mind. He sets out at length in his petition the various transactions by which the transfer to Charles was effected and asks this court to set aside such of them as may be necessary to restore Harry's title. Charles answers, admitting many of the transactions, but denying that there was any fraud or undue influence in them; denying that Harry was or is an imbecile, and denying that plaintiff is Harry's duly appointed guardian. By way of cross-petition, he avers Harry's soundness of mind, and asks that he may be made a party to quiet his title. Harry, being made a party, answered plaintiff's demurrer to that answer was sustained. His amended answer, filed by leave against objection of plaintiff, denies that he was an imbecile either at the times of the transactions set forth by plaintiff, or at the time of the appointment, and that he is an imbecile when filing his answer. He denies that undue influence or fraud was exercised by his brother as charged, and disclaims any interest in the property described in the petition. He alleges that he had no notice of the application for plaintiff's appointment as his guardian, and that it is therefore void. He asks that plaintiff's petition be dismissed. By way of cross-petition he avers that plaintiff is interfering with his rights, and prays that the appointment may be set aside and that the plaintiff may be perpetually enjoined from acting thereunder.

The first issue to be considered is the right of plaintiff to bring this action for Harry Dickson's benefit. If he is Harry's guardian, then the statute makes it his duty to bring it, if what he alleges is true. It is claimed that plaintiff is not Harry's guardian, because no notice was given to Harry of the application for the appointment. The questions presented under this issue are:

1st—Was notice to Harry jurisdictional?

2d—If jurisdictional, was it given or waived?

First—In sustaining the demurrer to Harry's original answer, I held that his admission that plaintiff was duly appointed his guardian July 30, 1886, and was still acting as such, concluded him from appearing by separate pleading in this court to contest plaintiff's right to represent him. Jordan v. Dickison, ante 147. In the course of that holding and in answer to an argument of counsel, I expressed an opinion that although the statute made no provision for it, notice ought to be given. I relied on the following cases: Cox v. Cox & Anderson, 2 Dec. Re., 20; Wheeler v. State, 34 O. S., 394; Chase v. Hatheway, 14 Mass., 222; Eddy v. People, 15 Ill., 336; In re Dozier, 4 Baxter, 81; In re Whitenack, Re. 20; 3 N. J., Eq., 252; In re Russell, 1 Barb. Ch., 38; In re Tracy, 1 Paige, 580. These were cases in which the finding of lunacy was attacked in a direct proceeding on error. Admitting the correctness of the views already expressed, the question still remains to be answered, what is the effect of a want of notice? Does it only affect the regularity of the proceedings, or does it render them void? The Massachusetts and Alabama cases hold that a want of notice renders the appointment void and subject to collateral attack. Conkey v. Kingman, 24 Pick., 115; Smith v. Burlingame, 4 Mason, 121; McCurry v. Hooper, 12 Ala., 823. There is, however, a decision by our own Supreme Court, which prevents me from following these authorities. The case of Shroyer v. Richmond & Staley, 16 O. S., 455, contains a very full and clear opinion by Judge Scott, on the power and jurisdiction of the probate courts of this state in the appointment of guardians which has often since been cited with approval by the Supreme Court. He says: "Proceedings for the ap-

pointment of guardians, are not *inter partes*, or adversary in their character. They are properly proceeding *in rem;* they are instituted, ordinarily, by application made on behalf of the ward, and for his benefit; and the order of appointment binds all the world. In such a proceeding, plenary and exclusive jurisdiction of the subject-matter has been conferred by statute on the probate court, and that jurisdiction attaches whenever application is duly made to the court for its exercise in a given case. It is not essential to the jurisdiction, that the ward be actually before the court, unless, by reason of his right to choose a guardian, or for other cause, the statute so require. And when jurisdiction has attached, the court has full power to hear and determine all questions which arise in the case, whether in regard to the status of the ward or otherwise; and no irregularity in the proceedings, or mistake of law in the decision of the questions arising in the case, will render the appointment void or subject it to impeachment collaterally. All questions arising in the case, become *res adjudicatae*, by the final order of appointment, which binds all the world until set aside or reversed by a direct proceeding for that purpose. The facts thus ascertained, and the sufficiency of the evidence upon which they were found by the proper court, can not be collaterally inquired into and determined, *de novo*, upon parol testimony. Where the record shows nothing to the contrary, it will be conclusively presumed in collateral inquiries, that the final order was made upon a proper showing, by the proofs, of all the facts necessary to authorize it." If the probate court can acquire jurisdiction in a case without bringing the alleged imbecile before it, as this language shows, it follows that notice, though the regularity of the proceedings requires it, is not jurisdictional. Want of it, is therefore only an irregularity which can not be complained of in a collateral proceeding. So in Bethea v. McLennon, 1 Iredell, 526, it was held that although the alleged lunatic is entitled to be present at the inquisition, the denial of this right is only an irregularity, and that after confirmation by the court such inquisition must be regarded with the respect due such solemn proceedings until it be reversed or superseded. See also Dutcher v. Hill, 29 Mo., 274; Rogers v. Walker, 6 Pa. St., 372. Nor is such a conclusion without analogous precedent in this state. The appointment of a guardian it appears is a proceeding *in rem*. A failure of notice to an interested party in such a proceeding, though notice be required, does not avoid it unless the statute makes notice jurisdictional. In the case of Sheldon v. Newton, 3 Ohio St., 494, 500, the proceeding of an administrator to sell real estate to pay debts of a decedent was held to be a proceeding *in rem*. The statute provided that the heir should be made a party defendant. The action was by the heir in ejectment to recover land from the purchaser on the ground that he had not been made a party to the proceeding. Judge Ranney in deciding the case said that he was strongly of the opinion that such an omission went only to the regularity of the proceeding, and not to the jurisdiction of the court; and that its final order could only be set aside or reversed on error, and could not be treated as a nullity in a collateral action. The conclusion I have reached upon this point does not conflict with my former holding, that the appointment is conclusive evidence of the ward's incapacity to do anything which is made by law the duty of the guardian. That holding was chiefly based on the inconvenience and absurdity of establishing the relation of guardian and ward by a proceeding in a court of record having plenary and exclusive jurisdiction for the purpose, and then allowing that relation

and the necessary incapacity of the ward to be overthrown by collateral attack. Notice should be given, and if not given the appointment may be set aside in a direct proceeding. This will sufficiently protect the ward from abuse by a proceeding which in the theory of the law and generally in fact is for his benefit. Failure of notice in such a proceeding does not work the injury which it does in a civil action *inter partes*, because, as was said in Dutcher v. Hill, 29 Mo., 274, "The proceedings under the law concerning insane persons are not like a final judgment which is unalterable after the end of the term at which it was rendered. They are *in fieri*, like a cause pending; and irregularities in them or defects of the record, may be obviated at any time so long as the lunatic is under the control of the guardian appointed for him. It is conpetent for the court to discharge the lunatic at any time from the care and custody of his guardian as soon as it is informed of their regularity of the proceeding." These remarks are as applicable to our Ohio procedure as to that of Missouri.

It is claimed by counsel that though the decision in Shroyer v. Richmond & Staley, cited above, be given the full effect I have indicated. the proceeding at bar is not a collateral, but a direct proceeding to attack the appointment, in which a want of notice may, therefore, be made the ground for attack. The Revised Statutes provide for an appeal to the common pleas court from an appointment, and for proceedings on error to the same court, the first within twenty days from the appointment and the second within two years. By sec. 6316, Rev. Stat., whenever the probate judge shall be satisfied that letters of guardianship have been improperly issued, he shall terminate the guardianship, and I presume that a refusal by the probate court to set aside the appointment for irregularity in making it, may be carried up on error because such refusal is a final order within the statutory definition, i. e.: "An order in a special proceeding affecting a substantial right of a person interested." By sec. 587, Rev. Stat., the exclusive power to appoint and remove guardians except as otherwise provided by statute, is vested in the probate court. The above are the only provisions of the statute for the removal of guardians or the setting aside of their appointment. It follows, therefore, that the general equitable jurisdiction of this court gives it no right in a direct proceeding to set aside an order of the probate court appointing a guardian, where that court had jurisdiction. Courts of equity originally had full control over the creation and termination of the fiduciary relation of committee and insane ward and still retain it in many states, but in Ohio under the present law they have none. Counsel relies on Messenger v. Bliss, 35 O. S., 587, to show that a court of equity may remove a guardian in a direct proceeding. That was an action in equity by a ward to enjoin his guardian from interfering with his property where the guardian had been appointed under a statute expressly providing that the appointment should only be *prima facie* evidence of the imbecility for which the appointment was made. This necessarily made the appointment only *prima facie* evidence in any court of the guardian's right to act as such. Thus the exclusive jurisdiction of the probate court to remove the guardian was taken away, by taking from its finding the conclusive character which it ordinarily has. The power to give relief to unwilling wards who were able to overcome the *prima facie* right of the guardian to act as such, was to that extent again found in the general jurisdiction of a court of equity. This is the ground upon which the case of Messenger v. Bliss expressly

rests, and the proviso of the *prima facie* effect of the appointment of guardians for imbeciles having now been repealed, it can not be an authority at bar.

Second—But if I am wrong and notice is jurisdictional, was notice given? The original record shows no notice to Harry. Counsel claims that it is therefore void, and that no proof of notice can be made. He contends that the probate court has such special and limited jurisdiction that its record must recite the facts which give it jurisdiction both of the subject-matter and of the person, or be of no effect. The question of the jurisdiction of the probate court and of the presumptions to be indulged in its favor has been a much mooted one, but I think that the tendency of our Ohio cases and of modern authorities generally is to give to its judicial acts, when clearly within the jurisdiction as to subject-matter, the same intendment as to jurisdiction of the person as is extended to courts of so called general jurisdiction. When the record is silent as to the jurisdiction over the person, it will be presumed over the person, it will be presumed in a collateral proceeding. Scobey v. Gano, 35 O. S., 550; Maxsom v. Sawyer, 12 O. R., 195; Kimball v. Fisk, 39 N. H., 119; Davis v. Hudson, 29 Minn, 28; Johnson v. Beazley, 65 Mo., 250; Bostwick v. Skinner, 80 Ill., 147; Propst's Ex'rs v. Meadows, 13 Ill., 157; Hutts v. Hutts, 62 Ind., 214. In this state, a judgment of a court of general jurisdiction which is silent as to jurisdiction over the person may be collaterally attacked by showing that no such jurisdiction was acquired. The presumption in its favor is a rebuttable one. Of course the same rule would apply to judgments of the probate court.

This brings us then to a discussion of the question, was sufficient notice given to Harry of the application of plaintiff to be appointed his guardian? The only competent evidence in the case upon this point shows that Harry Dickson, went to the probate court in company with Nathan Jordan and requested the judge to appoint plaintiff his guardian; that the judge proceeded then to examine him for the purpose of determining his mental condition; that he directed two physicians to make further examination, which was done, and upon their reports and the Judge's examination, the appointment was made. There is no doubt that so far as Harry was able he consented to and requested the appointment.

In Lackey v. Lackey, 8 B. Monroe, 107, it was held that when a defendant in an inquisition of lunacy was brought into court, and the inquisition was held in open court, there was no necessity for either notice or writ. The court said that the chancellor was the protector of persons of unsound mind, and it would be presumed that he had done his duty. This case is cited with apparent approval by Judge Okey in Cox v. Cox, 2 Dec. Re., 20.

The Statute of Indiana, as to the appointment of guardians for the insane, provides that upon the proper written statement being filed, the court shall cause the alleged lunatic to be produced in court, and an issue to be made by the clerk of the court, denying the facts set forth in the statement, which shall be tried by a jury. In Nyce v. Hamilton, 90 Ind., 419, the petitioner appeared with the alleged lunatic made his application, an answer was filed, the issue tried and a verdict returned by the jury without leaving their seats. The case was carried on error to the Supreme Court, and a reversal asked on the ground that no notice of the proceeding had been served on the subject of investigation. The

court held that the statutory mode of acquiring jurisdiction was sufficient and that if the alleged lunatic was present in the court, it was immaterial whether he was produced by order of court, by the applicant or by voluntary appearance. Judge Elliott in refusing a rehearing, says: "Even if a notice had been necessary, as counsel insist, it could have done nothing more than secure the production of the person whose mental condition was the subject of investigation in open court, and this right was fully accorded him, as well as all rights consequent upon it." In Missouri the mode of acquiring jurisdiction is by production of the alleged lunatic in court, and there as in Indiana the finding of insanity by the court is conclusive upon the ward until reversed in a direct proceeding.

By secs. 703 and 739 of our statutes, when it is sought to have a person committed to an asylum for insanity, a warrant issues to the sheriff or some other suitable person commanding him to bring the person before the court on a day in such warrant named, not more than five days after the application. Subpoenas immediately issue to the witnesses named in the application and to a physician designated by the court to appear on the return day of the warrant and if any person disputes the insanity subpoenas shall issue for such as he demands. On the return day, unless the court adjourns it, the hearing is had. Now it is clear from these provisions that the notice intended is merely a production in court. The warrant need not be served, and probably is not generally served until the day of or the day before the return. It certainly can not be claimed that the probate court does not obtain jurisdiction to commit a person to Longview because he is arrested and tried on the same day. The question of adjournment is left to the protecting discretion of the court. Judge Okey, in Cox v. Cox & Anderson, 2 Dec. Re., 20, seems to think that the legislature intended the same sort of notice and hearing in applications for guardians as in inquests, and it is very apparent from a reading of that opinion that the judge deemed the presence of the alleged lunatic in court sufficient notice.

All the cases, with but two exceptions, cited by counsel as opposed to this view, are cases where the alleged lunatic had no notice, and was not present either in court or at the inquisition, as in Eddy v. People, 15 Ill., 386; Chase v. Hatheway, 14 Mass., 222. Or they are cases where the statute required a certain fixed notice in writing to be served, as in Shumway v. Shumway, 2 Vt., 339; Morton v. Sims, 64 Ga., 298; North v. Joslin, 59 Mich., 624. The cases *in re* Vanauken, 10 N. J. Eq., 186 and *in re* Whitenack, 2 Green's Ch., N. J., 252, were hearings before the Chancellor as to the granting of a traverse of an inquisition found. It was decided in the latter case that the appearance, without notice, of the alleged lunatic before the inquisition to attempt a defense, did not aid the defect of want of notice. In the former it was held that a notice from Saturday to Tuesday was not enough. These were decided without a statute, and support the plaintiff's claim. I am of the opinion, however, that the effect of the statute of Ohio in inquests of lunacy as to notice, together with the authorities cited, require me to hold that a presence in court of the subject of investigation for guardianship is sufficient. If I am right in this, it is not material that no formal order was made by the court for Harry's production in court under sec. 6406, Rev. Stat., which provides that the probate judge

shall order notice to be given for such length of time as he shall deem reasonable, in any proceeding where notice is required by law, and the manner of giving it is not fixed by statute. When he was present in court and that gave jurisdiction, further action by the court to cause his presence would be superfluous and unnecessary. As was said in the Indiana case, formal action could have secured him no greater rights.

These conclusions make it unnecessary for me to consider whether Harry's conduct in requesting the appointment was a waiver of a want of notice as was held in Kimball v. Fisk, 39 N. H., 119, where the circumstances were similar, or whether the *nunc pro tunc* finding of the probate court as to notice can be used at bar to supplement the original record of the appointment. The order of appointment having been made in the exercise of jurisdiction, I am concluded in this action from inquiring into Harry Dickson's capacity at the time of appointment or now. His answer and cross-petition will be dismissed.

Isaac M. Jordan, for plaintiff.

Thos. McDougall, for H. R. Dickson.

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## 364 TAXATION.

[Hamilton Common Pleas.]

### † JULIUS DEXTER ET AL. v. HAMILTON CO. (COMS.)

In counties within the purview of Revised Statutes, secs. 1005, 1006, 1007, 1008:

(a.) The limitation fixed by the Revised Statutes, secs. 1005, subd. 5, and 1006, is intended to apply only to the current expenses of the county as ordinarily understood. The authority conferred by the several statutes to issue county bonds for the costs of improvements, evidence the legislative intent to withdraw such costs from the category of current expenditures of the county; the tax levy for sinking funds created for the redemption of such outstanding bonds is not subject to the above said limitations.

(b.) In the county of Hamilton the levy of 1888 for the road and bridge fund is without authority of law.

(c.) Where an act provides for the construction of a road and the levy of a tax for the same, it does not thereby make such levy additional to that authorized by Revised Statutes, sec. 1006, unless by the express language of the act, or by the nature of the improvement or the amount of its costs or like circumstances, which disclose its extraordinary character, the legislative intent is shown to make the levy additional; the furnishing of highways for the public being one of the functions of the state ordinarily discharged by the agency of counties.

(d.) The provisions of acts of March 21, 1888, and March 30, 1888 (85 O. L., 419, 491), requiring the levy authorized by each to be made in June, 1888, are directory. The delay to make such levies until September, 1888, does not invalidate them.

SHRODER, J.

The plaintiffs claim that at the end of the last week in March, 1888, the cash on hand in the county treasury, together with the taxes then to be collected in June, 1888, applicable to the payment of the lawful expenses of the county, amounted to $492,351.06; that the county commissioners and board of control have made levies of taxes and directed

*See State v. Hagerty, 3 Circ. Dec., 161; where this case is overruled in part, and approved in part.

the auditor to place on the tax duplicate for 1888, amounting in the aggregate to $580,500, which two sums are in the total $1,072,851.06; that said total levy, inasmuch as it is above the maximum limit allowed by law (that is $1,000,000), to be levied and placed on the duplicate for the twenty months following the first Monday in April, 1888, is illegal and void; that a levy for road and bridge fund has been certified to the auditor, and that this levy is illegal and void; that levy of taxes for the following funds have been certified to the auditor: North Bend road, Bridgetown road, Pleasant Ridge, and Columbia road, Lester road, Loveland and Madeira road, western avenue and Browne street bridge, and that these levies are unauthorized by law; that the western avenue and Browne street bridge levies were required by statute to have been made on or before the first Monday in June, 1888, but were not made until September 25, 1888, and are therefore void; that the auditor threatens to place these unlawful levies upon the tax duplicate, and that to prevent the same an injunction is prayed for.

Upon the hearing, the several levies which composed the aggregate of $580,500.00 to be levied, as well as the several funds which made up the aggregate of funds in the treasury, 492, 351.06, were offered in evidence, and it was claimed by the defendants that the plaintiffs are in error as to several of these items when they include them as among those intended by law to be within the one-million-dollar limit, and that if not thus included, the aggregate of the remaining levies, which defendants contended, are alone properly and lawfully within this limit, do not amount to one million dollars. The defendants also claimed that levies for the road and bridge fund, as well as for Western avenue and Browne street bridge, are lawful; that the other road funds are intended by law to be levied for in addition to the funds included within the one-million-dollar limitation.

Held. (1.) That by force of the Rev. Stat., secs. 1005, 1006, 1007 and 1008, the auditor is required to present to the county commissioners and board of control on or before the first Monday of April each year an approximate estimate of money needed for all lawful expenses of the county and its several departments, offices and institutions, for twenty months following the first Monday of April, but no greater sum than $1,000,000 shall be estimated; and that this shall embrace the moneys in the treasury, the taxes collectible in June following, and the probable proceeds of that year's taxes; that the commissioners are not authorized to determine a total levy for the purposes mentioned higher than the auditor's estimate, and consequently within $1,000,000; that the estimate and levy are intended to cover current expenses, as distinguished from the payments of the bond liabilities of the county, and to include such items as would constitute the legitimate expenditures of the county as may occur during the year.

(2.) That the several acts creating sinking funds, and interest and sinking funds, the act of May 41, 885 (82 O. L., 253), and the act of April 16, 1888 (85 O. L., 549, the latter, passed subsequent to the first Monday of April), being intended to make provisions for the future payments of outstanding bonds, do not contemplate the payment of debts and the accumulation of moneys for that purpose as among the current monthly or annual expenses of the county. These several items are therefore not to be included as under the limitations of Rev. Stat., secs. 1005 and 1006.

(3.) That the effect of secs. 2 and 4, of act of May 4, 1885 (82 O. L., 253), and of the act of March 21, 1887 (84 O. L., 224, *et seq*), was to

deprive the county commissioners of their authority which they had before March 21, 1887, to levy a tax for the road and bridge fund, and to limit their power to the bridge fund only; which whole bridge fund, until one-third shall be demanded by the city, is subject to the appropriation of the county commissioners; that the whole of this fund comes properly within the designation of county expenses. The levy for road and bridge fund is therefore illegal and void.

(4.) That the following acts authorizing levying of taxes: For Bridgetown road, (March 21, 1888, 85 Ohio L., 425); for Pleasant Ridge and Columbia road (85 Ohio L., 475); for North Bend road (85 Ohio L., 496); for Lester road (85 Ohio L., 513), do not give authority to make levies in addition to that conferred by Rev. Stat., sec. 1,006; that these acts respectively were necessary in order to give these commissioners authority to improve these roads, and the power they conferred to levy taxes was but an auxiliary provision in order to make the authority effectual; the act related to a subject which would ordinarily be included within the item of current expenses of the county, and not to one of such extraordinary character as would compel the conclusion that the levy therefor was to be extra and outside the limit of general taxation under secs. 1005 and 1006. (U. S. v. County of Macon, 99 U. S. S. C., 590; Ralls County v. U. S., 105 U. S., S. C., 735), nor did they, like other acts, expressly provide that the authority to levy was an additional one to that already given to the commissioners.

(5.) That the following acts: For Western avenue, March 21, 1888; for Browne street bridge, March 30, 1888; for Loveland and Madison road, April 11, 1888 (85 O. L., 419, 491, 519), each expressly provides that the commissioners' authority to levy the tax is to be "in addition to the taxes now by law authorized to be levied." The plain meaning of these words would exclude these funds from the one-million-dollars limitation.

(6.) That the provisions in the acts for Western avenue and Browne street bridge that the levy is to be made on or before the first Monday of June, 1888, or at the June session, are directory; that the authority by each given to the board of public affairs to proceed to make expenses and contracts in anticipation of the levy and collection of the taxes makes the commissioners' duty mandatory; the delay until September on the part of the commissioners cannot defeat the law. (State v. Comrs., 35 Ohio St., 458-466; State v. Harris, 17 Ohio St., 608; People v. Supervisors, 8 N. Y., 317-320; 21 Pick., 64; 3 Mass., 230; 58 Ala., 562; 14 Cal., 155; 4 Nev., 789; 34 Pa. St., 513; Cooley on Taxation (5th ed.), 280, 289, 290; Burroughs on Taxation, 249.)

(7.) That according to these conclusions the evidence shows that as to the funds which are to be included in the one million-dollars-limit, there was on the first Monday of April, 1888, in the treasury, together with the June taxes, $381,965.64; that, excluding the unlawful levy for road and bridge fund, and including the levy for the four roads mentioned, the levy in question amounted to $538,351, the total being $920, 306.64.

The unlawful portion of the levy being distinct and separable, an injunction ought to issue against the auditor restraining him from placing that portion upon the duplicate, and it is so ordered.

I. J. Miller, for plaintiff.

Davidson & Hertenstein, county solicitors.

C. B. Matthews, Coppock & Gallagher, and Gorman & Thompson and Price Jones, contra.

## PROHIBITORY ORDINANCE. 367

(Licking Common Pleas.)

McConnell v. St. Louisville (Hamlet.)

McConnell keeps a saloon in the place, and the people there have been trying for a long time to get rid of it. They secured a prohibitory ordinance and were about to enforce it, when McConnell secured an injunction from Judge Irvine restraining the officials from enforcing the law. The attorneys for the hamlet demurred to the petition and injunction, taking the ground that McConnell should have waited until he had been arrested before he had anything done. Judge Buckingham decided the point well taken, and sustained the demurrer and dismissed the petition of McConnell at his own costs.—(Editorial.)

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## CORPORATION. 368

[Superior Court of Cincinnati, Special Term.]

Alfred M. Allen v. J. De Lagerberger et al.

1. The voting power incident to ownership of shares of stock in a corporation is not lost when they become the property of the corporation, but their withdrawal from the number of voting shares is in effect an equal distribution of their voting power among the individual shareholders.
2. Therefore, when the directors of a corporation pledge its own stock to secure a loan, they may, if it will secure additional consideration for the benefit of the corporation in the contract of loan, confer on the pledgee the right to vote the stock.

Taft, J.

This is an action brought by a stockholder of the C., H. & D. R. R. Co. to enjoin certain persons, in whose names are registered 650 shares in that company, from voting the same at the annual election, which is now at hand, on the ground that they are not the owners of those shares; that the company itself is the owner and that such shares are therefore, by law, withdrawn from the number to be voted. H. B. Morehead, another stockholder, on his own application has been made a party defendant, and files his cross-petition, in which he avers that the company is the owner of 4,182 shares of its own stock; that 650 shares are those mentioned in the petition, and that the remaining 3,532 shares have been pledged as collateral to secure a debt of the company owing to Post & Martin; that shortly prior to the closing of its transfer books, this stock was transferred into the name of Post & Martin by the procurement of the directors of the corporation, for the purpose of enabling them to vote this company stock, held in trust for the benefit of all the stockholders, in favor of themselves. Post & Martin are made parties; also the directors of the company; also the inspectors of election appointed by the common pleas court. The company was made a party originally.

The facts appear to be, that these 3,532 shares were part of the holdings of Ives & Co. before that firm's failure, which the company was obliged to take up in order to retire certain shares of fraudulently

issued preferred stock; that in so doing the company was assisted largely by Julius Dexter and associates; that a final arrangement was made by which all debts incurred in these various transactions and all the collateral taken up were to be united. To accomplish this the company gave its note for $832,000.00 payable to Julius Dexter, and secured by all the collateral given by Ives & Co. on the various debts and taken up by the company. The note was sold to Post & Martin, after being endorsed by Julius Dexter. In the collateral delivered were the shares in controversy. The company is the owner and pledgor of this stock, and Post & Martin, and persons with whom they have divided the loan, are the pledgees. Post & Martin hold the legal title by transfer. Post & Martin have not been served. They are non-residents. The railroad company has appeared by counsel, and resists the application for an injunction.

Three objections are urged. First, it is said that there is no ground stated in the cross-petition for equitable relief, and McHenry v. Jewett, 90 N. Y., is cited to sustain the proposition. The effect of that authority certainly seems to support the claim of counsel for the railroad company, but the case of Hafer v. C., H. & D. R. R. Co., 9 Dec. Re., 470, is directly opposed to the New York authority. The Hafer case was where a stockholder sought to enjoin the voting of stock by a trustee, in whose name the stock appeared, on the ground that the contract by which he was given the power to cast the votes of a large number of stockholders was illegal and void. The relief was granted, the stockholder seeking it being no party of the contract, on the ground that he was entitled to a fair election, and might have the preventive aid of a court of equity to secure it. The Hafer decision is, of course, the law of this court.

The next objection is that a similar suit has been brought in New York by another stockholder, on behalf of himself and all objecting stockholders, to enjoin the voting of this stock, against the same defendants, and in that suit a restraining order originally granted has been dissolved, and that that suit is binding on this plaintiff. The only proof of such a suit is a copy of the record, but not certified either by the clerk of the court or by affidavit. The ground of the decision does not appear. *Non constat* that following the case of McHenry v. Jewett, 90 N. Y., no equity was found in the complaint, and the injunction was dissolved. If so, the law of this state, as laid down in the Hafer case, grants what there was denied, and a mere failure to secure a certain form of interlocutory remedy could hardly be pleaded as *res adjudicata* in this state, which is the home of the corporation and where the remedy is allowed.

It is further objected that Post & Martin are non-residents, and have not been served, and that this court has no jurisdiction to grant an order of injunction against them. The cross-petitioner's rights are with regard to an Ohio corporation which is within the jurisdiction of this court, and where his right as a stockholder is to be injuriously affected by the manner of conducting an election in that corporation. The jurisdiction of a court of equity to protect him from such injury by process against the company who is the common trustee of all the stockholders to secure fairness in the election, would seem to be clear. If the rights of Post & Martin are thereby affected, they can enter their appearance herein. Meantime the objection that there is, ordinarily, to granting an injunction on an *ex parte* hearing has been obviated by the very full presentation of their side of the case by counsel for the railroad

company, who joined with Post & Martin in resisting the injunction in New York.

This brings us to the main question of the case: Can the pledgee of stock in a corporation, of which the corporation itself is pledgor, vote that stock at the election? It is a well established principle that stock held by the corporation cannot be voted. It is said that it can not be voted because while held by the company it is cancelled stock. I think not. Such is not the language of the authorities. The corporation may cancel it if it chooses, but it may also hold it and receive the dividends on it which go to the equal benefit of all the stockholders, and when that is done it is stock. The power to vote is a power incident to ownership of stock, but to allow the directors acting for the corporation to vote the stock would not be distributing the power equally among the stockholders, as the dividends are distributed equally amongst them by payment into the treasury of the company, and it would be entrusting to persons in power the means of keeping themselves in power. As is said in *Ex parte* Holmes, 5 Cowen, 426, "if there could be a vote at all upon the stock, one would suppose it must be by each stockholder of the company in proportion to his interest in it." Now, it would of course be inconvenient that fractions of shares should be voted. Exactly the same result is accomplished by suppressing the vote on the stock altogether, because by so doing each voting share is given an exactly equal additional weight. This view of the reason for the suppression of the voting power of company stock is supported by the case of Farwell v. Houghton Copper Works, 8 Fed. Rep., 66, where it was held that the company treasurer might vote shares bought by the company for non-payment of assessments at a meeting where all the stock was represented and all consented to the vote. In effect, this was to hold that each shareholder, by his consent had given the treasurer a proxy to vote so much of the voting power as he would otherwise have had by the not voting of the shares at all. When the company comes to sell the stock, it sells not only the dividend earning power of the stock, but also its voting power, and the proceeds being paid into the treasury, the consideration for the power to control by voting is equally distributed among the stockholders. If then the suppression of the voting power of company stock is only a means of distributing the voting power equally among its stockholders, and if in selling the stock the company gets consideration for the voting power of the stock there seems to be no reason why, whenever the company can get into a money form the equivalent of that power, to vote so that it does not enure equally to the benefit of all stockholders, the power to vote should not revive in the hands of the person paying consideration for it, subject to the limitation that the naked power to vote the stock could not be sold to a person having no beneficial interest therein. Ordinarily, as between the pledgor and pledgee of stock, the right to vote is in the pledgor; but if, by the contract of pledge, the pledgee is given the power to vote it, the contract will be perfectly legal and will be enforced. Now, it is quite clear that under some circumstances a more advantageous contract of loan and pledge might be obtained by the company if the pledgee should be given the power to control the affairs of the company to the extent of voting the stock pledged. Such advantage, whether evidenced by lower interest or easier conditions, would necessarily benefit each stockholder equally. No reason suggests itself therefore why by such agreement in a contract of pledge by a company the power to vote the stock may not

be given to the pledgee. It is no objection that the contract is made by the directors, for exactly the same objection might be made to a sale of the stock. If in either case the directors do not get full value for the stock so sold or pledged with the power to vote, abating anything to secure the votes of the vendees or pledgees in their own behalf, this would be a breach of trust, and the contract would be set aside.

The case of Brewster v. Hartley, 37 California, 15, is opposed to the view I have taken, proceeding on the theory that as between pledgor and pledgee the pledgor has the right to vote, and as the company has no right to vote, it can not, by agreement as pledgor, confer upon the pledgee the right which it does not itself enjoy. I have attempted to show that the inability of the company to vote was in fact an equal distribution of the power to vote among the shareholders, and that therefore there is no reason why, under a pledge by express contract, the right to vote may not be transferred, if transferred for a consideration enuring to the benefit of all the stockholders. The case of Vail v. Hamilton, 85 N. Y., 443, is a case where the question was as to whether two-thirds of the stockholders, as required by statute, had assented to a mortgage, and the court held that while stock held by the company need not be counted to make up the whole, of which two-thirds was required, that stock pledged by the company must be so counted on the ground that the pledgee had the right to assent and to vote. This is directly opposed to the California case, and for the reasons given, I must follow this case.

It remains only to consider, therefore, whether, by the contract or pledge in this case, the pledgee was to vote. The title is transferred to the pledgee, and although that is not conclusive evidence of the intention, there are terms in the contract of pledge which leave little doubt in my mind that the intention of the parties was, that the pledgee should vote.

Collusion is charged in making the pledge by the directors with the pledgee, as to this voting. Julius Dexter, to whom the note was made, and who sold it to Post & Martin, denies the existence of any such arrangement. It may be that it was expected that the pledgees would vote for the present management, but if they gave full value for the collateral, with power to vote—and there is no showing to the contrary on the evidence—it is no ground for setting aside the contract. See State v. Smith, 48 Vt., 266, and Loomis v. C., H. & D. R. R. Co., If Post & Martin are not bound by any collusive agreement between them and the directors, secured by parting with rights or property of the company, to support the present board, their preference in the matter growing out of confidence in the present managers, even if known to those managers, at the time of the pledge, does not indicate fraud upon the rights of the stockholders. Their interest as pledgees in the welfare of the company is great enough, certainly, to warrant the inference that they will vote as seems to them to be for the interest of the company, because that is their own interest, and nothing more is required of stockholders.

For the reasons given, the motion for an injunction will be overruled. If I am mistaken in my view of the pledgees' rights, I am glad that my conclusion does not leave the cross-petitioner without a remedy, because the question of the legality of the vote of these shares, if the election depends upon them, may be tried, if the cross-petitioner protests against them at the election, in a *quo warranto* proceeding, in which a more deliberate and satisfactory consideration can be given to the question than

I have been able to give in the short time since the argument. On the other hand, the issuing of an injunction might leave the defendants without a remedy, except upon a bond, which, however, complete in theory, is clearly not satisfactory in fact in such a case.

An injunction will be also refused the plaintiffs, because no showing is made of the facts stated in the petition upon which action of the court can be invoked.

Mortimer Matthews, for plaintiff.

Judge Harmon and R. B. Bowler, for H. B. Morehead, the cross-petitioner.

Lawrence Maxwell, for the C., H. & D. R. R. Co.

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## INSOLVENT ESTATES. 370

[Superior Court of Cincinnati, General Term.]

CINCINNATI (CITY.) v. FRANK D. GOODHUE.

1. An assignee of a general assignment for the benefit of creditors under the insolvent laws of Ohio, does not, by mere acceptance of such assignment, become liable to payment under a lease which previous to such assignment belonged to his assignor, even if the leasehold is specifically mentioned in the assignment.
2. Such assignee has a right to decide whether the leasehold will benefit his estate, and has a reasonable time in which to elect, to accept or reject the same. Mere entry upon the premises to remove the goods of the assignor is not an election to take the same. If, however, the assignee enters the premises and uses the same for the benefit of the estate, this is an election to take the lease, and makes the assignee personally liable for the rent.

TAFT, J.

The Board of Trustees of the University of Cincinnati leased to Gibson, Webstein & Company a building known as 137 Main street, in this city, for the term of three years from April 1, 1886 at a rental of $2,000.00 a year in monthly installments of one hundred and sixty-six dollars and sixty-six cents. On the twenty-eighth day of May, 1886, Gibson, Webstein & Co., made an assignment to Frank D. Goodhue, for the benefit of creditors. Goodhue entered upon the premises, paid rent for two or three months, and then left the premises. This is an action for rent under the lease for the month of November, 1886, after he had ceased to occupy the building. At the trial, the court below directed the jury to return a verdict for the defendant. The case is here for our consideration on reservation of the plaintiff's motion for a new trial.

The preemptory instruction of the court to the jury, is claimed by counsel for the plaintiff to be erroneous on two grounds: 1st, because the acceptance of the general assignment, which was of all the personal property of the assignors, and so included the lease, conferred upon the assignee the estate, and created between him and the lessor, the plaintiff herein, that privity known as the privity of estate, which binds him to perform the covenant to pay rent.

2d, because, even if the first ground is not tenable, there was evidence tending to show an entry by the assignee upon the demised premises, and such conduct upon his part as to constitute a specific acceptance of the lease.

Entry is not necessary to bind the assignee of a lease by the covenants that run with the land. An accepted assignment creates privity of estate between the lessor and the lessee, and the liability to pay rent under the lease begins upon such acceptance.

Where several different kinds of property are conveyed in gross by one instrument, acceptance of any part of the property so conveyed is an acceptance of everything included in the transfer.

We presume that these two propositions cannot be disputed as correct general statements of the law. If they are to apply to the case of an assignment for the benefit of creditors, then the contention of counsel for his first ground must be sustained.

It was early held under the bankrupt law that an assignment in bankruptcy did not vest in the assignee a term of years, and that they were not bound to accept a lease, or agreement for a lease to which the bankrupt was entitled because, as Lord Kenyon said in Burdiloon v. Dalton, 1 Espinasse, 234, it might prove what was known in the civil law as a *damnosa hereiditas*, instead of profitable to their trust. This exception has been recognized in many cases. Hudson v. Stephenson, 1 Barn & Ald., 307; Copeland v. Stephens, 1 Barnewell & Alderson, 593; Broom v. Robinson, 3 Smith, 333n.; Turner v. Richardson, 7 East., 335; Wheeler v. Bramah, 3 Camp., 340; Ex parte Scott, 1 Rose, 12; Tuck v. Fyson, 6 Bingh., 321; Ex parte Fletcher, 1 Den & Chitty, 318; Ex parte Blandy, 1 Deac., 286; Ex parte Benecke, 1 Deac., 186; Ex parte Williams, 2 Deac., 330. The leading case is Copeland v. Stephens, where Lord Ellenborough explains the reason for the right in the assignee to elect to accept or reject the lease, as follows: "An assignment by commissioners of a bankrupt is the execution of a statutable power, given to them for a particular purpose, viz.: the payment of the bankrupt's debts. Nothing passes from them, for nothing was previously vested in them. Whatever passes, passes by force of the statute, and for the purpose of effecting the object of the statute. And therefore the assignees of a bankrupt are not bound to accept a term of years that belonged to the bankrupt, subject to the rent and covenants; for the object of the statute and of the assignment being the payment of the bankrupt's debts, and the assignees under the commission being trustees for that purpose; the acceptance of a term, which, instead of furnishing the means of such payment, would diminish the fund arising from other sources, can not be within the scope of their trust or duty. And in this respect such a term differs from the debts of the bankrupt and his unincumbered effects and chattels." We presume that an assignor for the benefit of creditors might, in his deed of assignment, provide that his assignee should have an election to accept or reject a term of years included therein as he should determine it to be, or not to be, for the benefit of creditors in whose behalf the deed is made; and it might be well argued that the beneficial interest towards the creditors, with which a general deed of assignment is made, would justify implying such a provision when not expressed to best carry out the object of the deed, just as in bankruptcy it is presumed to carry out the object of the law. It is upon this ground that the holding of Lord Tenterden can be justified in Carter v. Warne, 1 Moody & Malk, 479, where he decided that in respect of leases included in a voluntary deed for the benefit of creditors the assignee had the same right to elect or reject as an assignee in bankruptcy.

Carter v. Warne has been followed in this country in Pratt v. Levan & Snyder, I Miles Pa., 358; Journeay v. Bradley, 1 Hilton, 453, and Horvitz v. Davis, 16 Maryland, 313; 12 Bard. In the last case, speaking of a leasehold, the court say: "If it were supposed to be included only because the lessees made a general assignment of their property, the supposition was erroneous, for a lease is deemed property or not in such an assignment, at the election of the assignee, until he enters under it, or by some other act or omission to act determines his right to elect. Instead of being property, it may be a heavy incumbrance; or a debt instead of a benefit."

Lord Tenterden's holding in Carter v. Warne has not, however, been followed in England. Its correctness was doubted in How v. Kennet, 3 Adolph & Ellis, 659, and it was directly overruled in White v. Hunt, L. R. 6 Exch., 32, the court holding that the assignment being by the debtor, must be construed like any other assignment or deed transferring the estate. These three cases were of voluntary deeds for the benefit of creditors at common law, and their operation and effect were not limited by statute. Under the English insolvent debtor's act which permitted an imprisoned debtor to file a petition for his discharge, at the same time assigning all his property to the provisional assignee, a permanent officer of court appointed for the purpose, it was held that, because the statute provided that the whole estate of the insolvent should vest in the provisional assignee by virtue of the deed, the assignee was given no discretion to accept or reject a lease so transferred, and was liable on the covenants of lease by virtue of the debtor's assignment so long as it remained in him. Crofts v. Pick, 8 J. B. Mo., 384; Doe dem. Palmer v. Andrews, 4 Bingham, 348. In the last case two judges, Gaselee and Burroughs, based their decision on the fact that the statute, in terms, vested the lease and other property assigned in the provisional assignee without giving him an option to accept or reject. Clark, J., puts it on this ground, and also on the ground that the deed was the voluntary deed of the insolvent and passed his estate. This same court, however, in Lindsay v. Limbert, 12 Moore, 209, decided that the permanent assignees of an insolvent debtor appointed by the court, to whom the provisional assignee made an assignment, had the same right to accept or reject a lease as a *damnosa hereditas*, as an assignee in bankruptcy, in order to effect the object of the statute. Yet these assignees took by a deed from the provisonal assignee, in whom was the estate passed by deed from the insolvent, and the statute provided that such deed should vest in them the same rights as if by deed directly from the insolvent debtor. It is true they were permitted by statute to decline the appointment, but this gave them no more right than any assignee for the benefit of creditors at common law had to decline to accept the deed as a whole: 2 Platt on Leases, 455. Lindsay v. Limbert has never been overruled, and seems to show that a deed from the insolvent debtor to the assignee, if made under a statute passed for the benefit of creditors, to a voluntary assignee, will give that assignee the right to accept the general assignment and to "take to" or reject a leasehold therein included. It should be said that in the case of Bishop v. Bedford Charity, 1 Ellis & Ellis, 697; it is stated that the ground for the decision in Doe dem. Palmer v. Andrews was the second ground stated by Justice Park, namely, that the estate came by deed from the insolvent, but this can with difficulty be reconciled with the decision in Lindsay v. Limbert, as shown above.

This brings us, then, to the position of an assignee for the benefit of creditors under the insolvent laws of Ohio. He stands in a very different position from the assignee for the benefit of creditors at common law. He much more nearly resembles in his rights and duties the assignee in bankruptcy. Under our law, he represents not the rights of the assignor, but the rights of the creditors. He acquires by operation of law those rights, and not by virtue of the deed, because the assignor had no power to convey them. Thus he has the right to attack any conveyance in fraud of creditors, though such conveyance would be valid as against the assignor. In Blandy v. Benedict, 42 O. S., 295, an insolvent debtor, in his deed of assignment, sought to except from its operation "all existing liens which were not to be affected thereby." Judge McIlvaine said that the intent of the assignor was to secure certain mortgages the full amount of their liens to the extent that they were valid as against the assignor, and continued: "Can such purpose be accomplished by such means? We think not. Undoubtedly these mortgages were valid as against the assignor, but void as against his creditors. By the assignment, the rights of the creditors passed to the assignee as matter of law. The possession of the assignee was the possession of the creditors. The right of creditors to seize the property in the hands of the assignee did not exist, but the assignee was bound, in law, to administer the trust for their benefit. Every right which the creditors might have asserted against the property before the assignment, the assignee is bound to secure for their benefit after the assignment." We think that if an assignor could force upon his creditors the burden of a leasehold of a worth less than nothing it would defeat the object of the statute, which is to enable the assignee in every way best to preserve the rights of creditors. Although named by deed, his right to represent the creditors is his by law, not by deed, and gives him, we think, the right to reject what of the assignor's chattels is a burden. Though an assignee by deed, the effect of that deed is limited by statute so as to best carry out the equal distribution of the assets to the creditors. The mode of distribution is regulated by law and the assignee is subject to the orders of the probate court. Every reason, therefore, which induced the court in Lindsay v. Limbert, 12 Moore, 209, to hold that the permanent assignees under the act of 7 Geo. 4, to relieve insolvent debtors had the same right as assignees in bankruptcy, leads us to the same conclusion with regard to our statutory assignee. If Lindsay v. Limbert is affected as authority by the remarks of Peck, Justice, in Doe dem. Palmer v. Andrews, 4 Bing., 348, and of Williams, in Bishop v. Bedford Charity, 1 Ellis & Ellis, then we prefer to follow the other, believing that in so doing we are in better accord with the spirit of our statute as to insolvent debtors, especially when in no American case has the rule contended for by counsel for plaintiff been enforced.

The difference in effect between assignment by deed and assignment by operation of law claimed by counsel is recognized in Hoyt v. Stoddard, 2 Allen, 442, but only to distinguish the case under discussion from the effect of English authority, and not necessarily to approve that authority.

For the reasons given we do not think that the defendant by accepting the assignment under the statute became liable upon the covenants of a leasehold included in the general words of the assignment unless he elected by words or conduct to accept the same. What conduct constitutes such an election? The assignee has the right to take steps

to ascertain whether the lease is worth keeping for his estate, and for this purpose it is held that he can put the lease up for sale to see what it will bring without electing to take it. Turner v. Richardson, 7 East., 335. He can enter upon the premises to remove the goods, and has a reasonable time within which to do so. But if he carries on any business for his estate there, or does any other act which indicates ownership of the lease, he will be held to have elected to take the lease. Dorrance v. Jones, 27 Ala., 630; Howitz v. Davis, 16 Md., 318; Hoyt v. Stoddard, 2 Allen, 442. There certainly was evidence which should have been submitted to the jury on the question of acceptance, and the court therefore erred in directing a verdict for the defendant. The motion for a new trial will be granted.

Wm. Worthington, for plaintiff.

C. W. Baker, for defendant.

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## JUDGMENT LIENS. 397

[Franklin Common Pleas, 1888.]

EDWARD G. ROBERTS v. GUSTAVUS A. DOREN ET AL.

Judgment liens acquired pending an action to foreclose a mortgage, are divested by a sale of the mortgaged premises, under the decree taken in the foreclosure, though the judgment lien-holders were not parties to such action.

EVANS, J.

In the present case the plaintiff, Edward G. Roberts, commenced in this court an action against the said John L. Gill and others, May 5, 1877, to foreclose a mortgage executed by said Gill and wife on real estate in this county. This mortgage was duly executed and recorded in July, 1867. Said Gill and wife were duly served with summons in said action May 14, 1877. A decree for $9,460, and of foreclosure and sale was entered June 4, 1877, and sale of the premises made under the decree April 15, 1879. At said judicial sale the mortgaged premises were struck off to James M. Montgomery, for $10,025. The sale was duly confirmed and the premises conveyed by the Master to said Montgomery, who thereupon conveyed to the defendant, Nancy L. Doren and the latter—May 2, 1879, paid to said Master the sum of $3,343, being the first installment of the purchase-money, and at the same time the said Nancy L. Doren and her husband executed and delivered their promissory notes for the residue of the purchase-money, and their mortgage upon said premises to secure the payment of said notes. Said Montgomery in making said purchase acted as agent of Mrs. Doren. The proceeds arising from said judicial sale of said mortgaged premises, were insufficient to satisfy said mortgage indebtedness. After the service of summons upon said John L. Gill and wife, in said foreclosure, other actions were commenced in this court against said John L. Gill, and in these actions judgments were entered against him, prior to the date of said judicial sale, under said decree of foreclosure, and these judgment creditors are seeking in the present action to enforce their said judgment liens as against said real estate thus purchased by Mrs. Doren, and they ask this court for an order to sell said premises,

and to have the proceeds which may arise from a re-sale applied to the payment of their liens, according to priority.

The question here presented is whether judgments taken pending an action to foreclose a mortgage, remain liens on the mortgaged premises after they are sold under the decree in the foreclosure suit, where such lien-holders are not parties to the foreclosure.

It is well-settled that the rule of *caveat emptor* applies to purchasers at judicial sales, and that the rights of lienholders whose liens are acquired before the commencement of an action, and who are not parties thereto, remain unaffected, the same as if no judicial sale were made. And judgments taken *pendente lite* undoubtedly became liens upon the judgment debtor's lands within the county, and the question is here made as to whether Mrs. Doren took said premises subject to the rights of these judgment creditors.

Ordinarily, the decree of a court binds only the parties and their privies in representation or estate. But he who purchases, during the pendency of a suit, is held bound by the decree, that may be made against the person from whom he may derive title. Where there is a real and fair purchase, without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy, for otherwise alienations made during a suit might defeat its whole purpose and there would be no end to litigation. Every man is presumed to be attentive to what actually passes in the courts of justice of the state where he resides, and therefore a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner, as if he had such notice; and he will accordingly be bound by the judgment or decree in the suit. Story's Eq. Jur., secs. 406, 405; Pom. Eq. Jur., secs. 632-640; Wade on Notice, sec. 342; Herman on Est., sec. 186. The law is, that he who meddles with property in litigation, does so at his peril, and is as conclusively bound by the results of litigation, whatever they may be, as if he had been a party to it from the outset. Herm. on Est., sec. 186.

It is, however, urged by the learned counsel for defendants claiming judgment liens, that the doctrine of *lis pendens*, is restricted to sales made by a defendant, and that it has no application to liens acquired by judgment, or levy of execution.

The rule by which a purchaser of property *pendente lite* is bound by the decree of the court, is thus expressed by Lord Bacon: "No decree bindeth any that cometh in *bona fide* by conveyance from the defendant, before the bill is exhibited, and is made no party by bill or order; but when he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or priority of court, there regularly the decree bindeth." Wade on Notice, sec. 337.

Mr. Pomeroy (Pom. Eq. Jur., sec. 632), says: "It has been said that a pending suit in equity operates as a constructive notice to the world, and that a purchaser, *pendente lite*, is bound by the final result of the litigation, because he is charged with such a notice of the proceeding, entirely irrespective of any information which he may, or may not have had. Courts of the highest authority and ability have adopted a somewhat different theory. According to this view it is not correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describe its operation. It affects him not because it amounts to notice, but because

the law does not allow litigant parties to give to others pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienee had or had not, notice of the pending proceedings. If this were not so, there could be no certainty, that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings, would always render a new suit necessary, and so interminable litigation might be the consequence. It must not be supposed that this mode of explanation affects in the slightest degree the settled rules concerning *lis pendens* or alters the rights and liabilities of alienees from a party to a suit, during its pendency; it may, however, prevent the extension of the doctrine and restrict its further application to particular persons and conditions of fact."

A judgment or decree in an action to foreclose a mortgage lien upon land binds all the estate in the land which was held by the parties defendant to the action, at the commencement of the action, or which they or any of them may sell to a third person *pendente lite*, with notice of the action. Amador Co. v. Mitchell, 59 Cal., 168. In California, when this decision was made, a statute in force required notice of the suit to be filed in order to affect the purchasers with notice. The object of the statute evidently was to add to the common law rule, a single term, to-wit, to require for constructive notice not only a suit, but filing a notice of it, so that the rule is as if it read: "The commencement of a suit and the filing of a notice of it, are constructive notice to all the world of the action, and purchasers or assignees afterwards becoming such, are mere 'volunteers, and bound by the judgment.' " Richardson v. White, 18 Cal., 102, 106; Devlin on Deeds, sec. 804.

It is well settled that a bill to foreclose a mortgage, or establish a resulting trust, is constructive notice to purchasers, and creditors who obtain judgments after the institution of the suit. W. & T's Leading Cases in Eq., Vol. 11 p. 195, and cases there cited.

Poerschke v. Kedenburg, 6 Abb. Pr. N. S. (N. Y.), 172, was an action to enforce a mechanic's lien. Judge Barrett, page 177, says: "Here the proceeding is *in rem*. Its commencement followed up the *lis pendens*, is the statutory substitute for an actual seizure, and the property, pending the litigation, may be said to be *quasi in custodia legis*. Indeed in a proper case an injunction may be granted and even a receiver *pendente lite* may be appointed. The lienor's rights are thus in theory reduced to possession, practical effect being given them by the decree, which works either a confirmation of such possession, or the release of the property therefrom.

In Scott v. Colman, 5 T. B. Monroe (Ky.), 73, the court of appeals decided that "A suit in equity by a creditor, to set aside a fraudulent deed, and have the land sold, gives complainant a lien on the land, which is not defeated by a *bona fide* sale by creditors, under an execution on the judgment of another creditor. In such case, the purchaser under the suit *pendente lite*, will be overreached by the purchaser under the decree, and the chancellor will compel him to surrender the possession on a petition." Judge Onsley, delivering the opinion of the court, pp. 74 and 75, says: "It was then decided" (the case having been before the

court on a former occasion) "that by his suit against McMillan the complainant Scott acquired a lien on the property in contest for the satisfaction of his demand, and that notwithstanding any subsequent conveyance by McMillan, to honest creditors, the property remained liable to the claim of Scott; and, if so, it is not discerned how it is possible that Coleman, though a purchaser at a sale under an execution of a creditor of McMillan, made during the pendency of that suit, can occupy more favorable ground. Under the law subjecting land to sale, it is only such interest as the defendant has, and may lawfully part with, that may be sold under execution, and as McMillan could not after the pendency of the suit defeat Scott's lien by selling and conveying the land to others, the right of Scott should not be prejudiced by the sale of an officer, under an execution against McMillan * * *. Coleman must be treated as a purchaser *pendente lite.*"

"Those who purchase at an execution sale will be affected in the same manner as purchasers directly from the defendant, when the action upon which the execution is based has been commenced subsequent to that in which the title to the property is litigated." Wade on Notice, sec. 377; Pindall v. Trevor, 30 Ark., 249; Horn v. Jones, 28 Cala., 194. For a purchaser at sheriff's sale acquires no greater interest or right than the judgment debtor had at the time of levy and sale, and takes the property subject to outstanding equities. McLouth v. Rathbone, et al., 19 Ohio, 21.

"Incumbrancers, who become such *pendente lite*, are not deemed necessary parties although they are bound by the decree; for they can claim nothing except what belonged to the person under whom they assert title, since they purchase with constructive notice; and there would be no end to suits, if a mortgagor might, by new incumbrances, created *pendente lite*, require all such incumbrancers to be made parties." Story's Eq., Pl., sec. 194. And in an action under the code, to foreclose a mortgage, the equity rules in regard to parties still prevail. Bliss on Code Pl., sec. 104. The cases of Cradlebaugh et al. v. Pritchett, 8 Ohio St., 646, and Comer et al. v. Dodson, et al., 22 Ohio St., 615, are decisive of the question under consideration. The syllabus of the case of Cradelbaugh et al. v. Pritchett, is as follows: "Where after order of sale in partition, a judgment was recovered against one of the defendants in partition, and the premises were subsequently sold, under said order, to a stranger, and the sale confirmed, on bill filed by the judgment creditor to subject the undivided interest of his debtor, prior to said sale, to the payment of the judgment: Held—1. That the lien of the judgment upon the undivided interest which the judgment debtor had at its rendition, was divested by the sale in partition, and could not be asserted as against the purchaser at said sale. 2. That such judgment creditor, on due application to the court having control of the proceeds of the sale, might have had the portion belonging to his debtor applied to the satisfaction of his judgment." Judge Peck, delivering the opinion of the court, pp. 649, 650 and 651, says: "The proceedings in partition were properly commenced—all parties then interested in the lands were made parties thereto, and no change in the ownership or beneficial interest occurred, until after the order of sale had been made. If, pending these proceedings in partition, Anderson had executed a mortgage, or granted the whole or a portion of his interest in the joint estate, it would scarcely be claimed that the mortgagee or grantee, *pendente lite*, could arrest proceedings rightfully commenced, or delay a hearing until the petitioners

had made him a party. If a voluntary pledge or alienation could, in such case, delay or defeat the proceedings in partition, then it would necessarily follow that such partition could, by the repeated exercise of the power of sale, be permanently frustrated. The statute expressly confers upon tenants in common the right to have partition. It is, as it were, a statutory incident to the joint estate. The suit was regularly and properly commenced, and if, in such case, it cannot be proceeded in to final partition, that provision of the statute is, or may be, made nugatory and useless. No one, we apprehend, in view of these consequences, would hold that a co-tenant could, by his own act, thus delay, embarrass or defeat a partition once properly commenced; but the law should, in such case, remit to the purchaser the share set apart to his vendor or mortgagor, if partitioned, or his portion of the proceeds, if sold. And if this be so, it is difficult to see why a different rule should prevail where the transfer or incumbrance is created by operation of law. In the case at bar, Pritchett, by his judgment, did not acquire the undivided interest of Anderson as land; but merely the right to have it appropriated to pay the judgment. This he still had a right to do, and if vigilant, would have done so by an application to the court on confirmation of the sale. And this is what equity and good conscience would seem to have required of him. * * * The cases cited by counsel for defendant in review, to the effect that a partition does not divest a lien, are all cases where the lien was created or arose prior to the institution of the proceedings in partition, and in none of them do the premises appear to have been sold."

In Comer et al. v. Dodson, et al., *supra*, the court decided that "where one of the parties in a proceeding in partition, during the pendency of the case, assigned to several persons, specified amounts, of his share of the money to be realized from a contemplated sale of the land, and afterward a creditor of the same property obtained a judgment against him, and levied execution on his undivided interest in the land, also at the same time proceeded by cross-petition to subject such interest to the payment of the judgment, and the proceeding in partition resulted in a sale of the land. Held: The lien acquired by the judgment creditor on the interest of the debtor in the land, was divested by the sale in partition, and his equitable right to that portion of the proceeds of the sale belonging to the debtor, having accrued after a part thereof had been assigned by the debtor, is subordinate to the rights of the assignees and in the distribution of the fund, the amount assigned to them must be first paid." Judge Day delivering the opinion, p. 620 says, "It would probably make no difference whether the liens claimed were fixed before or after the order of sale was entered, where the case results in a sale of the land, if the liens were obtained *pendente lite;* for, in either case, the sale would be an incident to, and result from, the case in partition, and the purchaser would take a title clear of incumbrances by either the assignments or judgment lien. Cradlebaugh v. Pritchett, 8 Ohio St., 646. Therefore whatever rights were procured by the assignments and judgment, they were all subordinate to the proceedings in partition, and a sale of the land could neither be delayed, prevented nor affected thereby."

But the rule of *lis pendens* has no application to purchasers at tax sales. The authority of the state to make a tax sale is paramount to the rights of the owner and of all others; and when made in accordance

with law, the sale is conclusive against all persons. Bigelow on Fraud, p. 297; Wright v. Walker, et al., 30 Ark., 44.

These authorities satisfactorily show that judgment liens acquired pending a suit to foreclose a mortgage, and which are not operative as liens at or prior to the commencement of such pending action, cannot be enforced as liens on the land after sale made in such foreclosure, though the holders of such liens were not parties to the action. Such judgment lien-holders are chargeable with constructive notice of the pendency of the action to foreclose, and acquire and hold their liens, subject to the results of the action, and the purchaser of the mortgaged premises sold under the decree in such action, holds the lands free and clear from all such judgment liens, and the latter cease to exist except as upon the funds arising from such judicial sale.

In foreclosure the doctrine of *lis pendens* applies not only to those who purchase and receive deeds of conveyance for an interest in the mortgaged premises from the defendant, but also to those who acquire, *pendente lite*, any interest in the premises as mortgagees, or lessees, of the defendant, or by virtue of any judgment lien or levy of execution. And they are all equally affected for the same reason. The existence and maintenance of the doctrine of *lis pendens* are necessary to any effectual administration of the law. And the necessities of mankind require that the decision of the court in the suit in which the land is sought to be sold, shall be binding not only on the litigant parties, but also on those who derive title, or acquire rights under, or through them, pending the suit. If the doctrine were otherwise, it would be in the power of the defendant to make the litigation interminable. A sale or mortgage made, or judgment confessed, or contract entered into before a final decree or a judicial sale, would render new parties necessary, and so the litigation might be made endless. If a mortgagee of the defendant is within the rule of *lis pendens*, why is not a judgment lien-holder? So far as I am advised, no court has ever held that the latter is not. And no reason is discernable why an innocent mortgagee who parts with his money or property upon the faith of his mortgage security, should stand in a worse position than an innocent judgment creditor, seeking to collect a debt. It is said in argument, however, that the judgment lien is created by operation of law, and that therefore it is not within the rule of *lis pendens*. That judgments would not operate as liens in the absence of legislation giving them that effect, no one disputes. But it is equally true that the record of a mortgage does not make the mortgage valid, as against subsequent *bona fide* purchasers and incumbrancers, in the absence of legislation. The entry of the judgment in the proper court, and the filing of the mortgage in the proper office, are essential to the existence of the liens as against third parties, and both depend upon legislation to give them force and effect.

Mrs. Doren, by purchase of the mortgaged premises sold under the decree of foreclosure, acquired all the estate in the land which was held by the parties to the foreclosure at the commencement of that action. John L. Gill, was then a defendant, and his interest in the land was *quasi in custodia legis* and subject to the results of the foreclosure. The court might have appointed a receiver to take possession of the land pending the suit. Pending the action, Gill had no power to sell or incumber the land, so as to affect the right of the plaintiff, Roberts, to have all the estate, which Gill had in the land, at the commencement of the action, sold under the order of the court for the satisfaction of his mort-

gage lien. Judgments might be entered against Gill on warrants of attorney, or by confession, or default or otherwise and these liens might be good against all the world, except the plaintiff in foreclosure, but as to him, they would be wholly inoperative and could not affect his right to have all the interest which Gill had in the land at the commencement of the action, sold under the decree of the court, and the proceeds applied to the satisfaction of his mortgage debt. And this interest, Mrs. Doren purchased and paid for and holds. Under the rule of *lis pendens* the judgment creditors had constructive notice of the pendency of the foreclosure suit and the rights of the plaintiff, Roberts; or at least they acquired their liens, subject to the results of the foreclosure, and were bound to come into the case as parties defendants and set up their liens. If they neglected and failed to do so, and thereby lost any right, that loss is not chargeable to Mrs. Doren, and whether she had notice actual or constructive, of their rights, is immaterial. The doctrine of *lis pendens* can not be claimed to be an equitable rule merely, but the policy on which the rule is founded, is to give full effect to the judgment which may be rendered in the suit pending at the time the liens or other rights were acquired.

Again, the purchaser of the land at the judicial sale under the decree in foreclosure, took the land subject to the judgment liens, or not subject to them; and her rights and liabilities in that respect were fixed at the time of the sale. If any lien-holder was entitled to share in the distribution of the purchase-money, had the land sold for enough to reach his claim, it is clear he could have no lien subsisting on the land as against the purchaser. If the judicial sale operated to transfer the lienor's right from the land to the purchase-money, the lienor had the right to participate in the distribution of the funds but otherwise he had no such right. The criterion by which the lienor's right to participate in the distribution, is important, or may be so, to the other lien-holders, is where the funds are insufficient to pay all the liens in full.

The conclusion reached, is that the liens of judgments taken pending the foreclosure were divested by the sale under the decree, and are no longer in force as liens upon the land, and that such judgment lien-holders are therefore not entitled to have said premises sold, for the payment of their liens.

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## DOWER—BANKRUPTCY. 401

[Hamilton Common Pleas.]

FRANCES W. DUBOIS v. CLAYTON W. EBERSOLE ET AL.

Where a wife joined with her husband and released her dower, in a deed of his land to an assignee for the benefit of creditors, under the Ohio statutes, and afterwards within six months the husband was adjudicated a bankrupt, and upon application of the assignee in bankruptcy, the assignee for the benefit of creditors was ordered by the court in bankruptcy to convey said land to the assignee in bankruptcy, the wife not being a party to such application and order, she was not barred of her dower in said land.

MAXWELL, J.

On October 4, 1869, the plaintiff joined her husband and released her dower in a deed of the land described in the petition, to one Glenn,

for the benefit of creditors, under the Ohio Statutes. On October 6, 1869, one Kizer, a creditor of the firm of which Dubois was a member filed a petition in bankruptcy against them, setting up in his petition, among other acts of bankruptcy, and making of the above assignment, and on that petition such proceedings were had that the firm of which Dubois was a member were adjudicated bankrupts. One Shotwell was elected assignee, and a conveyance was made to him of the property of the bankrupts.

Thereafter Shotwell applied to the court in bankruptcy for an order requiring Glenn to convey to him the aforesaid real estate. An order was made to that effect, and Glenn appeared voluntarily, complied with the order and made the deed, and thereafter Shotwell by order of the court in bankruptcy sold the real estate to the ancestor of the defendants.

The plaintiff was not a party in any way to, and had no notice of the application and order, and Glenn did nothing further in the matter of the assignment to him than as recited above.

Dubois, the husband, died November 9, 1887, and the plaintiff, his widow, sues for dower in said real estate.

The defendants claim that she is barred of her dower by reason of the deed to Glenn for the benefit of creditors,and the deed from Glenn to Shotwell, or, in other words, they claim to have her release of dower through the above two conveyances and the deed to their ancestor.

It is conceded that the order made by the court in bankruptcy was without any jurisdiction over the plaintiff, and could affect her rights in no other way than as it affected the deed of Glenn for the benefit of creditors, and his position as such assignee.

The application of Shotwell and the order made thereon, that Glenn should convey the real estate to Shotwell, are of such a character, that, were it not for the settled construction of the bankrupt act, it would be difficult to say what their force and effect were, and whence the court in bankruptcy derived the power to entertain the application and make the order. There was no privity between Glenn and Shotwell, no consideration passed from Shotwell to Glenn, nor was the conveyance made by Glenn in pursuance of his power or duty as assignee for the benefit of creditors. Our statute does not recognize or authorize any such disposition of assigned property, and does not permit an assignee so to substitute any one in his place. If, however, we turn to the construction given the bankrupt act by the United States courts, we may find what the legal effect of such an application and order would be.

It has been decided by the United States courts that an assignment for the benefit of creditors is an act of bankruptcy as tending to hinder and delay creditors, and, as such, may be set aside at the election of the assignee in bankruptcy, if made within six months next preceding the proceedings in bankruptcy. 12 Bankruptcy Register, 81; 13 Bankruptcy Register, 311; 15 Bankruptcy Register, 228, 522.

Also, that if the assignee elect to have the assignment set aside, then it, i. e., the assignment, is set aside as null and void *ab initio*, as any other conveyance in fraud of the bankrupt act would be, and all rights that may have vested under it fall with it.

It is also well settled that where husband and wife make a deed of real estate, she releasing dower, and the deed be set aside for any reason, then the dower of the wife is not barred, by such deed, except in cases of special statutory provision to the contrary. Ridgway v. Masting, 23 Ohio St., 294; Mattill v. Bass, 89 Ind., 220; Elmendorf v. Lockwood,

57 N. Y., 322; Lockett's Adm'x v. James, Adm'r, 8 Bush., 28; 2 Scribner on Dower, 312.

It is true that most of cases in the books are cases of fraudulent deeds or conveyances, but the principle that the inchoate right of dower revests in the wife upon setting aside of the deed does not depend on the character of the deed, as is well stated in 2 Scribner on Dower, 313, and 57 N. Y. at p. 325, opinion of the court.

This is reasonable, for the wife conveys or releases only an expectancy, and if the deed be set aside the expectancy revives at once. It is different from a conveyance of a present interest.

I am of the opinion that the order of the United States Court, made upon the application of Shotwell, set aside and made null and void the deed made by Dubois and wife to Glenn for the benefit of creditors, and that her dower was not barred thereby.

Decree for the plaintiff.

Bateman & Harper, for the plaintiff.

J. F. Baldwin and W. E. Jones, for the defendants.

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## BANK CHECKS. 419

[Hamilton Common Pleas.]

† LAFAYETTE NATIONAL BANK v. CINCINNATI OYSTER & FISH CO.

A bank received a certified check on another bank from the drawee of a draft held by it for collection and thereupon surrendered the draft to the drawee. The certifying bank failed the same day. The former bank thereupon sued the drawee. Held, the certification of the check having been made before its presentation and not at the request of the bank, is not absolute payment but merely additional security or conditional payment, and the drawee of the draft is liable on his check.

The Lafayette Bank, of Cincinnati, in June, 1887, received from a correspondent in Detroit, a draft on the Cincinnati Oyster and Fish Company, for $54. On June 20th, the company drew its check on the Fidelity Bank for $54. At that bank, the check was certified as good. The check was then accepted by the Lafayette Bank in exchange for the draft. Next day, June 21st, the check was presented to the Fidelity, but as that bank had on that day been closed, payment was refused.

The Lafayette Bank then demanded payment of the Oyster Company, the drawer of the check, but it was refused. When the Lafayette Bank received the check, the Detroit bank was credited with the amount of the draft, as is customary. The question the court had to decide was, whether the Lafayette Bank could look to the Oyster Company for the payment of the check, or whether the Lafayette Bank's acceptance of the certified check, released the drawer of the check in the absence of any special agreement. Judge Robertson found that the weight of authority was that where the drawer of a check—before presenting the check to the payee—causes it to be certified by the bank upon which it is drawn, and then delivers the check to the payee, the bank certificate is taken and treated merely as an additional security and indorsement, and does not release the maker of the check.

† See ante 94, and 2 Circ. Dec., 463.

The court held the rule was otherwise where the certificate of the bank is procured at any special instance and request of the payee, and before the acceptance of the check. In such instances, the authorities seem to hold that the drawer of the check is released, and that the payee can only look to the bank that certified the check, for payment. In the case at bar, there was no evidence tending to show that the Lafayette Bank took the certified check in any other way than as a conditional payment, nor that the Fidelity Bank's certificate was obtained at the special instance or request of the payee, and so judgment was given for the Lafayette Bank.—[Editorial.]

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## 420 ELECTRIC RAILWAY POLES.

[Hamilton Common Pleas, November 17, 1888.]

† MT. ADAMS & EDEN PARK INCLINED CO. v. H. S. WINSLOW ET AL.

1. A pole carrying wires used in the operation of an electrical railway cannot be set in the sidewalk in front of private premises without the consent of the owner of such premises or compensation first made to him; and an injunction restraining its continuance will issue upon the application of such property-owner.
2. Neither a grant from the municipal authorities, nor the fact that such pole is used as one of the instrumentalities of public travel, will justify such an impairment of the right of the abutting owner to have the street in front of his premises open and unobstructed as attends the planting of such a pole in the street.
3. In cases relating to the rights of abutting owners in public streets, the question is not whether the public use contemplated is of one kind or of another, but whether such use results in a taking of private property. If it does, compensation must be first made, and the abutting owner cannot be obliged to suffer the loss of his property and to rely upon an action at law for the recovery of damages.

Maxwell, J.

The Mt. Adams & Eden Park Inclined Railway Company, a corporation operating a street railway from the heart of the city up to and into Walnut Hills, has made a contract or arrangement for the construction of an electric railway on part of its line. In the course of that attempted construction, which was to be by what is known as the over-head system, that is, by planting poles along the sides of the street to carry wires, from which wires other wires led to the central wire in the street, and then down to the car, so as to conduct the power, they planted a pole in front of the premises of the defendants in this case, near the corner of Gilbert avenue and McMillan street. This pole, according to the testimony, is eleven inches in diameter, and about twenty-seven feet high. As was alleged in the petition in this case, the defendants were about to remove the pole, and the plaintiff applied for and obtained a temporary injunction against the defendant removing the pole. Afterwards, the defendants made a motion to dissolve that injunction, and the case came on to be heard by the court upon that motion, and a motion by the plaintiff to continue the injunction until the final hearing of the case.

Sometime ago, a number of cases, similar to this, but relating to telegraph and electric light poles, were submitted to me; and after a careful examination of the law in the case, I came to the conclusion that they could not be put in the sidewalk in front of the premises of abutting property-owners, without first obtaining the consent of the property-owners, or compensating them for the taking of their property. McLean v. Brush Co. 8 Dec. Re., 619. These cases were taken to the circuit court, but for some reason were not prosecuted by the defendants, so that the circuit court was never called upon to pass upon them; and in this city the

†This judgment was reversed by the circuit court; opinion 2 Circ. Dec., 240.

question has never been raised with reference to questions of that character, aside from the decisions above. So that, when this case came to be submitted to me, I felt some little embarrassment in taking it, for the reason that I had passed upon similar questions before; but counsel being advised of that, chose to go on and submit it.

A somewhat similar case has been passed upon by one of the circuit courts in the northern part of the state with reference to telegraph poles in the public highway in the country, not in a city; and there they held that they could not be placed there without first obtaining the consent of the property-owner, or compensating him for taking so much of the property. Smith v. Telegraph Co., 1 Circ. Dec., 475.

In the argument of this case, however, counsel for the plaintiff undertook to distinguish between cases of that character and the present case, claiming that this was a use of the street fairly within the contemplation of all the parties interested in the street, and was a legitimate use, for the reason that it furthered public travel upon the street, by being an adjunct or an appurtenance to the running of a street railway, which had been held in our state to be a proper use of the street. Street Ry. v. Cumminsville, 14 O. S., 523.

If we take the whole subject of poles in large cities especially, I venture to say that you will find as to no other subject such a contradiction and confusion as exists in the decisions of the Supreme Courts of the various states.

The Supreme Court of Missouri (88 Mo., 258), in passing upon the question, decided that a telephone company in St. Louis might plant its poles in the side of the pavement in front of a large and handsome business block, without making any compensation to the owners of the business block, and without getting their permission. That decision was by a divided court, divided as nearly equal as it was possible for it to be; the chief justice going with the minority. The Supreme Court of Massachusetts having under consideration the question of placing telegraph poles, (136 Mass., 75), came out the same way, the decision by a divided court, and divided as nearly equal as it was possible for the court to be. In Minnesota the same question arose, going up from St. Paul, and from the district court there, to the Supreme Court, and one of the judges being sick and unable to sit on the bench, the Supreme Court divided evenly on the subject, and as a consequence then affirmed the judgment of the district court, which had enjoined the placing of poles, (34 N. Y. Rep., 337.)

In New York, however, in addition to the controversy about the elevated railway, this question has been fairly settled by the courts. There the decisions have been uniform that poles cannot be planted in the public highways or in the streets without first obtaining the consent of the property owners or making compensation. (67 How. Pr. 73, and 365.) The same has been held in Illinois, (107, Ill., 507, and in New Jersey 42 N. J. Eq., 141.) See also 41 Pa. St., 35; 26 Conn., 255.

Now, to go back again, beginning at what may be considered the starting point in this case as to the law, we find that in the state of Ohio the law with reference to the rights of abutting property owners has been by our Supreme Court laid down more clearly and positively, and, as I think, more logically than by the court of last resort of any other state.

In the case of the Street Railway Company v. Cumminsville, supra, a case that is perhaps as familiar to the bar as any other case can possibly be, this particular question came under consideration by our Supreme Court. They had before that time decided numerous questions relating to the grading of streets, raising them and lowering them and so on; but the particular point as applicable to this is found in the fourth and fifth syllabi of the case, and I read those:

"4. The legislature may authorize the occupation of the easement originally acquired by grant or appropriation, in any manner calculated to further the general objects of the acquisition, but may not divert it to purposes which exclude the original uses, or lay additional burdens upon the land, or destroy or impair the incidental easements of adjoining lot owners in the street or highway."

"5. The interest of adjoining lot owners is properly protected by the constitution, and subject to be taken or appropriated only upon the condition that compensation is made; Crawford v. Delaware, followed and approved."

This case was decided by Judge Ranney in a very lengthy opinion. The point I desire to emphasize in this case is this: That our Supreme court undertook to say that the right of the abutting property owner to ingress and egress, light and air, is just as much property as the ground upon which his building stands; and further, that following our constitution, that right of property cannot be taken, abridged or diminished without obtaining his consent or compensating him for it. They cannot enter upon it and leave him to his remedy at law for damages.

(See also Railway v. Lawrence, 38 O. S., 41; Ryan v. City of Cincinnati, 1 Circ. Dec., 311.)

This decision then settles two questions with respect to the right of the abutting lot owner; that he is to have free ingress and egress, light and air, and secondly that he must be compensated for such property right before it can be taken or abridged, or his consent must be obtained. Now these propositions of law are simple enough, and clear enough, and in the states where differences have arisen in their Supreme Courts, there is no difference whatever between the members of the court as to the law applicable to the case. The difference arises in the application of it; and the difference nearly always, in my judgment, has arisen from the fact that they ignored the principle which is so plainly stated in the syllabus in 14 O. S., 523, that the right of the abutting property owner is in itself property just the same as the ground is.

Take the case of the Julia Building Association v. The Bell Telephone Company, 88 Mo., 258, which went up from St. Louis. In deciding this case the majority of the court, by Judge Norton, after referring to the facts of the case and to the argument of counsel, says:

"A highway may be said to be nothing but an easement on the land, and that the public have no other right in it than the right of passage, with the powers and privileges incident to the right.

"While this rule as to the extent of the interest which the public acquires in highways is strictly true as to highways in the country, it must be taken with some limitation as to the streets of a city or a large village. There are certain uses, such as the construction of sewers, the laying of gas and water pipes, to which the latter are generally applied. These—called urban servitudes—are the necessary incidents of streets in large cities, and are paramount to the rights of the owners in fee."

Now that is a correct statement of the law. Then he goes on to say, and there he begins to deviate from the true principle which he has begun to lay down:

"These streets are required by the public to promote trade and facilitate communication in the daily transactions of business between the citizens of one part of the city with those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business at one end of Sixth street wishes to communicate with a citizen living and doing business at the other end, or at any intermediate point, he is entitled to use the street, either on foot, on horseback, or in a carriage or other vehicle in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than in any of the above methods, or any other known method of hearing oral communications. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen or carriages. If a thousand messages were daily transmitted by means of telephone poles, wires and other appliances used in telephoning, the street through these means would serve the same purpose which would otherwise require its use either by a thousand footmen, horsemen or carriages to effectuate the same purpose."

Then he goes on to illustrate. He says, "it is true that to the extent of the space of 18 inches each of the poles proposed to be erected would be an obstruction, etc." Thus, "a man walking along the pavement of Sixth street would obstruct so much of the sidewalk as for the time being he occupied, and to that extent the free and unobstructed use of the sidewalk would be denied to E walking just behind A, or immediately in front of and approaching him. The carriage or wagon being driven by C in the street would be an obstruction to the carriage or wagon being driven by D just in front of and approaching the carriage being driven by C." And he uses a large number of illustrations of that character to sustain the application of the law to the facts. He concedes at the same time that the law is stated by the minority opinion of the court, announced by Judge Henry, that "when land is condemned for a special purpose, on the score of public utility, the sequestration is limited to that particular use."

All those illustrations simply tend to this point, and to this only; and that is, that this is not a very great injury. But when we come to consider the principle applicable to these illustrations, what do we find? The right of the citizen, other than the abutting owner, in a public street is an easement. That is the foundation of the law and of his right. What is that easement? It is a right to pass and repass in the street; but it is essentially a changing easement. According to Judge Norton's reasoning with reference to poles, any man would have the same right

to plant a pea-nut stand in front of a building and keep it there, because it could be said that the pea-nut stand was no more in the way of anybody passing along than any citizen would be if he chose to stop for a moment on the street, and some one were just behind him desiring to pass. But the radical difference, and that is just what it seems to me has entirely escaped the view of the court, is the character of the obstruction. In the one case the obstruction follows the laws of easement. It is continually moving, continually changing; there is an opportunity to pass it. While in the other case the thing itself becomes a fixture, and as against the abutting property owner it is perpetual, permanent, never changing, never gets out of the way; and that is the essential difference between the two things, which as it seems to me, with deference to the opinion of the learned judges in this case and in the similar cases, has escaped the attention or has been ignored by them.

Suppose that the street railway company be ceded the right to plant its pole in front of the premises of the defendants. In the first place, I cannot recognize that there is any distinction as to the application of it to the street railways, because street railways can be operated in a different method. There is no necessity for using this method of operating a street railway, none whatever, it is conceded. It is an imperfect way, and they say that they are endeavoring to secure a better and more perfect way of doing it than this. But if it be necessary, the telephone has the same right in front of the premises of the defendants; the telegraph has the same right, the electric light pole has the same right there. The court say, in the 88 Mo., 258 case, it does not differ from the case of the man obstructing the passage of another man, or from a carriage obstructing the passage of another carriage. Now, does it not differ, not only essentially in fact in the measure of damage, but does it not differ most essentially in principle? Is not the difference as wide as can be as between the easement strictly, the right of passage and repassage, and the right to plant something which shall be permanent, perpetual and in antagonism to the rights of abutting property owners? Now, when I have said that, it seems to me, practically, I have said all that can be said in the case. I cannot recognize the distinction attempted to be made by counsel about the difference between poles planted to operate a street railway and poles planted to operate an electric light or a telephone or a telegraph.

The injunction should be dissolved, the motion for the plaintiff for a further injunction overruled, and a mandatory order made to remove the pole.

Ramsey, Maxwell & Ramsey, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly and J. F. Winslow, for defendants.

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## GUATDIANS. 455

[Hamilton Probate Court.]

### In re Estate of Martha A. Cloud.

Where a guardian receives money from an executor by order of court, the order being subsequently reversed for want of jurisdiction; in a proceeding to compel the guardian to charge himself with such money he is estopped from setting up the illegality of such order. The money so received is assets of the estate, and he is liable therefor in his representative character to the party who has a good title thereto.

Gorbel, J.

Joseph P. Cloud died in 1872, leaving a last will, by which he devised to his wife Martha A. Cloud, in lieu of dower, $27,000.00, and devised the residue of his estate to his two children William and Ellen, equally. William F. Converse was appointed the executor. Martha A. Cloud subsequently became insane, and Charles Simonson was duly appointed guardian, and acted as such until the eighth day of September, 1877, when John H. Tebbs was appointed.

In 1877, the debts of the estate having been paid, Simonson on behalf of his ward, instituted proceedings in the probate court, under sec.

6195, Rev. Stat., to enforce order of distribution, claiming that William and Ellen Cloud had no existence; that Joseph Cloud had no children, and that Martha A. Cloud was the sole heir, and entitled to all the property of the decedent.

The court ordered that notice to William and Ellen Cloud, of the pendency and prayer of said petition, be given by publication in some newspaper, for six consecutive weeks. On the hearing of this petition, the court found the allegations to be true, and ordered said executor to pay to Simonson, guardian, the share devised to William and Ellen Cloud.

In pursuance of this order, the executor did pay to said Simonson the shares of William and Ellen, amounting to $23,405.64. Ten years thereafter, in a proceeding in the court of common pleas the identity of William and Ellen Cloud was fully established. Thereupon, William and Ellen filed a motion in the probate court to set aside the former judgment and finding, alleging that they had no notice of such proceeding; that there was error in the proceedings, in this, that the service upon them by publication, was not in compliance with law and the order of the court, and that the court, therefore did not obtain jurisdiction of the subject-matter.

The motion was overruled and a petition in error was prosecuted in the common pleas, to reverse the orders of the probate court. On hearing, the court of common pleas found that there was an error in the judgment and finding of the probate court as alleged by William and Ellen.

Simonson filed his account as guardian, but failed to charge himself with the amount of $23,405.94 so received from the executor. The present guardian files exceptions to this account, and asks the court to charge the late guardian with said sum.

Simonson and his sureties are resisting the application, and it is claimed by them, that the late guardian ought not to be charged with this amount, because the same did not belong to the estate of Martha A. Cloud, and the guardian had no authority in law to receive it.

In pursuance of the judgment and order of the court, Simonson, as guardian, received the money; can he and his sureties now defend on the ground that such order was illegally made? If Simonson, as guardian, must account for the money so received his sureties are concluded by the order and will not be heard in an action upon the bond, in absence of fraud and collusion to question its correctness or to demand a rehearing of the accounts. Braiden v. Mercer, 44 Ohio St., 339.

We assume that they may enter an appearance and make the same defense that Simonson may make in his own behalf. We do not understand that, in a proceeding of this kind, the court is to determine whether such sureties are liable or not, and apply to them the rules applicable in an action upon a bond against sureties.

If the court shall charge the late guardian with the amount received, and order him to pay the same to the present guardian, upon his failure to obey the orders of the court, there is a breach of the bond. The relation the sureties assume to the court and its action, so far makes them privy to the proceeding affecting their principal, as to deny to them the right, when called upon to answer for the breach of the bond, to call in question the grounds upon which the court based its action and to have the same cause re-tried.

We also hold that, if the judgment was void against William and Ellen Cloud, Simonson, in his representative character in which he appeared in that proceeding, is estopped from setting up the illegality of such order, as to him it is conclusive evidence in the absence of fraud and collusion. Mississippi v. Jackson, 51 Mo., 25; Inhabitants v. Moan, 30 Me., 347; Bell v. R. R. Co., 4 Mich., 508; Tenant v. Elliott, 1 Bos. & P. 3.

Otherwise, it would enable him to volunteer the protection of the claim of William and Ellen, against whom the order was made, and draw them into this controversy to defeat his liability.

A defendant cannot set up as a defense, that the deposit is the proceeds of securities belonging to third parties, which the depositor obtained and fraudulently converted. Nor will a debtor be permitted, by plea or answer, to volunteer the protection of the claims of those with whom he has had no dealings, to defeat his liability for performance of his contract. Lund v. Seamen's Bank, 37, Barbour, 129.

Where a party received money of a person, who was in the lawful possession thereof, and expressly agreed to deposit it to his credit, he is estopped, by his contract, in a suit for its recovery, from setting up the rights of any third party. Sinclair v. Murphy, 14 Mich., 392.

In a suit by a depositor against a bank, for deposit to his credit, it is against public policy to permit a bank to allege that the money deposited belongs to some one else. Lockhaven v. Mason, 95 Penn. St., 113.

Where a guardian had received money in Maryland, to which, under the laws of Maryland, he was not entitled, the court held that he was liable upon his bond. United States v. Nichols, 4 Cranch, 191.

In an action against the county treasurer for the refusal to pay over to the commissioners of state taxes, the amount received by him, it was held that, having received the fund, under, and by virtue of the acts, he could not set up their invalidity and on that ground, claim to retain it for himself as against the party for whose benefit he received it.

Supervisors of Seneca county v. Allen, 99 N. Y., 533.

Whatever property or money is lawfully recovered by the guardian, in virtue of his representative character, he holds as assets of the estate, and is liable therefor, in such representative character, to a party who has a good title thereto.

To want of knowledge, or the possession of knowledge, on the part of the guardian, as to the rights and claims of other persons, upon the money thus received, cannot alter the rights of the party to whom it ultimately belongs.

And whenever a guardian in his representative character lawfully received money or property, he may be compelled to respond in that character, to the party entitled to the same, and shall not be permitted to throw it off, after he has received the money, in order to defeat the plaintiff's action.

This was the rule laid down as to executors and administrators in De Valengin Admrs. v. Duffy, 14 Peters, 283, and followed in the case of Duffy v. Neal, administrator, 1st Taney, Circuit Court decisions, 271.

It follows that the guardian must charge himself with $23,405.64, the amount so received by him.

Harmon, Colston, Goldsmith & Hoadly, and P. W. Francis, for Tebbs, guardian.

Jordan & Jordans and Milton Sater, for sureties.

## 457 RAILWAY CONSTRUCTION CONTRACTS.

[Hamilton Common Pleas.]

FREDERICK SCHNEIDER v. CINCINNATI & RICHMOND RR. CO.

1. The section 3207, R. S. (80 O. L., 99), does not authorize the recovery of a judgment at law against the owner of a railroad under contract of construction, in favor of claimants specified in secs. 3207 and 3211 of the same act.
2. The remedy is by invoking relief in equity, for an accounting and distribution of the funds, which the owner ought to have in his hands, under the construction contract executed, or as if executed in accordance with the provisions of said sec. 3207.

SHRODER, J.

The admitted facts are that J. B. Gonder & Bros. were contractors for the construction of a part of defendant's road, and the plaintiff, upon the orders of these contractors, furnished groceries to laborers on the work. Plaintiff sought to recover a personal judgment for this merchandise by virtue of secs. 3207 and 3211 (80 O. L., 99.)

The sections are as follows:

Section 3207. "Any person, association of persons, or corporation contracting for the construction of a railroad, depot buildings, water tanks, or any part thereof, shall be liable to and shall pay to each person performing labor or furnishing materials stipulated for in the contract with the owner of the road, under a contract express or implied with the original contractor, or with any sub-contractor, for the whole or any part of the work stipulated in the original contract with the owner of the railroad; and the railroad company shall provide, in its contract with any person, association of persons, or corporation for the construction of its road or any part thereof, that payments under its said contract shall be made in the following order of priority. First, to the persons performing labor or furnishing materials, or furnishing boarding on the order of any contractor or sub-contractor to persons employed by them or either of them, in furnishing materials or labor for or in the construction of such railroad, without preference. Second, to any sub-contractor, any balance due under his contract after payment of his, or their liabilities to persons performing labor, or furnishing materials, or boarding under his or their contract. Third, to any contractor or construction company intervening between a sub-contractor and the railroad company, in the order of such intervention from such sub-contractor, upward, to the owner of the railroad, any balance due after payment by the company, of amounts found due in the order of priority above stipulated."

Section 3211. "The provisions of the four preceding sections shall apply to and include any person who furnishes grain, hay, merchandise, tools, or implements, or who repairs any tools or implements on the order of any contractor or sub-contractor, for their own use, or the use of persons employed by them, or either of them, while furnishing materials or labor for or in the construction of such railroad; provided, that the amount of such claim shall not exceed the wages of the person performing labor or furnishing materials, to whom furnished, or the amount found due such contractor or sub-contractor, under the provisions of sec. 3207; and in every such case, the requirements of sec. 3208, as to filing affidavits and giving notices, shall be strictly complied with; and provided further, that the aggregate of all liens taken and perfected under secs. 3207, 3208, 3210 and 3211, shall not be in excess of the actual construction contract price of the railroad company. The word 'owner' in these sections shall be held and considered as including any lessee, receiver, corporation, company or persons, owning, operating or managing any railroad with whom, or in whose behalf, the contracts herein have been made."

The only effect of sec. 3211 is to confer the rights and remedies of secs. 3207, 3208, 3209 and 3210, Rev. Stat., upon persons furnishing merchandise and other specified things to laborers under orders of railroad contractors.

Whilst on the one hand secs. 3208, 3209 and 3210 relate to the obtaining and enforcement of a lien upon the railroad for such claim, on the other hand, sec. 3207 makes provision for rights other than that of a lien. It does not expressly prescribe that the owner of the railroad is to pay such claimants directly, and it imposes no duty upon any such claimants to notify the owner of the existence of his claim. It is not to be inferred that the statute would create a direct liability on the part of the owner to persons and for claims unknown to him; nor will it be inferred that the statute contemplated an indefinite delay of settlement, until the owner could, at his risk, search for and discover claims and claimants. This sec. 3207 makes it mandatory upon the railroad company to provide in its construction contracts that its payments thereunder shall be made in the order of priority—first, to laborers and material men and the like without preference; second, to sub-contractors; third, to contractors and to intervening claimants in their order. A fund is here created and held by the railroad company in which several classes of creditors are interested; of which creditors the railroad company may have no knowledge. In such case the proper remedy is to invoke the aid of a court of equity to effect a distribution of the fund. Its orders and decrees for the bringing in of creditors, for distribution of the fund, and in certain cases of contribution among creditors, will protect the owner of the road and holder of the fund, and secure to creditors their dues, according to their respective rights. Williams v. Gibbs, 17 How., U. S., 239; 2 Daniels Ch. Pr., 1206, 1207 and notes. Such was evidently the intention of sec. 3207. Any creditor of the owner can commence such a proceeding. As the plaintiff brought this action to recover personal judgment, and not for an accounting and marshalling of claims, the petition upon the facts ought to be dismissed.

Judgment accordingly.

Gorman & Thompson, for plaintiff.

Charles Darlington, for defendant.

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## VEHICLE LICENSES. 458

[Hamilton Common Pleas.]

### Jacob Bogart v. State of Ohio.

### B. H. Busse v. State of Ohio.

1. The statute of a state, requiring owners of vehicles using the streets of a city to pay an annual license, and providing that the license monies be placed to the credit of the street repairing fund of the public treasury of said city, is not repugnant to art. 1, sec. 8, clause 3, of the constitution of the United States (the interstate commerce clause), when enforced upon owners who are non-resident of the state and not engaged in any business in the state, for vehicles used by them upon such streets in interstate transportation and in prosecution of interstate commerce.

2. Such license fees being intended by the statute for the repair of the streets, their enforced payment must be regarded as compensation for the advantages and facilities afforded to such transportation; and the requirement of license is not a restraint or other form of regulation of interstate commerce.

SHRODER, J.

These cases, on error from the police court of Cincinnati, present the same question for decision and may be considered together. They are prosecutions of citizens and residents of Kentucky for violation of the act of April 16, 1883, as amended by the act of March 25, 1884 (80 Ohio L., 129; 81 Ohio L., 77), commonly known as the Russell Law.

The information in the court below against each of the plaintiffs charged their unlawful use, on May 21, 1888, of the streets of the city of Cincinnati with a vehicle without first having obtained, in accordance with law a license from the comptroller of the city. Upon the evidence the court below found each guilty, and pronounced judgment accordingly.

At the time of the offense charged Bogart was a resident and citizen of Newport, Ky., engaged there in business and having none in the state of Ohio. From time to time, for uses of his business, he bought materials in Ohio and other states and sold goods to Ohio and other states; and, whenever necessary, the materials and goods were delivered at the wharves and depots of interstate transportation companies of Cincinnati, Ohio. In the course of his business it became necessary to transport these materials and goods to and from such wharves and depots across the Ohio river from and to his place of business. On May 21, 1888, in the course of his business he drove a vehicle owned by him over the streets of the city, his route being between his place of business and the railroad depot where he delivered a load of goods manufactured and sold by him to said business place, for shipment to the state of Missouri, and thus used the streets for a temporary purpose. He had not obtained any license from the city comptroller under the Russell law. The license fee which would be required of him greatly exceeded the expense of issuing it, and the excess would have been used as a source of supply for the public treasury of the city.

In the other case the facts are that at the time of the offense charged Busse was a resident doing business in Covington, Ky., there selling goods manufactured by him in Covington to purchasers in various parts of Cincinnati, where he was required by the purchasers to make deliveries. On May 21, 1888, in making such deliveries, he used with a vehicle owned by him, the streets of the city. In all other respects the facts are the same as in the Bogart case.

By section 29 of the acts referred to owners of vehicles used upon the streets of a city are required to pay specified annual license fees. Certain exceptions not applicable to either of these plaintiffs, are made by statute. By sec. 38, all monies received for licenses from vehicles are placed to the credit of the street-repairing fund, and all other license fees are placed to the credit of the general fund. Section 2 of the act enacts the penalty for violation of any of the provisions of the same.

The plaintiff's assign as error that the act as applied to them upon the foregoing facts is repugnant to art. 1, sec. 8, clause 3 of the constitution of the United States, which provides among other things that Congress shall have power to regulate commerce among the several states. The contention is that in relation to inter-state commerce Congress possesses exclusive jurisdiction, and that if the law charges a license fee upon the vehicles used in the transportation of inter-state freight, it was a regulation of inter-state commerce, and therefore unconstitutional and void as to the plaintiffs.

As favorable to the proposition, plaintiff's counsel refer to decisions of the U. S. Supreme Court, among which were Pickard v. Pullman Co.,

117 U. S., 34; Fargo v. Michigan, 121 U. S., 230; State Freight Tax Cases, 15 Wall., 232. These decisions do not however support their view. See Wabash Ry. v. Illinois, 118 U. S., 585.

It is settled that commerce among the states includes transportation of property from one state to another. 114 U. S., 196. If the subject of commerce is national in its character, requiring uniformity of regulation, the power of Congress is exclusive; if however, it is local or limited in its sphere of operation, the state may prescribe regulations until Congress acts upon it. 15 Wall., 232, 107 U. S., 692, 701; 102 U. S., 691; 114 U. S., 196; 118 U. S., 558, 585. It seems from these decisions if it be conceded that the use made of the vehicles in these cases was to constitute them instruments of inter-state commerce, the local character of this use upon the streets of the city would bring them within the authority of state regulations.

The state has full power to regulate within its limits whatever will promote the convenience and prosperity of its inhabitants, and this power embraces the construction and maintenance of highways. Until congress lawfully acts upon the subject, the power of the state is plenary. This power extends to the imposition and collection of tolls for transportation thereon, and to the disposition of the revenues thus derived. B. & O. R. R. Co. v. Maryland, 21 Wall, 456; Escanaba Co. v. Chicago, 107 U. S., 683. And if the charging of the license fee may be taken as compensation for the keeping the streets in condition for use in course or transportation, then the Russell act could be held to be a state regulation over its highways. Under Rev. Stat., sec. 2640, the city is vested by the state with control of the streets and is under obligation to keep them in repair. Johns v. Cincinnati, 45 Ohio St., 278. By the Russell act, the license fees collected from owners of vehicles used upon the streets, are placed to the credit of the street repairing fund of the city. These statutes together, for the purpose of the cases, constitute the regulations by which the state preserves its highways within city limits, for the convenience of its people. These license charges are not intended as directly imposed upon commerce as such; and that inter-state transportation may remotely or incidentally be affected thereby does not make them operate as a restraint upon or as a regulation of inter-state commerce in the constitutional meaning of that term. 18 Wall, 80, 81; 15 Wall, 293; 118 U. S., 583.

If in these cases, however, the license fees are to be considered as compensation for the facilities provided by keeping the streets in repair for use of vehicles, even when engaged in inter-state commerce, then these fees are clearly allowable under the constitution of the United States. The Supreme Court of the United States has repeatedly sustained the validity of wharfage charges under like conditions. Packet Co. v. Keokuk, 95 U. S., 80; Packet Co. v. St. Louis, 100 U. S., 423; Packet Co. v. Catlettsburg, 105 U. S., 559. Tax or tolls were held valid under the constitution of the United States when imposed upon vessels on streams within the jurisdiction of the United States, to meet expenses incurred in improving the navigation of the waters—the charges being regarded as compensation for additional facilities thus provided. Kellogg v. Union Co., 12 Conn., 7; Thames Bank v. Lovell, 18 Conn., 500; McReynolds v. Smallhouse, 8 Bush., Ky., 447, cited with approval in 114 U. S., 217. See 114 U. S., 217, *supra*, County of Mobile v. Kimball, 102 U. S., 691.

Now, under the statute, the license is required to be paid upon vehicles only when used on the streets, and the license monies collected are placed in the street-repairing fund. These provisions indicate that the fee is required as means to the keeping the streets in repair. It is a mode of paying for the repair of the streets by those whose use of them makes such repair necessary. It is analogous to the requirement of toll upon a country highway, and is, according to experience, the only practicable way of collecting similar compensation for like use of a city highway. The fact of temporary use by these plaintiffs ought not to influence the conclusion, since, under all circumstances, the use of the streets by vehicles by any person whatsoever must necessarily be but temporary; nor would it be practicable or possible to adjust or fix a compensation upon a scale proportioned to the quantum of use. The Supreme Court in Marmet v. the State, 45 Ohio St., 76, said: "The principle involved is not different from that upon which the establishment of toll roads and the authority to collect tolls of those travelling upon them * * * is sustained." Nor is the fact material that the moneys are a source of supply to the public treasury of the city, since this treasury does not exclude the street repairing fund; nor does the fact imply a diversion of the fees from the fund. The Supreme Court in the Marmet case (45 Ohio St., 63, 68), "said that the provision placing these fees in the street repairing fund refutes the claim that the money from this source is raised for general revenue." It, therefore, appears from the language of the act, from its purpose and intention, and under the construction given to it by our Supreme Court, that these license fees are charged by and for compensation for the privileges and facilities afforded to owners of vehicles in the use of the streets. In such case the law requiring the obtaining of such license and punishing the use of the street without first obtaining the same, is not repugnant to the inter-state commerce clause of the U. S. constitution. This conclusion disposes of the only question presented in these cases, and requires that in each case the judgment below be affirmed.

Jordan & Jordans and B. W. Nelson, for Bogart.

Edwards Ritchie, for Busse.

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## 465 STOCKHOLDER'S LIABILITY.

[Superior Court of Cincinnati, Special Term, 1888.]

CHARLES E. BROWNELL ET AL. v. DAVID ARMSTRONG, RECEIVER.

A receiver engaged in winding up the affairs of a national bank, may set off the additional liability of a stockholder against a dividend due on the deposit account of the stockholder, and it makes no difference that the claim to the dividend has been assigned to others, or that the amount of the stockholder's liability has not been ascertained.

PECK, J.

The plaintiffs bring this action to recover the amount of a dividend on the deposit of Charles A. Brownell, in the Fidelity bank, of which defendant is the receiver, and to the creditors of which he has declared a dividend of twenty-five per cent. The claim of said Charles A., was assigned to the plaintiffs, after the failure of the bank, and when pre-

sented to the receiver, he issued to them a certificate showing that due proof of the claim had been made, and the amount of the same. After the declaration of a dividend, plaintiffs demanded the payment thereof, and were refused, whereupon they brought this action.

The defendant answered, admitting the allegations of the petition setting forth the above facts, but setting up two defenses.

The first is, that Charles A. Brownell, at the time of the failure, was a stockholder in the bank to the extent of fifty shares, and liable thereon to the creditors, to an amount equal to the par value of the stock. That the bank became insolvent on the twenty-first day of June, 1887; that there is a deficiency of assets; that it will be necessary for the defendant to collect the amounts for which the stockholders are additionally liable; that the amount has not yet been definitely ascertained, and cannot now be stated, but that the amount due from Charles A. Brownell, will largely exceed the amount of the dividend due on his deposit account, of which plaintiffs are assignees, and that Charles A. Brownell was insolvent at the time he made the assignment of his claim to these plaintiffs.

To this defense the plaintiffs demur, and the question is, whether the stockholder's liability of Charles A. Brownell can, under the circumstances, be set off against plaintiff's claim to a dividend upon the deposit account.

The first question is, whether the assignment of the claim to plaintiffs defeats defendant's right to set-off, if he has any. The Supreme Court of Ohio in Brown v. Hitchcock, 36 Ohio St., 667, has held that the liability of a stockholder to the creditors of the corporation, begins at the time the debt is contracted by the corporation. A cause of action upon such liability, accrues when the corporation becomes insolvent. Terry v. Tubman, 92 U. S., 156; Terry v. Anderson, 95 Id., 628; Scovill v. Thayer, 105 Id., 143.

The receiver when appointed then forthwith had a cause of action against the stockholders, and if the two can be set off, the right to do so then existed, and the assignment of the claim to the plaintiffs could not impair defendants' right in that respect, Rev. Stat., 4993; Fuller v. Steiglitz, 27 Ohio St., 355.

The principal question however, is: Can this stockholder's liability be set off against the claim to a dividend due the stockholder as a depositor in the bank. It is argued that the set-off can not be allowed, because the two claims are not in the same right. The one, it is said, is a claim against the assets of the corporation, and the other to a sum which would go to constitute a part of a trust fund for the benefit of creditors, over which the corporation had no control, and against, which it could create no such right. The doctrine relied upon is clearly and fully expounded in Sawyer v. Hoag, 17 Wall., 610, where it was held that the obligation of a stockholder upon his unpaid stock subscription could not be off-set by the indebtedness of the corporation to him, for the reason that such subscriptions constitute a trust fund for the benefit of creditors. There is no doubt that the additional liability of a stockholder is quite as much of a trust fund, as unpaid subscriptions, and in that respect the case at bar does not differ from Sawyer v. Hoag, but in another respect there is a material difference which directly affects the result of the case. The action is upon a claim to a dividend not upon the original claim against the corporation, as Sawyer's was. A dividend

is the proportion of the assets in the hands of a receiver declared applicable to the claim of the creditor. If there had been nothing in the way, Brownell or the plaintiffs as his assignees, were entitled to receive the amount of the dividend at once from the assets in the hands of the receiver. It follows that as there was a right of action in the person entitled to the dividend, against the receiver as the representative of the creditors—for when the latter declared the dividend he was acting in behalf of the creditors, as much as if he were collecting the trust fund—the two claims were in the same and not in different rights, and could, therefore, be set-off against each other. If the amount of the dividend be unpaid, the amount in the hands of the receiver is thereby so much increased, and if an equal amount of that creditor's liability as a stockholder be set-off against it, the account is balanced, the two items may be cancelled, and the fund for the benefit of creditors will remain precisely as it would have been if the dividend and the liability had both been paid. Such a result could not have been produced in Sawyer v. Hoag by allowing the set-off, but Sawyer would, in effect, have secured the payment of his claim against the corporation in full, while other creditors could only secure such dividends as might be realized from the assets. The difference is that Sawyer's claim was to set-off the debt of the corporation against his liability to the assignee. In this case the dividend is a liability of the receiver, as such, and against it he seeks to set up a claim which he makes as receiver. Sawyer had no right of action against the assignee, except to compel the allowance of his claim, as one of the creditors; but Brownell had, and plaintiffs have a right of action at law against the receiver, for the amount of the dividend. The money which the receiver is asked to pay, comes from the same fund as that to which the amount he would receive if he collected the stockholders' liability would go.

The final objection to the proposed set-off is that the amount of Brownell's liability has not been ascertained. From the facts admitted, it seems highly probable that it will much exceed the amount of plaintiff's claim—which is $800.00; while the total amount of Brownell's stockholders' liability is $5,000.00, and it seems quite probable that he will be assessed for much the larger part, if not all of it. It has been frequently determined that the right to set off a claim to an undetermined balance of account might, in case of insolvency, be exercised as against a claim for a money judgment. Neil v. Greenleaf, 26 Ohio St., 567. So also a claim for unliquidated damages, Needham v. Pratt, 40 Ohio St., 186.

The only difficulty I have experienced on this point arises from the fact that the defendant does not come in and ask to have the amount of Brownell's liability ascertained, and so set off against plaintiff's claim; but he says that cannot now be done, and the facts seem to fully justify the statement. The affairs of the bank are so extensive and complicated, and its assets so much involved in litigation that it would be quite difficult, if not impossible to fix the amount which the stockholders shall be called upon to pay at this time. It is also very doubtful whether that could properly be done in this action. Brownell, the stockholder, is not a party to it, nor is it necessary that he should be unless it is for that purpose. The plaintiffs are not interested in the question of Brownell's liability, except in so far as it is proposed to set it off against their claim. If there are other such actions against the receiver, he must go into each one and determine the stockholder's liability there, if it be made a matter

in issue, and so in every such action a question would be raised which should be settled as to all stockholders at once and in the same action. Umsted v. Buskirk, 17 Ohio St., 114.

Further, if this claim to set-off cannot be made available in this way, it may, however valid, fail altogether—because it is apparent, as before stated, that the amount of the stockholder's liability cannot now be determined, and if the plaintiffs may proceed to judgment without regard to this claim because it cannot be determined in this action, or has not been determined in some other, defendant's claim to a set-off, however rightful, is lost to him. It seems, that a court of equity should not permit such a result to occur in a case where the insolvency of the party would render the loss of the right to set off equivalent to the loss of that much of defendant's claim. And although, I know of no precedent for such action, yet, as the alleged set-off is a valid one, the demurrer, is overruled, and an order may be entered, staying proceedings until the amount of Brownell's liability as a stockholder can be ascertained.

The set-off being, probably, much larger than plaintiff's claim, I have not deemed it necessary to pass upon the second defense, upon which an issue of fact was tried at the same time that the demurrer was heard.

Bateman & Harper, for plaintiffs.

Kittredge & Wilby, for defendant.

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## ASSIGNMENTS FOR CREDITORS. 467

[Superior Court of Cincinnati, Special Term, March, 1888.]

BARBARA ALT ET AL. v. GEORGE WEBER ET AL.

1. Property assigned for the benefit of creditors and not so applied, may be subjected to the payment of the claims of the creditors when re-conveyed to the assignor, and by him transferred to a purchaser with notice of the trust.
2. Creditors are not estopped by the finding of a decree to the effect that their claims have been settled, made in an action between the assignor and assignee to determine individual claims made by them to the property assigned. In such an action the assignee is not the representative of the creditors.
3. The knowledge of the president of a corporation of outstanding equities affecting the title of property he was selling to the corporation, which knowledge was not acquired by him in his official capacity nor while transacting the business of the corporation, cannot be held to show that the corporation had notice of such equities; but where it appears that the record of a preceding action affecting the title to the property, disclosed such facts as should put one upon inquiry concerning equitable claims of other parties against the property, and such record was known to the officers of the corporation and their attorney, and inspected by them before the purchase, and such claims could have been discovered by inquiry, the corporation will be held to have had notice thereof.

In the year 1874, George Weber made a general assignment of his property, consisting mainly of a brewery and the real estate upon which it was situated, for the benefit creditors, to Jacob Pfau and Alexander Starbuck. The latter accepted the trust and entered upon its execution, and continued to act as assignees until removed by the probate court in 1878, when Leo A. Brigel was appointed to act as assignee in their stead. About the same time Brigel made a written agreement with Weber looking to the formation of a partnership for the purpose of carrying on the

brewing business, then being carried on by Brigel as assignee upon the premises assigned, and under the orders of the probate court. In said agreement it is stated that Brigel had contributed the sum of $25,000 in cash for the use of the firm, "part or the whole of which is to be applied towards the buying or purchasing of unsecured claims against the said George Weber, the said claims to be bought at the very lowest possible figure, and to be charged at cost."

Pursuant to the agreement Brigel and Weber proceeded to and did purchase from the creditors of the latter numerous claims, at prices ranging from 25 per cent. of their amount upwards. The partnership agreement was intended to be secret, and was known to but few, if any, of the creditors at the time they parted with their claims. When purchased, the claims were indorsed or assigned over to Brigel or Weber, or to Joseph A. Weber, the son of George Weber. In this way nearly all the claims against Weber were gotten in, when, in 1882, Weber refused to proceed under the partnership agreement, claiming it had been procured from him by fraud and duress, and that it was unlawful. Having obtained a deed from Starbuck and Pfau, purporting to re-convey to him the property assigned, he took possession of the property, excluded Brigel therefrom, and began an action in this court to enjoin Brigel from interfering with his possession, and to quiet his title to the property against the former. In his petition in that action, Weber alleged that the claims of all his creditors had been paid or settled, the object being to show that the trust under which the property was held by Brigel had been executed, and that Weber was therefore entitled to the sole possession and use of the property, because of the invalidity of the partnership agreement.

In his answer and cross-petition, Brigel also asserted that the claims of all the creditors had been settled, set up the agreement, and prayed its enforcement. The court found in favor of Weber, held the so-called partnership agreement to be illegal, enjoined Brigel from interfering with Weber, and quieted his title upon condition that Weber repay Brigel the moneys advanced by him, and compensate him for services, which conditions were afterwards performed. Weber continued in possession of the property, operating the brewery, for which purpose he borrowed considerable sums of money from Wm. Stichtenoth, and became indebted to him for material furnished for the manufacture of beer, for which he gave Stichtenoth a mortgage. In the year, 1884, Weber and Stichtenoth agreed to form the George Weber Brewing Co. For that purpose a company was duly incorporated, and Weber conveyed to it the brewery and appurtenances, with the personal property used in brewing, and Stichtenoth conveyed to it a malt-house owned by him, each of them taking pay for the property so conveyed in stock of the company, which is nearly all held by Weber and Stichtenoth. Weber was chosen president of the company, Stitchtenoth, vice-president, and a son of the latter William Stichtenoth, Jr., vice-president. Thereupon the company took possession and operated the brewery until the year 1887, when an assignment was made of its property for the benefit of creditors.

After the termination of the action between Weber and Brigel, certain creditors who had sold their claims to them, became aware of the illegal agreement, received back the evidences of their claims from Brigel, and brought actions upon them against Weber, giving him credit for the amounts received as payments thereon. The court held that the portion of the agreement as to the purchase of claims, above set forth, constituted

any purchase effected thereunder, a fraud upon the creditors whose claims had been so purchased, and gave judgments for the respective plaintiffs for the unpaid balances of their claims. Thereafter this action was commenced to subject the property originally assigned to the payment of the judgments so obtained, and to the claims of other creditors alleged to have been purchased by Brigel and Weber under the illegal agreement, and the action is prosecuted by plaintiffs for the benefit of themselves, and all other such creditors.

PECK, J.

That Weber is personally liable for the balances of the claims fraudulently purchased is conclusively settled by the judgments aforesaid, which were affirmed by the general term, and the Supreme Court overruled a motion for leave to file a petition in error to the latter judgment. The question here to be determined is whether the brewery property, late in the possession of the Brewing Company, and now in the possession of its assignee, is subject to the payment of such claims. The property was originally assigned to secure the payment of those claims; they remain unpaid, and the property has never been applied to their payment. The transfer of the property from Starbuck and Pfau to Brigel & Weber in no way affected the rights of these plaintiffs. In the hands of Weber the property was undoubtedly subject to the original trust. The transfer to the Brewing Company is the transaction out of which the real questions of the case arise. It is claimed on their behalf that they are *bona fide* purchasers for value, and without notice of the plaintiff's equities.

This claim raises a number of questions by no means free from difficulty. It is fairly shown that the company purchased the property for value, but whether without notice of the fraud practiced upon the claimants when they transferred their claims to Brigel and Weber, is the point of controversy.

The company necessarily had notice of the original agreement, for the deed was of record, and in their chain of title. The nature of the deed necessarily disclosed to them that it created a trust for the benefit of creditors, and as the record disclosed no sale of the property by any of the assignees, the company necessarily had notice that the property had not been applied to the payment of the claims of the creditors and, as matter of law they knew that the claims must have been settled, or in some lawful way gotten rid of, or that the property was still subject to their payment. The officers of the company testify that they had the title to the property examined at the time of the purchase, and were told that it was clear of all claims except certain liens not here in question, and the record of the action by Weber against Brigel was introduced, together with the statement by the secretary of the company that he had read the decree therein, as evidence, to show that the claims had all been settled, or that at least any one knowing the contents of the decree had the right to believe that they had.

The decree found that Brigel held the property in trust for Weber, and quieted the title of the latter as against the former. The action was brought against Brigel individually, and not as assignee, and it was defended by him in like manner. The object of it was to settle their personal claims to the property in dispute. Weber claimed the whole of it, Brigel the half, and neither of them pretended to be asserting the claims of any other person. It is true that each of them averred that the creditors had been settled with, but the assertion was made in further-

ance of the personal claims of each. The finding of the decree, based upon such agreed statement, is not binding upon the creditors, for they were not there, either in person or by any representative. The creditors might be bound by the admission of the assignee in an action where he was asserting or defending their interests, but not by such admission when made by the assignee solely in furtherance of his own claims. Whoever knew of the decree in that action was bound to take notice of the pleadings upon which it was based. A judgment or decree can hardly be properly understood without reference to the pleadings in the case, and can only be construed with reference to them. They are parts of a single record, and must be read together. To any one examining the pleadings in connection with the decree, it would be apparent that there could be no other finding with respect to the claims of the creditors, than that which was made, for there was no denial of Weber's assertion that they had been settled, but a reiteration of it by Brigel in the answer.

Grant that Weber's petition therein may be construed as an attack upon the trust, the answer made no issue on that subject, and the admission as to the settlement of the claims was obviously made in furtherance of the personal claim that Brigel was making to a half interest in the property. It was necessary to Weber's case to show the termination of the trust, as without that he could not maintain his right to the possession of the premises. It was equally necessary to Brigel's case upon the cross-petition to show the same fact, for otherwise he could not maintain his claim to the ownership of the one-half. It seems to be settled that a judgment against an assignee in a case prosecuted by or against him as such, is binding upon the creditors.

Kerrison v. Streait, 93 U. S., 155. But whether a judgment by confession of the assignee, or based solely upon admission by him, would be so, may be a matter of doubt. Assuming that such a judgment would stop creditors, it can only be so in a case where the admission was made by the assignee in his trust capacity, and where the record was such as to disclose nothing tending to show that it was made otherwise than in good faith and in the discharge of his duty as such assignee. The record here disclosed that the admission was made in furtherance of private claims which the assignee was making against the property assigned.

If such an admission were not made *bona fide*, and the party claiming under the judgment knew that to be the case, it would be of no avail to him. And an admission which concedes away the interests of the *cestui que* trust for the personal benefit of the trustee can hardly be said to be made in good faith. Such admission being found in the same record, which discloses that the purpose for which it was made was not to benefit the trust, or in the discharge of his duty as trustee, but to further personal interest, the purchaser who took with notice of the record must be held to have had notice of the fact that the assignee in making such admission did not represent the creditors. If not made by the assignee as such, and it was only a statement made in furtherance of his own interests, the purchaser who relied upon it did so at his peril. Briggs v. Davis, 20 N. Y., 15; Flint v. Bell, 27 Hun., 155.

The statement contained in the pleadings upon which the decree was based in the case of Weber v. Brigel, that all the creditors had been paid or secured, and that those who had not been secured, had consented in writing to the reconveyance of the property to Weber, was true in one respect. Such settlements had been apparently effected, and nearly

all the creditors had surrendered the evidences of their claims, or at least transferred them to Joseph Weber. If the settlements had not been tainted with fraud, the statement would have been strictly correct. But, as before stated, they were fraudulent, and the holders of such claims are entitled to rescind them as against Weber, and to hold him for the full amount of the same. Can they subject this property to the payment of such claims?

If one, induced by fraudulent representations, makes a sale of personal property, the fraudulent purchaser may sell it to a *bona fide* purchaser without notice of the fraud, and confer a good title on the latter. Wald's Pollock on Contracts, 513, and cases cited. There does not appear to be any sound reason why the same principle should not apply to the transfer of a chose in action, or the release of an equitable interest.

These claimants had suffered themselves to be deceived into releasing their claims, and many of them had done so for the avowed purpose of assisting Weber to regain the property, and while they may undo the wrong when dealing only with Weber, they cannot, in my judgment, be permitted to undo it at the expense of a *bona fide* purchaser for value, without knowledge of the fraud. The question remaining, is whether the Brewing Company is in the position of such a purchaser. As before stated, the company purchased the property for a valuable consideration, and in the belief that these claims were no longer existing. The officers of the company had been told that the property was "clear," and as they had notice of the assignment, such a statement made by a competent attorney, could only be construed to mean that the claims of the creditors had been disposed of in some lawful means, so as to be no longer an incumbrance upon the property. Unless it appears that the officers of the company had notice of the fraud when the property was acquired, they took it free from the claims here asserted.

With reference to notice, two propositions are urged. That as Weber was one of the parties to the fraud, and as he was made president of the company, in which he was also a large stockholder, his knowledge is to be imputed to the corporation. The law is well settled that notice to a person who is a president or director of a corporation which came to him as an individual, is not notice to the corporation, unless such president or director act on behalf of the corporation in the transaction in question. If he took no part in it, or if his position was adverse to that of the corporation, such, for instance, as that of a vendor of real estate purchased by the corporation, then the knowledge had by such officer, cannot be imputed to the corporation. This doctrine has been applied in a number of cases where presidents or directors of companies have transferred real estate to the latter, being aware of outstanding equities affecting the title thereof. In nearly all such cases, the knowledge of the president has been held not to be the knowledge of the company. Winchester v. Balt. R. R. Co., 4 Md., 231; Wickersham v. Chicago Zinc Co., 18 Kan., 481; Bawer v. Trenton Gas Light Co., 27 N. J. Eq., 33; LaFarge Ins. Co. v. Bell, 22 Barb., 54; Waynesville Bank v. Irons, 8 F. R., 1 and note Loomis v. Eagle Bank, 1 Disney, 285.

In the case of Hoffman Coal Co. v. Cumberland Coal Co., 16 Md., 511, it was held that when a person transferred the title to real estate to a corporation, taking in payment therefor the stock of the company to the extent of 4996 shares of 5000 issued, and was chosen as president of that company, the latter would be presumed to have notice of the facts affecting the title to the real estate which were known to the person from

whom it was so received. The court said that the conveyance to the company was but a conveyance to himself, and the whole affair had the appearance of an arrangement especially gotten up to place the title to the property in such a position as to get rid of the rights of those not concerned in the scheme. In that respect it differs from the case at bar—and from all the other cases cited—and also in that the decision proceeds upon the assumption that there were no other persons materially interested in the company than those who secured the making of the transfer.

In the case at bar there is nothing to show that the Brewing Co. was organized simply as a means of avoiding the claims of creditors. Weber retained the title to the property and conducted the business in his own name for several years. Stichtenoth made *bona fide* advances to him of money and property, and finally the business and property of both were merged in the corporation under such circumstances as to leave little room to doubt that it was done as a business arrangement in good faith for the supposed benefit of the parties to it. Weber had a large interest in the stock of the company, and so had Stichtenoth and his sons. Under the circumstances I feel bound by the authorities cited, and numerous others which could be adduced, to hold that the knowledge of Weber as to the fraudulent settlements with the plaintiffs, cannot be held to be notice thereof to the corporation. In the transaction with the company Weber represented himself, and not the company. He was the seller, and the purchase appears to have been made with deliberation, after an examination of the title, and some inquiry concerning it, and instead of combining for any unlawful purpose, the Stichtenoths, who may be said to have represented the company, appear to have dealt with him at arms length.

It is urged, secondly, that the company did have actual notice of the fraud involved in the settlement of the claims. The officers of the company, other than Weber, were aware of the action between him and Brigel, and as before stated, the secretary had read the decree therein. The action was in their claim of title and was known to their attorneys. The claims of Brigel had been disposed of by means of it, and Weber's title quieted. The decree itself referred to the claims which had been purchased under the illegal agreement, and one of the points of reference to the master commissioner designated to settle the accounts of the parties, was that he should ascertain and report the nature and amount of the claims so purchased. The illegal agreement was set out in the pleadings *totidem verbis*. Clearly the defendants must be held to have had notice of the agreement, and that claims had been purchased in pursuance of it. That does not go so far as to show that the claims of these plaintiffs had been settled in that way and the only question remaining is whether, with those facts before them, defendants were bound to inquire further and ascertain what claims had been settled in that manner. Just what circumstances are requisite to put a party upon inquiry has never been stated and is, perhaps, impossible to state; as it cannot be said what precise acts are necessary to make a case of fraud or of negligence. Only general rules can be given, and each case must be determined upon its own facts.

Generally speaking, anything which naturally arouses suspicion should cause inquiry. It has been held that persons dealing with trustees with reference to trust property, under such circumstances as would naturally arouse suspicion, are under obligation to inquire and see that

no breach of trust is being committed. Stroughill v. Austey, 1 DeG. M. & G., 634. Devaynes v. Robinson, 24 Beav., 93; Howorth v. Decen, 1 Eden., 356 and note (2d ed.). Here the officers of the purchasing company had knowledge of an agreement to perpetrate a fraud upon the creditors by the purchase of their claims, and that the agreement had been executed, to some extent, at least, by the purchase of claims, in pursuance of its terms. I cannot perceive what more could be requisite to put them upon inquiry. They were so near to actual knowledge of the very fact of which they claim to have been ignorant, that it is difficult to perceive how they could have avoided inferring the truth.

It is argued that these equities of the plaintiffs are of a doubtful nature, and such as should not prevail against a purchaser for value even with notice. 1 Story, Eq. Jur., sec. 400. The right of these creditors to subject the property to the payment of their claims was not doubtful unless by reason of the claim that they had been settled with— and the only settlement alleged was stated to have been made under such circumstances as to render them fraudulent. It has been more than once held by this court that the production of that agreement with the evidence that any given claim had been purchased under it, made a complete case of fraud, and the facts were fully and precisely alleged in the record which the Brewing Company's officers had before them, save that the names of the creditors so dealt with did not there appear.

As the claims were originally clear and valid, and the attempted settlements clearly invalid, it is hardly possible to hold these to be doubtful equities. As existing claims against Weber they were so clear that the court, after all the testimony had been taken in each of the cases referred to, directed a verdict for the plaintiff.

As against the property they are equally clear, unless rendered doubtful by the company's claim to have been a *bona fide* purchaser— but that is hardly what is meant by a doubtful equity—I understand that phrase to mean an equity doubtful in itself, and not one which is rendered doubtful by the fact that a subsequent purchaser claims the property to be free from it. If the latter were the correct doctrine, any equity, however plain, might be rendered "doubtful" and so gotten rid of simply by disputing its existence.

The argument as to estoppel is disposed of by what has been said as to notice. If the officers of the company had actual notice of the fraud it can hardly be claimed that they were mislead by the pretended settlement, and if they had such information as to put them upon inquiry, the result would be the same.

From what has been said it is apparent that there must be a decree for the plaintiffs, who are judgment creditors, and for such others of them as come within the principles of this decision. It is however, important that Joseph A. Weber should be made a party, and his interest in or to the claims, if any he has, should be settled, both in justice to the defendant, and to relieve the title to the property from suspicion. For similar reasons care should be taken to bring in all persons having valid existing claims against Weber's estate under the original assignment.

In view of the defect of parties, and the number and variety of the claims, the case will be referred to a special master commissioner, upon the official report of the evidence already taken, and with leave to hear such other pertinent evidence as may be brought before him, and report the same to the court, together with his findings including therein a list of all the valid existing claims against the estate assigned, in accordance

with the principles of this decision, and his findings of fact and law upon the questions pertaining to the validiity of such claims other than those now decided, and also to state what if any interest Joseph A. Weber has in such claims or any of them, who may be made a party defendant with leave to answer.

A decree may be entered in accordance herewith.

Ramsey, Maxwell & Ramsey, and Kittredge & Wilby, for plaintiffs.

Jordan & Jordans, and Mallon & Coffee, for defendants.

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## 471 ATTACHMENT-NEW PARTIES.

[Muskingum Common Pleas, 1888.]

AMOS M. BOYER v. W. L. MAGINNIS.

One having no interest in the subject of a pending action may not become a party for the sole purpose of asserting title to property therein attached.

PHILLIPS, J.

This action is for money converted. The defendant being a non-resident of the state, an attachment has been levied on certain real estate, as the property of the defendant, whose wife now moves for leave to become a party defendant in order that she may allege and prove that the property attached is hers. This motion is resisted; and the question presented is: Should one who has no interest in the subject of the action, be allowed to become a party for the sole purpose of asserting title to property therein attached?

In considering this question it is important to understand, and to keep in mind, the distinction between the action and the attachment. The action is commenced, and is carried on by allegations and proofs, to adjudicate the claim of plaintiff that the defendant owes him; the attachment is an auxiliary, concurrent proceeding to seize and hold property to satisfy the plaintiff's claim, in the event he obtains judgment for it. The cause of action is stated in a petition, and is to be met by answer; the order of attachment issues upon an affidavit, and is to be met by motion.

If this applicant should become a party, what position would she occupy in the case? She has no interest in the plaintiff's claim, and none in any defense that the defendant may make. She is, and must remain, a stranger to the action proper. Her position must be one of attack, and not of defense. She must assert title, and ask affirmative relief; and upon principle, she must do this by a pleading, so that an issue may be made, and so that it may be tried as such issues are triable. To allow her to come into this action, and assert her claim, would be to carry on in one case two independent lawsuits, of different natures, between different parties, and for different purposes. This, of course, can not be done. 2 Ohio Dec., Handy, 11.

The defendant himself can not move to discharge the attachment on the ground that the property attached does not belong to him. McCarthy v. Garraghty, 10 Ohio St., 439.

The statutory provisions as to making persons defendants, and as to bringing in parties, are limited to such as have an interest in the subject-matter of the action. Sections 5006, 5013, 5014.

This applicant should seek relief by an independent proceeding. This action can not be incumbered and embarrassed bv the assertion of her claim herein.

Leave refused.

J. T. Crew, for plaintiff.

Ball and Hoffman, for defendant.

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## CHANGE OF VENUE. 474

[Butler Common Pleas, August 21, 1856.]

### † STATE OF OHIO V. WILLIAM ARRISON.

**The sixteenth section of the "act directing the mode of the trial in criminal cases" must, in subordination to the constitution, be construed as conferring upon the accused alone, the privilege of applying to the court to direct his cause to be tried in an adjoining county, on being satisfied that a fair and impartial hearing cannot be had in the county in which the offense is alleged to have been committed.**

DECISION as to the change of venue.

CLARK, J.

The indictment charges the defendant with having committed the crime of murder in the first degree on the person of Catherine Allison, on the twenty-sixth day of June, 1854, at the city of Cincinnati, in the county of Hamilton, in the state of Ohio.

The defendant has entered a plea to this indictment, containing substantially the following averments:

That the offense set forth in said indictment, is alleged therein to have been committed in the county of Hamilton; that the prosecuting attorney of Hamilton county, made his motion in the court of common pleas of that county, praying for a change of venue in this cause to some adjoining county, alleging as the ground of said motion, that of fair and impartial trial of this cause could not be had in said county of Hamilton; that affidavits were read by said prosecuting attorney, in support of said motion; that said court on hearing said motion, and the affidavits read in support thereof, granted said motion, and ordered the venue in this cause to be changed to Butler county; that the defendant resisted said motion to change the venue, and caused his objection to said order of said court to be entered on record; for which reasons he prays judgment of this court will or ought to take cognizance of the indictment aforesaid, and that he ought to be discharged from all other proceedings under said indictment in this court.

The state demurs to this plea; and the question of its legal sufficiency, is the one now to be determined.

The single inquiry is, can the trial of a criminal cause in the state of Ohio, be removed from the county in which the offense is alleged to have been committed, to some adjoining county in the state, at the instance of the public prosecutor, without the consent and against the will of the defendant, on its being shown, to the satisfaction of the court having jurisdiction of the case, in the county in which the crime is charged

†This doctrine is denied in State v. Myers, post., 21, B. 57.

to have been committed, that a fair and impartial trial cannot be had in that county.

In support of defendant's plea his counsel rely on the following clause of the tenth section of the first article of the constitution of the state:

"In any trial, in any court, the party accused shall be allowed to appear and defend, in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial, by an impartial jury, of the county or district in which the offense is alleged to have been committed."

It is urged that this constitutional enactment secures to the accused, in all cases, and as a matter of absolute right, the privilege of being tried by a jury of the county or district in which the criminal act is charged to have been committed; and that the constitution itself making no exceptance to this guaranty, none can be made, either by the legislature or by the courts.

No case has hitherto arisen in this state, calling for a construction of this provision of the constitution. The place of trial in criminal cases, it is true, has frequently been changed at the instance of the party accused on showing to the court that a fair and impartial trial could not be had in the county in which the prosecution was originally instituted. It is claimed, on behalf of the state, that if the accused may have a removal of the cause, under such circumstances, it follows that the same right belongs to the state; and that if the state has not the right, the defendant has not. It seems to me, however, that the conclusion does not follow. It is a principle well recognized, that a party upon whom the law confers a privilege, may waive that privilege. But it is contended, that if the consent of the defendant can authorize the removal of a criminal cause to another jurisdiction, when it could not be removed without that consent, then the forum to which it is removed acquires its jurisdiction solely by consent—a mode of acquiring jurisdiction which has never been recognized as valid. There would be some force in this argument, if there was no law in the state authorizing the removal of criminal causes, from one county to another. But, by the sixteenth section of "an act directing the mode of trial in criminal cases," passed in 1831, it is provided that—

"All criminal cases shall be tried in the county where the offense was committed, unless it shall appear to the court by affidavits, that a fair and impartial trial cannot be had: in which case, the court before whom the cause is pending, may direct the person accused to be tried in some adjoining county."

There is no question but that this section of the statute is constitutional, in so far as it authorizes a change of the place of trial at the instance of the accused. The constitution confers upon him the right to be tried by a jury of the county or district, and this right is not infringed by a statute which gives to him, under certain qualifications, the privilege of being tried by a jury of a different locality. In such case, the court to which the cause is removed, acquires its jurisdiction, not by the mere assent of the accused, but by virtue of the law. The same objection (that it was acquiring jurisdiction by consent) might have been made to the authority of our former Supreme Court to try capital cases, under the statute which gave the accused the privilege of electing to be tried either by that court or the court of common pleas. The jurisdic-

tion of the Supreme Court in capital cases evidently depended, not on the mere election of the accused, but upon the statute which authorized the election.

The instances, therefore, in which the courts of our state have changed the place of trial on the application of parties accused, in my judgment constitute no precedents for the settlement of the present question.

Thorough as have been the researches of counsel, and as ingenious as have been the analogies which they have adduced, I still cannot avoid feeling the embarrassment attendant on the position of being called upon to decide a grave question, without the guidance of a single authority directly in point. It is therefore with much hesitation and distrust, that I have arrived at the conclusion which I am about to announce.

The right of trial by jury had its origin far back in the history of the common law. It is referred to by the earliest writers on English jurisprudence, as a well known right not requiring definition. In the celebrated twenty-ninth chapter of *magna charta*, the right guaranteed to every freeman, without defining in what it consists. We are not left in the dark, however, as to its meaning. The common law rule in regard to the laying of the venue and the place of trial, is thus laid down by a standard English writer on criminal law:

"At common law the venue should always be laid in the county where the offense is commited, although the change is in its nature transitory, as seditious words or battery; and it does not lie on the prisoner to disprove the commission of the offense in the county in which it is laid, but it is an essential ingredient in the evidence on the part of the prosecutor to prove that it was committed within it. And in the earlier periods of our history, it was necessary that the offense should be tried by a jury of the visne or neighborhood, who were then regarded as more likely to be qualified to investigate and discover the truth, than persons living at a distance from the scene of the transaction." (1 Christy's Cr. L., 177.)

This visne, vicinage, or neighborhood, was, by common law, much more limited than the county. The right to challenge for want of hundreders existed till repealed by 6 Geo. 4 C., 50, though for a long time before the passage of that statute, it had been customary to summon the jury from the body of the county, challenges for the want of hundreders having fallen into disuse. (1 Ch. C. L., 177.)

The right to have the jury from the vicinage, however, was subject to certain well ascertained exceptions. The same author from whom I have before quoted, says:

"At common law, when a fair and impartial trial cannot be obtained, and the indictment has been removed into the King's Bench, by *certiorari*, the court have a power of directing the trial to take place in the next adjoining county, when justice requires it." (1 Ch. C. L., 201.)

The same writer remarks in another place: "When an indictment or presentment has been removed into the King's Bench, or was instituted there, that court has a general jurisdiction to direct the trial to take place in a county different from that where the offense was committed, when it shall be made to appear to them that an impartial trial cannot be had in the latter county." (H., 494.)

This right of the court of King's Bench to change the place of trial in causes either commenced in that court, or removed into it by *certiorari*, seems not to have belonged to any of the criminal courts of limited territorial jurisdiction. The courts of general and quarter ses-

sions, and the Assize Courts, so far as I am able to discover, possessed no such power. The court of King's Bench is a court of general jurisdiction throughout the realm. All offenses committed in the county of Middlesex may be originally prosecuted in it by indictment; and indictments for offenses committed in any part of the kingdom, may be removed into the King's Bench from inferior tribunals, by *certiorari*. (Ch. C. L., 156.) It was this court whose jurisdiction is co-extensive with the territorial limits of the kingdom, that was authorized by the common law, when an impartial trial could not be had in the county in which the offense was committed, to direct the trial to take place in the next adjoining county. This discretionary power of controlling, in certain cases, the right of the accused to be tried by a jury of the vicinage, seems to have belonged to, or to have been assumed by the court of the King's Bench, in consequence of the general extent of its territoral jurisdiction, its authority extending alike over all places in the kingdom.

Derived from the common law, we find the right of trial by jury recognized by the constitution of the United States. Article VI, of the amendments to the constitution provides:

"In all criminal prosecutions the accused shall enjoy the right of a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The constitution of the state of Ohio, of 1802, aiming to preserve the same great principle, in the eleventh section of the Bill of Rights declares:

"That in criminal prosecutions the accused hath a right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witness face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment, a speedy public trial, by an impartial jury of the county or district in which the offense shall have been committed."

Substantially the same provision has been transferred to the present constitution of the state, to which reference has before been made.

There is no doubt that the intention of these several constitutional enactments has been to preserve inviolate the right of trial by jury, substantially as it existed at common law. It has been remarked by our Supreme Court, in a recent case, that "the institution of jury referred to in our constitution, and its benefits secured to every person accused of crime, is precisely the same in every substantial respect as that recognized in the great charter, and its benefits secured to the freemen of England, and again and again acknowledged in fundamental compacts, as the great safeguard of life, liberty and property." Work v. The State, 2 Ohio St., 296.

The only difference between our state constitution and the common law, in reference to trial by jury, is, that our constitution employs the words "county or district" instead of the term "vicinage." What the term district means in the constitution may be matter of grave speculation. The word is borrowed from the constitution of the United States, where it is provided that the "district" therein mentioned shall be ascertained by law. I take it also that the term "district" in the Ohio constitution, means some territorial division of the state, as entertained by law, over which a criminal court exercises jurisdiction. Whether the judicial districts provided for in a subsequent portion of the constitution,

are the same as the districts spoken of in the bill of rights, it is unnecessary now to determine; for the county of Hamilton constituting of itself one of the judicial districts provided for in the constitution, a case cannot be removed from Hamilton county without being at the same time removed from the judicial district composed of that county.

Our constitution then guarantees to the accused the right of trial by a jury of the county or, whatever other district may be the territorial limit of the jurisdiction of the court in which the cause is pending. This right is guaranteed without exception or reservation; but the question now is whether we shall, by implication, make an exception to it, which in England it only lay in the power of one court to make, and that by virtue of a peculiarity in the constitution and jurisdiction of the court, which exists in that of no criminal court of this state. If we had in the state of Ohio a criminal court of general jurisdiction throughout the state, or a court of criminal jurisdiction extending over a district composed of several counties, then, by analogy to the peculiar power exercised by the court of King's Bench, such a tribunal might have authority, under certain circumstances, at the instance of the state, to direct the trial to take place in a county different from that in which the offense was committed, but still within the territorial limits of the jurisdiction of the court. But our courts of common pleas are not such courts of general jurisdiction. The common pleas of the different counties, or at least of the different districts, stand to each other, in the exercise of their criminal jurisdiction, in much the same relation as the Assize Courts of the different counties of England; and as one of these latter courts cannot, by the common law, remove a criminal cause to another for trial, so, by no common law, construction of our state constitution, in my opinion, can a criminal cause be removed, against the will of the accused, for trial, to another county of the state entirely without the territorial jurisdiction of the court first having cognizance of the offense. We have enacted the general principle of the common law in our state constitution in reference to trial by jury; but we have not enacted an exception to which that principle was made subject in a peculiar court in England.

It has been claimed on behalf of the state, that the right to change the place of trial without the assent of the accused, should be sustained on the ground of necessity. It is said that owing to local prejudice or excitement, it may frequently be wholly impossible to procure a jury in the county, legally competent to try the offender, who, by objecting to a change of the place of trial, may prevent himself from being tried at all. This argument from inconvenience would justly be entitled to great weight in construing doubtful language. But the language of the constitution is not doubtful; and even when read by the light of the common law it is equally plain and unmistakable. The exceptional part of the common law rule, has not been incorporated into our constitution; but even if we are to regard it as being here by implication, the peculiarity in the constitution of one of the British courts, out of which the exception grew, does not as yet exist here. "Even the failure of justice," it has been told, "is not sufficient ground for construing a statute against its meaning, so as to give a court jurisdiction." (1 Bono. Just., 42.)

I do not propose to review all the authorities which research of the counsel has adduced. Various decisions in New York have been adverted to, in which the place of trial has been changed at the instance of the state, and without the consent of the defendant. The only provision of the New York constitution in which trial by jury is named, enacts that

"the trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever." The great difference between this language and the language employed in our constitution, must be apparent at once. Under the constitution of New York, it was entirely competent for the legislature to pass any statutes which did not deprive parties of the right of trial by jury. A provision for a change of the place of trial, is not taking away the right of trial by jury. It is a mode of trial which is guaranteed by the constitution of New York, and not a place of trial. But it is claimed that the trial by jury mentioned in the New York constitution means a trial by jury in all respects, as provided for in the common law. This may be granted so far as the mode of trial and number of jurors are concerned; but will it be contended that the legislature of New York cannot provide that the jurors may possess different qualifications from those prescribed for jurors at common law? and if the legislature prescribe the qualifications of jurors in other respects, in that state, why not in regard to locality?

Two or three Virginia cases have also been referred to, in which the place of trial was ordered to be changed without the consent of the accused. The Virginia constitution provides that "in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation; to be confronted with the accusers and witnesses; to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty."

Under this constitution a statute was passed, authorizing the place of trial to be changed, under certain circumstances, to another county, of the same, or the adjoining circuit, whether the prisoner consented or not. This statute under which the Virginia cases cited by counsel, were decided, was simply an extension, or more properly definition of the vicinage from which the jurors were to be selected. Vicinage, at common law, does not mean county, but the villa, neighborhood, or immediate district where the fact to be tried occurred. It was not till the passage of 6 Geo. 4, c., 50, that the vicinage was declared to be co-extensive with the county. This term vicinage, therefore, had no such fixed meaning at common law, as when employed in the constitution of Virginia, to preclude the legislature of that state from giving it a definition for themselves. Our constitution itself defines the vicinage to be the county or district, and has conferred no power upon the legislature to determine otherwise.

The conclusion to which I feel constrained to come, after a careful examination of all the authorities to which I have had access, is that the sixteenth section of the "act directing the mode of trial in criminal cases "must, in subordination to the constitution, be construed as conferring upon the accused alone, the privilege of applying to the court to direct his cause to be tried in an adjoining county, on being satisfied that a fair and impartial hearing cannot be had in the county in which the offense is alleged to have been committed.

The demurrer to the defendant's plea will therefore be overruled and judgment rendered dismissing the cause for want of jurisdiction. It is also ordered, that the papers in the cause be returned to Hamilton county, and that the sheriff of the county deliver the defendant into the custody of the sheriff of Hamilton county.

Joseph Cox, prosecuting attorney of Hamilton county, for the state.
Judge Wm. Johnston and Judge Thos. M. Key, for the defense.

## CONDEMNATION SUITS—LIMITATIONS. 9

[Hamilton Common Pleas, November 16, 1888.]

†TRUSTEES OF THE CINCINNATI SOUTHERN RAILWAY V. DAVID BANNING.

SAME V. JOHN HOHNE ET AL.

**Plaintiffs brought condemnation proceedings under the municipal code, against the defendants, in the probate court, in 1877, and compensation was awarded defendants, plaintiffs excepting thereto. Proceedings in error resulted in a new trial in the probate court, in 1887, and a lower compensation was awarded defendants. Plaintiffs had tendered amount of first verdict into court, but were compelled to pay defendants. Held,**

1. **That plaintiffs could maintain an action for the excess of the verdict over that of the second verdict.**
2. **That the statute of limitations does not commence to run against such action until the second verdict.**
3. **That the provisions of the Revised Statutes, sec. 2253, allowing proceedings in error, are intended to give the aggrieved party a substantial right, and to give him the opportunity of having any error corrected, and to secure the benefit of such correction.**

Decision on demurrers.

SHRODER, J. (orally.)

It appears in this case, that on the third day of August, 1877, the trustees of the Cincinnati Southern Railway began a condemnation proceeding against David Banning, and also against Hohne et al. In the Banning case, the jury assessed the damages at $9,498.13, and on this subsequently, a judgment was entered. On the eighth day of August, 1877, Banning obtained an injunction restraining the plaintiffs from taking the property until the money was paid, and thereupon the money was paid by the plaintiffs, under protest, and possession of the property was taken. Then proceedings were brought in the court of common pleas on error, which court, on the twenty-second day of November, 1877, reversed the judgment below. Other proceedings were had, and the final result was, that the judgment of reversal brought the case back for a new trial in the probate court. A new trial was had, as late as March, 1887—ten years after this reversal—in which new trial, the jury returned a verdict of $7,529.50, being $1,968.63 less than the first verdict. Counsel for the trustees demanded a judgment of restitution from the probate court, for the $1,968.63, which was refused, and they brought this action in assumpsit for this money. Similar facts appear in the Hohne case, the difference between the two verdicts being $1,250, and a similar action was brought against Hohne and others, to recover this $1,250.00.

It is claimed by the defendants that this action does not lie; first, because the payment by the trustees was a voluntary payment; secondly, the statute of limitation of six years is a bar; thirdly, so far as the Hohne case is concerned, that Hohne and the other parties defendant, have distinct interests, and that there is therefore, a misjoinder of actions.

†For probate decision reversed hereby, see 9 Dec. Re., 828.

The trustees of the Cincinnati Southern Railway were authorized by the legislature to condemn property in the same manner and by the same proceedings as municipalities are authorized under the Revised Statutes. We must look to that portion of the Revised Statutes to determine the rights of the parties. Section 2253 reads:

"When such petition is filed (that is, petition in error), the court of common pleas, or probate court, as the case may be, may suspend the execution of any order which may have been made, on such terms as may be deemed proper, and may require a bond, with security, for the payment of any damages or costs which may be thereby occasioned; and in all cases where the municipal corporation pays or secures, by a deposit of money, the compensation assessed by the jury, and gives such security as may be deemed adequate to pay any further compensation and all damages and costs which may be thereafter adjudged, the right to take and hold the property condemned, shall not be arrested by any such review."

It has been held, where, a judgment being recovered against a party, he takes steps in error, and execution is issued upon that judgment, and payment made, and the judgment is reversed, that restitution would either follow the judgment of reversal, or be given in an action in assumpsit. The restitution by direct order, would be given when the amount due on the reversal appeared in the record itself; but if it required evidence *aliunde* to establish that fact; the proper proceeding is by assumpsit. A number of cases that treat and decide upon these points, disclose the fact that execution was either issued, or about to be issued. A case found in 72 N. Y., 578, decides that it is not necessary that execution be issued; that the right of the successful party in error arises from the judgment in error; that the judgment of reversal is in effect of a judgment of restitution; that the judgment creditor ought to refund the money *ex aequo et bono;* that on the broad basis of an action in assumpsit, it is just and right that he should refund the money which does not belong to him. A number of cases are cited in the opinion, which can be referred to. See Bank of U. S. v. Bank of Washington, 6 Peters, 19.

It is not necessary, with the view I have taken in this case, to hold that the payment was not voluntary; although it might be said that, inasmuch as condemnation proceedings, in the exercise of the right of eminent domain, are founded upon public necessity, this necessity might possibly be held to be such a force and such an influence, as would make payment under such circumstances involuntary. Pollock, in his work on Contracts, page 522, gives it as his opinion that when the payment is made under such circumstances that the party has no choice to do otherwise, it would be an involuntary payment. But the very nature of these proceedings, excludes from the consideration of this subject, any of the questions that might be brought to us, in cases of ordinary judgments in ordinary actions, because these proceedings, by reason of our constitution, are extraordinary in their character. They are *sui generis*. The constitution, article 1, section XIX, prescribes that private property shall not be taken for public uses, (with the exception of certain instances mentioned in that section,) unless compensation shall be first made or deposited, to be determined or assessed by a jury. It has been held by the Supreme Court, that the word "jury" in that section, means a jury as understood at common law, subject to the control and directions of a court; and that the condemnation jury has no rights, privileges or immunities that any other jury has not got—that

they cannot commit error which the court is unable to control; that the word "jury" in that section, is like the word "jury" in different sections of the constitution, meaning an ordinary, common law jury as understood in our courts. Smith v. A. & G. W. R. R. Co., 25 Ohio St., 91, 102.

Now, sec. 2253 says, that when the corporation shall give security that shall be deemed adequate to pay any further compensation and damages, the right to take and hold the property shall not be affected by any review. That carries with it the corelative right of the property-owner to get his compensation. So we have here a provision of the statute permitting error proceedings to either party, at the same time giving full force and effect to the judgment below, without any expectation of restitution; because when once property is taken possession of, and when once the compensation is paid, from the very nature of the thing, upon reversal there can be no restitution. The right to take the property under such circumstances being recognized as one of necessity, and the statute itself providing that the corporation may take and hold the property condemned, not to be affected on any review—all this excludes all ideas of any intention on the part of the legislature that the rights of the parties should be restored. This is different from the case of reversal in ordinary actions. Here the judgment below becomes *functus officio*. It is executed by virtue of the statute. Then the question is, what is intended by this statute when it gives a right of error and provides for a reversal?

It has been argued by counsel— Mr. VonSeggern, in his brief— that the answer to this question is: "The logical conclusion of this statute is to bring for review only a legal question," to use his language. That is true, if we are permitted to assume that proceedings in court are for that purpose. Either these proceedings in error were intended by the legislature as mere moot trials to decide abstract questions of law, or they must have been intended for some substantial use and purpose. We must adopt the latter view, if any such construction can be reached from a consideration of the statute.

Inasmuch as it was intended by the legislature to give these parties a right to proceed in error and to have the judgment below reversed, certainly it was intended they should have the benefit of the reversal. But, inasmuch as the benefit of the reversal is not the same as the reversal in ordinary actions, viz.: That of restitution and of the restoring the parties to their original rights and condition—and inasmuch as the statute and the constitution provide that when the property is taken, compensation must be first made, the purpose of the legislature seems to be that these supplemental proceedings should give the parties a remedy for wrongs that might have been done them by means of an unlawful assessment made at the first trial. It is called a new trial; it is really in the nature of a supplemental proceeding to right whatever wrong might have been done by the assessment which at the time it was made was not judicially found to be an unlawful assessment, but which since then has been determined by the reviewing court to have been an unlawful assessment. The property-owner is entitled to his compensation before the property is taken. The constitution means lawful compensation. Of course, until it is found to have been not lawful, the judgment stands as evidence of its lawfulness; but, if it should be ascertained in due course that that compensation was not lawfully made, then, I take it, it is the intention of this legislation to give to either party this

remedy of a new trial upon the question of compensation. Meily v. Zurmehly, 23 Ohio St., 627; Wagner v. Ry. Co., 38 Ohio St., 32. This does therefore not militate against the constitutional provision that the property should not have been taken and held until the compensation was first made, but simply gives a remedy to either party for any wrong that might have happened in executing this constitutional provision.

It is therefore that the precedents of cases other than condemnation cases under this statute throw very little light, and we must go to the statute itself to ascertain the rights of the parties. As this course was taken, and as it was the purpose of the legislature in enacting these laws to give these remedies when it was ascertained that there was error in these assessments—in one case to the extent of $1,900; and in the other case $1,250—we must hold that it was also the intention of the legislature to give the corporation the benefit thereof, and to give it the remedy for any wrong that might have been done to it by the wrongful assessment, whereby it was compelled to pay as compensation what in law was not compensation, but an excess of compensation.

The next question is: Is this action barred by the statute of limitation of six years? An action could not have been begun until the difference was first ascertained, and in this case that was first ascertained in March of last year. This is not more than six years before the beginning of this action. Criticism might be made as to the delay in bringing about this new trial in the probate court—and what the rights of the parties, under the construction that I give to sec. 2253, might be in such cases in the probate court, it is not for me to determine here—but it is sufficient for the present case that this petition was not filed more than six years after their right to bring this action had accrued.

As to the point made in Hohne case, that the parties have distinct and separate interests, and that the action against Hohne et al., ought to have been brought separately, and that therefore there was a misjoinder of actions, the petition does not sustain that claim. The petition alleges that the judgment on the first verdict was in favor of the "defendants," and then in all its statements it uses the same expression—that the reversal was in favor of the plaintiffs and against the "defendants"; that on the second trial there was a verdict in favor of the "defendants," and that after the first trial the money was paid to the "defendants." It does not show that part was paid to one person and part to the other. It does not show any separating or any payment in severalty; so there is nothing in the petition to authorize that conclusion, and therefore nothing that will authorize the court to sustain that point. It might possibly be that such is the case—that there were separate payments made, separate rights recognized and separate verdicts had; if so, the petition should be amended and bring that upon the record; but as the record stands now, there is no several payment nor several rights recognized. It was a joint payment, a joint verdict, a joint reversal—in fact all the way through joint rights and obligations are spoken of.

The conclusion is, that in each case the demurrer will have to be overruled. If counsel desire to answer, they may take fifteen days.

Simrall & Mack, for plaintiffs.

Ramsey, Maxwell & Ramsey and J. R. Van Seggern, for defendants.

## GAS METERS. 18

[Hamilton Common Pleas, December 24, 1888.]

ADAMS EXPRESS CO. v. CINCINNATI & GAS LIGHT AND COKE CO.

Plaintiff, a consumer of gas, introduced the electric light system into his premises, and after that used his gas connection only exceptionally, or in cases of emergency when accidentally deprived of electric light. Held, he had ceased to be a consumer of gas as contemplated by the statute, and the Gas Company is no longer bound to continue its gas connection with the plaintiff's premises.

SHRODER, J.

On May 24, 1888, an order was issued in this action restraining defendant from severing the gas connection between its gas main and the plaintiff's Baker street premises; also, from refusing to furnish gas for lighting said premises. Defendant's motion to vacate this order is submitted upon affidavits, city ordinances and other exhibits.

It appears from the evidence that upon plaintiff's application in 1877 and 1883 the defendant made connections and furnished adequate meters to supply gas for one hundred burners in one room on the north side of Baker street, and sixty burners in another room on the south side of Baker street. Until November, 1887, the average annual consumption of gas supplied through these meters was respectively 12,500 and 158,700 feet. From November 1, 1887, to December 1, 1888, the consumption in one room was 2,100 feet, and in the other 1,200 feet; that this use of the gas was in one room during the months of July, September and November, and in the other during the months of April, September and October. The meters cost the defendant $40; the expense of keeping them in good order was annually $4; the revenue from the plaintiff from November, 1887, to December, 1888, aggregated $3.80. The non-use of meters causes their deterioration, and otherwise injures them.

The Express Company denies that it has ceased to use gas, and affirms its intention to continue its use; and as late as June 30, 1888 (the date of the jurat to the reply, submitted as an affidavit), it expressed the expectation of using it "each and every month." The evidence, however, discloses that its use of it was limited in each room, not to any one period of three succeeding months, but to three separated months, scattered through the entire year. The plaintiff avers that the denial of gas will greatly embarrass it in its business, and especially in the event of accident to its electric light system.

By virtue of its charter and the statutes, and with the consent of the city council, the defendant is endowed with the right of laying its pipes in the streets of Cincinnati. This franchise is granted by the state, and is accepted by the Gas Company, for reciprocal purposes; that is, to enable the company to sell and deliver its gas, and to enable the inhabitants of the city to obtain it. The rights and obligations of the company, and of the consumers, are mutual, in view of the peculiar nature of the business of manufacturing and selling gas, and of gas as a commodity. In the latter respect it is an article essentially of local production, and of local consumption. The manufacturer can not carry it, like any article of commerce, to any other market than the locality of its production; nor can the consumer obtain it in any other place. The business is one which requires associated capital and labor in its conduct. Its

public character subjects it to the demands of public convenience and necessities, and entitles it to conduct its operations under, and to require public compliance with, just and reasonable rules and regulations of its own adoption.

As between the state granting and the defendant accepting the franchise, considering the subject of the grant, the object to be accomplished, the reciprocal advantages which are sought to be secured, it must be taken that the right and privilege of laying pipes in the streets and other franchises are granted in consideration of the consumer's right to obtain gas from the company for his own uses. The company's rights thus create this corresponding duty and obligation. Williams v. Mutual Gas Company, 52 Mich, 499. The Revised Statutes, sec 2482, in part enforces this obligation by enacting the penalty of forfeiture of its charter, for any neglect to furnish gas. The provisions of the statutes, however, indicate that the duty is not intended to be without just limitation. Section 2478, Rev. Stat. empowers council from time to time, to regulate the price which the company shall have the right to charge consumers. This makes it compulsory upon it to supply gas at such price. In this case, council has, by ordinance passed February 13, 1880, and February 27, 1887, fixed the maximum price. The statutes do not intend that this power vested in council, is to be exerted either arbitrarily or capriciously, State v. Cincinnati Gas Light and Coke Company, 18 Ohio St., 263, 301, but they contemplate its being exercised fairly and with discretion, having in sight the just requirements of both the consumers and the company; taking into consideration, among other things, such prospective use of gas for an illuminant, as could be reasonably anticipated.

If it be reasonable to regard the statutes as evidencing this purpose and intention, then they indicate a limitation to the company's duty of supplying gas to consumers. It would exclude such uses as are exceptional or accidental, or as may be made necessary by reason of extraordinary emergencies. This view of the law would not authorize the company to decide for any consumer the quantity of gas he is to use, or to refuse him a supply because it entails a loss upon it. Whether or no the consumption is exceptional or accidental, or for an extraordinary emergency only, would require the taking into consideration the habits, disposition and necessity of the individual consumer, and the special circumstances of each case. If the company would not in such case be obliged to supply gas, it follows that it would not, under like conditions, be bound to continue its gas connections for such purposes.

The evidence discloses that since November, 1887, the plaintiff's use of gas was exceptional; that it did not expect to consume it in the Baker street rooms unless on such occasion as when the failure of their electric light would embarrass its business. If the introduction of the electric light has rendered the gas so unserviceable to plaintiff as to confine its use in very limited quantities to cases exceptional in their nature, or when accidentally or temporarily deprived of its electric light, then it must be held to have ceased being a consumer of gas as contemplated by the statutes. Under such circumstances there is no duty upon the defendant either to supply gas or to continue its gas connections with the said Baker street premises. The conclusion is that the motion to vacate the restraining order ought to be granted as to said premises. It is so ordered.

E. A. Ferguson, attorney for Gas Company.
Ramsey, Maxwell & Ramsey for Express Company.

## WILLS—POWER OF SALE. 29

[Superior Court of Cincinnati, Special Term, 1888.]

†CHARLES C. BREUER v. TIMOTHY HAYES.

1. A power to sell real estate, conferred by will upon executors, for the purpose of paying debts of the testator and dividing his estate, does not authorize the executors to make a perpetual lease of the premises with privilege of purchase.
2. Where a certain specified portion of the estate is directed to be sold, and the proceeds thereof invested in bonds, the principal and income of which are specially devised to certain designated persons, a perpetual lease of such portion with privilege of purchase, is not a proper execution of the will of the testator.
3. Specific performance of a contract of sale of real estate will not be decreed in a case where there is a grave doubt about the validity of the title of the vendor, and such doubt may arise upon a question of law or the construction of a will.

In the year 1886 Pollock Wilson died, leaving a will in which he devised to his five children in equal shares all his estate, real, personal, and mixed, whatsoever, to have and to hold the same to them and their heirs forever. He also appointed executors, and authorized them "to sell to any person or persons, and for such price and upon such terms as they may deem best, at public or private sale, any part of my real estate which they may think best to sell, either for the payment of debts or for the purpose of making division of my estate amongst my heirs, and the purchasers from my said executors shall not be bound to see to the application of the purchase-money. And in case of the death, resignation, refusal or incapacity to act, or removal from executorship of either of said executors, the other shall have the same power."

To the will there was a codicil in which the testator revoked the provision devising a portion of the property to one of his children, but provided that the clause should stand as to any other children therein named, who were to take each one-fifth of the estate as therein specified. The codicil further proceeds: "The remaining one-fifth of my said estate I do hereby give, devise and bequeath to John Carlisle and Alexander Clark, my executors in the said will named, and the survivor of them, but in trust, nevertheless, for the purposes following, to-wit: to convert the same into money, and the same to invest and keep invested in the bonds of the United States, or of the state of Ohio, or of the city of Cincinnati, and the net income thereof to pay to my said son William during his natural life or under the occurrence of the events hereinafter providing for the cessation and ending of the payment of said income, the said income to be paid to him only upon his own personal receipt given therefor, and not to his assigns, and only when and as the said income shall accrue; and at the death of said William, or upon the occurrence of any of the said events in case he should live and have children, then to pay over and to transfer to said children the bonds aforesaid; but in case there shall be no such child or children to take the same, then and in any such case to pay over and transfer the said bonds to my daughter Amy Gill. But in case the above provision for my son William, which I make for my own sole use, benefit and support, or any part thereof, should by any debtor be attached, garnisheed or levied upon, or taken for his liability, or in case he should be made bankrupt, or dispose by sale, alienate, transfer, or in any way venture to part with or make over to any person or persons, or in any way to encumber the said income and provision coming to him under his said trust, then and in any such case the said trust for his benefit and all his interest under and by virtue thereof shall thereupon cease and be utterly void to all intents and purposes, and the said bonds shall thereupon become the property of his child or children, if any he shall have or if he shall have none then the said bonds shall go to my daughter, Amy Gill, as above provided."

Among the property left by the testator was a large farm lyin partly within the limits of the city of Hamilton, Butler county, Ohio. The will was duly probated, and the executors name therein entered upon the discharge of their duties. On

†This judgment was affirmed by the superior court in general term; opinion post, 22 B., 144.

the first day of December, 1887, they made a lease of the farm to the plaintiff and two others, in consideration of certain sums paid, for a term of 99 years, renewable forever, at a yearly rental of $1,500; the lessees to pay all taxes and assessments; and the executors further covenanted that all rents, taxes and assessments being paid, and all covenants being performed by the lessees as stipulated, they would at any time during the continuance of the lease convey the premises to the lessees, their heirs and assigns, in fee simple, by giving a sufficient deed of general warranty, on payment to them of the sum of $30,000; the lessees to have the privilege of paying the purchase money in installments of not less than $10,000. and upon such payments being made the lessors to convey such part of the premises as the payment would be of the sum of $30,000, as might be agreed upon,—and in case they should not agree, the matter to be referred to three arbitrators and determined by them. The lease contained the usual covenants, and a covenant that upon failure to pay the rent and assessments in accordance with the lease, the lessors or assigns should have the right of re-entry, and a covenant of quiet enjoyment on the part of the lessors.

On the twenty-fourth day of February, 1888, the plaintiff, Breuer, who in the meantime had acquired the rights of this co-lessees in the premises they had leased for that purpose, entered into a written contract with the defendant Hayes, whereby in consideration of the sum of $20,000 to him in hand paid, and in consideration of the exchange of property and assumption of the payment of the balance of purchase, and of the terms and conditions hereinafter set forth to be done and performed, Breuer agreed that he would by a sufficient deed of general warranty sell and convey to Hayes, his heirs and assigns forever, the leasehold estate acquired by the lessees above mentioned from the executors of Pollock Wilson, the premises to be clear and free from all claims and incumbrances, but subject to the terms of the lease. Hayes agreed to pay Breuer, in consideration of the conveyance of the property, the sum of $10,000 purchase-money, and to give him a mortgage on the premises for $10,000, securing the payment of the remainder, and in addition to convey by warranty deed to Breuer a certain farm owned by Hayes in Pendleton county, Kentucky. It was further provided that the conveyances mentioned and cash payment were to be made on or before the first day of May, 1888; and if upon the examination of the title to the lease hold estate aforesaid "it shall appear that the said John Carlisle and Alexander Clark have not full power and authority without an order of court to convey to said Timothy Hayes, his heirs and assigns, the fee-simple of the estate in said described premises, then this agreement is not to be binding upon the parties thereto."

Soon afterwards some difference arose between the parties, and after some little negotiation and investigation Hayes declined to execute the contract; thereupon Breuer commenced this action to compel the specific performance thereof. Peck, J.

Various reasons are assigned by Hayes in his answer why he should not be compelled to take the property. The most important is the allegation that the executors of PollockWilson under the powers conferred upon them by his will, have no authority to make the lease which they entered into with Breuer and others, and that the title to the property in Breuer is bad for that reason.

As against that claim, it is urged that the clause of the contract which provides that if upon examination of the title it appears that the executors have not the power to convey the fee simple of the premises, the agreement shall not be binding, the parties have provided the sort of a title that the purchaser shall have, and that as there can be no doubt about the power of the executors to sell the property and convey it in fee simple, Hayes has no right to require more; that as the minds of the parties were directed to the title, and that is the only stipulation contained in the agreement, it is presumed to exclude any other stipulation. I am unable to agree with counsel who have so forcibly urged this argument. There is, without stipulation, in every such contract an implied condition that the vendee shall have a good title, 1 Sugden on Vendors, 42; for without title the consideration of the contract on the part of the vendor necessarily fails; and Breuer's title is entirely dependent upon the lease. If that be void for want of authority in the executors, it would be singular, to say the least, if upon the showing to Hayes, that the executors had the abstract power to sell and convey the fee-simple, he should be compelled to accept a deed from Breuer which would convey no interest in the property. What the parties were stipulating for, as apparent from the whole contract, was the property and all interests therein; and what was intended that the lessor should convey to the purchaser, was a title to the property; and the mere fact that the purchaser might, even if his title under the lease should fail, ac-

quire a title from the executors by purchase, would not fulfil the intention of the parties.

The real question at issue is whether the executors of Pollock Wilson had power, under his will, to execute that instrument. The power given in the will itself, apart from the codicil, appears to be only a power apart from an estate, as the distinction has been made; for it is established by the weight of authority that the devise of power to executors to sell lands to pay debts, or distribute property, does not clothe them with any title, but vests in them simply the power to sell under the circumstances, and in the manner prescribed. 1 Sugden on Powers, 129, et seq., also Neff v. Neff, 3 Ohio Dec. Re., 75, where this subject is learnedly discussed by Judge Storer. Also, 1 Ohio, 232; Taylor v. Galloway, 1 Williams on Executors, 725.

The codicil, however, does create a trust in the executors as to the one-fifth of the property, but their power of sale is strictly limited, and the disposition of the proceeds very carefully provided for. It is that the interest shall be sold, and the proceeds thereof converted into bonds of the United States, the state of Ohio or the city of Cincinnati, the income of which shall be paid to the son during his life, or upon certain contingencies, both principal and interest go to the children of the son or to the daughter of the testator. In naming the contingencies under which the proceeds shall be disposed of, such proceeds are always spoken of as bonds, showing, conclusively that it was the intention of the testator that the interest of his son derived from the sale of the property, should be invested in that way. Under these circumstances, the power to sell, in the executors, would not seem to be any greater than the power in the will itself, for it is evidently intended that the sale shall be for money to be invested in bonds. The clear and positive directions contained in the codicil, seem to me entirely inconsistent with a lease. The testator did not intend that his son should be provided with an income from a rental, but from bonds so held that the principal could be disposed of as directed. The power of executors to sell, means, not power to barter, exchange, or sell for anything except money. See Taylor v. Galloway; Cleveland v. State Bank, 15 Ohio St., 225, 236.

Counsel have very extensively and learnedly discussed the question whether the power to sell, includes power to lease, and the industry of counsel for plaintiff has succeeded in producing one case analagous to that at bar, in which it has so been determined. 2 Wendell, 487. In that case the power under which the conveyance was made, recited that the land was too far distant for the owner to explore, examine, sell or settle, and therefore he appointed one Cooper his attorney, to bargain, sell, convey and assure the same or any part thereof, to anyone inclined to purchase, and the court say that "it has been held that a power to give, includes a power to sell, as it does also a power to charge, and that a power to sell, implies a power to mortgage, which is a conditional sale; further, that a power to make an absolute sale, implies a power to make a conditional sale, as was done here, and as 'omne majus in se continet minus,' it seems to follow that the power to sell gives the attorney power to convey any lesser estate." No authority is cited in direct support of the proposition.

But though the court held that there was power, and that therefore the lease under which the action was brought was valid, yet for other reasons given in the opinion, judgment was rendered for the defendant, so that the conclusion as to the validity of the lease was unnecessary to the determination of the case, and while there are some cases which hold under certain special circumstances, that a power to sell includes a power to mortgage, the weight of authority is now decidedly to the contrary. 2 Washburn's Real etsate, 5 Ed., 708; 1 Jones on Mortgages, sec. 129; 87 Mo., 387; 66 Tex., 43.

The argument which is much insisted upon, that the greater includes the less, and therefore a power of sale includes a power to lease, or to convey any lesser estate than the fee simple, does not seem to me applicable under the circumstances, of the power given in this will. As to four-fifths of the property, this is a power of sale pure and simple, and such a power, in my judgment, would not include a power to carve out minor estates, such as would encumber or prevent the object of the testator, which was, if necessary, to sell the property.

It is to be borne in mind, that the instrument which the executors executed, is more than a lease. It gives to the lessee the privilege of a purchase at any time, upon the payment of a stipulated price. Such a privilege is not an executory contract of sale, as has been argued. It does not bind the lessee to buy at all * * * It simply confers upon him the option of purchase if he chooses to do so, at any time during the continuance of the lease, and so far as he is concerned, the executors by this instrument, have deprived themselves of the power to sell. It may be

argued that the executors may hereafter sell the reversionary interest, the fee of the property, and that in this way, the intention of the testator would be carried out; but it hardly seems reasonable to hold that he intended that an estate so encumbered, should be sold by his executors when he transmitted to them by his will, an unincumbered fee simple title, the sale of which he authorized, and a sale made under such circumstances, can hardly be said to be the same as the sale of the property itself, which of course, means all interest in the property. It may be that a leasehold of that sort would be worth more than the property would bring if put upon the market; it may be that it would be worth less. It certainly would be materially different from the selling of the property itself.

The Supreme Court, in Taylor v. Galloway, above mentioned, said that "the power must be strictly pursued, and must be executed according to the manifest intent of the testator. If the trustee could encumber an estate by granting an equitable claim to an undivided moiety for the purpose of procuring a removal of the entries and the completion of the title to the residue, he might, on the same principle, exchange it for land in Virginia, and give a moiety of it to the agent who should negotiate the exchange." It could quite as plausibly be argued that a power to sell upon terms to be fixed by the executors would include a power to exchange for other things of equal value, which other property might afterwards be sold for as much or more than the land itself; but as above stated, it has been repeatedly held, both in this state and elsewhere, that a power to sell does not include a power to exchange, and for the same reasons, and upon every analogy that I am able to think of, I believe that a power of sale such as this does not authorize executors to make a perpetual lease with privilege of purchase.

I have come to this conclusion after some study of authority, and with some hesitation, in view of the case in 2 Wendell above mentioned; but it seems to me so well grounded in reason that I cannot come to any other. If upon final and complete examination it should be held by a higher court that I am in error in this respect, of one thing I feel quite certain, that there is so much doubt about the power of the executors to enter into this lease that there is grave doubt about the validity of Breuer's title, and under such circumstances a court of equity will not compel a purchaser to accept the property. It has been repeatedly held, and I know of no authority to the contrary, that where there is grave doubt about the validity of the title to property sold, specific performance of the contract of sale will not be decreed, and the doubt may arise as to a question of law or upon the construction of a will. Pryke v. Waddingham, 10 Haire, 1; Waterman on Specific Performance, secs. 411, 412, 413 and 414; Swayne v. Lyon, 67 Penn. St., 436.

The finding is for the defendant and the petition dismissed.

Noyes & Fitzgerald and Kittredge & Wilby, for plaintiff.

D. D. Woodmansee and C. W. Baker, for defendant.

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## 38 ATTACHMENT.

[Muskingum Common Pleas.]

### CHICAGO & COLUMBUS COAL CO. v. JAMES G. MANLEY ET AL.

1. In an action before a justice of the peace, where there is neither actual service nor voluntary appearance, but jurisdiction is acquired by attachment of property and publication of notice, the justice may render judgment for the full amount of plaintiff's claim, if not in excess of his jurisdiction.

2. In such case the judgment is a mere incident to the appropriation of the attached property—resting upon the necessity for a finding of personal liability as a condition precedent to the application of the property—and has no operation beyond the disposition of the property seized in limine.

3. The statutory provision, that in such case "the judgment shall stand and execution may issue thereon for the residue in all respects as in other cases," contravenes the constitutional guaranty of "due process of law," and is unconstitutional

PHILLIPS, J.

Manley sued this plaintiff, a resident of Illinois, before a justice of the peace. There was neither service of summons nor entry of appearance, but an attachment was issued on the ground of non-residence, property was attached, notice published, and judgment duly rendered for Manley. The attached property did not satisfy the judgment, and a transcript was filed with the clerk of this court, and execution issued to the defendant, Bethel, as sheriff of this county, who has levied the same upon lands of this plaintiff, and this action is brought to restrain the defendants from selling the said lands under such levy. A temporary injunction was allowed, and the defendants now move to dissolve this injunction.

If sec. 6507, Rev. Stat., providing that in such case "the judgment shall stand, and execution may issue thereon for the residue, in all respects as in other cases," is constitutional and valid, then the right to file the transcript and issue the execution is conceded, the levy is valid, and the injunction should be dissolved; otherwise, the motion to dissolve should be overruled.

To consider intelligently the question here presented, we must understand the true ground of jurisdiction in foreign attachment.

The object of an attachment proceeding is to subject a debtor's property, found within the territorial jurisdiction of the court, to the satisfaction of the attaching creditor's demand.

The property is seized *in limine*, but before it can be applied to the satisfaction of the demand, the demand must be established by judgment. Such judgment is necessarily *in personam*.

The general rule is, that to authorize the rendition of a personal judgment, (1) the court must be competent, by the law of its creation, to pass upon the personal liability of the defendant, and (2) he must be brought within its jurisdiction by service of process, or by voluntary appearance.

Where, in a proper case, the property of a non-resident debtor has been attached, the court thereby acquires jurisdiction, and service may be made by the publication of notice; and such service will authorize the rendition of a personal judgment for the entire demand, if it does not exceed in amount the jurisdictional limit.

The jurisdiction of the court to inquire into and determine the validity of demands against non-residents rests upon, and is a mere incident to, its conceded jurisdiction over their property found within its jurisdictional boundaries.

The law may, with some show of justice, impose upon the owner of property a liability to have his property subjected to the jurisdiction of the tribunals within whose territory he has placed it; but to go further, and subject non-resident debtors to judgments *in personam*, without actual notice of voluntary appearance, would contravene the constitutional guaranty of "due process of law," and would make courts the medium for the practice of fraud and oppression.

Service of process is necessarily limited to the territorial jurisdiction of the court issuing it, and the operation of notice by publication is equally limited; for if the tribunals of one state can not send their process into another state, and require parties domiciled there to respond to such process, *a fortiori* they can not impose such obligation by mere publication of notice.

A personal judgment in foreign attachment being a mere incident to the appropriation of the attached property, and resting upon the necessity for a finding of personal liability as a condition precedent to the application of the property, it follows, as a logical conclusion, and as a legal corollary, that such judgment should have no operation beyond the disposition of the property seized *in limine litis*.

Such has been the almost uniform treatment of such judgments, in the U. S. courts and in the state courts that have had occasion to determine the extent of their operation. Freeman on Judgments, 567; Cooley's Const. Lim., 404; Rennoyer v. Neff, 95 U. S., 714; Drake on Attachmt., 5; Cooper v. Reynolds, 10 Wallace, 308.

The Supreme Court of North Carolina is the only court, so far as I have been able to learn, that has held that a statutory provision like ours gives the judgment validity beyond the disposition of the attached property. In the North Carolina case, Ruffin, C. J., says, that the court is not insensible to the injustice that may be done to non-residents by making the seizure of a trifling article the foundation for the recovery of a large demand; but if the legislature thinks it proper to enact that such judgment shall have the operation of judgments in actions commenced by original process personally served, the statute, and not the courts, is to be quarreled with. Skinner v. Moore, 30 Am. Dec., 155.

With due deference to so high an authority, I suggest that the constitutional guaranty, and the true ground of the jurisdiction, were overlooked by the court.

After reaching the conclusion that the statutory provision under consideration is unconstitutional and of no effect, I find that our Supreme Court, in 1883, in the case of Leonard v. Lederer, not reported, held a judgment in such case void as to the residue thereof, on the ground that the statute in question "has relation only to cases in which the defendant was summoned or appeared."

But I respectfully submit that where "the defendant was summoned, or appeared," the judgment is valid as to the residue without this statutory provision, and that its inconsistency with the constitution is the true ground upon which to withhold its application from judgments rendered without actual service or voluntary appearance.

Motion overruled.

Train & Durban, for plaintiff.

C. A. Beard, for defendants.

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## 54 ADMINISITRATION OF ESTATES.

[Hamilton Probate Court, January 28, 1889.]

IN RE ESTATE OF JOSEPH GARRETTSON.

1. A widow has the first right to administer upon the estate of her deceased husband.
2. The fact that she agreed with her husband for a consideration to live separate and apart from him during their natural lives, and did so live, and to make no claim on his estate in any event, does not deprive her of that right.

GORBEL, J.

Dr. Joseph Garrettson died intestate, leaving a widow, Julia A., and a son, Dr. George C. Garrettson. On the twentieth day of June, 1879, Dr. Joseph Garrettson and his wife entered into an agreement by which, in consideration of $2,500 paid to her, they agreed to live separate and apart from each other during their natural lives, and that said Julia A. was in no event to make any claim to the property of the said Dr. Joseph Garrettson. In pursuance of this agreement they did separate and remained so up to the time of the death of Dr. Joseph Garrettson.

Julia A. Garrettson then made application to be appointed the administratrix of said estate, which was resisted by the son, George C., claiming that under the said agreement, Julia A., while technically the widow of Dr. Garrettson, was not his widow in fact, and that she was estopped from setting up any claim against his estate.

The court held: 1. Separation alone does not deprive a wife of her right to administer; the marriage not having been dissolved, she is still his widow.

2. Section 6005 gives to the persons mentioned, in the order prescribed, the absolute right to letters of administration, subject only to the condition that they are competent and suitable for discharge of the trust, and do not neglect, without sufficient cause, to take administration.

3. Under sec. 6005, a widow has the first right to administer upon the estate of her deceased husband, and the probate court has no power to deprive her of that right except for cause.

Burch & Johnson for Mrs. Garrettson.

William Strunk and Henry M. Cist, *contra*.

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## CHANGE OF VENUE. 57

[Franklin Common Pleas, Special Term, 1888.]

STATE OF OHIO V. ALLEN O. MYERS.

1. A plea to the jurisdiction of the court and the challenge of a jury, by the defendant in a criminal case, on the ground that the case had not been legally transferred from another county for trial, are too late, if the jury has been impaneled.
2. The state has an equal right with the defendant to a change of venue, when there is no restriction of the right to the defendant by the law providing for such change of venue.
3. Section 7263 does not, in terms, or by implication, restrict the right to have a change of venue to the defendant in a criminal case, but it bestows the same right upon both the state and the defendant.
4. That section thus construed is not in conflict with section 10, article 1, of the constitution.

PUGH, J.

(1.) The defendant was indicted in the county of Franklin, by a grand jury of that county. The indictment alleges that the crime imputed to the defendant was committed in that county.

On the sixteenth day of July, 1888, at the April term of the common pleas court of Franklin county, upon the application of the prosecuting attorney of that county, which was supported by affidavits showing that a fair and impartial trial of the case could not be had there, the place of

trial was, by order of that court, changed to this (Madison) county—a county adjoining Franklin county, and being in the same judicial district. The defendant made no resistance to the motion or application for a change of venue when it was made, although present in person and by counsel at the time; the affidavits were not combated by counter-affidavits, or evidence in other forms; no argument against the change was made by his counsel; he contended himself with having noted an exception to the order in the entry placed upon the journal of the court.

The case was sent here; the time of the court has been engaged for nearly a week in selecting a jury from the citizens of Madison county, for the trial; the jury is now impaneled, but not sworn, and for the first time active resistance is made to the change of venue, by a plea to the jurisdiction of the court filed, and also by a challenge of the whole jury on these grounds: (1) That the jurors are not citizens and residents of Franklin county; (2) that the defendant is entitled to be tried in the last named county; (3) that the change of venue was not ordered on his motion or by his consent; and (4) that the court had no power, either under the statute (sec. 7263, Rev. Stat.) or the constitution (article 1, sec. 10) to order a change of venue upon the motion of the state.

The good faith of the disclaimer, that the plea and challenge are not made to avoid a trial, would have been more obvious, if the opposition to the change of venue had been made in the other county when the application was heard by the court of that county. The large expense which has since been incurred in the preparation for the trial would have been avoided, if that court had concluded that the change of venue could not legally be made.

The jury has, as has been stated, been impaneled. The swearing of a jury is not essential to its impaneling. The term "impaneling" means the selection and the qualification of the jury. It has been so construed by courts of high authority.

"No inference can be drawn from the word 'impaneled' in the record that the jury was sworn." Lyman v. The People, 4 Brad. (Ill.) 348. See also, 1 Bouvier's Dictionary, 773.

"It appears from the definition of Lord Coke, that the term 'impaneled' was applied to the body of the jurors when the sheriff brought them into court with their names. Adhering to this definition, it is clear that this designation can refer to no process of drawing, selecting or swearing a particular jury, after the body of jurors for the term appear. But, curiously enough, the general understanding of this term under our practice is, that it covers all the steps of ascertaining who shall be the twelve men to sit as jurors in a particular case. A jury may be said to be impaneled when they are ready to be sworn, and in this sense the term is used in the caption of this chapter."

It is evident that the legislature, in enacting sec. 7300 of the Rev. Stat., used the words "impaneled" and "swear" to express different meanings in their application to a jury for a capital case; and the Supreme Court in Palmer v. State, 42 Ohio St., 596, recognize the discrimination. It is equally evident that the word "impaneled" in that section does not include the swearing of the jury.

In all indictments, from time immemorial, the two words have been employed to express different and exclusive acts. Precedents are evidence of what the law is. According to Judge Yaple, most of Lord Eldon's qualifications as a famous and great chancellor were acquired from his careful and diligent study of precedents.

The defendant having delayed his objection till after this jury was impaneled, waived his right to object.

"A party cannot take part in and treat the proceedings as valid until a jury has been impaneled, and then challenge the jury as not of the county or district where the offense was alleged to have been committed." Maxwell's Criminal Procedure, 545, citing State v. Potter, 16 Kansas, 80.

The defendant should have made his objection to the change of venue by a plea to the jurisdiction of the court, before the jury was impaneled.

It is hardly necessary to say that this holding of the court is not predicated to what the defendant did in the other county where the application for change of venue was made. If the saving of an exception in the entry to the order of the court of that county, without a bill of exceptions, made a sufficient record for an appellate court to review, to pass on, the decision, there was no need for the plea to the jurisdiction or challenge of the jury to be interposed here. This court has no jurisdiction to review the decision made in Franklin county.

(2.) It was contended that the prosecuting attorney had no right to make an application for change of venue, and that the court had no power to order such a change, under sec. 7263 of the Rev. Stat. That section is as follows: "All criminal cases shall be tried in the county where the offense was committed, unless it appear to the court, by affidavits, that a fair and impartial trial can not be had therein, in which case the court shall direct that the person accused be tried in some adjoining county." If this section does not infringe upon the provision of the constitution mentioned, the contention is unreasonable. Omitting all reference to the constitution, its meaning is not ambiguous. There is not a syllable in its language, which, either expressly or impliedly, limits the right to make the application for a change of venue to the defendant; indeed it does not expressly require that either party should make an application or motion; literally, the court may make the order without a motion by anybody. It is too obvious to need the support of an argument, that the right of the state to a change of venue is equal to that of the defendant, when the statute does not restrict the right to him, the statute being constitutional; and it has been so adjudged. 1 Bishop's Criminal Procedure, sec. 73; citing People v. Webb, 1 Hill, 179; People v. Baker, 3 Parker C. C., 181.

The authority of the decisions cited by Bishop is not weakened by the fact that there was no provision in the New York constitution, at the time they were rendered, similar to sec. 10, of article I of our constitution; because the court is now construing our statute independently of the constitutional provision. The construction placed upon this section by the defendant's counsel is repugnant to its terms; it does violence to its language.

(3.) It was urged that the transfer of the case to this county, without the defendant's consent, violated his constitutional right, and to sustain this contention an appeal is made to the section of our constitution just mentioned, which ordains, among other things, that a defendant in a criminal case shall be entitled to "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

It is argued that the defendant cannot be tried in any other than Franklin county without his consent; and that the word "district"

in the guaranty cited is a synonym of "county," its neighboring word.

If the accused of crime in all cases is guaranteed a trial in the county in which the offense is alleged to have been committed, the word "district" should not have been used by the makers of our constitution, and it is meaningless. It is a conclusion that violates one of the fundamental canons for the interpretation of laws, that a meaning must, if possible, be given to every word. To say that the word "district" is a synonym of the word "county" is an impeachment of the common school learning of the makers of our constitution.

A constitution owes its force to its ratification by the people; and unless the language used in it has "acquired a settled meaning, thoroughly understood, not only in legal parlance, but in common acceptation, or unless the very nature of the subject indicates, or the context suggests, that it was used in a technical sense, it is to be taken in its common acceptation, its plain, ordinary, natural, untechnical sense." Endlich's Interpretation of Statutes, sec. 507.

And as in a statute so in a constitution, it is *prima facie* true that a word or phrase is used in the same sense wherever it occurs. Id., sec. 514.

This provision of section 10 of the bill of rights does not guarantee to a defendant, in all cases, a trial in the county in which the offense is alleged to have been committed. Nor was it intended thereby to fix or circumscribe the jurisdiction of the common pleas court. It was borrowed by the authors of our constitution of the United States constitution. But there is no decision of any United States court which throws any light on the question of construction.

In the opinion of the court, the word "district," in the tenth section of the first article of our constitution, means a territory, a locality, larger than a county. It means a common pleas district, a judicial district. The word was used with reference to a division of the government designated in another part of the constitution by the same term.

In the constitution of Wisconsin there is a similar provision. It differs from ours in this, that after the word "committed," this clause is added: "which county or district shall have been previously ascertained by law." In Wheeler v. The State, 24 Wis., 52, the same question raised here was decided.

After noticing the similar provision in the constitution of the United States, and explaining the purpose of it, the court observed that it was copied into their "constitution without being precisely applicable to any organized division under our constitution and laws. It is true we have school districts, and senatorial and assembly districts. But, of course, it would not be claimed that it had reference to either of them. And, whether it can have any effect or application under the present order of things in this state, or under any that may hereafter be established by law, may be uncertain. But it is certain that there is no existing division known as a district, which was previously ascertained by law, and including Pepin county, where this offense was committed, which can create any doubt or question about the right of the prisoner to be tried in that county, which was previously ascertained by law."

This utterance clearly proves that the court would have decided that the prisoner could have been tried out of the county, where the offense had been committed, if there had been any organized division of the government created by the constitution and designated by the term "dis-

trict," and to which the same word in the seventh section would have been applicable.

This is a negative authority supporting the construction of the word "district" asserted by this court.

The decision in Kirk v. The State, 1 Cold., 345, is another negative authority. The constitutional provision of Tennessee is substantially like ours. The question in the case was the construction of that provision.

It was held that the statute was repugnant to the constitution. But the reasoning of the court makes it manifest that the authority does not support the contention of defendant. In the opinion it was said:

"In the existing organization of our judicial system, the clause of the constitution in question is to be read, omitting the word 'district'; which was used in the original constitution of 1796, with reference to the district system then existing, but which was abolished in 1809." Is it not plain that, if the district system, with reference to which the word "district" was used in the constitution, had not been abolished, the court would have decided the question the other way? Hence it is an authority adverse to the argument of defendant's counsel.

*Ex parte* Rives, 40 Ala., 612, was cited. But in that case the court only decided that a criminal action could not be transferred to another county, against the consent of the defendant, because the presiding judge had been of counsel for the prosecution; all else that was said, on any other topic, was *obiter dicta*.

In The State of Minnesota v. Robinson, 14 Minn., 447, it was held that a statute which provided, that when offenses are committed on the boundary lines of two counties, or within one hundred rods of the dividing line between them, they may be alleged in the indictment to have been committed in either of them, and may be prosecuted and punished in either county, was not in conflict with the provision of the constitution parallel to that of ours under consideration. In the opinion it was said that the constitutional provision did not "define or limit the jurisdiction of the courts of this state over criminal offenses, nor does it expressly, or in effect, guarantee to the accused in all cases a trial in the county in which the offense was committed, but it defines and limits the locality from which a jury shall be taken for the trial of the defendant in a criminal prosecution, and in effect, we think, secures to him a trial within the same limits."

If it is constitutional for a legislature to authorize a court of one county to try a person for a crime committed one hundred rods over the line in the adjoining county, why can it not give the same authority when the crime had been committed one mile, or any distance, over the line in the latter?

There is nothing in the constitution of our state to prevent the legislature from enacting that a grand jury may be called from two or more counties in the common pleas court, for the purpose of inquiring into offenses committed in any of such counties; nor is there any prohibition against the legislature providing that all criminal cases in a common pleas court, for two or more counties, may be tried at one place in one of the counties, providing the counties are in the same district.

This is true, because there is no restriction in the constitution itself upon the territorial jurisdiction of a common pleas court. Section 3, of article 4, contains all that there is in that instrument in regard to the territorial jurisdiction of such courts. It requires the state to be divided

into nine common pleas districts of compact territory, and bounded by county lines; and again, requires each district to be divided into three subdivisions, of compact territory, bounded by county lines, and as nearly equal in population as practicable, and in each of which one judge of the court of common pleas for said district * * * shall be elected. If our constitution had established a common pleas court for each county, as it did not, except for Hamilton county, and had limited its territorial jurisdiction to the area of such county, an accused person would, certainly, be entitled to be tried in that county and no other. But this section does not contain any such limitations on the territorial jurisdiction of the common pleas court. See Minnesota v. Robinson, 14 Minn., 447.

The parallel provision in the constitution of Minnesota to that in sec. 10 of article 1 of ours, ordains that the "district" shall be ascertained or prescribed by law, while ours does not. The omission of this provision, found in nearly all the constitutions of the states in which cases have been decided by the appellate courts, makes it clear that the meaning of the word "district" must be ascertained from the constitution itself. It is not left to be defined by statute. And considering the nature and ordinary import of the term, and the context of the constitution, cited, does it not obviously mean a judicial district? It is ordained by sec. 4 of article 4 of our constitution that the jurisdiction of common pleas courts and the judges thereof, shall be fixed by law. There being no limitation upon the territorial jurisdiction of such courts prescribed by the constitution, all of the statutes fixing and limiting jurisdiction must be construed together, whether they expand or contract each other; and sec. 7263, embracing a part of that subject, must be so construed with them. It directly relates to the subject of jurisdiction—territorial jurisdiction; it provides where an accused person in a criminal case may be tried. Indeed it is the only section of the statutes which has been cited that prescribes the territorial jurisdiction of the court for the trial of criminal cases.

It was urged that the literal terms of the statute allow a case to be transferred out of the district, because all of the adjoining counties to any particular county might not be in the same district. But a restricted construction of the statute must be adopted so as to make it harmonize with the constitution. It should be held to mean only those adjoining counties which are, in fact, in the same judicial district.

Osborn v. State, 24 Arkansas, 629, is cited. There, the Supreme Court of Arkansas declared that a statute which empowered a circuit judge to change the venue of a criminal case without the application of the defendant, where he had judicial or other knowledge that facts existed which would entitle the defendant to the removal of the case upon his own application, to be inconsistent with, and in violation of the constitutional provision similar to that of ours now in question in this case.

This is an unequivocal, clear-cut authority in support of the argument of the defendant's counsel, and the only one, in my humble opinion, which has been cited. But in the opinion of the Arkansas court there are no adequate reasons assigned for the conclusion; indeed it would be erroneous to say that any reason at all was given. The case is a strong illustration of judge-made law, which, Macauley justly said, was "a curse and scandal not to be endured."

The decision of the Butler county common pleas court in State v. Arrison, has been relied upon. I have never seen the opinion in print. All that we know about it in the discussion of this case has been read from the note of the Code commissioners. It appears from that note that one reason for the decision was that the case was transferred to another judicial district, Butler county not being in the same district with Hamilton county, from which county the case was transferred.

Anything else decided in the case may be *obiter dicta*.

The resources of fervid and impassioned oratory have frequently been displayed to show that an accused person should have the right to elect whether he will be tried in any other county than where the offense is alleged to have been committed; because he should not be taken from his friends, witnesses and neighbors, and that this guaranty is necessary to protect him from the tyranny and oppression of rulers. In the days of stage coaches, when there was not much travelling, and in the times when judges were appointed by the government, and not elected by the people, and were abject and dependent, this was true. Now it is almost true that when a large minority of criminals are tried in the counties where the offenses were committed, they are tried away from home, friends and neighbors, if they have any. Criminals have become migratory. They have a right to take depositions anywhere, and the absence of witnesses is no deprivation.

Criminal laws are so humane and so jealous of the rights of criminals, that there are more chances for their escape from punishment than for conviction. Judges are not servile agents of power. All of the cases cited and positions taken by counsel for defendant have been considered with assiduous care, although the time for such consideration has been limited to a few hours.

The challenge will be overruled, and the demurrer of the state to the plea will be sustained.

Nash, Huling and Locke, for the state.

Powell, Wilson and Lincoln, for defendant.

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## STREET ASSESSMENTS. 62

[Hamilton Common Pleas, December, 1888.]

### †MATTHEW RYAN ET AL. V. CINCINNATI (CITY.)

### B. STORER ET AL. V. SAME.

1. The estimate of cost of street improvement transmitted to council of a municipal corporation, under R. S., sec. 2214, does not fix the limit of the amount of the assessment to be made upon the abutting property for such improvement. Such estimates is not intended to include any items of cost or expense other than such as may be the subject of contract under R. S., sec. 2215. Nor is the amount of the assessment in any way affected by any sum stated in the notice given under R. S., sec. 2304 of the passage of the preliminary resolution for an improvement.

†This argument was reversed by the circuit court; opinion 2 Circ. Dec., 546. The circuit court was affirmed by the Supreme Court; unreported, October 28, 1890. In a case of Cincinnati v. Ryan, the Supreme Court refused a petition in error, March 5, 1889.

2. The omission to declare specificially in the improvement ordinance that the expenses to be assessed upon abutting property shall include the damages which may be found by a jury, does not, in view of the provisions of R. S., sec. 2284, estop the city from including such damages in the amount of expenses so to be assessed.

3. Property owners, who present to the board of public works a petition for the improvement of a street adjoining their property, in which petition they also ask that the cost be assessed upon their property, will be held to have actively participated in the improvement, so as to estop them from denying the validity of the assessment ordinance duly passed in accordance with the terms of such petition; and are thereby estopped from claiming the benefit of Rev. Stat., 2271, which would, but for the terms of the petition, restrict the assessment to twenty-five per cent. of the valuation of the property as entered upon the county duplicate.

SHRODER, J. (orally.)

In the cases of Ryan and of Storer against the city it is not necessary to discuss more than one case. These are petitions setting forth that the city had improved Hunt street, and for that improvement had levied an assessment per foot front upon the property of the respective plaintiffs at the rate of $13.88 and a fraction; that this assessment is excessive; and the prayer is that the court reduce this assessment so as to bring it within the limits of the law, and to restrain the city and its officials, especially the city comptroller, from taking any action upon the assessment and collection over and above what the petitioners consider a valid assessment.

One of the grounds taken is that in the estimate connected with the preliminary resolution of council, the city authorities fixed the cost at $8.95 a front foot; and that also the contract resolution referred to the same estimate, and that therefore the excess of $4.92 and a fraction is illegal and void. Another claim is that the improvement ordinance declared the intention of the city to assess only the cost of construction upon the abutting property-owners, and that the assessment ordinance, however, has included the damages the city was compelled to pay to the abutting property-owners caused by the improvement, which amounted to $43.-603.66; and that by reason of the unlawful addition of the amount of damages, which would come to $5.15 and a fraction per front foot, this excess of $5.15 was illegal. The third ground taken is that the assessment is in excess of twenty-five per cent. of the valuation of the property as entered upon the county duplicate.

Under the first head, it has been proved that upon petition of certain property owners, among whom were these plaintiffs, the city engineer made an estimate of the cost, and that estimate fixed the probable assessment at $8.95 a front foot; that the board of public works forwarded its recommendation to council foot; that the board of public works forwarded its recommendations to council with the estimate; that the preliminary resolution of council was made, and that the notices required by statute were given to the property owners, and that at the bottom of the notice there was a memorandum note which set forth the assessment would be $8.96. The resolution for improvement then provided that the expenses of the improvement shall be assessed upon the property owners. It made no special statement that the damages shall be so assessed, but provided by a separate resolution in the ordinance that the damages shall be judicially determined before the improvement was undertaken.

It is now claimed that by the statute under all these circumstances, the city was limited in its assessment to the amount fixed in the estimate.

Taking up the first claim, that is, of the estimate made by the engineer of the board of public works and forwarded to the city council with its recommendation: Whatever was done by the Board of Public Works was done by virtue of sec. 2214 Rev. Stat., which provides:

"In any cases where assessments are to be made, or where the estimated cost of any work or material exceeds five hundred dollars, the board shall transmit to council with its recommendation a resolution or ordinance, as the case may be, authorizing the execution of such work, or the purchase of such material, at a cost not to exceed the amount of the estimate which shall be transmitted."

It is claimed that the phrase, "the estimated cost of any work," includes, or ought to include, when the first board has obtained the cost,—the damage; but this section ought to be taken in connection with sec. 2215, which provides, that after the passage by council of the resolution, the board should advertise for proposals in accordance therewith for the work or materials required; also with sec 2224.

In section 2215, these words occur:

"And the board shall award the contract to the lowest responsible bidder or reject all bids, but no contract shall be awarded to any bidder the cost of which shall exceed the estimate transmitted to council."

Section 2224 provides that:

"When it becomes necessary in the opinion of the board in the prosecution of any work to make alterations or modifications in the specifications or plans of the contract, such alteration or modification shall only be made by order of the board, and such order shall be of no effect until the price to be paid for the work under such altered or modified contract has been agreed upon in writing, and signed by the contractor and some person authorized thereunto by the board, provided the total cost of the work with the addition of the price so agreed upon shall not exceed the original estimate."

Now these three sections taken together seem to me to indicate that the work intended by sec. 2214 must be such work as is to be contracted for. It does not mean the improvement. It does not mean the larger sense of the word "work;" it means the word "work" in the sense of service,—means that in any case where assessments are to be made, or where the estimated cost of any service or material exceeds five hundred dollars. The three sections referred to, indicate that the estimate is to be made of such things as the board of public works was authorized at that time to let out by contract. That necessarily excludes from this estimate anything that is not a matter of contract, and therefore necessarily excludes the assessment of damages by a jury.

It is claimed that by the notice given to the property owners,—in which notice there was in this case a memorandum note that the assessment would be $8.96 a front foot—was such a notice as estopped the city from assessing a higher rate. But the note containing the $8.96 a front foot was no part of the notice, and came after the signatures. By whose authority it was made is not shown. If made by the notice clerk, it requires no argument to decide that a notice clerk cannot bind a municipality to a limit of its assessment; that would be a power not contemplated by any legislation; to place in the hands of a subordinate, of a clerk, the power, by which, in writing a notice, he could limit the city in its assessment, would be so unusual that we should want to see some authority giving it. There is none shown.

Again, what is the notice that is to be given? The statute R. S., sec. 2394 in its own language says that the notice shall be given simply of the "passage" of the preliminary resolution; and that is all. There is no authority in anybody to state to the property owners what their assessment might be, but only to give notice that such a resolution has been passed so that the property owners might avail themselves of the privilege given to them by the statute, to-wit, of presenting their claim for damages, or be held to have waived them.

When the property owner receives such a notice, he is presumed to know what the law is—he is presumed to know that this is simply a notice that the city council has passed such a resolution, and if there is anything else contained in the notice, he is advised by the law itself that it is unauthorized and therefore cannot be binding—it cannot mislead him.

It is claimed, however, that this estimate of the city engineer, being in his office and subject to inspection by the property owners upon their notice, is binding upon the city, because it is upon that estimate that they can base their objections. But the inquiry is what objections have they the right to make? Is there any law or statute that points out the right of a property owner to present any objection to the estimate? The purpose of the notice is simply to enable him to present his claims. And what does the statute contemplate should be placed upon the files of the engineer's office? Simply the plans and profile. And in the case of Longworth v. Cincinnati, 34 Ohio St., 101, 111, the Supreme Court held that it was not necessary, it was not the part of the city to have placed upon record the estimate for materials that were to be used. The language is, "we do not understand that section 563"—which provides and requires that the plans and profiles relating to the improvement should be recorded—the language is, "we do not understand that this would require the specifications of every item of expense to be set out." The language of the statute does not require it,—the construction given in the opinion of the Supreme Court in the case of Longworth v. Cincinnati, does not seem to require it.

The Revised Statutes, in sec. 2277, contain the only provision that I have been able to find in which the estimate is to be a matter of record, but that is an estimate to be made by a committee or a commission composed of three disinterested freeholders, or of the board of improvements, or of the board of public works, as the case may be, when they are to apportion the assessment among the property

owners according to the benefits, which is to be the basis of assessments. So we might argue that from the exclusive requirement of sec. 2277 it was not intended by the legislature that the estimates in any other case were to be made a matter of record, but that in such other cases it was to be confined to the plans and profiles of the work. Probably the reason is that at the time these estimates are to be made, it being at an early stage of the preliminary portion of the work, it would be impossible to anticipate most of the expenses that might be incurred, and would be inequitable and unjust to work an estoppel against the city upon such an estimate under such circumstances, for nobody can be misled by it, and anybody of common experience would know that at the early and preliminary stages of the work and legislation the estimate given was simply approximate, and nothing else.

It is claimed in addition that when the council in its ordinance of improvement did not expressly provide that damages should be included in the amount assessed, it was a declaration of the intention not to assess such damages upon the abutting property owners. The ordinance of improvement in this case provides that the expenses shall be assessed upon the property owners. Does that exclude damages because they do not specifically say "including damages?" Now, the ordinary meaning of the word "expenses" and the statutory meaning of the word "expenses" includes the damages R. S., sec. 2284. Is there anything under the circumstances concerning the passage of this ordinance to give it a different construction? They had in mind the damages, because the council did provide that the damages should be assessed before the improvement was to be proceeded with. It is, however, argued because in its very ordinance of improvement they did provide specifically that the interest on the bonds should be included in the assessment that, anything other than the cost of construction was not to be included; but that expression as to the bonds should be taken with the hypothetical part of the resolution, which says: "If bonds are to be issued in anticipation of the work, then the interest is to be included." It does not follow, therefore, that they intended to exclude everything else when they made provision for something that would be hypothetical—something that might or might not take place. The council having in its ordinance of improvement provided for all the things that under sec. 2264 it is required to do, this ordinance was valid, and I do not see anything in this ordinance that would warrant the court to infer that it was the intention of council to exclude the damages from the general word "expenses." If it intended simply to say that the cost of the construction should be included, it could have said so, but it says, "the expenses of the improvement shall be assessed."

The next claim is that the assessment is to be limited to twenty-five per cent. of the valuation of this property as found upon the county duplicate. This assessment comes under the act of March 27, 1884, found in the 81 Ohio Laws, page 86. At the time that the assessment ordinance was passed there was upon the statute books the Act of March 4, 1885, found in the 82 Ohio Laws, page 260. By this act the assessment was to be limited to twenty-five per cent. of the value of the property after the improvements. By the Act of March 27, 1884, which was passed four days before the passage of the preliminary resolution, and which was in force at the time that the improvement was undertaken, the limitation was twenty-five per cent. of the value as entered upon the county duplicate, but the Act of 1885 provides that it shall not apply to improvements that had been ordered prior to the passage of the act. Although the Act of March 4, 1885, repealed the Act of March 27, 1884, the necessary inference is that the legislation intended to retain the restriction upon council and restrict the assessment, and not to give it unlimited power by the passage of the Act of March 4, 1885. The Act of March 27, 1884, which limits it to twenty-five per cent. of the value as found on the county duplicate, therefore applies to this case.

It is claimed by the city that by reason of the nature of the petition of the property holders which initiated, set in motion, this improvement, the property-holders are estopped from claiming this limitation of twenty-five per cent.

The petition is addressed to the Board of Public Works, and represents that "the undersigned, owners of property represented by the foot front abutting on Hunt street"—I need not read some of these particulars—"hereby petition your honorable body for the improvement of Hunt street, * * * and for the assessment of the whole cost of such improvement, except the cost of intersection, and two per cent. to be made and collected in ten equal annual installments, and in case the bonds of the city are issued in anticipation of the assessment as petitioned for, that the interest should be assessed." Upon the face of this petition there appear erased words that had been originally inserted, before it had been presented to the

Board of Public Work;—the words are "three-fourths of the property represented." There is also erased from the printed form the guarantee of these signers by which they agree to make good to the city any deficiency in the assessment caused by the insufficiency of value of the property of those not signing this petition. These last mentioned provisions are stricken out. It is argued by the plaintiff's that this is a statement to the Board of Public Works, that the signers had intended expressly to bring themselves outside the provisions of sec. 2272. This sec. 2272 operates as an exception to the restriction placed upon council by sec. 2271, which restriction limits the assessment in this case to twenty-five per cent. of the taxable value of the property. Section 2272 provides that in cities of the first class, "when a petition subscribed by three-fourths in interest of the owners of property abutting upon any street or highway of any description, is regularly presented to council for the purpose, the cost of any improvement of such street or highway may be assessed and collected in equal annual installments, proportioned to the whole assessment in a manner to be indicated in the petition, but if not so indicated, then in the manner which may be fixed by council."

Then it makes provision for non-signers or petitioners. In this case the claim is that these erasures were an announcement to the board of public works that the petitioners were not within the provision of sec. 2272, and inasmuch as they did not constitute three-fourths in interest that was a statement to the board of public works, that they were not to be held under that section for the full assessment—that it was a statement that they did not waive the limitation of twenty-five per cent. Now, by striking out those words, the petitioners simply avoid saying that they are three-fourths of the property-owners in interest. They also say that they will not be bound for any deficiency by reason of the non-collectibility from non-signers. That is all they say. The petition does not come within sec. 2272 in its terms, because it is not signed by three-fourths of the property owners in interest. It does not bring sec. 2272 into operation, because that only relates to a petition that is signed by three-fourths. If it informed by erasures the board of public works that they were not three-fourths, I cannot see by what process of reasoning they then advised them of anything which related to sec. 2272, which applies to the three-fourths only. By advising the board of public works that they did not constitute three-fourths, do they advise them that they intend to except themselves expressly from the provision of a section that applies only to cases where three-fourths sign the petition? I do not understand how that reasoning can be sustained. It then simply stands as a petition without regard to sec. 2272, and that brings us to the question whether that operates as an estoppel irrespective of the provisions of these two sections.

Now, a mere petition for improvement, I take it, does not estop property-owners from claiming the privileges of the statute, but this was not a mere petition for improvement, it was a petition also that the assessment for the whole cost of such improvement, except the cost of intersection and the two per cent.. to be made and collected in ten equal annual installments, shall be made upon them; that is the effect of this writing.

Now, what effect did that have upon the authorities of the city? It was addressed to the board of public works, it was not addressed to the city council, but sec. 2272 requires that a petition shall be addressed to council only when it is a petition signed by three-fourths, so the fact that it was not addressed to council, but to the board of public works, can have no bearing in view of the conclusion we have reached, that sec. 2272 has no relation, no application to this petition.

It was known to these property-owners that the initial steps, the very first steps, under the statute must be taken by the board of public works, and that whatever was done by council must be done upon the recommendation of the board of public works, so when they addressed the board of public works, they did address the only authority that the statute provides for as the representative of the city for such a purpose. They therefore addressed the city through its board of public works, and they did set this improvement and all the legislation connected with it in motion, and as a conclusion of fact to be drawn from these circumstances, and from this evidence I cannot find otherwise than they, as far as they could do it, caused this improvement to be made.

Now, in the case of Mitchell v. The Commissioners of Franklin County, 25 O. S., 143, it was held by the Supreme Court that notwithstanding the unconstitutionality of the act where the abutting lot-owners cause a street to be improved under the act and bonds of the city to be issued to pay for the improvement, all who have participated in causing the improvement to be made are estopped from denying the validity of the assessment made in accordance with the act to pay such bonds. There the Supreme Court held that where an abutting property-owner caused an

improvement to be made by his petition, where he participates in causing the improvement to be made, and the improvement is made in consequence of his act, and he gets the benefit of that improvement, he cannot after all that is done turn around and attack the validity of the act.

In the case of Tone v. Columbus, 39 Ohio St., 251, this same improvement came before the Supreme Court again, and there they held that while the petitioner by causing the improvement to be made is estopped from attacking the validity of the act because it is unconstitutional, that, however, does not estop him from attacking the validity of the action of the city government—of council—in passing its various ordinances and resolutions. He can be held only to have intended to say by his petition for the improvement, "I petition that this improvement shall be made, but that it shall be made according to law." And the Supreme Court, however, said that active participation in the improvement will estop the party engaged therein from denying the validity of the assessment. This is not a case by which it is attempted to raise an estoppel by silence, but by reason of active participation in causing the improvement to be made. The case of Tone v. Columbus, makes no exception for cases of that sort—where a person actively participates in causing the improvement to be made he is estopped from denying the validity of the assessment.

Now, in this case, no question is made as to the validity of these various resolutions and ordinances save and except to that portion of the ordinance of assessment which is in excess of the twenty-five per cent. Then the inquiry is, "can they, by reason of this petition, be said to have caused this assessment to be made for the full amount regardless of the twenty-five per cent?"

It is a petition first for the improvement. It is a matter that is to be recommended first by the board of public works. Then it is also a petition that in connection with the improvement the assessment for the whole cost shall be placed upon their property.

When a petition relates to an assessment it must necessarily be intended to address that body upon whom is cast the duty of making that assessment. Under the statute it is council that makes the assessment, and when the petition addresses the board of public works and prays the improvement, and at the same time that the assessment for the whole shall be cast upon them, it seems to me as a conclusion from the various requirements of the statute that it is intended to address itself to that body whose duty it is in the course of legislation to make the assessment. The duty of passing the ordinance of assessment was upon the council; therefore so much of this petition as addressed to the board of public works in connection with the petition for the improvement, sets forth as an inducement that the assessment shall be placed upon their property, can be held to have been addressed as much to the city council as to the board of public works.

Now, when a property-owner causes an improvement to be made, and causes assessment to be made, if he thus causes an improvement to be made upon the strength of a petition that the assessment should be made for the whole cost upon him, in the language of the Supreme Court in the case of Columbus v. Tone, it would be inequitable for him to turn back when pay-day comes, and say, "I did not intend what I said; I meant to restrict you to what I did not say, that is, to twenty-five per cent." I think in a case of this sort the ordinary doctrine of estoppel applies. So, therefore, when the petitioners applied to the city comptroller to limit the collection, or to separate what they considered illegal from the valid part, and he refused, their application was properly refused.

As to the part of the Ryan case in which the evidence was that after the verdict in the damage case, the Ryans notified council that they withdrew their signature from the petition, after having suffered their signature to remain with the city for nearly three years, and having caused the city to pass all these resolutions and go to the expense of the proceedings in court (which is one of the items which enter into the costs and expenses to be assessed by virtue of sec. 2284, of the statutes), and made no tender of reimbursement, did not offer to indemnify the city, but simply after having these advantages and putting the city to this expense and having secured all this legislation, they seek to withdraw their name; whether that shall have the effect of removing from them the estoppel—I think the mere statement of the case is almost a decision of it.

Upon the whole case, therefore, the petition will have to be dismissed.

Harmon, Colston, Goldsmith & Hoadly, Wm. Wirthington and F. C. Ampt, for plaintiffs.

Hortsman, Hadden, Foraker & Galvin, for defendant.

## TAXATION. 88

[Superior Court of Cincinnati, General Term.]

### †HENRY PROBASCO V. FREDERICK RAINE, AUDITOR.

1. By article 12, section 2 of the constitution of 1851, the legislature has no power to exempt from taxation by express enactment, stocks or bonds of this state issued under that constitution and held by residents of this state.
2. In view of this want of power, the act of 1856 (53 Ohio L., 112) authorizing the issue of certificates of indebtedness of the state known as canal stock can not be construed to include in its provisions, the clause of the canal act of 1825 (Chase St., sec. 1473) exempting stock issued under that act from taxation, although without the constitutional objection, language in the act of 1856 referring to the act of 1825 might bear such construction.
3. So far as stockholders were concerned, the stock of 1825 was paid and extinguished, and the stock of 1856 was a new contract of loan taxation of which in no respect impaired the state's obligation under it.
4. Taxation of canal stock held by a resident of this state is not taxation of public property used exclusively for any public purpose.
5. Good faith in a tax return, which does not state truly the taxable personal property held by the taxpayer because of a mistake of law honestly entertained, does not prevent it from being a false return with section 2781 as amended 83 O. L., 92, when only inaction on the part of the tax official is shown.

TAFT, J.

These are two suits for injunction reserved on agreed statements of facts by the court at special term. Henry Probasco, a resident of this county, has held in his own right and as trustee during the six years beginning with 1881 and ending with 1886, upwards of $140,000 in the aggregate of the par value of certificates of indebtedness issued by the commissioners of the sinking fund of Ohio under the authority of an act of the general assembly passed April 8, 1856 (53 Ohio L., 112.) The auditor proposes to place upon the duplicate of the county in Mr. Probasco's name the varying amounts of these certificates which he held on the day before the second Monday in April of each of the six years, and thus authorize the county treasurer to collect tax on the same. Mr. Probasco has never listed the same for taxation during the years mentioned. None of the certificates of this kind have ever been listed for taxation or subjected thereto by state executive authority.

The form of the certificates was as follows:

"STATE OF OHIO CANAL STOCK, COLUMBUS, OHIO.

Office of the Commissioners of the Sinking Fund:

Be it known that the State of Ohio owes to ——— or assigns the sum of———, bearing interest from the — day of ———, 18—. inclusively, at the rate of six per centum per annum, payable half yearly on the first days of January and July in the city of New York being stock created in pursuance of the act of the general assembly of the State of Ohio passed April 8, 1856, the principle of which is reimbursable in the city of New York at the pleasure of the state, after the thirty-first day of December, 1885, which debt is recorded in this office, and is transferable only by appearance in person or by attorney according to law upon the books of the commissioners of the sinking fund."

The certificates were signed by the auditor of state as president of the sinking fund commissioners, countersigned by the secretary of the state, and certified to be

†Judgment reversed by the Supreme Court; opinion 50 O. S.. 378

in due form of law and valid by the attorney-general. On the margin at the top is the following: "Provisions of the Constitution of Ohio adopted, A. D. 1851, Article 7. The faith of the state being pledged for the payment of its public debt, in order to provide therefor, there shall be created a sinking fund which shall be sufficient to pay the accruing interest on such debt and annually to reduce the principal thereof, by a sum not less than one hundred thousand dollars, increased yearly, and each and every year by compounding at the rate of six per cent. per annum. Art. 7. The auditor of state, secretary of state and attorney-general, are hereby created a board of commissioners to be styled The Commissioners of the Sinking Fund."

The plaintiff purchased his certificates from persons who bought them under this act of 1856 referred to in the body of the certificates. All the certificates sought to be taxed have been redeemed by the state, and the question presented to this court for decision is whether the plaintiff should have returned these certificates, and not having done so, whether the auditor of this county can now legally assess him on the grand duplicate of the county for the years from 1881 to 1886.

Section 2736, Rev. Stat., provides as follows: Each person required to list property shall annually upon receiving a blank for that purpose from the assessor or within ten days thereafter, make out and deliver to the assessor, a statement verified by his oath, of all the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies, annuities or otherwise, in his possession, or under his control, on the day preceding the second Monday in April of that year, which he is required to list for taxation, either as owner or holder thereof, or as parent, husband. guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor or otherwise.

Section 2737 provides the form of the return to be made, and under the fifteenth subdivision is as follows: fifteenth, the amount of all the moneys invested in bonds, stocks, joint-stock companies, annuities or otherwise.

Section 2731 provides that all property, whether real or personal in this state and whether belonging to individuals or corporations; and all moneys, credits, investments in bonds, stocks or otherwise, of persons residing in this state, shall be subject to taxation, except only such as may be expressly exempted therefrom.

Section 2730, which is a section defining the meaning of terms used in the Title of Taxation, contains the following: "The terms 'investments in bonds' shall be held to mean and include all moneys in bonds or certificates of indebtedness of whatever kind, whether issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states or other incorporations, or by the United States, held by persons residing in this state, whether for themselves or others.

It is very clear that the certificates in question being certificates of indebtedness of a state, come under the definition of "investments in bonds" given in sec. 2730 cited above, and that unless the legislature had not the power to tax them or has somewhere expressly exempted them from taxation, that the plaintiff should have returned them while he held them. It is claimed by counsel for the plaintiff both that the legislature had no power to tax them, and that it has expressly exempted them. This is said to follow from the history of the legislation by which they were issued. The act under which they were issued is entitled "an act to provide for the payment of the public debt of the state due January 1, 1857, and for the payment of the interest on the public debt." By the first section of the act it is provided "That the commissioners of the sinking fund be and they are hereby authorized to issue in accordance with the provisions and conditions of the act of February 4, 1825, creating the state debt, and of the several acts amendatory thereof, transferable certificates of stock, bearing interest at a rate of interest not exceeding six per centum per annum payable semi-annually at the transfer agency in the city of New York, the principal to be redeemable at the pleasure of the state at such time between the years 1875 and 1886 as the commissioners may determine; the certificates to be transferable at said agency in the manner prescribed by law or coupon certificates as the said commissioners may deem most advisable to be registered at said agency.

Section 2. The said commissioners shall not, by authority of this act, issue certificates to an amount greater than the principal of the funded debt of the state, made payable at the pleasure of the state after the year 1856, after the application of the sinking fund available for that purpose to the payment thereof.

Section 3. The moneys arising from the sale of the certificates authorized by this act shall be applied by the commissioners of the sinking fund to the redemption of the certificates of the funded debt of the state, made payable as stated in the second section of this act.

Section 4 provides for payment of interest on the public debt.

The act of 1825 referred to in this law, is the act in which canal commissioners were appointed, and canals were ordered constructed, and an indebtedness created therefor. The commissioners were authorized to issue certificates as follows (Chase's Statutes, 1473—sec. 4).

"They shall borrow from time to time, moneys on the credit of the state, at a rate of interest not exceeding six per centum per annum, and not exceeding in the year eighteen hundred and twenty-five, the sum of four hundred thousand dollars, and in any succeeding year, during the progress of the work hereby contemplated, a sum which shall not exceed six hundred thousand dollars, for which moneys so to be borrowed, they shall issue [issue] transferable certificates of stock redeemable at the pleasure of the state, at such time between the year one thousand eight hundred and fifty, and the year one thousand eight hundred and seventy-five, as the said commissioners of the canal fund may determine, to be paid out of said fund, and transferable at such place or places, as in the opinion of the said commissioners of the canal fund, shall best promote the interest of the state."

Provision is made in section 5 of this act for a yearly taxation in addition to the taxation for ordinary purposes, and then the act proceeds in the same section (Chase's St., 1474, sec. 5), "And the faith of the state is hereby pledged, that the tax hereby levied shall not be altered or reduced, so as to impair the security hereby pledged for the payment of the interest, and the final redemption of the principal sums to be borrowed by virtue of this act; and that no tax shall ever be levied by the legislature, or under the authority of this state, on the stock to be created by virtue of this act, nor on the interest which may be payable thereon; and further, that the value of the said stock shall be in no wise impaired by any legislative act of this state."

In 1826 another act was passed providing for further construction and indebtedness and with similar provisions as to taxation of certificates. A series of acts followed which it is not now necessary to specify.

It will be seen that by the act of 1825 the stock or certificates issued thereunder, were expressly exempted from taxation, and that such exemption may be said to be one of the provisions and conditions of the act of 1825 creating the state debt. Did the legislature, in 1856, intend to make such exemption from taxation a part of the contract in the issuance of the stock under discussion? Under the constitution of 1802 the legislature had power to exempt such property as it chose from taxation, and it has been definitely decided by the Supreme Court of the United States, in Piqua Bank v. Knoop, 16 Howard, 369, and Jefferson Bank v. Skelly, 1 Black, 436, that under that constitution one legislature could make a contract for the state with a citizen containing an exemption from taxation as a condition which would bind succeeding legislatures in the exercise of the sovereign power of taxation. In the constitution of 1851, a change was made, and the wide discretion given to the legislature under the one of 1802, as to the mode by which a revenue should be raised, was much restricted. Article XII, sec. 2, of the present constitution provides "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and also all real and personal property, according to its true value in money; but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose and personal property to an amount not exceeding in value $200.00 for each individual may by general laws be exempted from taxation, but all such laws shall be subject to alteration or repeal, and the value of all property so exempted shall from time to time be ascertained and published as may be directed by law."

The language of this section is mandatory, and requires the legislature to tax all the property therein described, except what is specifically named as within the discretion of the legislature to tax or exempt. Exchange Bank v. Hines, 3 Ohio St., 1; Zanesville v. Richards, 5 Ohio St., 589; Bradley v. Bauder, 36 Ohio St., 28. Are the certificates in this case, within the terms used in the constitution to describe the property upon which the legislature is enjoined to levy taxes? At the time the constitution was adopted, certificates of indebtedness issued by corporations, municipal and state, were known as stocks, and would be naturally included within the term "investments in stocks," used in art. XII, sec. 2, of the constitution. This appears from the constitutional debates and current dictionaries and literature. Moreover, it is apparent from the definition of "investments in stocks," given in the first taxing law passed after the adoption of the constitution in 1851 (50 Ohio L., 136). Indeed, the certificates in the case at bar bear the name upon them, "Canal Stock." In the present law and by present usage these certificates are known as investments in bonds. Unless, therefore, there is some reason for holding that the term "investments in stock" used in the constitution, though wide

enough to include certificates of indebtedness of other states and the United States, should not include certificates of indebtedness of this state, the certificates under discussion come within the constitutional injunction. It has been decided by our Supreme Court in Champaign County Bank v. Smith, 7 Ohio St., 43, that the constitutional term "investments in bonds," includes bonds of this state, unless issued before the present constitution, under a law exempting them from taxation and that taxation of bonds in this state not so exempted, was not an impairment of the contract of loan. The mere fact, then, that these certificates of indebtedness were issued by this state, does not take them out of the meaning of the constitution in its use of the term "investments in stocks." They were issued under our present constitution, and are therefore, property upon which the legislature is enjoined to levy taxes. The property which the legislature may exempt is specifically named. No room is left for doubt that under the constitution any other exemption than of the kind of property therein named for exemption, would be in violation of this section. It would seem to follow that an express exemption of certificates of indebtedness of the state, they being included in the property which the legislature is required to tax, would be beyond the legislative powers to enact, and void. *A fortiori* would the legislature be unable to bind succeeding legislatures by inserting such an exemption in a contract of the state with the citizen. Indeed, so carefully constructed is the constitution in regard to making tax exemption the term of a contract, that even as to property which the legislature is permitted to exempt from taxation, it cannot make the exemption except by general law, *i. e.*, by a law affecting all property of the same kind throughout the state, and except in such a manner as not to prevent its alteration or repeal by a succeeding legislature.

It is true that the constitution does not execute itself, and if the legislature simply fails in its constitutional duty to pass laws taxing any kind of property in article XII sec. 2, no tax can be collected on it. But when instead of mere passive disobedience, it expressly enacts an exemption, it is void, and if under the general provisions of law the property is taxable, the exemption fails and the property must be returned. Such is the effect of the decision in Exchange Bank v. Hines and Zanesville v. Richards, *supra*. It follows from what has been said, that in 1856 the legislature had no power to incorporate in the contract of loan to the state a provision exempting that loan from taxation. In the construction of all laws, it is a well settled canon that if possible, the law must be so construed as to be within the constitutional power of the legislature to enact. Burt v. Rattle, 31 Ohio St., 116; Zanesville v. Richards, 5 Ohio St., 589. In construing the act of 1856 therefore, we are bound to presume that the legislature in its reference to the act of 1825 did not intend to import into the act of 1856, the exemption of the stock from taxation, when under the new constitution it had no such power of exemption.

It is said however by counsel, that these certificates are only evidences of stock exempt under the constitution of 1802; that though the legislature had no power to contract new debts and make them non-taxable in the hands of residents of this state, that they were not creating a new debt here, but were simply renewing or extending an old one on the same terms, and that because the state was without money to pay this debt when it became due to the amount of $2,300,000, as appears from the agreed statement of facts, they were obliged to take this course. It sufficiently answers this argument to say that by the law of 1856 the legislature neither did nor did it intend to extend the old contract of indebtedness. The act is "for the payment of the debt" of 1825. It in effect provides that the certificates of that debt shall be redeemed with the money produced by the sale of the new certificates. Under that law the commissioners were authorized to get a premium upon the new certificates if they could. There is nothing in the act to show that new certificates were to be exchanged for old ones. No such power was given the commissioners. Much has been said about the term "redeem" and the distinction made in the laws and construction between paying the debt out of money in the treasury, and redeeming the debt by new loans. We find no difficulty upon this point. When the law provides that a certificate of indebtedness shall be redeemed in money, that is a payment as between the state and its debtor. It is an extinguishment of that contract. The holders of 1825 stock were not asked to forbear pressing their claim. They were not even given the option of taking the new stock in exchange for the old under the law. They were obliged to take what was due to them. If in fact exchanges of old stock for new were made, the legal effect of such an exchange is to be found in the law authorizing the issue of the new stock. Such exchange would be merely a payment of the old debt and a purchase of the new. The debt which was contracted to raise money to pay the old debt, was the same debt in so far as that they both represented the same benefit once enjoyed by the state, and the new debt may, in this sense, be said to be a mere continuance

of the old debt. But speaking of the debts as representing contractual relations between creditor and debtor, they are as separate and distinct as if they were made for wholly different purposes.

The same argument as to a renewal of this debt is made in another form. The old certificates of 1825 were non-taxable, not because of any provision in the constitution of 1851 which exempted them, for they were within the terms of the injunction upon the legislature as to what property it should tax, but because the exemption was part of the contract of their issue, and as to them the new constitution was a law impairing the obligation of a contract and could not apply. Now, it is said that as no renewal of a debt extinguishes it, except by express agreement, the creditor has a contract right to rely on the terms of the old debt until payment, and therefore, no matter what limitations there are upon the power of the legislature to issue non-taxable securities under this constitution, it would be an impairment of his original contract to tax these certificates, and so illegal under the constitution of the United States. Of course, this argument fails for the same reason as the one just considered, because so far as the creditor under the act of 1825 is concerned, his certificate is redeemed in money, and that debt is no more. But even if it could be said that a creditor under the act of 1825, who had bought the same amount of stock under the act of 1856 with the money paid him on his old stock, had renewed his old debt, no such case is presented at bar, because there is no evidence that the certificates owned by the plaintiff were ever owned by any person who had owned stock of 1825. So far as appears, plaintiff's assignor first invested his money under the law of 1856. Clearly, then, he can have no reliance on the contract of 1825.

We have been pressed with the argument that this debt was the same debt in another view of this case. Counsel in an able and exhaustive brief, have reviewed the history of the construction of internal improvements within the state, from 1825 down to recent years, and have demonstrated how sacred has been the credit of the state, thus pledged to pay off the debts incurred for public works, in the eyes of succeeding legislatures. It has been shown that the plan for the payment of that debt has been preserved, and all sorts of expedients resorted to for the purpose of creating a fund to reduce it. The commissioners of the sinking fund created by the constitution, were merely the successors of the commissioners of the canal fund. It was a feature of loans under the old constitution for this canal building, that evidences of such loans should not be taxed, but we can find nothing in the new constitution which authorizes a continuance of that feature in the new loans to be contracted to redeem the old indebtedness, but on the contrary, in article XII, sec. 2, we find an express prohibition of it. It is argued in this connection, that this canal stock comes within the exemption of that section, as being "public property used exclusively for a public purpose." But this argument has been completely answered by Judge Scott in the case of the Champaign County Bank v. Smith, 7 Ohio St., 23, where state bonds were held to be taxable unless exempt by the law authorizing their issue under the constitution of 1802. Certainly state bonds could only be issued for a public purpose, but they were taxed because when held by individuals they were the property, not of the state and so public property, but of the individual holding them. So with this canal stock, although it represented a transaction of the utmost good to the state, as property, it was the private property of the plaintiff, and as subject to taxation as any other of his investments.

It should be noted that on April 1, 1856, 53 O. L., 51, the taxing law of 1852 was so amended as not to require investments in certificates of the public debt of the state to be listed for taxation. Whether this law in its application to state debts, created after the constitution of 1851, resulted in a mere failure to tax them —and was thus beyond the power of courts to correct, or was an express exemption which was void, it is not necessary to decide, because that law was repealed by the act of April 12, 1858, 55 O. L., 128, and has never been reenacted.

In sec. 2737 Rev. Stat. under the sixteenth subdivision, the return of a taxpayer is required to state the monthly average, amount or value for the time he held or controlled the same within the preceding year, of all moneys, credits or other effects within that time invested in or converted into bonds or other securities of the United States or this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday in April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the 14th item of this section. Here is said to be a recognition by the legislature of the non-taxable character of state bonds and stocks. This part of sec. 2737 first appeared in an act passed in 1868 (65 O. L., 38) at a time when bonds issued before 1851 and

non-taxable were still outstanding, to which this language might properly apply. See the speech of Mr. Perkins in the Constitutional Convention of 1851, 2 Const. Debates, 109–111; also report of the auditor of state, 2 Const. Debates, 282-284; also report of the auditor of state, 51 O. L., 41–42. It cannot be contended that the legislature intended this language to operate as an exemption. It was plainly a provision to prevent an evasion of personal tax by the purchase and temporary holding of bonds non-taxable. When it appears otherwise, as it does, that there are now no such non-taxable state bonds, it is apparent that this is a provision of law which was effective as to state bonds, when enacted, and which by revision has simply been continued in the statute until after the time when it could have any application to such bonds. The provision is now in fact applicable only to bonds of the United States. Finally it is said that the construction put upon the tax laws by the executive department of the state in practically exempting this stock from taxation for thirty years ought to weigh with the court and control its decision so as to be in harmony with such action. The same argument was made in the case of the Western Ins. Co. v. Rattermann recently decided by the Supreme Court. That case was stronger than this one at bar in this regard. For there the auditor of state had given his opinion that the stock in question there was not taxable. The syllabus of the opinion of the court is decisive of the question against the argument of the counsel. It is as follows: "A construction, by officers having the enforcement of the tax laws of Ohio since the enactment thereof, to the effect that under such laws shares held by residents of Ohio of stock of foreign railroad corporations having property in this state on which they pay taxes, and of consolidated railroad companies, are not taxable in Ohio, does not bind the successors of such officers, nor the state, in the proper assessment and collection of taxes upon such shares," 46 O. S., 153; Vicksburg & Shreveport R. R. Co. v. Dennis, 116 U. S., 665.

Under section 2781 as amended, (83 Ohio L., 82) the power of the county auditor to place upon the duplicate personal property for five years passed is limited to cases where a person has made a false statement or return for taxation, and it is claimed that the plaintiff believing, as he did, that the stock was not taxable, can not be said to have made a false return. It is to be observed that the duty of making the return is on the tax-payers. Section 2736, Rev. Stat. If he assumes to decide that property is not taxable without offering to return the same, and he makes a mistake in law, his return is false, however free he may be, as he undoubtedly was in this case, from moral blame in making such statement. The maxim that ignorance of the law excuses no one must apply here. There were no acts done or opinions rendered by state or county officials which could in any way estop the state from assessing as upon a false return. Delaware Div. Canal Co. v. Commonwealth, 50 Pa. St., 399.

We hold on the whole case:

1st. That under the Constitution of 1851, art. 12, sec. 2, there was no power in the legislature to exempt from taxation stocks or bonds of the state issued after the adoption of that constitution and held by residents of this state.

2d. That in view of this want of power the act of 1856, under which these stocks were issued, can not be construed to include in its provisions the tax exemption clause of the act of 1825, although without the constitutional objection such might be its construction.

3d. That so far as stockholders were concerned, the stock of 1825 was paid and extinguished, and the stock of 1856 was a new contract, taxation of which in no respect impaired its obligation.

4th. That taxation of the stock in the hands of plaintiff, an individual, a resident of this state, is not taxation of public property devoted solely to public uses.

5th. That we can not follow an erroneous construction of taxing officials evidenced only by their enaction.

6th. That good faith in a tax return, which does not state truly the taxable personal property held by the taxpayer because of a mistake of law honestly entertained, does not prevent it from being a false return within section 2781, when only inaction on the part of the taxing officials is shown.

The decree will be for the defendant, and the temporary injunction granted will be dissolved.

PECK and MOORE, JJ., concur.

Isaac M. Jordan, Jackson A. Jordan and Aaron F. Perry, for plaintiff.

W. L. Avery and L. W. Goss, for defendant.

## LIBEL. 93

[Superior Court of Cincinnati, General Term, January, 1889.]

COMMERCIAL GAZETTE CO. v. MICHAEL HEALY.

**In an action of damages for libel, the defendant may offer evidence of the truth of the publication, in mitigation of damages, and if the jury find the publication to be true, they may reduce the damages to a nominal sum.**

PECK, J.

The action below was brought by Healy to recover damages for an alleged libel concerning him published in the newspaper of the company. The answer admitted the publication, but denied all other allegations of the petition. The case was tried to a jury and a verdict rendered against the defendant below in a substantial amount, and a judgment was entered upon the verdict.

During the progress of the trial, evidence was offered by defendant below for the purpose of mitigating the damages, tending to show the truth of the statements contained in the article complained of, and at the close of the evidence counsel for the company requested the court, to charge the jury "that if from a fair preponderance of the evidence, the publication appeared to them to be true, they might in view thereof render a verdict for nominal damages only," which charge the court declined to give, and this action by the court is, among other things, assigned as error, and a reversal of the judgment asked on account thereof.

In the general charge the court instructed the jury as follows:

"If there is not a complete justification for the publication, yet, if the publication appears to you, from a fair preponderance or weight of the evidence, to be true, or if the defendant was actuated by good faith and a careful reasonable regard for the peace and welfare of the plaintiff, and had reasonable cause for believing in the truth of the statement made, and what an honest, reasonable, careful man, having respect for the reputation and good will of his neighbor, would have done under like circumstances, then you may consider all that in mitigation of damages—that is, by way of reduction of the amount of what you might have found if the elements of good faith, as stated, were missing in the matter." The court also instructed the jury as to compensatory and exemplary damages, and the facts which must be shown to give rise to a claim for either.

It is claimed by counsel for plaintiff below that there was no error in the refusal of the special charge above set forth, and that the same ground is substantially covered by the portion of the general charge quoted.

It seems to be the law of Ohio that if the libelous statements be shown by way of mitigation to be true, the jury may reduce the damages to a nominal sum, and the company had the right to have that proposition stated to the jury. Van Derveer v. Sutphin, 5 Ohio St., 293; Halstead v. Schemp, 8 Dec. Re., 204.

A careful analysis of the general charge leads to the conclusion that the jury were, in effect, thereby instructed that if they found the libelous statements to be true they would be authorized to exclude exemplary damages from their estimate—and impliedly, that even if the statements

were true, the plaintiff below would be entitled to substantial damages by way of compensation.

If the publication be found true, that fact would ordinarily defeat a claim to exemplary damages in toto, but it may also mitigate the claim to compensatory damages to such an extent as to leave the plaintiff only the right to a nominal sum.

The judgment will have to be reversed for the error involved in the refusal to give the special charge asked, and the case remanded for a new trial.

TAFT and MOORE, JJ., concur.

T. M. Hinkle, for plaintiff.

Follett, Hyman & Kelley, for defendant.

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## 103 RAILWAY COMPANIES—TRUSTS.

[Superior Court of Cincinnati, Special Term.]

CHARLES RAYMOND, TRUSTEE, v. SPRING GROVE, AVONDALE & CINCINNATI RY. CO. ET AL.

1. A trustee, holding bonds for the benefit of others, cannot maintain an action of deceit to recover damages suffered by his *cestuis que trustent* by reason of a deception, practiced upon them in connection with their purchase of the bonds, nor can he maintain an equitable action on the ground of fraud in such case.
2. When persons are elected directors of a railway corporation by the votes of subscribers to the capital stock who were not authorized to vote because they had not paid any installment upon their stock subscriptions, Rev. Stat. 3545, and the persons so selected entered upon the discharge of their duties without objection from any one connected with the corporation, the validity of such election cannot be inquired into collaterally in an action by a creditor of the corporation.
3. Railway companies have general power to issue bonds secured by mortgage, and where such bonds are issued in excess of the amount allowed by law, there can be no recovery *on the bonds*, against the individual stockholders and directors who caused the issue.
4. Where a mortgage to secure certain bonds contains a clause limiting the effect of the contract contained, in the bond, as to matters not pertinent to the mortgage, a holder of such bonds will not be presumed to have notice of such clause merely by reason of a general reference to the "terms and conditions" of the mortgage, contained in the bonds.

This case came on to be heard on general demurrer to petition.

The petition sets forth the organization of the Cincinnati Northern Railway Co., with the names of its stockholders and directors; that it was indebted and in need of money for the completion of its line, and that the persons named as its stockholders and directors, in order to raise money for that purpose, combined together and incorporated a company called the Spring Grove, Avondale & Cincinnati Railway Company for the ostensible purpose of constructing and operating a line of railway from Avondale to Venice, in Butler county, but in reality to make use of the corporate powers so secured to raise money or the use of the Northern Railway Company. That with such purpose they took out articles of incorporation for a company, with a capital stock of $1,000,000 which they, the same persons named as stockholders of the Northern Company, immediately proceeded to subscribe, the names and amounts

of such subscriptions being set forth; that upon the same day that the subscriptions were made, no part of the same being paid, the directors were elected, and forthwith resolved that the company proceed to issue bonds in the sum of $1,000,000, to be secured by a mortgage upon the property of the company, of which it is alleged that the company then possessed none other than the said subscriptions to its capital stock; that by the terms of the resolution it was provided that the bonds should bear date as of the first day of July after the passage thereof; but before that time proceedings were had and certified to the secretary of state whereby the capital stock of the company was reduced to $50,000, no part of which was ever paid, and that notwithstanding such reduction they proceeded to and did issue bonds to the amount of $1,000,000, bearing date as of the day fixed by the original resolution and in pursuance of the terms thereof, and thereafter transferred all of said bonds to the Northern Railway Company, to which also a perpetual lease of the line of the Spring Grove Company was made, the former agreeing to complete the line in consideration of the bonds so transferred, which were secured by a mortgage on all the property of the Spring Grove Co.; that the Northern Co. sold $750,000 of the bonds of which the sum of $400,000 was used in constructing the Spring Grove Road, and the remainder in paying the debts of the Northern Company. That thereafter both roads defaulted in the payment of interest upon their bonded indebtedness, and the mortgages thereon were foreclosed, and the roads sold; that the holders of the bonds of the Spring Grove Company realized but three per cent. of the face value thereof, and that both the companies are totally insolvent. Plaintiff further alleges that he is the holder as trustee of two hundred and eighty of said bonds, of the face value of $1,000 each, no part of which has been paid, except the three per cent. above mentioned.

For a second cause of action, plaintiff repeating the allegations of his first cause of action says that, the defendant caused an unusual clause to be inserted in the mortgage made to secure the bonds, to the effect that the holders of such bonds should have no recourse to the private liability of any stockholders of the company for the payment of the bonds or interest; that this clause was unknown to the plaintiff or the parties for whom he holds said bonds at the time they were purchased, and no allusion is made to the same, and no similar provision is contained in the bonds, a copy of one of which is given, in which appears a reference to the mortgage and the terms and conditions therein contained.

At the end of each cause of action, plaintiff alleges that neither he nor those from whom he received the bonds in trust had any knowledge of the facts in the petition set forth until within six months of the date thereof, and that the same had all come to their knowledge within that time. Throughout the petition, in both causes of action, it is alleged that all the proceedings of the stockholders and directors of the two companies, were part of a scheme of fraud, and a recovery of the amount of the bonds and interest is sought against the individual stockholders of the two companies, all of whom are made defendants.

PECK, J.

It is obvious that this action cannot be maintained by this trustee as an action of deceit. If such cause of action accrued to the purchasers of the bonds, they are the parties in interest who alone can maintain an action upon it. Such a cause of action is not assignable, and if it were,

the transfer of the bonds would not transfer the cause of action, for an action of that sort could not be brought upon the contract contained in the bond, but to recover that which was lost by reason of the deceit.

This proposition also appears to dispose of the claim that recovery may be had in this as an equitable action on the ground that the bondholders have been defrauded by the conduct of the defendant stockholders. In every such case the person defrauded is the proper party plaintiff. Bigelow on Fraud, 2d ed., 214; Dickinson v. Seaver, 44 Mich., 624; Foster v. Wightman, 123 Mass., 100. The bond was the bond of the corporation, and no action can be maintained upon the bonds against the defendants, unless it appears that they were pretending to act in behalf of a corporation which did not exist. In such cases, the persons so conducting themselves may be treated as principals to the transaction. Medill v. Collier, 16 Ohio St., 599; Fay v. Noble, 7 Cush., 188, 194. It is claimed that this is a case of that sort, because the stockholders did not pay in ten per cent. of their subscriptions before organizing, or at any other time, and secs. 3243, 3244, 3245, Rev. Stat., are relied upon in support of that claim.

Section 3243 provides that ten per cent. of each share of stock shall be payable at the time of making the subscription, and the rest in installments as fixed by the directors. Section 3244 formerly provided that as soon as fifty per cent. of the stock was subscribed, and ten per cent. paid, the subscribers should so certify to the secretary of state, and call a meeting for the election of directors, but that section was amended in the year 1880, 77 O. L., 266, so as to do away with the necessity of paying the ten per cent. before calling the meeting. Section 3245, which is the one especially relied upon, provides that at the time and place designated in the notice, a meeting of the subscribers shall be held and directors elected, "but no person shall vote on any share on which any installment is due and unpaid." The words last quoted should, it is claimed, have prevented the election of any directors, because none of the subscribers had paid anything upon their subscriptions; but assuming that proposition to be correct, directors were chosen, and they accepted and acted as such without objection on the part of any one connected with the company. From and after the filing of the articles of incorporation, there was a body corporate, (sec. 3239) with power to elect directors, and perform all other corporate acts, which this class of corporation is authorized to do and perform. The casting of illegal votes at an election for directors does not so far avoid the election as to permit it to be questioned collaterally. Morawitz on Corporations, sec. 639. The statute does not prohibit the holding of an election, but only forbids voting by those who have not paid. The directors were *de facto* officers of the corporation, and as such their acts are entitled to the same respect as if they were lawfully elected, unless called in question in a direct proceeding instituted by the state or some authorized person, for that purpose. Chamberlain v. Painesville R. Co., 15 Ohio St., 225; First Presb. Soc. v. First Presb. Soc., 25 Id., 128; State v. Taylor, 25 Id., 279; Ehrman v. Insurance Company, 35 Id., 339.

It is further claimed that granting the lawful organization of the company, there was no power to issue the bonds because the statute, sec. 3287, limits the amount of such issue to the amount of the capital stock, and that persons who act in behalf of a corporation without the power to do that which they undertake to do in its behalf, are liable

individually to as great an extent as if they were pretended agents without a principal.

The power to borrow money and issue bonds is within the scope of the general powers of the corporation, and in such cases a disregard of the limitations upon the exercise of the power does not render the act void to all intents and purposes. The distinction is very clearly stated by Judge White in Ehrman v. Insurance Company, *supra*, as follows: "Where there is an absolute or total want of power in a corporation to deal in respect to a given subject, it may be that acts done in the name of the corporation, in regard to such subject, would, as corporate acts, be void for all purposes and as against all persons. But there is an obvious distinction between such a case, and one where the corporation deals with a subject within the scope of its granted powers, but for a purpose or in a mode not authorized by its charter." In the case at bar it is alleged that bonds were issued for illegal purposes and to an amount in excess of the limit fixed by the statute, which facts seem to show that the action was not so entirely void as to render the stockholders individually liable as principals in the transaction, or to deprive the holders of a remedy against the company. Hays v. Galion Gas Co., 29 Ohio St., 330, 339.

The cases of Bartholomew v. Bentley, 15 Ohio, 659, and 1 Ohio St., 37, and Medell v. Collier, 16 Ohio St., 599, do not militate against this view. The first was a special action on the case to recover damages sustained by reason of a fraud. The second of the Bartholomew-Bentley cases, (for although between the same parties they were different actions), was an action of debt brought under a statute authorizing a recovery in that form against individuals issuing bank notes without authority, 2 Chase, 904. The case of Medell v. Collier is nearer to the doctrines contended for by plaintiff than others, but there is a plain distinction between that case and this. The ground of that decision is stated at page 613 thus: "Without undertaking to determine how far the principle may be extended, it is decisive of this case to hold as we do, that where the entire business carried on by persons in the name of a corporation, is such that the corporation is prohibited by law from doing, they can not interpose the corporate privileges between them and the liabilities which the law imposes upon individuals in the transaction of similar business without the use of the corporate name." And it is elsewhere stated that the "plaintiff had no information as to whether they were doing business as a corporation, or as private bankers. He seems to have trusted them in the latter capacity." So it was held that those of the stockholders who engaged in the business of receiving deposits, or authorized, or sanctioned it, were individually liable upon a certificate of deposit issued in the name of the bank. In this case there was no room for any purchaser of bonds to suppose that he was dealing with the individual members of the company. The nature of the transaction and the language of the bond preclude any such idea. Nor is the transaction one of a sort in which individuals engage. The construction and operation of railways is confided by our statutes to corporations. And finally, the corporation was authorized to issue bonds, though not to the amount determined upon by the resolution. For these reasons I am unable to perceive any such relation between the individual stockholders of this company and the purchasers of the bonds as will support an action by the latter against the former upon the bonds. This of course relates only to the form of action, for if the bondholders have been defrauded by

defendant stockholders by the abuse of corporate powers or otherwise, there is undoubtedly a remedy against them but such a cause of action can not be transferred to a trustee and maintained by him in behalf of others.

Is there any aspect of the petition from which a cause of action in behalf of this plaintiff appears? It is sufficiently alleged that plaintiff as trustee is a creditor of the corporation to a large amount; that his claim is unpaid, the corporation insolvent, and its assets exhausted. The petition further sets forth the names of all its stockholders, the amount of their subscriptions, and the fact that they are unpaid. If the reduction of stock be conceded to be valid, there remains $50,000 of undisputed subscriptions, applicable to the claim of creditors of the company. Gaff v. Flesher, 33 Ohio St., 107. Nor is the liability of the subscribers affected by the clause in the mortgage set forth in the second cause of action, that the bondholders shall have no recourse to the individual liability of the stockholders. The liability there referred to is not that arising upon their stock subscriptions. Without payment of the subscriptions, there would be no lawful stockholders. They constituted debts due to the corporation which might and should have been collected by it, and clearly this clause in the mortgage would have been no defense to an action by the corporation upon the subscriptions. The bondholders as creditors of the corporation have the right to have the debts due the corporation collected, and the proceeds applied to their claims. In this respect, at least, the petition states a good cause of action, and to it the four years' limitation to actions for relief on the ground of fraud, does not apply. It is unnecessary to express any opinion as to whether or not defendant stockholders may be held to the full amount of their original subscriptions, but it is sufficient to dispose of the general demurrer to find that the petition states a cause of action, and such demurrer to the first cause of action is therefore overruled.

The demurrer to the second cause of action is overruled. The clause in the mortgage complained of, was not pertinent to the subject-matter of that instrument. The purpose of the mortgage was to give to the holders of the bonds a lien upon the property of the company as security for the debt due upon the bond. The bond was the contract of the company, containing the terms of its obligation, and anything affecting those terms properly belonged to it. That which affected the lien of the mortgage was the proper subject-matter of that instrument, and the "terms and conditions" of the mortgage referred to in the bond would properly be assumed by anyone reading the bond, to be terms and conditions affecting the security, and not the contract. An action at law might be brought upon the bond without regard to the mortgage, and to such an action the defense that the terms of the bond were modified by the language in the mortgage, could hardly prevail, unless it was shown that the bondholders had actual knowledge of the language relied upon. To a claim of implied notice arising from a reference to the mortgage in the bond, the holder of the latter might well say: "I regarded the mortgage as security only for the bond, and had no reason to expect that you would place it in terms derogatory to the contract expressed in the bond." The force of this proposition may perhaps be better appreciated by supposing the case of an ordinary promissory note secured by mortgage. The purchaser of such a note could hardly be held bound by conditions in the mortgage limiting the liability of the maker of the note, unless the purchaser had knowledge of such conditions? We are not

without authority on the point. The case of Mueller v. Engeler, 12 Bush, 445, was one where the purchaser of a farm and the chattels thereon received a deed which referred to another deed in his chain of title which contained a reservation of a lien upon the chattels to the maker thereof. The court of appeals held that the purchaser was not to be held to have had notice of the lien upon the chattels because his deed contained a reference to the deed setting forth the lien, as a deed of real estate was an unusual place in which to insert a lien upon chattels, and such a lien had no connection with the purpose of the deed. Certain English cases have been cited in which it was held that one having notice of a lease was presumed to know of the covenants therein contained even if unusual, but those cases will be found to be cases where the covenants, though unusual, affected the title of the property or the conditions of its tenure by the lessee, and do not bear upon the point in question. See also Wade on Notice, sec. 314, 315-336.

To an action to collect the stock subscriptions the Northern Company is not a proper or necessary party, and its demurrer is therefore sustained.

Healy & Brannan, for plaintiff.

Kittredge & Wilby, Matthews & Greve, Perry & Jenney, Harmon, Colston, Goldsmith & Hoadly, Black & Rockhold, and Avery & Holmes, for defendants.

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## NOTES. 106

[Logan Common Pleas.]

### †James W. Wright v. Levi H. Kauffman and David D. Smucker.

1. When a "stranger" to a promissory note, for a valuable consideration, signs the note as an apparent maker, and there is no inadvertence or mistake as to any fact relative to or connected with such signing, he is liable as a maker of such note, although he may be mistaken as to the legal effect of his act. And, in such case, if the signature is added with the knowledge and consent of the holder of the note, and without the knowledge or consent of the original maker, it is a material alteration of the note which releases him from liability thereon.
2. In such case, when the person thus signing disclaims signing the note as maker, and also disclaims signing it in any other character or capacity, he must be held to sustain the relation to the note which the position of his name upon it indicates.

OPINION on motion for a new trial.

PRICE, J.

This cause is before the court on a motion to set aside the verdict heretofore rendered, and to grant a new trial herein. The original petition in the case charges that the defendant, Levi H. Kauffman, on the twenty-seventh of July, 1885, executed and delivered his promissory note of that date to one W. B. Smith, for the sum of $750.00, payable on the first day of October, 1886, with six per cent. interest from date. It further avers that afterwards, to-wit: on the first day of August, 1885, the defendant, David D Smucker, in consideration of the sum of $50.00 paid to him, agreed to and did guarantee the payment of said note by contract not in writing; and that he, Smucker, then and there signed said note by his initial signature of D. D. Smucker, placing his name thereon under the signature thereon of said Levi H. Kauffman. After trial and verdict of the jury, the plaintiff, by leave of court, filed an amended petition, which contains the averment that Smucker "signed said

†Judgment affirmed by the circuit court; opinion 2 Circ. Dec., 360.

note as additional maker thereof." The defendant Kauffman, filed an answer in which he claimed that without his knowledge or consent, the name of D. D. Smucker was subscribed to the note as additional maker thereof, and that the note was thereby materially altered and changed, so that he (Kauffman) was discharged from all liability thereon.

The answer of Smucker being to the original petition, and not to the amended petition that has been filed since the verdict, denies that he agreed to guarantee the payment of said note, and denies that he is liable thereon either as guarantor or in any other capacity. On the issues thus made the parties went to trial; plaintiff contending that Kauffman was liable on the note as maker, and that Smucker was liable thereon as guarantor; Kauffman contending that he was discharged from all liability because the note had been materially altered; and Smucker insisting that he was not liable on the note in any capacity. The jury found in favor of the plaintiff against the defendant Smucker alone. Smucker now seeks to set aside the verdict, mainly on the ground that the court erred in its charge to the jury; and it is to that ground I will direct my attention. On the trial the following facts were undisputed:

First—On the twenty-seventh day of July, 1885, the defendant Kauffman alone executed and delivered the note in question.

Second—That on the first day of August, 1885, the defendant Smucker, in consideration of the sum of $50.00 signed said note on its face, immediately under the name of Kauffman, with the knowledge and consent of the holder of the note, and without the knowledge or consent of the original maker, Kauffman.

The court, on the point under consideration, charged the jury, in substance, as follows:

I. That if, after the note had been fully executed and delivered, the defendant Smucker, in consideration of the sum of $50.00, signed said note as a maker, with the knowledge and consent of its holder, and without the knowledge or consent of the original maker, Kauffman, such signing would be a material alteration of the note which would discharge Kauffman from all liability thereon.

II. And that Smucker had signed the note in such manner as to indicate that he was a maker, and as he did not claim to have done so "through inadvertence or mistake," he must be held to be a maker, and would not be permitted to escape liability by saying that the writing above his name was not his contract.

Was there any error in either of these charges, in the light of Smucker's own claim as made in his testimony? For in determining whether there was error prejudicial to him, his own claim must be carefully borne in mind. As to the first proposition charged there is, perhaps, no serious controversy or conflict of opinion. It was conceded that Smucker, after the note had been executed and delivered, in consideration of the sum of $50, signed it apparently as maker, with the knowledge and consent of its holder, and without the knowledge or consent of its original maker. These facts being admitted, the charge of the court amounted to simply this: That if he signed the note as maker, such signing would amount to a material alteration of the note which would discharge Kauffman from liability. Wallace & Park v. Jewell, 21 Ohio St., 163.

Prior to the time of signing his name on August 1, 1885, Smucker was a "stranger" to the note. On the trial, plaintiff sought to hold him as a guarantor, and not as a maker. It seems to be settled in Ohio;

First—That the mere indorsement on a note, of a stranger's name, in blank, after the note has been executed and delivered, is *prima facie* evidence of guaranty.

Second—But the intention of the parties at the time of such indorsement may be shown by parol. Bright v. Carpenter et al., 9 Ohio, 139, 140; Champion et al. v. Griffith, 13 Ohio, 228; Seymour & Co. v. Mickey, 15 Ohio St., 515; Greenough et al. v. Smead et al., 3 Ohio St., 415; Castle v. Rickly, 44 Ohio St., 490; Robinson v. Abell et al., 17 Ohio, 36.

In this case, however, Smucker did not indorse the note; he did not "write on the back" of it. The question recurs, did the court err in charging the second proposition as before stated? While Smucker signed the note in the place or position of maker, and apparently as maker, yet if he signed it in that place "through inadvertence or mistake," or "intending to be a guarantor," he can not be held as a maker of the note, and it would not be a material alteration discharging the original maker, Kauffman. Wallace & Park v. Jewell, *supra*; Randolph on Commercial Paper, vol. 3, 860.

To be guilty of inadvertence is simply to be heedless, careless, negligent. A mistake is a fault in opinion, judgment or conduct. In my judgment, Smucker did not sign the note apparently as maker, "through inadvertence or mistake," as those terms are understood in legal contemplation. He labored under no mistake as to

what he was signing, nor as to where he was signing it. As to what he was doing in fact there was no "inadvertence or mistake;" and if there was any mistake at all on his part, it was simply as to the legal effect flowing or resulting from his deliberate act. "Where a note has been materially altered, it is error for the court, in its charge, to make the legal effect of the alteration depend on what the holder conceives to be its effect, etc." Wallace & Park v. Jewell, *supra*.

True, this citation refers to the holder of a note, but I apprehend the principle will apply as well to any other party to a note. In this particular case, it so happens that the plaintiff, Wright, had knowledge of the circumstances under which Smucker signed the note; but for the purpose of testing the principle, let us suppose the fact to be otherwise, and that Wright had no knowledge of such circumstances. Would the defendant be permitted to say: "True, I signed this note as an apparent maker; I know what I was signing and where I signed it; I received a consideration of $50.00 for such signing; I was not mistaken in regard to any fact relative thereto; but my legal opinion was that my signing it under such circumstances would have no legal effect?" If such is the law, and a person can thus tamper with negotiable paper, and send it forth into the commercial world without incurring any liability, it devolves upon every person taking commercial paper to exercise great caution.

"If, however, he signs it in that place by inadvertence, intending to be a guarantor, it will not render the note void," Randolph on Commercial Paper, *supra*.

There is no claim or pretense on the part of Smucker that he intended to become a guarantor. He claims, in his testimony, that he did not become a party to the note in any capacity, and in that claim, in my opinion, lies the weakness of his cause. If he had claimed that he signed the note as guarantor, or in some capacity other than that of maker, it would be a fair question whether the court did not err in its charge. Counsel have argued and cited authorities to show, that Smucker might introduce parol evidence to show what liability it was intended he should assume, and what relation he should sustain to the paper. The general proposition may be granted, and yet the defendant be liable.

The argument of counsel stripped of all tinsel and gauze, as applicable to the peculiar facts of this cause, comes to this complexion at last: A party to a note may show by parol evidence what his liability was intended to be; and in what character he is on the note, and what relation he sustains thereto; we can, therefore, by parol evidence, show that Smucker sustains no relation to this note; and that his name is not on it in any character or capacity whatever. Smucker claimed in his testimony that he signed the note under the name of Kauffman simply for the purpose of vouching that Kauffman was worth about $3,000.00. He disclaimed signing the note as maker, (either maker as principal or maker as surety), guarantor, indorser or in any character or capacity. He does not make a case then for the application of the rule which is frequently applicable, that a party to a note may show by parol evidence that his relation to it is different from what the position of his name would indicate. Smucker was a "stranger" to the note. For a valuable consideration he signed it as an apparent maker. When he so signed it there was no "inadvertence or mistake" as to any fact relative to such signing. While he disclaims signing it as maker, he also disclaims signing it in any other character. He must, therefore, be held to bear the relation to it which the position of his name upon it indicates.

Motion for new trial overruled.

E. J. Howenstine, for Wright.

West, Brown & West, for Kauffman.

William Lawrence, for Smucker.

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## STREETS. 121

[Superior Court of Cincinnati, Special Term.]

### MILLER V. CINCINNATI.

The city cannot change the established name of a street at will, no good cause for it existing, except on petition of the abutting property owners.

MOORE, J.

The superior court of Cincinnati has decided that the established name of a street cannot be changed by a city council, except on petition of the property holders on such street. The name of Fairfield avenue, Cincinnati, had been changed by the city council to Shenendoah avenue, and that of Warner street to Dryden street, at the time of a general turning over of the nomenclature of the city's streets, by the council. I. J. Miller, the well known lawyer, lives on Fairfield avenue, and had built himself a home there which he named "Fairfield Place." He filed a petition asking for a perpetual injunction against council from changing the name of the avenue, averring that the change had been attempted without any petition for such a change having been filed by any property owner on Fairfield avenue or on Warner street, and that no good cause for such a change existed. The city solicitor demurred. Judge Moore overruled the demurrer, and the city not desiring to plead further, a decree was granted perpetually enjoining the proposed change.—*Editorial.*

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## 122 ATTACHMENT.

[Superior Court of Cincinnati, General Term.]

PLATT & WASHBURN REFINING CO. v. JOHN GALT SMITH.

A valid lien upon the property of a non-resident of the state may be obtained by the levy of an attachment issued from a court of a county other than that wherein the property is situated, if there is also property of the defendant in the county where the action is brought, and an attachment issued in the same action is at the same time levied upon it, and in such case the fact that the last named property is subsequently exhausted in satisfying prior attachment liens does not invalidate the first named attachment.

ERROR to Special Term.

PECK, J.

The question in this case is one of jurisdiction. The principal defendant below, the Mystic Rubber Company, is a foreign corporation, and was served by summons and copy out of the jurisdiction. Writs of attachment had been issued by various parties in this action against that company, and among others, the defendant Smith caused such writ to be issued at the same time to the sheriff of this and of Montgomery counties. The writ was served in this county upon certain garnishees, who answered, admitting an indebtedness to the Rubber Co., but setting forth that such indebtedness had already been garnisheed by the other parties before mentioned. The writ to Montgomery county was served upon garnishees, who also admitted indebtedness, and have since paid the money into court, leaving it to be determined whether the plaintiff or the defendant is entitled thereto. The plaintiff commenced an action against the Rubber Co., in the court of common pleas of Montgomery county, and caused a writ of attachment to be issued and served upon the same garnishees who paid the money into this court, before such payment was made, but subsequent to the service of the writ issued by Smith herein, and the point to be determined is whether the latter writ under the circumstances, confers jurisdiction upon the court to render a judgment against the Rubber Co. as to the money paid in by the garnishees in the

absence of service upon the company within the jurisdiction. The claimants to the fund all came into the court below and submitted their claims in that behalf to its judgment, where the decision was in favor of Smith, awarding the fund to him.

It is claimed on behalf of the Refining Co. that there was no jurisdiction to issue the writ of attachment to Montgomery county, because the defendant, the Rubber Co., was not found or served within the jurisdiction, and that the issue of an attachment and the service thereof upon garnishees in this county furnished no foundation for the issue of a like writ to another county, and 2d, that as to the garnishments in this county, it turned out subsequently, but prior to final judgment below, that the funds garnisheed were insufficient to pay the claims of prior attaching creditors, and no part of the same proved applicable to the payment of the claim of Smith. Wherefore it is claimed that even if a writ of attachment may issue to another county in a case where property has been levied upon in the county where the writ is issued, if it turns out afterwards that such property is consumed by prior claimants, it is as if nothing had been levied upon, and the court obtains no jurisdiction by virtue of the writ.

As to the first question, can a writ of attachment be issued to another county where the defendant is only in court by constructive service, in a case where a like writ issued by the same court is levied upon property of the defendant within the jurisdiction of the court issuing the writs?

The question is one of Ohio law. Following Judge McIlvaine in National Bank v. L. S. & M. S. R. Co., 21 Ohio St., 221, 228, "we shall assume, for the purpose of this action, that it is within the power of the legislature to prescribe the manner in which service may be made in actions instituted in the courts of the state, in which property situate within the state is in any way involved or may be appropriated." Turning then to the statute, we find sec. 5030 provides that "an action * * * against a non-resident of this state or a foreign corporation, may be brought in any county in which there is property of, or debts owing to the defendant." And sec. 5525, provides that "orders of attachment may be issued to the sheriffs of different counties, and several of them may, at the option of the plaintiff, be issued at the same time.

Here is plainly authority to commence an action in any county where there are debts owing to the defendant, and to issue writs of attachment to other counties, unless there is something else in the statutes, or in the policy of the law to modify the meaning of the language of these provisions. Our attention has not been called to any other statutory provisions affecting the question, and to no principle or policy of the law other than that which is applied between jurisdictions foreign to each other and which rests upon constitutional principles not here involved. The laws of a state have no extra territorial force. The courts cannot render judgments effective as against persons or property not within the operation of the laws of the state or the reach of its officers; but this has no application to persons or property found within the state. The jurisdiction of the courts in different counties of the state is in no sense foreign to each other. The non-resident who has not been served with process in the state, can not be affected as to his person or property without the state by judicial proceedings within it. It is not within the power of the legislature to authorize a valid judgment in such a case. The citizen must be sued in the state of his residence, or where he can be found, but to a non-resident one county of the state is the same as another. It is

purely a matter of domestic regulation, for the legislature to determine when and upon what process property found within the state shall be applied to the claims of the creditors of the non-resident. Viewed as a matter of convenience, it certainly appears better for all parties that the claims should be heard and determined once for all in a single action, then that they should be put to the expense and trouble of litigation in each county where the defendant may have property. See Finnell v. Burt, Ohio Dec., 2 Handy, 223. We conclude that the first of plaintiff's propositions is not well founded.

Does the fact that it afterwards turned out that the debts garnisheed by Smith in this jurisdiction were consumed in paying the claims of prior attaching creditors, alter the case? There were debts owing to the Rubber Co. in this county, and Smith acquired a lien upon those funds by virtue of his levy. At the time of the levy neither the validity of the prior claims, nor their amount, had been judicially determined. If anything had remained it would have gone to Smith. To hold that because the property levied upon was insufficient to pay more than the prior claims there could be no jurisdiction, would be in effect holding that there was no jurisdiction, not because defendant had no property in the county, for he had such property; nor because it was not levied upon, but because of a fact which could not be ascertained at the time of the levy, which is the time as to which the question of jurisdiction is to be determined.

If we are right in our conclusion as to the first point, the second must also be resolved against the plaintiff in error, and the judgment is affirmed.

TAFT and MOORE, JJ., concur.

Wilby & Wald, for plaintiff.

Bradstreet, for defendant.

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124 **BANKS.**

[Superior Court of Cincinnati, Special Term.]

## †H. H. WARNER v. ARMSTRONG, RECEIVER.

A few hours before the Fidelity National Bank closed its doors and at a time when its officers knew that it was hopelessly insolvent, and that no deposit made could be withdrawn, G., acting as agent of W., was allowed by said officers to deposit W's check on another bank to G's account in the Fidelity National Bank and receive in exchange therefor a draft of the Fidelity National Bank on a New York Bank where it had no funds. *Held*,

1. That W. as against the receiver of the Fidelity National Bank was entitled to rescind the contract of deposit of the check for fraud, and on the tender of the dishonored draft was entitled to a delivery up of the check.
2. That W. was entitled in equity to enjoin suit against himself by the receiver in a jurisdiction where G's assignee in insolvency, who held the dishonored draft and refused to deliver the same to W. or the receiver, could not be made party.
3. Under section 5242, Rev. Stat. of the United States, there is no power in a state to issue a temporary injunction before final decree against the receiver of a national bank.

† See Decision in case of Armstrong v. Warner, post 434.

Defendant Armstrong filed a motion to dissolve the restraining order issued in this case on the ground "that the facts stated in the petition do not constitute a claim for equitable relief." As the only relief sought is equitable, the motion is, in effect, a demurrer to the petition.

The petition states two causes of action. The first in substance is, that Warner being liable upon a draft due in New York City for $4,067.62, forwarded his check on the Bank of Monroe of Rochester, N. Y., for that amount to W. J. M. Gordon to pay the same. Gordon deposited the check in the Fidelity National Bank a few hours before it closed its doors and when its officers knew that it was hopelessly insolvent. Gordon received from the bank at the same time a draft of the Fidelity on the First National Bank of New York, for $3,200.00, when, as the officers of the Fidelity knew, it had only a fraudulent and fictitious balance in the First National Bank, and its account was really at the time of the making the draft largely overdrawn. The receipt of the deposit and the issuance of the draft under the circumstances, are alleged to be a fraud upon plaintiff. Gordon forwarded the draft for $3.200.00 to New York, payment was refused, protest had, and the draft returned to Gordon, who presented it to defendant Armstrong, the receiver of the bank, and demanded a return of the check of plaintiff upon which plaintiff had stopped payment. The demand was refused. Gordon becoming insolvent this draft passed into the hands of defendant Hyman, his trustee for the benefit of creditors, who still holds it and refuses to deliver it to plaintiff except upon order of court. The receiver is about to bring suit upon the check against plaintiff.

The second cause of action is distinct from the first. Warner, the plaintiff, is liable upon a draft for $4,249.00 which he accepted for the accommodation of Gordon, and which Gordon discounted at the Fidelity Bank. The draft fell due the day after the bank closed its doors. When the bank failed Gordon had a large balance to his credit on deposit. Gordon is insolvent. Plaintiff is really only a surety upon the draft due the bank, and as such seeks to avail himself in equity of the set-off which his principal Gordon would be entitled to against the bank. The receiver threatens to sue plaintiff on this draft in New York where Gordon and his trustee cannot be made parties, and where therefore this equitable defense and set-off cannot be used by plaintiff:

On his first cause of action plaintiff prays that the receiver be enjoined from bringing suit upon the check of plaintiff; that Gordon's trustee be compelled to deliver First National Bank draft to the receiver, and that the receiver be compelled to surrender the check to plaintiff.

On his second cause of action plaintiff prays that the receiver be enjoined from suing plaintiff on his acceptance in New York, and that he be compelled to allow plaintiff to set-off Gordon's deposit against his liability to the bank on his acceptance.

An order was issued temporarily restraining the defendant as prayed. It is on a motion to dissolve this restraining order that the questions for decision arise.

TAFT, J.

By the allegations of the first cause of action Warner entrusted his check to Gordon as agent to take up his paper. As between Gordon and Warner the money represented by the check was Warner's until it was applied as directed. A fraud committed on Gordon with reference to this money was a fraud upon Warner, and I do not see why, by the ordinary rule of principal and agent, Warner may not avail himself of every remedy against the bank open to Gordon, had he been dealing with his own money.

We come to the inquiry what was the bank's title to the check deposited by Gordon? As Gordon was credited with the check as cash, the title to the check was transferred to the bank. See Metropolitan Bank v. Lloyd, 90 N. Y., 537. *In re* Bank of Madison, 5 Biss.

But when the bank received the check it was utterly insolvent as its officers knew and it issued in part return of the check a draft on a bank where it had no funds, as its officers well knew. These two facts are strong evidence tending to show that the officers received the check with the intent not to return the value of same on call, which is equivalent to intent to defraud. See Talcott v. Henderson, 31 O. S., 162. And such intent on the part of the officers managing the bank charges the bank with the same fraudulent intent. See Cragie v. Hadley, 99 N. Y., 31.

It is objected that no fraudulent intent is alleged, but that there is a mere allegation of law that a receipt by the bank under the circumstances was a fraud. I am inclined to think this a well founded objection. The facts pleaded are strong evidence of the ultimate fact, *i. e.*, the fraudulent intent of the bank, but do not make

up for a lack of the proper allegation, which would be that the bank and its officers received the check with intent to defraud Gordon. Taking it for granted that the petition can be amended to meet the objection, what would the right of the plaintiff under that allegation be? The title of the bank to the check would be voidable by Gordon or Warner on a tender of the draft within a reasonable time, and a notice of a rescission of the contract of deposit and a demand for the check. Such tender, notice and demand are all alleged, and give to Gordon, or his principal, Warner, the right to recover the check from the bank or its receiver. See Cragie v. Hadley, *supra*.

The check is a negotiable instrument in the hands of the receiver whose title thereto has been avoided. This is a well established ground for the interference of a court of equity to restrain a suit upon the instrument and to compel a surrender of it. It is not a sufficient answer to a prayer for such a remedy that the ground upon which the instrument has been avoided is a good defense at law to a suit thereon, because remedy by defense at law is not entirely adequate, for the check being transferable may become the foundation for other suits, and the person liable thereon be greatly harassed. If the instrument is voidable and has been avoided, the fraudulent holder can retain it for no good purpose, and equity will deprive him of any opportunity to use it.

High on Injunction, section 67; Story's Equity Jurisp., sections 698–700; Ferguson v. Fisk, 28 Conn., 501; Hamilton v. Cummings, 1 John., ch. 516.

It is clear, therefore, that were the bank a natural person, the state of fact alleged would justify this application to a court of equity. It is claimed, however, that a different rule applies to national banks which have passed into the hands of a receiver after the fraud because of section 5242 R. S. U. S. of the banking act, which forbids preferential transfers or assignments, and enforces equality of distribution among creditors; that the rights of creditors having intervened, the equity against the bank is lost as against the equity of all creditors decreed by positive enactment. The obvious answer to this objection is clearly pointed out in Cragie v. Hadley, *supra*, and is that where the defrauded party seeks to rescind and recover back his deposit, he claims not under any transfer or assignment from the bank, but under his original title, and so does not claim in contravention of the section cited. Counsel for the receiver, however, have cited some authorities which it is claimed are opposed to this view. In Bank v. Receiver, 15 Fed., 858, Judge Wallace held that a receipt of a draft and collection of it by a bank, after its insolvency was known to its officers, was a fraud, but that equity could grant no rescission and redelivery, because the proceeds of the collection had been mingled with the general funds of the bank, and as money has no earmark, the equities of the general creditors in the fund were as great as those of the plaintiff. In the case at bar the receiver holds the check itself, which is, of course, capable of identification and which therefore, clearly distinguishes this from the case cited. In the cases of St. Louis, etc., Ry. Co. v. Johnston, 27 Fed., 243; Metropolitan National Bank v. Lloyd, 90 N. Y., 530, and *ex parte* Jones, 77 Ala., 330, the pleadings did not raise any issue of fraud between the bank and the depositors. In the last case a customer of the bank bought a draft on New York with money on deposit. Before the draft was presented, the bank made an assignment and the assignee notified the N. Y. Bank to stop payment. Plaintiff sought to rescind the contract of purchase of exchange and to be restored to her right as a depositor because the bank was insolvent. It appeared that there were funds in New York to meet the draft. It was held that there could be no such relief in the absence of proof that the bank intended to defraud or had no reasonable expectation that the bank in New York would pay the draft. Under ordinary circumstances notice to stop payment on a draft would give the holder the right to rescind the contract by which it was delivered to him, but in this case, by the assignment, rights of creditors intervened before any right of plaintiff to rescind accrued, and defeated its exercise. If the right to rescind had been based on fraud in the inception of the contract, as in the case at bar, the right to rescind would have accrued at once, and the creditors would have taken the assignment subject to this right. This is the distinction taken by the Alabama court, which makes the authority rather against the receiver than in his favor in the case at bar.

It is objected by counsel for receiver, that by compelling him to litigate the validity of his title to the check in this jurisdiction he is deprived of the right to make the Bank of Monroe, of Rochester, N. Y., a party against whom he has a right of action on the check. In Kahn v. Walton, 46 O. S., 195, our Supreme Court has recently decided that a bank check is a revocable order for the payment of money, creating no right of action against the bank in favor of the payee, until it has accepted it.

The same rule has been laid down in Florence Mining Co. v. Brown, 124 U. S., 385; Bank v. Millard, 10 Wallace, 152; First National Bank v. McMichael, 106 Pa., 460; Coates v. Doran, 83 Mo., 637, and *ex parte* Jones, 77 Ala., 330. And this is the holding in New York, where it is proposed to bring the suit against the bank. Resley v. Phoenix Bank, 83 N. Y., 324. In this view, the receiver could not recover on the check from the bank of Monroe, whatever may be Warner's liability thereon, and therefore the receiver loses nothing by not being able to bring the bank in as a party.

In order that the receiver as representative of the bank may be put *in statu quo* it is necessary that he should be given the draft for $3,200.00 now in the hands of Hyman, trustee. Hyman refuses to deliver the draft. This is another ground for an equitable remedy to save a multiplicity of suits, and to bring all the parties interested into an adjudication of their rights in one hearing. The facts stated as a first cause of action, entitle plaintiff to the equitable relief he seeks.

(Upon the second cause of action, the court held that upon the facts set out, the plaintiff was entitled to set-off. This feature of the case was carried to general term on error, where it was more fully considered, and the same conclusion reached. The opinion of the general term on this point will be reported. It is therefore deemed unnecessary to include in this report the reasons of the court at special term for upholding the right of set-off.) See post, 46 O. S., 195.

The objection which has been most strongly urged to the temporary restraining order granted herein, is that under section 5242, R. S. U. S., there is no power in a state court to issue an injunction before judgment against a national bank association, and consequently none against a receiver.

The clause referred to is as follows:

"No attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county or municipal court." It has been a matter of dispute whether this restriction applied, except in cases where the bank was insolvent. The Supreme Court of the United States has settled the question in Pacific Bank v. Mixter, 124 U. S., 721, by holding that the restriction is general, and does not depend upon the financial condition of the bank. In that case the court says that remedy by preliminary injunction against the banks, was ample in the U. S. courts, until the amending act of 1882 was passed, when, by the proviso of section 4, (22 U. S. Statutes at Large, 163,) all laws giving the U. S. courts any different jurisdiction from that had by them over state banks, is taken away. The court plainly intimates that this takes away all power to restrain banks temporarily in any court. It is claimed that an act which so derogates from the ordinary legal remedy, should be strictly construed, and should not be held to extend to receivers of national banks, who, while they represent the creditors and the bank, are really officers of the United States engaged in an administrative capacity in settling up the affairs of an agency of the government. It has several times been decided that the proviso of section 4 of the act of 1882, does not extend to receivers, although it does in terms apply to banks. Mead v. Platt, 17 Fed. Rep., 509; 26 Fed. Rep., 677. The expression of prohibition is, however, against an injunction against the bank or its property. It is sought at bar to enjoin the receiver from enforcing the ordinary property rights of the bank, to which he has succeeded for the benefit of the bank and its creditors. In the case of Com. Exch. Bk. v. Blye, 101 N. Y., 303, where it was sought to apply this prohibition to an action akin to our replevin, against a receiver, no question was raised in the argument or in the opinion that it was not as applicable in favor of a receiver as in favor of the bank, although the particular form of action was held not to be within the remedies prohibited. While I should be glad to find some loophole for escape from what the U. S. Supreme Court suggests is a failure of legislation, I do not think the one urged by counsel is satisfactory. In view, however, of the clear equity of the petition, though I am obliged to dissolve the preliminary injunction, I shall give the plaintiff an opportunity to try his case within ten days, so that he may obtain an injunction after judgment, if the proof shall sustain his allegations.

Motion granted.

Bateman & Harper, for plaintiff.

Kittredge & Wilby and Burnet & Bruce, for defendant.

126 **HUSBAND AND WIFE.**

[Fayette Common Pleas.]

JACKSON RANKIN v. EUNICE RANKIN ET AL.

**Where a husband has conveyed lands to his wife without valuable consideration, and under such circumstances that the presumption of law arising from the relation of the parties, that an absolute gift was intended is rebutted, if the transaction be questioned the burden is upon the party claiming under the deed to show that it was not obtained by an abuse of the relation of trust between husband and wife.**

HUGGINS, J.

The plaintiff in this case seeks to set aside a deed made by him to his wife, the defendant Eunice Rankin, and also to set aside a judicial sale of the premises conveyed by the deed, such sale having been made upon a judgment taken upon a cognovit given by Eunice Rankin to the defendant Craighead, the defendant Holland being the purchaser.

The plaintiff Rankin and his wife Eunice are colored people. They have a large family of children, some of whom are yet small. Some years ago Rankin bought the premises in question, taking the title to himself, and by his labor paying the purchase money in installments from time to time, except a small mortgage incumbrance on the land when it was bought. He is shown to be an industrious man. His wife Eunice had no separate means. She contributed nothing to the purchase except by making a home for Rankin and the family by her household labors. Rankin improved the property, making it a somewhat comfortable home for him and his family in their station in life. He had no other property except some stock, including horses, and some farming implements. For some reason, Eunice became anxious to have a deed for the home, and importuned Rankin until, as he says, he consented to make the title over to her. This was done by Rankin and wife making a deed to a third person, and he a deed to her, no consideration being paid. Sometime after that, Rankin left home for a time, because of a criminal prosecution against him. He came back, however, and was tried and acquitted. While he was gone, Eunice, being pressed for payment of an attorney fee incurred in the transfer of the title, borrowed thirty dollars of Craighead to pay the attorney, who in turn borrowed the sum of Holland to lend to her. Craighead and Holland both lived in the vicinity and knew in a general way of Rankin's affairs. To secure this loan, Eunice gave Craighead a mortgage on a cow then in her possession, which had been bought by Rankin. Condition being broken Craighead took the cow. About this time Eunice left her husband, and has ever since refused to live with him, without cause so far as appears. Rankin having returned, brought a replevin suit against Craighead for the cow, which suit, upon final trial, went in Rankin's favor. He is still living upon the premises in question with his minor children. Both Rankin and his wife are entirely illiterate, and she is shown to be of feeble mind.

Craighead having failed in the replevin suit, got from Eunice a cognovit, not only for the loan of the thirty dollars and interest, but for the costs and expenses of the replevin suit, in all about one hundred and ninety-five dollars. He has not paid such costs, or his debt to Holland. It does not appear that such costs can be made from him on execution, or that he is good for the loan. A judgment was entered on the cog-

novit in favor of Craighead. On this judgment execution issued and was levied upon this land as the property of Eunice Rankin. A sale was had, Holland being the purchaser, and the sale was confirmed. At this stage, and before deed by the sheriff to Holland, Rankin brings this suit, claiming to be the real owner of the property; that the title was a trust in his wife, and that Craighead and Holland have conspired with her to defraud him of his home.

Eunice Rankin does not answer. Holland and Craighead answer, denying the trust,—denying that they conspired as claimed, and denying knowledge that Rankin paid for the property.

The facts I have stated should, I think, impress any candid mind that the result of these transactions is a wrong to the plaintiff Rankin. Nor does Craighead's conduct commend itself to the conscience of a chancellor. When the case was tried, however, I was unable to see how this wrong could be remedied. Yet where a wrong has been done of this kind the law professes to and should give a remedy. Considering this I have been much interested in the case, and have examined it with some care.

It is urged that no express trust has been shown—which I think is true. It is urged that the deed being to a wife the law presumes it to be a gift to her, and the gift being executed the property was hers and liable for her debts. But if this view shall prevail the result is that the home bought and paid for by Rankin, and by him deeded to his wife for nothing, will be sold and the proceeds turned over to Craighead in payment of a judgment founded upon a cognovit got from a feeble minded negro woman who can neither read nor write, and which had no legal consideration except in small part. It seems to me that this case is such that the wholesome rule laid down by Judge Swan for justices of the peace, and which is a good rule for any court, may well be applied.

"The first inquiry of the justice should be, what is just and equitable. And if a rule of law is pressed upon his consideration which in its application to the case, will do manifest injustice to the parties, the justice should disregard the rule, unless it is clearly and indubitably applicable." Swan's Treatise, Chap. XVI.

In most cases, however, when rules of law are urged which would in their application work injustice, the trouble is, not in the law but in imperfect knowledge of its principles, and their proper application. A careful examination will usually, and should always, harmonize the law and the justice of the cause, and I think will do so in this case.

It is a rule of equity that when land is bought and the title taken in the name of the wife of the purchaser, the presumption is, because of the relation of the parties, that a gift was thus made by the husband to the wife. Perhaps this rule applies when the land is conveyed after the purchase, the husband having taken the title to himself. But such presumption is not conclusive and is "a circumstance of evidence" only. Testimony will be heard upon the other side, and "the whole question is resolved into one of intent." 1 Perry, sec. 143 *et seq.*

"Where a person purchases property with his own funds, and places the title in the name of a stranger, the legal presumption is that he made such purchase for his own use and the property is held in trust for him.

"But where such purchase and conveyance is made by a man to a member of his own family, the presumption is that the property is intended as a gift or advancement."

"These are, however, merely abstract presumptions, that may be rebutted by circumstances, or by evidence going to show a different intention, and each case has to be determined by the reasonable presumption arising from all the facts and circumstances connected with it." Part of syllabus, Creed v. Lancaster Bank, 1 Ohio St., 1.

Now this house and land was substantially all that Rankin had. It was the homestead of himself and family. He was wholly unlearned, and so far as appears, acted without advice, and upon the importunate solicitation of his wife. These facts are also "circumstances of evidence" which rebut the presumption that the deed was intended as an absolute gift of the land, and leave the transaction to be determined without being governed by such presumption. Rankin was importuned by his wife to have this title conveyed to her. His testimony is that he did so upon her pledge that the title should be held by her for him and the family, and that the place was to be a home for them. Whether this is competent or not, no testimony is needed other than the admitted circumstances to show the nature of the transaction. He was dealing with his wife, the mother of his many children, with whom he was then living agreeably. No greater or higher relation of trust or confidence exists than this, and the rules of equity with regard to such relations, and which place the burden of showing that no trust was intended upon the party claiming a gift, are in my opinion upon careful examination applicable to this case.

"If a person obtains the legal title to property by such acts or circumstances of circumvention, imposition or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations." 1 Perry, sec. 166.

"The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations, has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain his advantage." Pom. Eq. sec. 956, quoting Yate v. Williamson, L. R., 2 Ch. 55, 6061.

"Courts of equity have carefully refrained from defining the particular instances of fiduciary relations, in such a manner that other and perhaps new cases might be excluded. It is settled by an overwhelming weight of authority that the principle extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic, or merely personal. Pom. Eq., sec. 956.

"Whenever a person obtains, by voluntary donation, a benefit from another, he is bound, if the transaction be questioned, to prove that the

transaction was righteous, and that the donor voluntarily and deliberately did the act, knowing its nature and effect.

The above rule is not confined to attorney and client, parent and child, etc., but is general." Head note, Cook v. Leamont, 15 Beavan, 234, Sir J. Romilly, master of the rolls.

"The rule in cases of this description is this: where those relations exist, by means of which a person is able to exercise a dominion over another, the court will annul a transaction, under which a person possessing that power takes a benefit, unless he can show that the transaction was a righteous one. It is difficult to lay down with precision what is meant by the expression relation in which dominion may be exercised by one person over another. That relation exists in the cases of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated that one may obtain considerable influence over the other." Id., 240.

"General rule, that he, who bargains in matters of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence." 4 Clause head note. Gibson v. Jeyes, 6 Vesey, 266, Leord Eldon Chanc.

"The same general principle extends with more or less force, to dealings between physician and patient, a spiritual adviser and penitent, husbands and wives, and persons occupying their position." Pom. Eq. sec., 963.

Among the cases cited by Mr. Pomeroy in support of his text last quoted is that of Turner v. Turner, 44 Mo., 535. The case is somewhat similar to the one at bar. That case was different from this, however, in that it charged both conspiracy and adulterous relations between a wife who obtained a deed from her husband, and another. The court was emphatic in its opinion that a case was made for relief, laying stress upon the fraud alleged, but recognizing at the same time the doctrine of an abuse of confidential relations, and applying it in the case.

The result of examination of these and other authorities is, to my mind, to establish this legal proposition: Where a husband has made a deed of lands to his wife, or she to him, without valuable consideration, and under such circumstances that the presumption that an absolute gift was intended is rebutted, if the transaction be questioned, the burden is upon the party claiming under the deed to show that it was not obtained by undue influence, or by an abuse of the relation of trust between husband and wife. No lawyer would doubt this proposition as applied to the husband. Cases supporting it from that point of view are not wanting. While for various reasons the rule will more frequently be applied to cases where husbands violate confidence reposed in business matters by wives, than to cases where wives violate confidence reposed in business matters by husbands, he would be a poor student of human nature who should maintain that the trust reposed and the power to abuse it did not exist on one side as well as on the other.

In order then, that this deed may stand, those claiming under it must show that it was intended to invest the title to this property in Mrs. Rankin, as an absolute gift. I do not think this has been shown, and I think the circumstances of the transaction point in the other direction.

As to Holland, the rule of buyer, beware probably applies "in all its rigor," to use the language of our Supreme Court as to purchasers at judicial sales. But if this were not so, the money he has paid is in reach of the court, and is ordered returned to him.

A decree may be entered setting aside the sale to Holland vesting the title to this property in Rankin subject to the mortgage lien he has never paid wherever outstanding. I fail to find that Holland has been a participant in any of these transactions in such a way that Rankin's costs should go against him. Rankin may recover his costs against Craighead. The other parties are charged with their own costs respectively.

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## 136 BANKS—SET-OFF.

[Superior Court of Cincinnati, General Term.]

†DAVID ARMSTRONG, RECEIVER, v. H. H. WARNER.

1. W. forwarded to G., at Cincinnati, his check on a Rochester bank for $4,067 with instructions to G. to take up W's bill of exchange, about to fall due in New York city, G. presented the check to the Fidelity National Bank of Cincinnati, which received it on deposit to G's credit on condition that he would take in part payment of the deposit a draft of the Fidelity Bank on its New York correspondent for $3,200.00, instead of checking out the cash for that amount. G. forwarded the draft to New York to take up W's paper. Before the draft was presented in New York, the Fidelity Bank had failed and closed its doors, and payment of the draft was refused. W. stopped payment on his check. *Held*, that W. was entitled in equity to set-off against his liability on his unpaid check, the amount due him on the unpaid draft.
2. G. and W. were liable as drawer and acceptor respectively on a bill of exchange for $4,049.60 to the Fidelity National Bank. As between G. and W., G. was principal and W. only surety. The Fidelity National Bank closed its doors and passed into the hands of a receiver before the maturity of the bill. G. subsequently became insolvent. At the time of the bank's failure, G. had $1,190 on deposit with it. *Held*, that W. was entitled in equity to set-off G's deposit against his liability on the bill of exchange.
3. Equitable set-off against the receiver of a national bank is not forbidden by sec. 5242 of the Rev. Stat., of the United States.

TAFT, J.

The petition and demurrer thereto raised many questions in equity, which need not be here considered, for the cross-petition for judgment afterwards filed by defendant waived many of them, and the action of the court on the evidence finally disposed of all the others so far as the plaintiff in error is concerned, except the single one of the right of the defendant in error, Warner, to set off against certain obligations of his, held by the Fidelity National Bank, and transferred on its insolvency to Armstrong, its receiver, indebtedness of the bank. There were two causes of action in the petition, and on each the question of set-off arises. The set-offs were allowed by the court below, and this is a proceeding in error to reverse that action.

The bill of exceptions taken by the plaintiff in error, embodies all the evidence. From this, as to the first cause of action, it appears that Warner's check for $4,067, on the bank of Monroe, Rochester, N. Y., was sent to W. J. M. Gordon, of this city with directions to pay Warner's bill of exchange in New York city, that in pursuance of these instructions, on June 20, 1887 Gordon's clerk took the check endorsed by Gordon to Fidelity Bank for deposit. The receiving teller, knowing that a run upon the bank had greatly reduced the cash on hand, refused to credit Gordon with

† This judgment was affirmed by the Supreme Court; see opinion 49 O. S., 376 followed 146 O. S., 499–512, 36; Co-ops 1064. See also Armstrong v. Law, post 27 B. 100 and Warner v. Armstrong, *ante* 426.

the amount of the check, lest he might at once draw out the cash on it. Gordon's clerk was referred to Hopkins, the assistant cashier, who told him that the bank could not receive the check as a deposit if he intended to draw cash. The clerk said he wished New York exchange for $3,200. Hopkins said he would give him this. Accordingly the check was deposited, the credit given, and the draft on New York issued to Warner, who sent this draft, with another obtained from another bank, to New York, to take up Warner's paper. The draft was duly presented in New York, but was not paid because the Fidelity had meantime closed its doors on June 21, and was taken charge of by the National Bank examiner. After this, Warner stopped payment on his check. Armstrong was appointed receiver June 27, 1887.

Under the decision of the Supreme Court of the United States, in National Bank v. Colby, 21 Wallace 609, the paramount lien of the United States, and the lien of the general creditors of the bank, attached at the time of the act of insolvency in keeping the bank's doors closed on June 21st, when the National Bank examiner took charge, and the rights of the receiver, appointed June 27th, relate back to that time. Two questions are presented on the record. First, if Armstrong were assignee of a state corporation for the benefit of creditors, the assignment dating from June 21st, could the set-off be allowed? And second, if an affirmative answer be given to the first question, do the provisions of the National Banking act, especially sec. 5242, prevent the operation of the state law as to set-offs? Under the first cause of action, neither Warner's liability on the check, nor the Fidelity Bank's liability on the draft, had accrued due until after the presentment of each for payment at the respective banks upon which they had been drawn and a refusal by those banks to pay. Such presentment was made in neither case until after June 21st, when the rights of the United States and the creditors vested, and the transfer or assignment to the receiver may be considered as having taken place. The decree of the court below, therefore, amounted to the set-off in favor of a debtor against a debt assigned before due, of a claim against the assignor not due at the time of the assignment.

Section 5077, Rev. Stat. of Ohio, provides that, "when cross-demands have existed between persons, under such circumstances that, if one had brought an action against the other a counter-claim or set-off could have been set-off, neither can be deprived of the benefit thereof by the assignment by the other, or by his death, but the two demands must be deemed compensated so far as they equal each other." Now it is evident that this section can not apply to the facts stated, because at the time of the transfer to the receiver on June 21st, neither Warner nor the bank could have brought an action against the other. In other words, this section has no effect unless both claims to be set-off against each other are due at the time of the assignment. Fuller v. Steiglitz, 27 Ohio St., 355. If any set-off can be allowed then, it must be what is called an "equitable set-off" *i. e.* a set-off which a court of equity from equitable consideration will allow, but which a court of law can not recognize.

Equitable set off is usually said to depend on the existence of a mutual credit between the parties. Mutual credit is defined by Judge Story to be "a knowledge on both sides of an existing debt due to one party, and a credit by the other party furnished on and trusting to such debt as a means of discharging it." Eq. Jurisp. sec. 1435. Now it can not be said in the case at bar, that when Gordon as Warner's agent gave the check to the bank and received the draft, that the parties expected that Warner's obligation on the check would be set-off against the bank's obligation on the draft, because the nature of the instruments exchanged, being primarily merely orders to pay money, shows that the expectation was that each instrument was to be paid in full by the bank to whom it was directed. The obligations of the drawers on the check and draft were contingent on non-payment by the banks on which they were drawn. It may truly be said that the contingent liability of Warner to pay on the check, was assumed in his behalf by Gordon, on the faith of the bank's contingent liability on the draft, and if the parties contemplated the happening of the contingency of non-payment at all it may be presumed that they expected these liabilities to off-set each other, and that in this sense they were mutual credits within the definition given above

But we do not think that equitable set off is confined to cases which come strictly within the foregoing definition of mutual credits. Story says in sec. 1434 Eq. Jurs.: "If there is a connection between the demands, equity acts upon it and allows a set-off under particular circumstances."

The doctrine of set-off is derived from the doctrine of compensation in the civil law, whereby when cross-demands existed, the two debts were *pro tanto* extinguished by operation of law, and only the balance remained as a debt. Speaking of

this doctrine, the Master of the Rolls, in Whitaker v. Busch, Ambler's Reports, 407 says: "Equity took it up, but with limitations and restrictions, and required that there should be a connection between the demands." A sufficient equitable connection is made between the demands when it appears that one obligation was entered into on the faith of and in consideration of the other. Thus Justice Miller, in Blount v. Windeley, 5 Otto. 173, says that equity has extended the remedy of set off so that "the fact that the mutual obligations have grown out of the same transaction, and many other purely equitable considerations, have been held to authorize the setting off of many classes of obligations held by the defendant, against the judgment duly recovered against him in a court of law." If set-offs are allowed against judgments, *a certiori*, will they be allowed against the claims on such grounds before they have ripened into judgments. So in Collins v. Farquar, 4 Littell, 154, the Court of Appeals of Kentucky say that equitable set-off will be allowed "in special cases, such as where the matter sought to be discounted forms part of the consideration of the original demand, against which the discount is prayed."

At bar, the draft and the bank's responsibility for its payment, were the consideration for $3,200.00 of the check and Warner's responsibility for its payment. This establishes such a connection between the two, as to require an equitable set-off of the draft, against the check. The non-payment of the draft gives rise to an equity in favor of Warner against the check, which was inherent in the transaction out of which the liabilities on the check and draft arose, and though this non-payment happened after the vesting of the rights of the United States and the creditors in the check, the equity growing out of it relates back to the original transaction, and must be held to attach to the original liabilities contracted with a view to such non-payment, and so to effect the check in the hands of the receiver.

To look at it in another way, the situation is this: in consideration that the Fidelity agreed that the First National Bank of New York should pay Warner $3,200.00, Warner agreed that the Bank of Monroe should pay the Fidelity $3,200.00. The receiver came into possession of the evidence of Warner's agreement. Is it equitable that he should enforce that agreement when the agreement of the bank is broken? We think not, and we can not see how it affects the question that the evidence of Warner's agreement was transferred to the receiver before the bank's agreement was broken, if by the transfer no rights were conferred on the receiver, which the bank did not then have. Of course if the receiver is a purchaser for value before due of negotiable paper from the Fidelity Bank, different questions arise. But for the present we are considering him only as if he were an assignee for the benefit of creditors under our Ohio laws. And on such an hypothesis we think a set-off would be properly allowed under the first cause of action.

On the second cause of action, it appears that when the bank closed its doors, Gordon had on deposit $1,190.57, and that the bank held a bill of exchange for $4,049.00, due June 24th, upon which Warner was acceptor and Gordon was drawer. The bill had been discounted for Gordon's benefit, so that Gordon was the principal debtor and Warner was surety, as between them. Gordon has, since the closing of the bank, become insolvent. It is conceded by counsel that these facts entitled Warner to the same right to avail himself of Gordon's deposit as a set off that Gordon would have against the bill of exchange. Wagner v. Stocking, 22 Ohio St., 297.

The question presented, then, is, could Gordon set off his deposit against his bill of exchange not due when the bank failed? Such a set-off could not be allowed under the statute, section 5077, quoted above, because when the transfer took place the bank could not have sued Gordon on his bill. Is there, then, any ground for equitable set-off?

Judge Story, in Green v. Darling, 5 Mason 202, in How v. Shepard, 2 Sumner 410, and in his Equity Jurisprudence, intimates some doubt upon the question whether insolvency alone will justify an equitable set-off of demands which can not be set off at law, and is inclined to think that it will not. Since Judge Story wrote, however, the remedy of set-off in equity has been extended in many states, so that in one class of independent cross-demands not compensated at law, insolvency gives rise to a right of equitable set-off. Where A. holds an obligation of B. which is due, and B. holds an obligation of A. which is not due, and B. assigns A.'s obligation to an assignee for the benefit of creditors, A. is allowed in equity to set off his claim, due before the assignment, against his debt not so due at the assignment. This principle is laid down in the leading case of Lindsay v. Jackson, 2 Paige, 380, where Chancellor Walworth examines the English cases in chancery, and reaches the conclusion above stated. That was a case where the creditor of an insolvent debtor sought to enjoin his assignee in insolvency from negotiating several promissory notes of the creditor which had not yet fallen due, on the ground that the credi-

tor's claim which was due before the assignment, was a just set-off against the notes, and by negotiation he would be deprived of that right. The injunction was sustained on the ground that, in equity, the insolvency justified the creditor, whose claim was due, in using that to pay his debt before it was due.

Exactly the same case was decided the other way in England, in In re Commercial Bank Corporation of India, L. R. 1 Ch. Ap. 538, where the court of chancery overruled the vice chancellor who granted such an injunction. See also Eastern Bk. v. Capron, 22 Conn. 639. But, whatever the English view, Lindsay v. Jackson has been approved in New York in a great number of cases. See especially Bradley v. Angel, 3 Comst., 475. The principle has been applied in Smith v. Felton, 43 N. Y., 419, and in Smith v. Fox, 48 N. Y., 674. See also Colt v. Brown, 12 Gray, 233. It is approved in Receivers v. Paterson Gas Light Co., 3 Zabriskie, 283, and in Reppy v. Reppy, 46 Mo., 571. Our own Supreme Court, in Bank v. Hemingray, 34 Ohio St., 381, approve and follow Smith v. Felton, 43 N, Y., 419. Smith v. Felton was a case where a firm had a deposit account with a bank, and the members of the firm were indebted on a note to the bank, the proceeds of which had gone into firm transactions. The bank became insolvent and stopped payment before the note fell due. The firm demanded a set-off of the deposit against the note. In a day or two an assignee took charge and the set-off was refused. The Court of Appeals held that the set-off should be allowed.

In Skiles v. Houston, 110 Pa. St., 254, A., a banker died insolvent. At the time of his death B. had $760.00 on deposit with him subject to check. Prior to A.'s death B. had a note discounted at A.'s bank for $850.00 which matured about a week after A.'s death. Held that a set-off should be allowed. See also Jordan v. Sharlock, 84 Pa. St., 366; Smith v. Mosby, 9 Heisk., 501; Platt v. Bentley, 11 Am. Law Reg., N. S., 171; Morse on Banking, sec. 338; Pomeroy Remedies and Rights, 163; Waterman on set-off, sec. 431. Reference to the cases cited will show that the equitable set-off of a debt due against a debt not due, in case of insolvency is worked out on the theory that the solvent party has the right to have his claim paid at once and waiving his right to delay the payment of his own debt until it is due, can apply the debt due him to the debt he owes at once.

It has sometimes been questioned whether a deposit can be said to be a debt due until demand for payment or set-off. Fort v. McCully, 59 Barb. 87. There are some remarks of Judge Folger in Munger v. City of Albany Bank, 85 N. Y., 580 to this effect, where the deposit is evidenced by a negotiable certificate of deposit in the hands of the depositor. See to the contrary Seymour v. Dunham, 24 Hun., 93; Smith v. Fox, 48 N. Y., 674, can not be sustained, however, except on the theory that a simple bank deposit, not evidenced by a negotiable certificate, for the purposes of a set-off, is due at the time the bank stops payment, without demand, and such is clearly the opinion of the Pennsylvania Supreme Court, the New Jersey Supreme Court, the Tennessee Supreme Court and the Missouri Supreme Court from the cases cited. It is true that, in this country, the statute of limitations does not run on a deposit debt until demand unless the bank stops payment. Such an event, however, dispenses with the necessity for demand (see Morse on Banking, sec. 322), so that, at the time the assets vest in the creditors on insolvency, the deposit of each creditor is due and entitles its owner to use it as a set-off against any debt held by the bank at the time of the transfer, whether due then or not. In the one case his right would be legal, in the other equitable, but none the less to be protected, because the statute law of Ohio recognizes the existence of equitable set-off. Section 5076, Rev. Stat.; Baker v. Kinsey, 41 Ohio St., 403, 409.

This being our conclusion as to the law of Ohio in both causes of action, we now come to the question whether the United States statutes as to winding up national banks has taken away this equitable right of set-off.

Section 5234, U. S. Rev. Stats. and amendments, provide that the comptroller of the currency may appoint a receiver of a national bank whenever he becomes satisfied of its insolvency, or upon its default in paying its circulating notes "Such receiver, under direction of that comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon order of court may sell or compound bad debts and may sell the real and personal property of the bank and may enforce the individual liability of the stockholders. He is to pay over all the money so made to the treasurer of the United States, subject to the order of the comptroller.

Section 5236 provides that the comptroller after paying any deficiency in redeeming notes of the bank shall make a ratable dividend of the money so paid over to him on the claims of creditors proven to his satisfaction or adjudicated in

a court, and the remainder shall be distributed to the shareholders in proportion to their stock.

Section 5242 provides that all transfers of the notes, bonds, bills of exchange or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, shall be void."

It is apparent from reading these sections that a receiver of a national bank occupies a position analogous to an assignee in insolvency under our state law. In the case of Hade v. McVay, 31 Ohio St., 231, our Supreme Court expressly say so and hold that a right of set-off available against a national bank is available against the receiver. It may be conceded that this remark was meant to apply to a case where both debts were due before the transfer, because that was the case the court were considering. The statute of set-off does not execute itself however. The debts remain until by the election of the party one is set off against the other. The effect of the decision in the case cited, then, is that the debt transferred to the receiver has attached to it the right of set-off to be exercised on suit brought at the election of the other party. Now what is the difference in the time the right of set-off attaches between a legal and equitable set-off with reference to the assignment. There can be none. Both attach before the assignment and the debt passes by the assignment subject to the legal right or the equity of set-off. The right is, therefore, prior to any rights which vest by the assignment or transfer.

Under the first cause of action the equity grew out of the original transaction, and though not developed until after the failure of the bank relates back and affects the check delivered from the beginning. In the second, the equity of set-off attached on the insolvency of the bank, to the bill of exchange. It was by operation of law. It was not by a transfer of any right of the bank in violation of the section quoted.

In Colt v. Brown, *supra* that suit was by the receivers of an insolvent bank on a note falling due after their appointment. The maker sought to set off bank bills held by him before the bank had been enjoined from paying any bill, deposit or other debt, negotiating, assigning or transferring any security and transacting business except receiving payment in cash of any debt falling due, and also bills bought by him after the issuing of such injunction, but before the appointment of the receiver. Shaw, C. J., deciding the case, says: "The first injunction, having been from time to time continued and ultimately made perpetual, had the effect of sequestrating and setting apart the assets of the bank as they stood at that time. The defendant having then bills of the bank taken in the course of business to the amount of $1,200, this was an equitable set-off and the receivers took the estate subject to that equity. To allow any further set-off would be inconsistent with the spirit and intent of the statutes and would essentially effect a preference in favor of debtors to the bank by enabling them to pay in a depreciated medium." And so it will be found that whenever the doctrine of equitable set-off has been enforced against an assignee for the benefit of creditors, it has always had to meet not only the equity of equality among the general creditors but an express statutory direction of equal distribution. In every such case, unless the equity of set-off attached to the debt before passing into the hands of the creditors, it could not have been upheld.

It is claimed, however, that the case of Venango National Bank v. Taylor, 56 Pa. St., 14, is opposed to this view. An examination of that case shows that the set-off sought to be enforced there was of a claim against the bank purchased by the defendant after the bank had closed its doors. It would of course, disturb the ratable distribution of the assets of the bank if its debtors could buy up claims against it for the purpose of setting them off. Such a course is denied in Colt v. Brown, 12 Gray 233, although in the same case, as has been shown, the view we take of the right of equitable set-off was fully sustained. We are also referred to the decision of Judge Sage, concurred in by Judge Jackson of the United States circuit court, in the case of Scott v. Armstrong, recently decided and found in 36 Fed. Rep. 63. The opinion certainly sustains the claim of counsel for the receiver, but highly as we respect the opinion of the judges of that court, we are unable to agree with their conclusion. Judge Sage says: "When the plaintiff was appointed receiver, the defendant was in the list of unsecured depositors to whom payment, the bank being insolvent, was prohibited. The defendant, had then no right of set-

off, nor any equity against its note, not then matured, which passed to the receiver. To allow the set-off, now that the note has matured, and thereby make payment in full to the defendant, in part discharge of its obligation to the bank, would be contrary, not only to the policy of the law, but also to the plain meaning of its provisions."

It will be seen that the whole theory of Judge Sage's view rests on the statement that the right which is sought to be enforced against the receiver arises only upon the bringing of the suit. This, we think, the authorities cited, show to be erroneous. They could not be sustained, unless the right was an equity attaching before the assignment. Judge Hammond, of the United States Court, dissents from his brethren. See Snyder's Sons v. Armstrong, Rec'r., 37 Fed. Rep., 18. There is no express provision in the statute against set-off. And the authorities cited show that the equity of set-off is not defeated by the equity of equality, however stringently and intensely that may be enforced. The decree of the court below is affirmed.

PECK and MOORE, JJ., concur.

Kittredge & Wilby, and Burnet & Bruce, for plaintiff in error.

Bateman & Harper, for defendant in error.

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## CHATTEL MORTGAGES. 140

[Hamilton Probate Court.]

### IN RE ASSIGNMENT OF ELIAS EHLER.

Choses in action are not the subject of chattel mortgages, but where a chattel mortgage, among other things, included are the book accounts due the mortgagor, the mortgage operates as an assignment so as to give a priorty as against the mortgagor's assignment for creditors.

GORBEL, J.

C. Crane & Co. represented to the court that they were the holders of a note executed by Elias Ehler for $12,769, secured by a chattel mortgage conveying to them, among other property, "all the accounts due Elias Ehler on book accounts." The assignee has disposed of all the property which came into his hands, except the accounts due to Elias Ehler, and has distributed the proceeds, and has collected a large amount of the said accounts. The claim of Crane & Co. has not been paid in full, and they claimed to have a lien upon said accounts or the proceeds thereof, and asked that the assignee be ordered to pay over to them the amount which he has collected on the accounts. The assignee denied that Crane & Co. have a lien upon the accounts.

*Held:* 1. The words "goods and chattels" in the chattel mortgage do not include choses in action; such words refer to and include personal property which is visible, tangible or movable. Hence book accounts are not the subject-matter of a chattel mortgage.

2. When such accounts are specifically included in a chattel mortgage, it operates as an assignment, whatever may be its form, and it is in legal effect a mortgage creating a specific lien on the accounts assigned, or the proceeds thereof.

Follett, Hyman & Kelly; for plaintiff.

Drausin Wulsin, Archer & McNeill; for defendant.

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## EMBEZZLEMENT.

[Hamilton Probate Court.]

### IN RE CITATION OF ANNA SATTLER ET AL.

S. died without debts, his sole property consisting of bonds which by his will were to be divided among certain of his children. These children met and divided up the bonds, each taking away his share. An administrator subsequently appointed demands a delivery of the bonds to him. *Held:*

1. The legal title of all personalty vests in the representative, and he is entitled to judgment against each child for what such child took away, but not against any of them for the bonds taken with his connivance by such other children as are non-residents or refuse to return them.
2. Rev. Stat., secs. 6053-6059 do not authorize judgment against those who assist in the taking of the assets.

GOEBEL, J.

This case is submitted to me on an agreed statement of facts, from which it appears that Ernst Sattler was the owner, at the time of his death, of twenty-two (22) bonds of the par value of five hundred dollars ($500.00) each. At the time of the death of Ernst Sattler, these bonds were in his room; after his death, they were taken by his daughter Anna, to the residence of Alvena Wagelin, also a daughter.

Ernst Sattler left a will and numerous codicils, written by him in the German language. From the reading of the will and codicils (somewhat ambiguously), it may be said, that he intended to divide his property, consisting exclusively of bonds, among his children in equal parts, except as to his son Hugo, he gives a less sum to be held in trust for him; and excepting also, the children of a deceased daughter.

After the probate of this will and before the appointment of an administrator, Anna Sattler, Alvena Wagelin, Hugo Sattler and Ida Voges being the children of Ernst Sattler, deceased, and the legatees under the will, met and divided the bonds between them as follows: Anna Sattler, six; Alvena Wagelin, six; Ida Voges, six; Hugo Sattler, four; each of the parties taking said bonds at par value.

Subsequently an administrator was appointed with the will annexed, and Anna Sattler and Alvena Wagelin delivered the bonds so taken by them, to the administrator. Hugo Sattler refused to turn over to the administrator, the bonds received by him, and Ida Voges is a non-resident of the county. There are no debts of the estate.

On the thirty-first day of January, the children of a deceased daughter of Ernst Sattler, through their guardian, filed their petition for citation under section 6053, Rev. Stat., charging Anna, Alvena and Hugo with having carried away assets of said estate, and maintaining that the administrator is entitled to all of the assets belonging to said estate; that Anna and Alvena, notwithstanding the return by them to the administrator of the bonds so taken, are liable to the administrator for the value of the bonds taken by Hugo, they having knowledge of the facts. *Held:*

1st. On the death of Sattler, the legal title to all his personal property vested in his personal representative as a trust estate for the benefit of creditors and distributees.

2d. The administrator is entitled to a judgment against Hugo Sattler for the value of the bonds so taken by him.

3d. The provisions of section 6053 to 6059 do not permit of a judgment in favor of the executor or administrator, against any person or persons aiding and assisting the person so charged in obtaining possession of such assets. The provisions are intended only to furnish a speedy remedy, in favor of the executor or administrator, against any person charged with concealing, embezzling or conveying away assets of the estate.

4th. A statute providing for a judgment, without pleadings or the right of trial by jury, ought not by construction, to be extended beyond its plain and obvious terms.

Coppock & Hammel, Palmer W. Smith; Warner W. Brown, attorneys.

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## CIVIL RIGHTS. 165

[Hamilton Common Pleas.]

### †JOHN W. HARGO v. HARF & CRAMER.

**The civil rights act, (81 O. L., 90), cannot be made to apply to an incorporated restaurant business, where its existence is not dependent upon obtaining a license from the authorities. Such business is a private enterprise, and hence the owner has exclusive control as to whom he will admit and may exclude any person, whether white or colored, reasonably or unreasonably.**

BATES, J.

A suit for recovery of the $100 penalty provided by the state statute for refusal to furnish the same accommodations to colored people that are furnished to whites, tried before Judge Bates and a struck jury, Hargo, who is a colored lawyer of Springfield, entered the restaurant of the defendants and ordered a meal. He was told to go down stairs, where there was a room specially provided for colored people. He refused to do so and left the restaurant. The statute under which the suit for recovery was brought (81 Ohio L., 90), specifies restaurants. In deciding the case, Judge Bates said:

"Undoubtedly every person who keeps a store, restaurant or other place dependent on miscellaneous patronage is deemed to extend an implied invitation to each member of the public to come and buy, and if after the customer has entered the premises the owner wishes to refuse his patronage and does so in a way to mortify or wound his feelings or violate his sensibilities, such owner probably would be liable for that reason apart from his right to recall the implied invitation. But where it is not claimed that such ground of recovery exists, and the owner explains to the proposed customer in a proper way that he does not desire his custom, the question of the application of this statute arises. And the question here is whether a restaurant-keeper's business is of such a private nature that he may choose his customers and exclude whom he pleases. If he can not exclude whom he pleases, he certainly can not exclude on the ground of color, and is liable if he does so, for the statute does not allow such discrimination. But if he can exclude whom he pleases, the statute can not effect him.

†See also decision in Hargo v. Meyers, 2 Circ. Dec., 513.

"It is settled that railroads, hotels, etc., are so far public in their functions that the state may control them. But as to the various kinds of private business these are of two classes: First—The class which can exist only by permission of the public—as for example, such as must obtain a special license. These must submit to the restriction of this law—*i. e.*: they can not exclude any one, white or colored, except on the ground of his behavior or character. Second—The class which exist independent of permission of the authorities. This includes the great mass of stores, shops, etc. Thus a man desiring to open such a business does not have to ask permission or license of the public, and the public have no concern with it, hence he could exclude part or all of the public at will. He might choose to sell only to people following a particular occupation, or of a certain age, or of a certain nationality, and the law could not compel him to abandon his whims or caprices. It follows that if he can exclude any white man or class of whites, he can exclude for color, and that the law merely says that whenever he can not exclude at will he can not exclude for color.

"Discrimination on the ground of color was punished in case of a hotel in United States v. Newcomer, 11 Philadelphia Reports, 519; in case of a theater in Joseph v. Bidwell, 28 Louisana Annual, 102; and in the case of a licensed skating rink in People of New York v. King, 42 Hun, 186. These cases belong to the first class above mentioned. While in the case of Bowlin v. Lyon, 57 Iowa, 536 (56 Am. Rep., 354), the exclusion from an unlicensed skating rink on the ground of color was held to be subject to the individual notions of the owner.

"As I have been obliged to investigate the law on short notice in order to charge the jury, I may be and very likely am mistaken in the matter, and in order that the plaintiff may be able to take the case to a higher court with as little expense and trouble as possible, I shall decide the case as on demurrer to the petition and sustain the demurrer, so that he may not be forced to have the evidence transcribed; the case will thus be in the best shape for a final decision."

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## 177 PUBLIC CONTRACTS.

[Superior Court of Cincinnati, General Term, 1889.]

### †GANO v. ESHELBY.

1. Section 2224, Rev. Stat., as amended 78 Ohio L., 228, and section 2255, Rev. Stat. apply to and are a limitation upon the power of the board of public works of Cincinnati to make changes in the plans and specifications for work to be done, under a contract made by the board for the construction of a sewer under the Trunk Sewer Act, 80 Ohio L., 184, after the contract has been let to the lowest bidder according to law.
2. The limit therein imposed upon the right of the board of public works to change or alter the contract is, that, by such change or alteration, the cost of the entire work, including changes or alterations, shall not exceed the "original contract." The meaning of "original contract" in section 2224 is "cost under the original contract." If a change made plainly increases the cost of the entire work beyond what the work under the original contract would have cost, then such change is beyond the power of the board to make; and is void.

†This judgment was affirmed by the Supreme Court without report, April 25, 1893, Minshall and Dickman JJ. dissent.

3. The fact that the work under the changed plans and specifications has been done, does not estop the city from defending against a claim made under such void contract for the excess over and above the cost of the original contract.

This is a suit by a tax-payer to enjoin the misapplication of the funds of the city. Defendant is the City Comptroller. The city solicitor, by consent of parties, has taken the place of the plaintiff. The case comes into this court by reservation from special term on a bill of evidence. The payments of funds sought to be enjoined is of about seven thousand dollars, the balance due on the final estimate made and approved by the board of public works, on the original contract and two supplementary contracts made by the board of public works with Henry McErlane, for the construction of what is known as the Hunt Street Sewer. The sewer was to be constructed under what is known as the trunk sewer act. The preliminary steps required by law were duly performed. The estimate of the cost of the work transmitted to council, was about $61,000.00. In the estimate, neither rubble masonry nor concrete were mentioned as necessary, but were afterwards inserted by the engineer by slips furnished the contractors inviting bids upon them. The estimated amount of rubble masonry upon these slips was 200 yards and of concrete, was 100 yards.

In the contract let, the city reserved full power to alter or amend the contract, and it was provided that no matter what should be omitted by order of the board from the work, the contractors should have no right to claim damages therefor.

The bids were by the unit. For the purpose of comparison of bids to determine who was the lowest bidder, the engineer reported to the board that on his estimate with McErlane's bid, the total cost of the sewer would be $46,000.50.

The original contract was made June 8, 1885. Two changes were made in the plans. One was to avoid running the sewer through the Deer Creek tunnel, which was private property. This change required sixty feet of new sewer and a large amount of additional rubble masonry. This contract was made by the board without advertising for bids, on October 19, 1885. The other was August 15, 1885, and consisted in lowering the grade of the sewer some four or five feet in Hunt street. The grade had been made to correspond with the grade of Hunt street, as it was to be improved at the same time with the construction of the sewer. Delay occurred in the improvement of Hunt street, by reason of litigation to assess damages. The street was to be filled some seventeen feet and the sewer was to be constructed above the then grade of the street. To prevent obstruction of travel, the sewer was lowered, and this led to a new contract, in which the prices per lineal foot of sewer pipe were considerably increased above the contract rate. The final estimate of the work under these contracts as done, was $91,346.32. Of this, about $16,000 was paid by assessment, and the remainder, with the exception of the $7,757.86, payment of which is now sought to be enjoined, has been paid by the city out of the trunk sewer fund. The lowering of the grade on Hunt street cost $8,125.00 in cost of lineal foot of pipe, and by the two supplementary contracts the rubble masonry and concrete instead of costing $3,000.00 as they would have cost had no changes been made in the contract, cost $38,640.80.

For rubble masonry and concrete, McErlane and one other were the highest bidders at $10.00 a yard, while some of the others ranged as low as $3.00 a yard, and averaged about $5.00 a yard. On the work

as actually done, McErlane's bid was the most expensive to the city of all the seven bidders save one. There is no charge of fraud made on the evidence, but these figures are necessary to show the effect of the course pursued by the board of public works with regard to this sewer.

TAFT, J.

The chief ground urged by the solicitor for making the injunction herein permanent, is that these two contracts supplementary, under which some thirty-five or forty thousand dollars were added to the cost of the sewer, are illegal and void, because in violation of section 2224, Rev. Stat., as amended April 20, 1881, 78 O. L., 258, and payment under them is in violation of section 2225.

Section 2224 as amended, is as follows:

"When it becomes necessary in the opinion of the board, in the prosecution of any work hereafter ordered, to make alterations or modifications of the specifications or plans of a contract, or to omit from said work any portion of the street or territory originally ordered to be improved, such alteration, modification or omission may be made by order of the board; provided such order shall be of no effect until the price to be paid for the work under such altered or modified contract has been agreed upon in writing and signed by the contractors and some person authorized thereunto by the board; and provided further, the total cost of the work, with the addition of the price so agreed upon, shall not exceed the original contract."

Section 2225 is as follows:

"Section 2225. No contractor shall be allowed anything for extra work caused by any alteration or modification, unless an order is made or an agreement signed as provided in the preceding section, nor shall he, in any case, be allowed more for such alteration than the price fixed by such agreement."

It is objected by counsel for defendant to the application of these sections in this case that this sewer was built under the trunk sewer act passed April 18, 1883, 80 Ohio L., 184, and that these sections have no application to construction of sewers under that act. There is nothing in that act which expressly excludes the operation of them. There are provisions therein requiring the board of public works to assess for the cost of the construction of these sewers the abutting property owners in the same manner and to the same extent as provided by law for the assessment for other sewers. Every thing, therefore, necessary in the making of the contracts to validate an assessment for sewers under the subdivision of sewers in the general law which is not expressly changed by the trunk sewer act, would be necessary in making trunk sewers. In other words, if these sections apply to contracts for the construction of sewers at all, they apply in the case at bar. It is next objected that under the decision of the Supreme Court in the case of the City v. the Anchor White Lead Company, 44 Ohio St., 243 and in the case of Anderson v. the City, 45 Ohio St., 407, the sections limiting the power of the board of public works, of which the sections under discussion are two, have no relation to the construction of sewers. In the Anchor White Lead Co. case, it was held that a failure to advertise for bids on sheeting, which was afterwards contracted for with the contractor at a dollar a lineal foot, and was included in the assessment, did not invalidate it, because the amount to be used could not be estimated. The sheeting which was used was necessary to a good job, and was properly

included in the assessment. This was on the authority of the case of Hastings v. Columbus 42 Ohio St., 585, where it was held that a French drain and other items not bid for were properly included in the assessments if they were necessary to make a good job. It is to be observed that as to both of these cases, neither of the sections under discussion could have had any application. In the Anchor White Lead Company case the sewer was built when section 2224 was unamended and the limit of changes was within the original estimate instead of "original contract" as now, and the total cost of the sewer, with the sheeting so contracted for, did not exceed the estimate. And in the case of Hastings v. Columbus these sections had no application because they only apply to work contracted for by the board of public works of a city of the first grade of the first class. In the Anderson case, the Supreme Court held that the provision as to making of an estimate in the chapter on sewers was controlling where there was a provision of a similar kind in the board of public works chapter. But it is to be observed that in the chapter on sewers, there are no restrictions or provisions whatever for the manner of making contracts and constructing the work. Such restrictions must be looked for elsewhere. The proper place for them would seem to be in the chapter providing general limitations on the powers of the board whose duty it is to do the work, and there we find the sections under discussion. We are of opinion, therefore, that these sections must apply to the making of such contracts as those at bar.

It is next objected that section 2225 authorizes the making of supplementary contracts beyond the limit imposed in section 2224. The argument is that the expression therein used "extra work caused by any alteration or modification" means additions to the original cost, and the section expressly orders payment therefor after a written contract made. It is said that the two sections could not refer to the same thing because it would convict the legislature of tautology. The history of these two sections does not justify the argument. They first appeared together as section 9 of the act creating the board of public works passed March 17, 1876—73 Ohio L., 43. In that section the word "estimate" was used instead of contract, and the connection between the expression "extra work caused by any such alteration or modification," and the limit of the original estimate, convinces us that the extra work was work within the limit imposed. The division of the sections has not changed their meaning in this regard. "Extra work" means work not provided for in the original contract but within the limitation of section 2224. If this is not the meaning, it is difficult to see that section 2224 with its limit on changes of the contract would serve any purpose at all. The one says the cost shall not be increased beyond a certain limit by supplementary contracts, and counsel's argument would make section 2225 mean that the cost may be increased to any amount provided it is contracted in writing. The two sections are not tautology. Section 2224 refers to the validity of the order making the change in the improvement, and section 2225 requires that no payment may be made except on the same formality. It is true the terms of section 2225 would probably be given effect inferentially from section 2224 even if section 2225 were not in the statutes, but such fullness of provision is not at all unusual where the legislative intent is to enforce what is regarded as a beneficial inhibition. The evil meant to be avoided here was the making over of the contract let, by supplementary changes without competition, so that it becomes an entirely different contract. The figures in the case at bar would seem to

make this a case in point. A majority of the court is therefore of the opinion that section 2225 does not affect in any way the limitation of 2224, but is only a further carrying it out.

It is next objected that section 2224, as amended by inserting the word "contract" for "estimate," can only apply to such contracts of the board as provide for the payment of a lump sum to the contractor. When it read "estimate" it is conceded that it applied to all contracts because that was a definite sum fixed by the engineer. As a matter of fact no large contracts are let for a lump sum. If the application of the section is only to lump sum contracts, it destroys its effect altogether, for in order to evade its provisions the board need make no lump sum contracts whatever. We can not think this to have been the intention of the legislature. There seems to be no reason why supplementary contracts under original contracts with a lump sum price are any more objectionable when they add to the cost than under contracts by the unit. What then is the meaning of the change? It seems to a majority of the court that original contract means "cost under the original contract" and that when any contract is made which will plainly increase the cost of the work beyond what it would have cost under the contract as it was let, it is illegal and beyond the power of the board to make without first advertising for competitive bidding. It is said that this construction makes the limit indefinite. We do not think that it is unreasonably so. There are very few cases in which it can not be at once known whether a change will make the work more expensive. The changes which the board can make with the contractor are substitutions, and not additions. In this view of the statute, the amount, payment of which is sought to be enjoined here, is for work clearly within the inhibition of the statute. It is said that this is a part of the ten per cent. withheld as security of good work, and that therefore a large part of it is for work under the original contract. If money has been paid it will be presumed to have been legally paid, and as more than what is legally due has been paid, the remainder must be illegal.

It is finally objected that the work has been done, that the city has received the benefit and is now estopped to set up such a defense, and the case of the City v. Cameron, 33 Ohio St., 336, is cited in support of this claim. It is to be observed that in that case the court limit its application to the exact facts before them. Judge Wright, says in conclusion: "All we mean to say in this case is, and it seems to be all that is necessary to the determination of the controversy, this: If the law makes a specific appropriation, which is claimed to measure the extent of corporate power, when a contract has been made which is within bounds and valid, it can not be invalidated by the subsequent action of the corporate authorities in concluding other contracts, the aggregate of which is in excess of the appropriation.

"And though the law requires directions to the contractor to be in writing if the contractor solicits such writings but the board dispenses with them as unnecessary and otherwise direct work to be done, and work is done as to payment for which no question exists, except the want of written authority, this is not sufficient ground of defense." It seems to us that this statement of the Cameron case shows that it can not apply at bar. The extent of corporate power was exceeded by each supplementary contract without regard to other contracts made by the board. The limit was here on the particular contract.

Second, if we were here considering an argument of the city solicitor representing tax-payers of the city that, these contracts were not in writing, the Cameron case would exactly apply. The case we are considering is whether, if the board of public works lets a contract of many thousands of dollars without advertising for bids, when it has no power to let such contract and it is expressly prohibited from so doing, the reception of the work so let by the board is a waiver of such a want of power. In the Cameron case it was a mere requirement as to evidence of the contract, fortified it is true by stringent statutory words, but nevertheless a formality, which the body who were required to enforce it, disregarded and refused to follow even at the request of the contractor. In the case at bar, the board in fact, by violating sections 2224 and 2225, abolished the one requirement of the law more important than all others, in securing economy and honesty in public works, *i.e.* competitive bidding, which the sections 2224 and 2225 were enacted to secure. Such want of power the contractor had notice of, and no benefit received can work an estoppel against the city in such a case. The decree for injunction will be made perpetual.

MOORE, J., concurs.

PECK, J., dissents.

Theodore Hortsman, City Solicitor, for plaintiff.

Paxton & Warrington, for defendant.

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## FIXTURES. 179

[Hamilton Probate Court.]

DAVID HYMAN, TRUSTEE, v. ANNIE M. GORDON ET AL.

**Stills in a glycerine factory connected with the motive power of the steam engine, resting in part on a brick foundation laid in the building, and in part attached by screws to the ceiling to confine them to their proper places for use, are not fixtures, but chattel property.**

GOEBEL, J.

W. J. M. Gordon purchased a tract of land upon which were a number of buildings. These buildings were united by him in on manufactory and for more than seventeen years, he carried on the business of manufacturing glycerine and other chemicals. Upon grounds outside the building, he erected in permanent brickwork his boilers and connected them by openings in the wall, with the distilling apparatus used on the inside.

This apparatus consists of stills, resting in part on a brick foundation laid in the building, and in part are attached by screws to the ceiling. These stills are in the different rooms of the manufactory, and connected, by the openings made in the walls, by steam pipes. All the stills are constructed for, and adapted to the use of the property as a manufactory of glycerine and other chemicals, and cannot be used for any other purpose.

Gordon made an assigment for the benefit of his creditors; the property being encumbered with mortgages and other liens. A controversy has arisen whether the stills are fixtures, and go with the realty or personalty.

There are many conflicting decisions as to the dividing line between realty and personalty, in cases where machinery has been fitted to mills and other buildings for use therein. Many cases hold, that if the article is attached for temporary use, with the intention of removing it, it does not lose its character as personalty; but if it is placed there for permanent improvement of the free-hold, it becomes a part of the realty. Hellawell v. Eastwood, 6 Exch., 295, 312; Lancaster v. Eve., 5 C. B. N. S., 715; Crane v. Bingham, 11 N. J. Eq., 29; Walmsley v. Milne, 7 C. B. N. S., 115; Walker v. Shereman, 20 Wendell, 636; Potter v. Cromwell, 40 N. Y., 287.

The Supreme Court of Ohio in Case Manufacturing Co. v. Garven, 45 Ohio St., 289, say: "Machinery used in a factory for manufacturing purposes only attached to the building to keep them steady in their places, so that they may be more serviceable when in use, and that they may be removed without any essential injury to the freehold or the articles themselves, are personal property, and do not pass by a conveyance or mortgage of the free-hold."

And in Teaff v. Hewitt, 1 Ohio St., 511; "Machinery and implements in a manufacturing establishment, although useful and even essential to the business carried on, which are not permanently fixed to the ground of the structure of the building, and which can easily be removed, without material injury to the building or articles themselves, and their places supplied by other articles of similar kind, are not fixtures but personal property.

Many of the authorities hold that the intention of the party or parties affixing the machinery, enters into the elements of the case, and that the permanency of the attachment and its character in law, do not depend so much upon the degree of physical force with which the thing is attached, or the manner and importance of its attachment, as upon the motives and the intentions of the party attaching it.

If the intention is that the articles attached should not, by annexation, become a part of the freehold, as a general rule, they do not, the exception being, that when the property can not be removed without practically destroying it or when it, or part of it is essential to the support of that to which it is attached. Ford v. Cobb, 20 N. Y., 344; Tifft v. Horton, 53 N. Y., 377; Vorhees v. McGinnis, 48 N. Y., 278; Winslow v. Merchants Ins. Bank, 4 Met., 306; Crane v. Bingham, 11 N. J. Eq., 29; McRea v. Central Nat. Bank of Troy, 66 N. Y., 489; Sisson v. Hibbard, 75 N. Y., 542; Eaves v. Estey, 10 Kansas, 314; Trull v. Fuller, 28 Me., 548; Ballow v. Jones, 37 Ill., 95; Wade v. Johnson, 25 Georgia, 331; Hill v. Wentworth, 28 Vt., 428. There seems to be no longer any doubt that the character of the property may be changed by the agreement of the parties as between themselves.

In the case before us, there is nothing about the stills that prevented their removal and use in another building for the same purpose. The fact that the stills are adopted to no other use, and, if detached from the building, render the balance remaining useless, and the parts detached have no saleable value except as old metal, and that that probably will destroy the use desired to be made of the real estate, cuts no particular figure in this case.

There can be no doubt that the stills are susceptible of removal and of use elsewhere. The fact that the stills were beneficial and necessary to the use of the factory, does not of necessity, stamp it as realty.

Recognizing the difficulty of prescribing a rule that may be applied to cases in general, and knowing no test that may be applied with anything like uniformity, we think however, that this case comes within the ruling in Teaff v. Hewitt and Case Mfg. Co. v. Garven, and we hold that the stills are not fixtures.

Follett, Hyman & Kelley, for assignee.

Lincoln, Stephens & Lincoln, Bateman & Harper, for mortgagees.

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## TAXATION. 180

[Hamilton Common Pleas.]

CHURCH OF THE EPIPHANY V. FRED. RAINE, AUDITOR ET AL.

**Rev. Stat. sec. 2732 exempts from taxation a house used exclusively for public worship and the grounds attached to it, necessary for its proper occupancy, use and enjoyment, and not leased or otherwise used with a view to profit; and it forms no exception that the same belongs to the worshipers as an estate of perpetual leasehold—that is, by a lease for ninety-nine years and renewable forever.**

SHRODER, J. (orally).

In the case of Church of the Epiphany v. Raine the plaintiff seeks to restrain the auditor from placing upon the tax duplicate its property for the purpose of taxation, and it alleges in support of its claim that it is exempt from taxation inasmuch as it is the owner of a perpetual leasehold—being for ninety-nine years and renewable forever; that the property in question is a house used exclusively for public worship; and that the grounds around it and attached to the house are necessary for the proper occupancy and use and enjoyment of the same.

The demurrer to the petition rests upon the decision of the Supreme Court in the case of Humphreys v. The Little Sisters of the Poor, wherein the Supreme Court held that the property of the plaintiffs in that case was not exempt because "The Little Sisters of the Poor" were not the owners of the building. The claim in that case was founded upon the sixth paragraph or subdivision of section 2732 of the Revised Statutes, which provides that:

"All buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustaining, and belonging exclusively to such institutions" were to be exempt from taxation. The Supreme Court there considered the word "belonging" to mean "being owned by," not in the sense of "pertaining," and the reason given for it was that the same meaning was to be given to the word "belonging" in the first member of the sentence of "buildings belonging to institutions of public charity," as given to the word "belonging" in the second member of the subdivision, which says, "all moneys and credits appropriated solely to sustaining, and belonging exclusively to such institutions;" and inasmuch as the meaning of the word "belonging" in the latter part of that subdivision necessarily is that of ownership, the Supreme Court concluded that the same meaning must be attached to the same word in the first member

of that subdivision. That was the reason given, and that was the ground upon which that decision rests.

It is clearly seen that this subdivision and this reasoning can throw no light upon the construction to be given to that portion of sec. 2732 which is now invoked by the plaintiff in support of its claim.

It is also argued that inasmuch as institutions of purely public charity are not exempt unless the buildings and property are owned by them, a charity of this kind is of equal sanctity and character to that of public worship, and therefore in the reason of things it was not intended by the legislature to exempt property used for public worship unless it was owned by the parties, by the institution or by the church that was occuping the house for that purpose.

In construing statutes, the plain and ordinary meaning is to be given to the words used, unless the context or the law itself attaches to the words a different meaning. In this case, sec. 2732 begins by saying:

"The following property shall be exempt from taxation:

"First, all public school-houses and houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit."

The plain and ordinary meaning of the phrase, "houses used exclusively for public worship," cannot be otherwise expressed than it is in the statute, it means houses that are so used. Is there any inference to be drawn from the context of this statute, the whole sec, 2732, that it was intended thereby to make a further condition; that it must be owned as well as used? Now, an examination of this sec. 2732 will disclose that in its discretion the legislature classified property under three heads: Property exempt by reason of its user; property exempt by reason of its ownership; property exempt because it is used by its owner. Under the first heading we find public schoolhouses and houses used exclusively for public worship, cemeteries, land used exclusively for graveyards or grounds for burying the dead, except where they are owned for purposes and with a view to profit, colleges and seminaries, and monuments to the fallen soldiers of this state, and moneys and funds accumulated for the purpose of building such monuments; and in the second class, *i. e.*, the class exempt because of their ownership, we find property belonging exclusively to the state or to the United States; in the third class—property that is to be used by the owner, which is owned and used— we find property belonging to counties, townships and towns, to institutions of purely public charity, to fire companies, to water works.

If it were necessary in a case where words are plain to ascertain the meaning by trying to get at the motive or the reason of the legislature, probably we could ascertain it in this case by noticing that where they make the user the ground of a condition for exemption, it is of that class of property which is least likely to be used in such a manner that a deception could be practiced upon the tax gatherers. A house of worship used as such, can hardly be used for anything else—can have no appearance of being used for public worship connected with any other kind of occupancy. The same can be said of schoolhouses, colleges and seminaries, graveyards, cemeteries—the same of soldiers' monuments.

We come to the second class, where the ownership is the condition of the exemption. Property belonging to the state exclusively is exempt for obvious reasons; property belonging to the United States government

is probably exempt because of constitutional reasons. McCullough v. State of Maryland would be decisive in a case of that sort.

We come to the other class, especially that nearest to houses of public worship, institutions of purely public charity. There can be all kinds of institutions of charity; and great numbers are established for all kinds of purposes, and yet are considered and apparently are for the purposes of public charity, and occupy places and buildings that are not exclusively held by them for these purposes. They can do their business and conduct their affairs in buildings of all sorts; and probably the same might be said of water works institutions and fire companies, and that might be the reason that the legislature made that condition, that it must be owned exclusively by the parties or persons who are using for these purposes.

Now, in the case at bar the property is a perpetual leasehold. In the case of The Cincinnati College v. Yeatman, 30 Ohio St., 276, the Supreme Court held that a perpetual lease was a separate subject of taxation as real estate, although, as in that case, the estate was separated from others with which it was united not by vertical lines but by horizontal.

If it were necessary to go further, sec. 2897 provides:

"Where lands or lots liable to taxation are held upon permanent lease, and with the improvements thereon are taxed in the name of the lessee, if the same are suffered to become delinquent, and are brought to sale by the county auditor for the non-payment of the tax, interest and penalty due thereon, such sale shall be confined to the right of the lessee on the premises and the improvements thereon, if the same shall be sufficient to meet the tax," etc.

We have here a legislative as well as a judicial recognition of the validity regarding a perpetual leasehold as a subject for taxation.

In the case at bar, the church is the owner of a perpetual leasehold. It is a subject for taxation unless it is exempt. Being a separate subject of taxation, separate from the fee, liable to be sold as such, it would be held as such unless exempt. There is no reason why it should not be put in the same situation as if the church were the owner of the fee.

Now, in addition to that, it might be said that it is the policy of this state to recognize perpetual leaseholds, put them in the light of a fee-simple, for perpetual leaseholds descend as fee simples do; they are sold on execution in the same way, and the statute provides that the deeds of conveyance of them are to be within the same formal requirements as deeds of fee simple estates.

Taking all these things into consideration, I do not see anything in the statues, nor in the decisions, which would warrant the court in attaching to this phrase, "houses used exclusively for public worship," any other meaning than it would ordinarily bear, and the ordinary meaning is, that it should be so used with no other condition.

In this case it is exclusively used as a place of public worship, and for that reason it is exempt under the statute. The demurrer will be overruled, and unless the defendant desires to answer further, the injunction will be made perpetual.

Ferris, Morrow & Oldham, for plaintiff.

Davidson & Hertenstein, County Solicitors, for defendant.

193 SET-OFF—PLEDGE.

[Superior Court of Cincinnati, Special Term, 1889.]

JAMES MCCONVILLE v. WILLIAM MEANS ET AL.

A stockholder's indebtedness against a national bank can not be set-off against the claims of a pledgee of the stock of the former, who received it in pledge to secure the payment of a loan made on the faith of such pledge, without knowledge of the claims of the bank, or that it was insolvent.

PECK, J.

The plaintiff in this action filed a petition in which he alleges that he is, under the laws of the United States, the duly qualified and appointed agent of the shareholders of the bank; that all its debts have been paid or provision made for them, and that the remaining assets should now be reduced to money for the benefit of the shareholders; that many of the shareholders are indebted to the petitioner, as the agent of the stockholders, and that they have pledged their shares, or part of them, to secure loans from others—who are also made defendants—who hold the certificates of stock as collateral security for the payment of the loans made upon the faith of them, and who claim the distributive share of the assets applicable to such stock, by reason of their interest in the stock as such pledgees.

The plaintiff further says that he is entitled to apply the distributive share, or dividend, on each share of stock, to the indebtedness of the shareholders to him, as agents, so far as may be needed for that purpose; and denies that the pledgees of such certificates are entitled to the dividends as against himself. And he asks the judgment of the court as to whether he shall pay the dividends to such pledgees, or whether he shall apply them to the indebtedness of the shareholders of the bank, regardless of the claim of the pledgees.

To this petition, the defendant George Gerke, has filed an answer and cross-petition, in which he admits, substantially, the averments of the petition, and further avers that he is the owner of 675 shares of the stock of said bank, in his own right, and of 737 other shares as trustee; that he has pledged 1087 shares of the stock so held by him to secure loans obtained by him from various persons; that he is also indebted to the bank, or to the petitioner as its agent, and that the persons with whom he has pledged the 1087 shares claim the dividends on such shares, by reason of their interest as pledgees; that the certificates representing the shares of stock held by him, were each in the ordinary form, certifying that the person named therein was the owner of the number of shares specified, and that the shares were transferable according to the acts of congress in that behalf provided. Each certificate had endorsed upon it a printed blank form of transfer, assignment, and power of attorney authorizing the assignee, or person holding the certificate, to have the shares transferred upon the books of the bank; that, in each instance, the defendant duly executed one of said forms of transfer and assignments and power of attorney, at the time he delivered the certificate as collateral security to his loans; that he, in good faith, pledged 987 shares of the stock aforesaid, on account of such loans, prior to the date when the bank ceased to do business, and without any notice or knowledge that the bank was in any way embarrassed. The persons

and number of shares and time when the loans were made, and amounts thereof, are specifically set forth in the answer and cross-petition.

It is further averred that the loans have not been paid, and are still due the pledgees, and that such persons claim their distributive share of the assets of the bank, as holders of such stock.

It is further alleged that, after the suspension of the bank, and while its affairs were being wound up by the receiver, certain of the pledgees demanded additional security upon their loans, and that, in order to save the stock already pledged, he, Gerke, delivered 100 additional shares of stock to said parties, as further collateral security, which is still held by them, and upon which they claim the dividends.

Defendant admits that the amount due him on the stock in his name which has not been pledged, should be applied to his indebtedness.

He further alleges that prior to the time when the bank ceased to do business, he, in good faith, loaned to one J. R. DeCamp, $5,000, and received from him a promissory note for the same, together with a certificate representing fifty shares of the stock of the bank, on the back of the certificate of which shares was a duly executed power of attorney to transfer, as aforesaid; that the defendant still holds the note and certificate, and the note is overdue and unpaid; and that he claims that, as such pledgee, he is entitled to the distributive share of the assets of the bank payable to the owner of such stock; that the bank never adopted any by-law, or regulation, for the reservation of any lien, of any kind, upon its stock, or for any indebtedness due to it by the owner or holder of such stock.

And he prays an order of the court directing the plaintiff to distribute the amount due upon the shares, the certificates of which are in his possession, toward the payment of his indebtedness to the bank; and, as to the certificates held be the pledgees, the amount due upon such shares be ordered paid to the holders thereof.

To this answer and cross-petition, the plaintiff has filed a general demurrer.

The question sought to be raised by the demurrer is, whether the pledgees of the certificates belonging to Gerke, are entitled to the distributive portion of the assets of the bank applicable to the shares the certificates of which are held by them, or whether the plaintiff, as agent of the bank, is entitled to have such distributive portion of the assets applied to the payment of Gerke's indebtedness to the bank, it being admitted that Gerke is indebted to the bank.

It seems clear, under the decisions of the U. S. Supreme Court especially the case of Bank v. Lanier, 11 Wallace, 369, that the bank has no lien upon the shares of the stockholder to secure any indebtedness to itself. In Bullard v. The Bank, 18 Wallace, 589, it is held that even a by-law giving to a bank a lien on the stock of its debtors, is not such a regulation as, under the National Banking act, the bank has a right to make. In the case at bar the answer avers that there was no such by-law, and the demurrer necessarily admits the facts alleged in the answer and cross-petition. But it is claimed that, as the stock pledged to the holders thereof was not transferred on the books of the bank, they can not be recognized by the agent as stockholders, and have no rights as such. In many respects this claim would be well grounded. If it were a question as to the right to vote at a corporate election, or to exercise other rights with reference to corporate affairs, or to be charged with liability as a stockholder, in view of the decisions of the Supreme Court of

the United States, on the effect of the National Bank law on those points, I should have no hesitation in holding that these pledgees could not exercise the rights, or be subject to the liabilies of such stockholders, and that only the person, or persons, in whose name the stock stood on the books of the bank would be entitled to exercise such rights, or subject to such liabilities. The doctrine contended for by counsel is most strongly set forth in the case of Richmond v. Irons, 121 U. S., 27, where, the question being whether one who had sold his shares to a bona fide purchaser prior to the insolvency of the bank, but had not transferred the same on the books prior to the insolvency, could be assessed upon his additional liability on such shares, as a stockholder. The question was resolved in the affirmative, for the reason that, under the act organizing and regulating National Banks, only those whose names appear upon its books as stockholders are to be treated by the bank as such, and that those whose names do appear are liable. But this case appears in a different aspect. Gerke is still the stockholder, for certain purposes, of that stock, and if it were a question whether Gerke or the pledgees should be assessed upon the additional liability, if such an assessment were necessary, there could be no question as to Gerke's liability upon such assessment. But these pledgees have an equitable right to subject the value of the stock so held by them to the payment of their claims. They are not stockholders in the sense that they are members of the corporation in any way. The plaintiff having no lien could, in any event, have only the equitable right of set-off, whereas the pledgees have acquired a lien upon the stock pledged, and this lien was acquired by them, in good faith, for a valuable consideration, without any notice of the claims of the bank against Gerke, and before the bank was placed in the hands of a receiver.

It is claimed that the bank, having ceased to do business, and passed into the hands of the plaintiff, as agent, is practically a corporation dissolved by decree of a court of competent jurisdiction. This claim, in view of the authorities on the subject, seems quite doubtful; for there are many cases which hold that a corporation may lose all its property, and may cease to transact any business, and yet remain a corporation and take corporate action as such. Bank v. Bank, 14 Wall., 383; Green v. Bank, 7 Hun., 63. In fact, it is difficult to perceive how there is any necessary connection between the ownership of property as a corporation, or even the transaction of business as such, and the existence of the corporation as a legal entity. But, however this may be, the corporation was in existence, and was the owner of property, and was transacting business when these pledgees acquired their claims upon this stock; and the fact that it has subsequently ceased to do business, or to hold property, can hardly be sufficient to change the rights which they then acquired. They had the right, at any time, under the powers of attorney which were endorsed upon the back of the certificates of stock, and executed by the defendant Gerke, to present those certificates for transfer, to the bank, and demand transfer of the shares to themselves, and, notwithstanding any indebtedness of Gerke to the bank, under the decisions heretofore cited, the officers of the bank could not have successfully resisted the claim of the pledgees to have the stock transferred to themselves. And, if the bank has a corporate existence now, there appears to be no reason why such action might not still be taken by such pledgees, if necessary. In other respects, at any rate, there is no difference in the position of the parties now as compared with what it

was before the bank ceased to do business. Gerke held the stock then, as the legal owner thereof. The pledgees then, as now, were the equitable holders of a lien upon the value of the stock to secure their loans. The bank was the creditor of Gerke. And, if the bank could not then set up its claims against Gerke as a reason why its officers should not transfer the stock to the pledgees, if the same were demanded, it is difficult to perceive why the agent of the bank, who no longer represents any creditors, but only the stockholders, should have any greater rights than the corporation, itself, had during its period of business activity.

The foregoing disposes of the questions relating to the stock pledged by Gerke, and to that held by him as pledgee, and there remains only the question as to the 100 shares pledged by him after the bank had passed into the hands of the receiver.

At the time that the receiver was appointed, Gerke was indebted to the bank, and the bank, or its agent, in winding up its affairs, would have had the right to set-off his indebtedness against his claim to a distributive share of the assets, as to such stock as was then held by him, and a subsequent assignment of such shares would not divest the agent's right of equitable set-off. R. S., 4993. These pledgees took the stock pledged after the appointment of the receiver subject to the receiver's right to set-off Gerke's indebtedness against his claim to a distributive share of the assets of the bank which would be due to the holder of that stock.

The order as to that will be that the portion of the assets due upon the 100 shares so pledged will be first applied to the indebtedness of Gerke to the bank, and, if any balance remains, that may be paid to the pledgees.

W. B. Burnet, for the plaintiff.

Paxton & Warrington for Gerke.

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## FRAUDULENT CONVEYANCE—LIMITATIONS.

[Superior Court of Cincinnati, General Term, 1889.]

### †ZIEVERINK v. KEMPER.

1. A petition to set aside a conveyance as in fraud of creditors of the grantor, brought more than four years after the execution of the deed, containing an allegation that the creditors in whose behalf the suit is brought had no knowledge of the fraudulent character of the conveyance until within less that four years prior to the filing of the petition, is not demurrable on the ground that the statute of limitations has run. The particularity required in pleading an exception to the statute of limitations in equity is not required under the code in pleading the express statutory exception.
2. Creditors charged with notice of a deed are charged only with notice of what it contains, and if the deed is for a full consideration on its face, it is not notice that the deed is fraudulent.

TAFT, J.

This is a proceeding to reverse a decree of the court at special term setting aside a conveyance from J. Henry Zieverink through a trustee to his wife as in fraud of creditors. Zieverink was the owner of a share of stock of the par value of

†Judgment affirmed by Supreme Court; opinion 50 O. S., 208. For decision on a demurrer in this case, see *ante* 220.

$2,000.00 in the Western Furniture Company. The company failed in June, 1878, and Zieverink became liable for $2,000.00 on his stock to the creditors of the company. The petition alleged that the conveyances complained of were made in May, 1878, and averred that the creditors of the company did not know of or discover the fraud until within four years from the date of the filing of the petition, which was January, 1887. The plaintiff was the receiver appointed to collect judgments against stockholders of the insolvent corporation.

Defendant denied the fraud and pleaded the statute of limitations. At the trial, the plaintiff offered his evidence. The defendant offered none. Decree was for the plaintiff on the case so submitted. It is claimed that this was error on two grounds, first, that there was no evidence to show fraud, and second, that the evidence did not take the case out of the statute of limitations. Error is also assigned for the overruling of a demurrer of defendant to the petition on the ground of the statute of limitations.

First, as to the evidence of fraud. A judgment was recovered against Zieverink in 1882, and an execution issued was returned "no goods." A fellow stockholder of Zieverink testifies that an assignment of the corporation was impending in May, 1878, that he and Zieverink consulted as to what course was best to pursue in regard to their property to avoid creditors of the company; that on his advice Zieverink went to a lawyer to convey his property away, and returned shortly thereafter saying that he had fixed it. The deeds of conveyance to the trustee from Zieverink and from the trustee to his wife recite $6,000.00 as the consideration. The trustee testifies that no money passed. In October, 1879, Mrs. Zieverink conveyed the property to Casimir Bauman for the recited consideration of six thousand dollars, with a secret agreement by him to convey back on payment of $1,000.00 which had been borrowed of him for Zieverink. The money was paid back, and in December, 1888, at the request of Zieverink and wife, Bauman conveyed to Lucas, who was a son-in-law of Zieverink. Lucas gave a note for $4,000.00 to Zieverink to protect Zieverink in case of accident to Lucas. In April, 1885, Lucas conveyed to Mrs. Zieverink at the request of Zieverink. Zieverink and his wife occupied the buildings and collected the rents down to the beginning of the suit. In the absence of any evidence to explain or contradict this evidence just recited, we are clearly of the opinion that all these conveyances were made to defraud Zieverink's creditors, and that as to the wife they were voluntary. Counsel contends that the relation of creditor and debtor did not exist between Zieverink and those whom plaintiff represents until after the assignment of the company, and that, as this conveyance was made before the assignment, to set it aside there must be the same evidence which is, required to set aside a conveyance made to defraud future creditors. Even if it be conceded that the relation of debtor and creditor did not exist until the assignment, we think the evidence quite sufficient to show that the conveyance was made with actual intent to defraud the creditors of the corporation, and so quite within the requirement of evidence, in cases of a conveyance to defraud future creditors.

Secondly, as to the statute of limitations, should the demurrer to the petition have been sustained? The limitation of this section is found in section 4982. "Within four years, * * * an action for relief on the ground of fraud; but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." Zieverink's liability as a stockholder accrued at the time of the assignment of the corporation in June, 1878. The right of the company's creditors, whom plaintiff represents, therefore, to begin an action to set aside this conveyance accrued at the same time.

The allegation of the amendment to plaintiff's petition is that certain named creditors of the corporation had no "knowledge of the lack of consideration for the conveyances set out in plaintiff's petition nor of the fraudulent intent therein set forth until a time within four years prior to the filing of said petition." Counsel for defendant claims that this is not a sufficient averment of facts constituting the exception in the statute of limitations; that the rules of equity pleading as to such exception apply and that under them it was necessary for the pleader to state the facts as to his discovery of the fraud and date thereof, so that the court may judge of his diligence in prosecuting his rights. Whatever the requirements in equity where an exception was sought to a statute containing no exception, the Supreme Court of our state has laid down no such rule for pleading under the code. In Combs v. Watson, 32 Ohio St. 228, 235, the court say: "In as much, then, as it appeared on the face of the petition that the fraud upon which the action was based, occurred more than four years before the action was brought, to save it from the statutory bar, it was necessary to aver that the fraud was not discovered until a time within that period in order to come within the saving of the statute, that "the cause of action in such cases shall not be deemed to have accrued until the discovery

of the fraud." This is substantially also the language of the syllabus. There is nothing said from which it can be inferred that anything more is required than the averment in the amendment as given. It is true the court justify their conclusion that an averment is necessary by reference to cases in equity where the rule as to particularity in pleading the exception with all its strictness was enforced, but we do not understand the court to adopt such a rule. Certainly, if they intended so to do when they were discussing the proper manner of pleading as in the case cited, they would have said so.

We come now to the question in the case most dwelt upon by counsel. Do the facts proven save the plaintiff from the defense of the statute.

In Bailey, Assignee v. Glover, 21 Wallace, 347, Mr. Justice Miller says, "in suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within the proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault, or want of diligence or care, on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. "* * * We hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such a character as to conceal itself, the statute does not begin to run until the fraud is discovered by or becomes known to the party suing." In Wood v. Carpenter, 101 U. S., 135, a somewhat stricter rule is laid down, but that was a case where the court were construing a statute of Indiana, making an exception only when the fraud is concealed by the wrongdoer. The remarks of Mr. Justice Swayne certainly seem to have a more general application than to the statute he was discussing, but subsequent decisions of the court have limited them to the statute in that case, and Justice Miller's opinion in Bailey v. Glover has been frequently approved and sustained. Kirby v. Lake Shore R. R. Co., 120 U. S., 136; Traer v. Clews, 115 U. S., 528, 538; Rosenthal v. Walker, 111 U. S., 185, 190. Now, it is clear that no stricter rule of construction can be applied to the exception under our statute than to give it the effect of the rule in equity above laid down. A party is not bound to presume fraud unless he has notice of facts which would put a reasonable man on inquiry. When, therefore, he has notice of no such facts, he cannot be charged with a want of diligence in not discovering the fraud. There is no proof that the creditors of the company had any knowledge of the conveyances complained of in this suit. The question whether the recording of a deed is notice to antecedent creditors of the grantor is one upon which the authorities do not agree. In Ward v. Thomas, 81 Ky., 452, it is held that it is not. A contrary view prevails in South Carolina. Lott v. Grafenreid, 10 Richardson, Eq., 346. See also Maule v. Rider, 79 Pa. St. 197; Battenhausen v. Bullock, 11 Bradwell (Ill.), 665 and Wade on Notice, sec. 96, page 70. All the authorities agree, however, that notice of the deed is notice only of what the deed contains. Tally v. Holland, 1 Swan., 396; Kuhn's Appeal, 87 Pa. St., 100; Godbolt v. Lambert, 8 Rich., Eq., 155; O'Dell v. Burnham, 61 Wisc., 570. The conveyances in this case on their face appear to have been for full consideration. The fact that the first two were from a husband to a wife might be held to a suspicious circumstance if the creditor so charged with notice of their contents also had notice that Zieverink was insolvent. But it must be borne in mind that the fact that the company was insolvent was no ground at all for believing that the stockholders were. In this respect, the circumstances here differ much from the ordinary case of a failing debtor conveying to his wife. In such a case, the debtor has generally failed to pay on demand, and the creditor has notice of his insolvent condition. But in this case, the liability is peculiar. In law; it accrues so as to set the statute running when the corporation is notoriously insolvent. In fact, it is rarely collected until the assets of the corporation are distributed, and by judicial determination, the amount of the liability is settled. The most solvent stockholders are generally in default until that time. Default of Zieverink to pay up his stockholders' liability, was not a circumstance naturally suggesting either inability to pay or an intention not to pay. So far, therefore, as the creditors of the company knew, or had reason to suspect, Zieverink was not in such a financial condition as to suggest a motive on his part for a fraudulent conveyance to his wife, or to make a conveyance by him to her on its face for a valuable consideration suspicious. Moreover, in eighteen months after the failure of the company, his wife conveyed this property to Casimir Baumann, who fraudulently held the

title until 1883, when he transferred to Lucas, another fraudulent grantee, who held until December, 1885. If creditors were charged with notice of the first conveyances, they also were charged with notice of the Casimir Baumann deed, and in that they would have ground for supposing that Baumann was a *bona fide* purchaser, as recited by its terms. Here then, was active concealment of the fraud by Mrs. Zieverink. This concealment was after the liability accrued, it is true, but as a matter of fact we cannot say that it was after the time when by reasonable diligence the assets of the company could be distributed, and the liability determined in a judgment. And not until such time, we think, would reasonable diligence require such an investigation of the financial ability of the stockholders as to lead a creditor to suspect the *bona fides* of the first deeds. The conduct of the defendants, and the circumstances in this case, rebut any presumption of negligence on the part of the creditors arising from the mere delay in discovering the fraud, if in fact they did not discover it. They all testify that they had no knowledge of the fraud until within four years from the beginning of this suit. It seems to follow, therefore, that the circumstances of this case bring it within the saving exception of the statute, because the acts of the defendant were such as to prevent discovery of the fraud by the use of ordinary diligence on the part of the creditors.

Decree of the special term is affirmed.

MOORE, J., concurs.

PECK, J., not sitting.

Avery & Holmes, for plaintiff

J. J. Glidden, for defendant.

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## 223 BOYCOTTS.

[Hamilton Common Pleas.]

### †N. & C. G. PARKER v. BRICKLAYERS' UNION No. 1 ET AL.

A trades-union and its members who participate, are liable in libel for issuing a false circular charging plaintiffs with employing inferior scab labor in prosecuting their business. They are also liable for damages caused by declaring a boycott against plaintiffs, and for inducing their workmen under contract to serve a certain time to break their contracts, although the inducement is by peaceable persuasion; and for inducing other persons by threats or intimidation not to deal with or employ plaintiffs, or inducing them to break contracts already made with plaintiffs.

STATEMENT OF CASE.

This cause was an action for damages—first, as in libel for printing and distributing a circular claimed to be false, charging plaintiffs with employing "inferior scab labor," and "inferior non-union and scab bricklayers" in the prosecution of their trade; and secondly for damages caused by a general "boycott," declared, and in part carried out by the defendants against the plaintiffs.

The plaintiffs were members of the Contractors' Union, and the

† The judgment of the circuit court, affirming the above, was affirmed by the Supreme Court without report, 51 O. S., 603.

The New York *Daily Register* makes the following comments upon this charge:

"Judge Buchwalter has contributed to the case on boycott a very well considered charge, which appears in the Cincinnati Weekly L. B., vol. 21, 223. It is an excellent illustration of the too little regarded importance of the work of our courts of first instance that a carefully considered decision of an able judge, though rendered at circuit or trial term, or on the decision of a motion, frequently formulates the law on a novel point so well that it is not only accepted by higher courts of the same state, but followed also all over the country, as in the case of the decisions of Judge Barrett and Judge Adderson Brown on boycotting.

"In the Ohio case, to which we refer, the action was by members of a contractors' union against a bricklayers' union and its various members and officers active in the controversy. It is to be regretted that it does not appear in the report whether the bricklayers' union was a voluntary association or a corporation, but we

defendants were the Bricklayers' Union—and its various members and officers, active in the controversy.

The case is more fully stated in the charge of this court.

CHARGE OF THE COURT.

BUCHWALTER, J.

The plaintiffs, Noah and Charles G. Parker, partners as N. & C. G. Parker, ask a recovery against the various defendants for wrongs claimed to have been done them, as set out in the first and second counts of their petition herein.

The plaintiffs ask damages from the defendants on their first cause of action in the sum of $25,000, for injuries claimed defendants did them in issuing and distributing the circular letter set out in the petition.

They claim that defendants, willfully intending to injure their reputation as business men, and as bricklayers and contractors, issued and distributed the said circular letter which they say is false and malicious.

To this claim the defendants file a general denial as their answer.

It is libelous to falsely and maliciously charge a journeyman bricklayer who holds himself out as capable of such service and seeking employment, to be an inferior workman; it is likewise libelous to falsely and maliciously charge one who holds himself out as a bricklaying contractor, (capable and seeking such contract work as his occupation and business)—to be a contractor who employs inferior bricklayers to do his work,and thereby imposes on the owners of buildings for whom he does work as such contractor.

The law presumes the reputation of plaintiffs to be good in respect to their trade or profession, and that they employ men who have the

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understand that individuals were made defendants, and we infer that the body itself was one defendant, and that the officers, agents, and members who had been active in the combination against plaintiff were also joined. The charge is too long to quote. It states with great distinctness the rule of freedom of service, the right of organization, and the right of employees in combination to refuse in good faith to work for any man obnoxious to them, and that they may combine to fix the hours of labor and rates of wages, etc. In this connection Judge Buchwalter, adds:

"They may combine for the honest purpose of benefitting their order by encouraging favorable terms to their employers in the purchase of material, and to procure contracts for such contractors as employ members of their union; but they become engaged in illegal enterprise whenever they agree to accomplish their purpose by threats, intimidation, violence or like molestation, either toward the apprentice, the expelled member, the non-union workman, the contractor and employer, the material man or the owner who proposes to make a contract. The like rule of legality or illegality applies to the contractor or employer, as to the purpose for which he may become and act as a member of the so-called 'boss contractors' union."

"The threat may be by word, gesture, sign or tone, and when you consider whether any particular line or course of conduct, or thing said or done, has menace or threat in it, you must consider all the circumstances under which the thing is said or done, what reasonably was the intent sought to be conveyed by the person uttering the word, or doing the thing. The intent reasonably conveyed must be to do some wrongful thing to the person or property, and in violation of the legal right of the one sought to be influenced. The intimidation meant is the effect of such things, said or done, or threat made, as reasonably put one in fear, and control his freedom of action, or thus compel one to act out the will of another instead of his own will."

"The plaintiff proved loss of various jobs, etc., and the jury rendered a verdict for the plaintiff for $3,700." (From page 281 B.)

usual or ordinary skill of the trade they are serving in, until the contrary appears in proof.

If you find that the defendants did in fact maliciously issue and distribute this circular; that it is false as to the essential charge that the plaintiffs employed "inferior labor" and "inferior bricklayers," then the plaintiffs are entitled to recover damages therefor.

The law authorizes you to assume that when one makes a false and libelous charge against another, which tends to do him an injury, he did so in malice.

The defendants have offered proof as to the character of some of the work done by plaintiffs and their men before the distribution of the circular, which was not admitted, to prove the truth of the circular, because they did not by their answer, make issue as to its truth; but it was admitted, and is competent and proper to be considered as to the motive—malice, if any, or the good faith they had in issuing and distributing the circular. If they honestly knew, or had heard of such work, and believed, in good faith that it was inferior work, and caused by plaintiffs employing inferior workmen, then you should consider that fact as in mitigation of damages.

If the jury find for plaintiffs on the proof according to the law as I have stated it, you should give such verdict as will fairly and justly compensate them for the injury, which the issuing and distributing of such libelous charge reasonably caused them, as to their reputation, in respect to their trade, and occupation and for such annoyance and distress of mind as they may have suffered in consequence of such publication.

And if you find there was malice in the purpose and act of the publication, you may also include in the verdict what you estimate as reasonable attorney's fees for prosecuting this cause of action.

And if the publication was made in such excessive degree of malice as that, in your judgment, compensatory damages are not a sufficient loss and punishment for the act done, then you may include in your verdict also such sum of money as you consider just to be recovered in the name of plaintiffs for their benefit, as by way of a punishment of defendants and to prevent a repetition of like publication.

But, Gentlemen of the Jury, have a care that your verdict in this respect be just and reasonable, remembering that the law eutrusts you with a large discretion in this respect. As punitive damages you can allow, nothing, or whatsoever sum you deem just.

On this question as to motive, malice and the degree of it, consider all the facts in proof, including the original controversy of the parties, and the matters between them occurring prior to the publication of this circular.

The burden is upon the plaintiffs to establish by a ponderance of proof that defendants issued and distributed the circular.

The issues involved in the second cause of action are substantially these:

The plaintiffs claim that the defendants, the Bricklayers Union No. 1, of Cincinnati, O., composed of three or four hundred members (then including the individual defendants) have from the first day of March, 1887, to the date of the filing of their petition herein on the ninth day of January, 1888, endeavored to coerce them to submit the conduct and management of their business to the dictation and control of the said defendant Union, as provided by its constitution and by-laws set out in the amended petition; and that in consequence of plaintiffs' refusal, the

defendant, its officers, agents and members; including the individual defendants, unlawfully combined and conspired together to impoverish the plaintiffs, to diminish their gains and profits in their business of contracting bricklayers, and as dealers in materials therein, to prevent them from carrying on and to break up and destroy their said business.

And they further aver that to accomplish the object of said unlawful combination, the said Bricklayers' Union maliciously adopted the circular letter as set out fully in the petition, and that it and the other defendants caused the same to be printed and circulated to various dealers in and manufacturers of building materials, including their patrons and customers. That they sent agents and committees to notify, verbally and by circular, the plaintiffs' patrons and customers, then dealing with them, selling and delivering material necessary in their business, that they should withdraw their patronage; and to others, not to deal with plaintiffs.

It is also charged that in furtherance of said conspiracy, when plaintiffs' patrons and customers failed to submit to said demands, the said defendants pursued a like purpose by like methods against them and their business and trade in the particular builders' material as supplied to their respective customers.

That defendants, with the same purpose and by like methods, interfered with their workmen in their service; induced them to quit plaintiffs, and deterred others from becoming employees.

That with the same purpose, and by like methods, they induced persons with whom plaintiffs had contracts for building work and for materials to break them, and deterred and prevented others from giving them contract work; all to the damage of plaintiffs in the sum of twenty-five thousand dollars.

All these claims and charges by plaintiffs, defendants deny.

In this contest the proof has taken a wide range, including, necessarily, many matters of controversy as to facts, as to the purpose, intent and motive which characterize the acts done, and the meaning of the things said by the parties.

The controversy submits to us the consideration of this rule of law: If the defendants combined together to commit an act unlawful (either as in the sense of being criminal or in violation of plaintiff's private rights, for which they would have a right of recovery in damages), or if they combined to do a lawful act by means of acts unlawful, then, in either such event, the combination is illegal.

If men conspire together to do an unlawful act, or to do a lawful act by unlawful means, then one knowing the purpose thereof, entering into such a conspiracy, is bound by all the things said and done by any of their number, in carrying out the purpose of such conspiracy, so long as he remains therein, and does not withdraw therefrom.

The plaintiffs had the legal right to conduct their business of contracting bricklayers, by the purchase of their material of such persons as they deemed best, in the honest promotion of their trade and occupation.

They likewise had the same freedom and right in the employment of their workmen, and in fair competition with others of their trade, to obtain contracts for work. Likewise had the several workmen, members of the defendant union, in the honest purpose of looking to their individual welfare, the right to work for whom they preferred, and, if not under contract for stipulated time, to quit the services of any one and go to the service of another, or to rest from labor

And it is the province of law to protect all alike—the owner, the material-man, the contractor and the laborer, be they members of so-called "unions" or not, be they skilled or unskilled. The law makes no distinction between them, because of the service or occupation of either. Every man's labor and skill are his own property; often they are his sole dependence and means of support for himself and family, and they are his only certain and satisfactory means of accumulating property.

It is essential to the laborer's welfare and manhood that he and his labor shall be free— the laborer as the employer, who, very frequently, is only one step in the way of prosperity removed from the laborer for wages, has the same need for freedom for action in his field of service.

Sometimes in their competition they come into conflict; but they must remember that each may, in the pursuit of his occupation, do whatsoever he will, only so long as it does not infringe on the equal freedom and right of the other. Workmen have the right to organize into unions for the common benefit of their members, for the purpose of advancing their skill, for mutual charities, and may bind themselves by rules, constitutions and by-laws within the scope of such purpose of organization. They may, for their own interests, make reasonable regulations as to how and whom they will instruct in the skill of their trade, and they can not be compelled to teach others against their will. They may persuade others not to enter their trade; they may refuse to work with or instruct those not registered in their union; and they may, with an honest purpose, refuse to work with men obnoxious to their interests, men expelled for reasons in good faith to them, or with men who refuse to join them, or refuse to work for any particular employer or contractor; they have a right to select their employees, and they may in combination refuse in good faith to work for any man justly obnoxious to them.

They may, with like honest purpose, to promote their united good, fix hours of labor per day and rate of wages, uniform or modified in rate, and they may encourage others to join their order.

They may combine for the honest purpose of benefitting their order, by encouraging favorable terms to their employers in the purchase of material, and to procure contracts for such contractors as employ members of their union; but they become engaged in illegal enterprise whenever they agree to accomplish their purpose by threats, intimidation, violence or like molestation, either towards the apprentice, the expelled member, the non-union workman, the contractor and employer, the material man, or the owner who proposes to make a contract.

The like rule of legality or illegality, applies to the contractor or employer, as to the purpose for which he may become and act as a member of the so called "boss contractors' union."

The threat may be by word, gesture, sign or tone, and when you consider whether any particular line or force of conduct, or thing said or done has menace or threat in it, you must consider all the circumstances under which the thing is said or done, what reasonably was the intent sought to be conveyed by the person uttering the word, or doing the thing. The intent reasonably conveyed, must be to do some wrongful thing to the person or property, and in violation of the legal right of the one sought to be influenced.

The intimidation meant is the effect of such things, said or done, or threat, made, as reasonably put one in fear, and control his freedom of action, or thus compel one to act out the will of another instead of his own will.

One inquiry of fact at the outset is, did the plaintiffs have any contracts with any of the men for any stipulated time or times other than by the hour or day on which any of them quit work? If so, and the defendants knew of such contracts with the apprentice or any of the men, and then induced such man or men to quit the Parkers' service, even by lawful persuasion, then all of the defendants who confederated together to accomplish that purpose would be liable for inducing such man or men to quit the Parkers; and if joining the union meant under its rules, to quit their service, then inducing them to join the union would create the same liability.

But if there were no such contracts for services for a definite time, or if there were such contracts, and these defendants did not know it, then there would be no liability on the part of the defendants to pursuade such man or men by lawful means to quit the Parker Brothers.

The same rule applies to the other contracts in controversy. It is claimed there was a contract between Moores & Co., lime men, and plaintiffs, for their lime supply for the year. You should first determine if there were such contract, and if so, what were its terms. If, in fact, such a contract existed, and no price fixed, you would not be authorized to fix any other than the market price on delivery in this city.

If there were a contract, did the defendants know it, and did they induce Moores & Co. to break the contract or fail to perform it? If there were such a contract, and the defendants knew it, and they caused any breach in its performance by Moores & Co., then they would be liable for the damages even though they caused the breach of it by lawful means.

The same rule of inquiry should apply to the question if they had any contract for sand with either Howe or Drott.

Likewise you come to the inquiry as to whether any contract in fact existed with the Little Sisters of the Poor. A contract to build such a structure is not required to be in writing; it may be either verbal or in writing.

By the proof, without dispute, the Little Sisters of the Poor reserved in their notice to bidders the right to reject any and all bids. They were under no legal obligation to give it to the lowest bidder, and could have legally constituted their architect, Rapp, their agent to aid them in making a contract.

The questions of fact are:

Did they personally accept the bid of the Parker Brothers? Or, did they authorize Rapp, and did Rapp accept their bid and notify them that they had the contract?

If there were a contract, did defendants know it, and did they induce or persuade a breach of the contract, either by their conference with the Little Sisters of the Poor or with their architect, Mr. Rapp?

If there were a contract and they knew it, and they caused its breach even by lawful means of persuasion, they became liable for all legal compensatory damages caused to plaintiffs thereby. But even if there were a contract, and they did not know it, then they are not liable to plaintiffs if they caused the breach of the contract by lawful means. I now call your attention to that status of the case existing in the event you have found that no contract was made with plaintiffs on their bid as to the building of the Little Sisters of the Poor, or with either of the material men, or with any of the workmen for any stipulated time of service. Observing the rules of law, as I have heretofore stated, pertaining to these issues, you should now determine whether the defendants, as is

claimed, did maliciously, intending unlawfully combine to obstruct and interfere with the business of the plaintiffs, for the purpose of coercing them to put their business in defendants' control, and employ "union" labor according to their rules and regulations, and whether they did so combine to impoverish the plaintiffs, to ruin and break up their said business, and, by threats, intimidation, or other unlawful means, cause damage, to their business of contracting bricklayers, or if they merely lawfully entered into competition to extend their numbers and influence, and to obtain work for their members.

As to any man in the employ of plaintiffs not under contract for any stipulated time, the defendants, as I before said, had a perfect legal right to solicit their membership in their Union for the honest purpose of benefit to the men or their order; but they had no right to threaten them or intimidate them, to cause them to do, from apprehension or fear, what they would not do of their own free will, or induce them by any other unlawful means.

If defendants combined to do only a lawful thing, solely by lawful means, and they in fact did nothing, either individually or in combination, but what they had a legal right to do, then the malice they had, if any, is immaterial.

I have heretofore defined what I mean by threat and intimidation. It is for you to say, from all the proof which you deem casts light on this issue, whether the defendants threatened, and whether the employees were intimidated to quit the service of Parker Brothers, or not.

Were there any unlawful means used to have the men quit? In this respect it is proper that I call your attention to the so-called circular describing the character of labor employed by plaintiffs.

It was in violation of the rights of every competent workman in their employ to falsely charge him as an inferior workman. It is our duty towards every man who holds himself out as a skilled workman, in any trade, to adjudge him to have ordinary skill and competency as such workman until the proof show to the contrary. If, therefore, the defendants falsely charged any of such employees of plaintiffs as inferior workmen, in order to induce the men to quit them, it would be the use of unlawful means, and plaintiffs would be entitled to recover damages incurred to their business by reason of injury which is the direct result of such interference, if any, by the defendants.

As to the controversy about the brickwork for the Little Sisters of the Poor: The defendants had a right to solicit, and, by all honest means, seek to obtain the work for the purpose of procuring it for some contractor who would work or employ union men, and enter into fair competition to obtain the contract for that purpose, provided they did not know of any contract given out to plaintiffs; and they would have this right, even though they knew plaintiffs were the lowest bidders just the same as for any contractor or bidder to compete honestly therefor.

Upon the other hand, the law would not authorize them to prevent the plaintiffs obtaining the contract by threats or intimidation of either the sisters or the architect. Remembering the definition which I heretofore gave of the word "threat" and "intimidation" you should proceed to a full consideration of all the proof you deem to bear on this issue, and determine whether defendants have acted in good faith within their rightful competition, or, if they acted maliciously with the sole intent and purpose of obstructing the plaintiffs, by threats and acts of intimidation, to coerce them against their will to yield to their demands as to

whom they should employ, or otherwise with the purpose of impoverishing and breaking up their business.

If the defendants unlawfully prevented the plaintiffs from obtaining the contract, then they are liable to plaintiffs in damages for the injury caused thereby.

If you have found no contract existing between the several material men and the plaintiffs, during the time in controversy, then it is necessary to consider the character of the conduct of the defendants towards these material men, and its connection with the business of the plaintiffs.

If the distribution of the various circulars in proof, the various calls of certain of the defendants, and their demands, upon the material men, were a part of a combination by defendants to coerce the plaintiffs into a discharge of their apprentice, their brother, and the non-union men, against their will, or otherwise with the intent to impoverish them and break up their contracting business, and you further find that defendants did threaten the respective material men, customers and patrons of the plaintiffs, with injury to their property, by loss of a large portion of their trade if they refused to comply with defendants' demand; that such threat or threats did reasonably put said material men in fear, and you further find that by reason thereof defendants did intimidate said material men so as to cause them to refuse to trade with and sell to the plaintiffs or caused any of them to deal with plaintiffs on different conditions and terms than theretofore, to the damage of the plaintiffs, then the plaintiffs are entitled to recover such damages from the defendants.

If the plaintiffs are entitled to recover, on each of the matters separately submitted to you, your verdict should be made up as follows:

For inducing workmen to quit the service of plaintiffs, such damage, under all the proof, as fairly compensates them for the direct loss of such service. That loss would be the expense and value of time in procuring workmen to take their places, difference of wages, if any, shown by the proof, for the equivalent service, and any direct damage by delay of work necessary in making the exchange of hands.

For injury, if any, by reason of defendants' conduct with material men, such damage as fairly compensates for loss of time, the extra cost, if any, for the lime, sand and brick and their delivery, over what they would have cost them without any interference by defendants.

And, if you find for plaintiffs as to the brickwork of the Little Sisters of the Poor, the amount should be in damages such as fairly compensate for the loss of the work or contract, which should be estimated by deducting reasonable and probable cost, or what it was then worth to perform the contract from the amount of plaintiffs' bid therefor.

In estimating what it was worth, or what it would then cost, you are to assume that the work would have been conducted in what you deem would have been the reasonably prudent and ordinary way. You should also take into account the services of the plaintiffs to superintend it, and the ordinary risks and conditions of such enterprises.

And, by way of damages, to be included in any amount you may find, interest, at the rate of six per cent. per annum, from the time when such damages accrued, to the seventh day of January, 1889, the beginning of this term of court.

If you find compensatory damages for the plaintiffs, and you further find that the defendants caused the injuries complained of, maliciously, then you may add thereto, as compensatory damages, such sum as you think just for plaintiffs' expense in employing counsel to prosecute this

cause of action. No testimony is admissible to prove the value, but you have had opportunity to estimate the same by actual observation of the service rendered by their attorneys.

And now, if in the just judgment of the jury, the defendants were actuated by such excessive degree of malice, that mere compensatory damages are not, in your opinion, sufficient loss to and punishment of the defendants, then the law authorizes you to include as a part of your verdict, such sum of money as you justly think ought to be recovered in the name and for the benefit of the plantiffs, as exemplary or punitive damages. The law leaves it wholly to the discretion of a jury, whether any sum whatever, and, if any, how much, should be added therefor.

You will see to it that your care to administer justice in this respect, will be in proportion to the large discretion which the law imposes on you; remembering that when you take from one to give to another, as a punishment, it must only be in such sum, as is just and meets the approval of good conscience.

In considering all issues of fact as to motive, you should consider all proof admitted on provocation, motive and general state of mind of defendants, their controversy with plaintiffs in August, 1886, about the order as to the hod carriers, by the bricklayers' union, the order of the "boss contractors" claimed to be in response thereto, and the notice to plaintiffs' union men to quit work, also the circumstances inducing the fine of plaintiffs' brother, David Parker, by defendant union, such information as defendants had before they issued and distributed the circular letter, as to any inferior work done by the men employed by the plaintiffs, and whether they, in good faith, considered it as evidence of inferior workmanship, giving to these and other facts, such weight as you deem they reasonably had, or ought to have had, upon the minds of the defendants, in any controversy following, having a connection herewith.

You will also remember not to include double damages for any injury growing out of the issuing and distribution of the circular letter. What amount, if any, you include in one count, you must not include in the other.

The burden is on the plaintiff as to the issues of the second count, to establish, by a preponderance of the proof, the plaintiffs' claim.

Authorities cited and considered on the second cause of action. Vol. 1, p. 144, Blackstone. Pub. Co., Oct. 1, 1887. Review of cases: Greenwood on Public Policy, 648; Wood's Master and Servant, 450 *et seq;* Com. v. Hunt., 4 Met., III; Benton v. Pratt, 2 Wend., 385; Corew v. Rutherford, 106 Mass., 1; Walker v. Cronin, 107 Mass., 555; Snow v. Wheeler, 113 Mass., — ; State v. Donaldson, 32 N. J. Law, 151; Coal Co. v. Coal Co., 68 Pa. St., 173; The Phila. Boot & Shoe-makers' case; Yates' Select Cases, 144; The Phila. Jour., Tailors' case, Phil., 1827, pp. 103, 160; State v. Stewart, 59 Vt., 273; (9 Atl. Rep., 559), 1888; State v. Glidden, 55 Conn., 46; (30 Fed. Rep., 40); Crump v. Comth. Va., 3 Ry. & Law Jour. 559; Steamship Co. v. McKenna, 30 Fed. Rep., 48; Rex v. Rowlands, 5 Cox Crim. Rep., 436; Rex v. Duffield *Id.*, 404; Steamship Co. v. McGregor, 15 Queen's Bench. As to Threats and Intimidation: 24 Fed. Rep., 217; 27 Fed. Rep., 443; 28 Fed. Rep., 544.

The jury returned a general verdict $3,700 (as compensatory damages) and various special verdicts on the causes of action and material issues of fact submitted to them.

Bateman & Harper, attorneys for plaintiffs.
Chas. W. Baker, for defendants.

## JUSTICE FEES. 228

[Superior Court of Cincinnati, General Term.]

STATE OF OHIO v. HAMILTON CO. (COMR'S) ET AL.

As no provision is made by statute for the payment of compensation to justices of the peace for services rendered by them, in making abstracts of election returns, the county commissioners have no power to make payment for such services out of the county funds.

ON DEMURRER to the answer reserved to general term.

PECK, J.

The action was brought by the plaintiff alleging that after the November election of 1887, the county clerk called to his assistance two justices of the peace, and that they thereupon made the abstracts of the returns of the election as provided by law. That after the abstracts were made and signed, the justices of the peace presented to the county commissioners a bill for one hundred dollars each, for services in that behalf by them rendered, and that the county commissioners would, unless restrained by the order of the court, order the payment of the bill, and that the other county officers would join with the commissioners in paying the bill, and prayed an injunction against the payment of the claim on the ground that no provision is made by the statutes for any payment for such services.

An answer was filed on behalf of the county commissioners in which substantially the same facts were averred, and the willingness of the county commissioners to pay the bill stated. It was also stated that in making the abstracts of the returns, provided by statute, there had been something over 90,000 words of record made by the clerk and justices, and that if the justices were allowed the statutory compensation for making such records the amount of their claim would be much larger than the $100 each proposed to be allowed, which the justices had agreed should be in full of their claims.

To the answer a demurrer was filed by the plaintiff, and the question to be determined is whether any compensation can be allowed the justices for services so rendered.

It has been frequently held both by the Supreme Court of Ohio and courts of other states, that where the law makes no provision for the payment of an officer he can recover no compensation. Debolt v. The Trustees, 7 Ohio St., 237; Anderson v. Commissioners, 25 Ohio St., 13; McClave v. Miller *Id.*, 14; Kyle v. Commissioners, 26 Ohio St., 46.

The question then is whether the statutes in this case make provision for the compensation of justices for the services rendered. It is claimed on behalf of the defendants that sec. 621 of the Rev. Stat., does not make such provision. That is a section which occurs in the chapter relating to the election, qualification, and duties of justices of the peace, prescribing their jurisdiction civil and criminal, and providing for certain procedure under and before them, and for their compensation.

The section relied upon provides that justices of the peace for services rendered shall be entitled to the following fees: For summons for each defendant named in the writ, 25 cents; for order of arrest, capias, writ of attachment, writ of replevin or mittimus, 40 cents; for each subpoena for one person, 25 cents; for each person in addition named in the

subpoena, 5 cents; for venire for jury, 40 cents; and so on through a long list of services such as are ordinarily rendered in litigation before justices of the peace, and for services in criminal cases. Also for certain other services of the kind ordinarily performed by a justice of the peace, as for instance ackowledgements to deeds, or the taking of depositions, or performing the marriage ceremony, or certifying accounts against the estates of deceased persons; and then we come to the words which are relied upon: "For each writing or record not provided for 15 cents per hundred words."

It is our judgment that the words relied upon in this section are to be construed by the aid of the maxim *noscitur a sociis*, and construing it with reference to its association with the other words of the section, that the writings for which compensation is to be paid are such as are made by a justice of the peace in his capacity as justice in connection with the performance of his duties as such in and about the administration of justice or otherwise; and that the matter of assisting the clerk in making the abstracts of election is not one which can be said to come fairly within the purview of this section.

The section of the statutes under which the services were rendered, 2980, provides that on the sixth day after the election, or sooner in case the returns are made, the clerk of the court of common pleas, taking to his assistance two justices of the peace of the county, shall proceed to open the several returns made to his office, and make abstracts of the votes in the following manner, etc., and sec. 2981 gives further directions as to how the abstracts shall be made, and provides that they shall be signed by the clerk and justices.

It seems quite obvious that in making such abstracts the justices of the peace are not acting severally as justices, but as members of a board or body, whose duty it is to make such abstracts, and no one of them can be said to perform that duty, but it is to be performed by all of them jointly. There is language in the statutes which seems to indicate that the clerk shall do the clerical work, and that the presence of the justices is required for the purpose of assisting in the inspection of the returns and directing the making of the abstracts and deciding upon questions that may arise during the progress of the count. Section 2965 provides that the clerk for making out such abstracts shall be entitled to 10 cents for every 100 words, while it is silent as to any compensation for the justices. Taking this section in connection with the other, which provides that the abstracts shall be made by the clerk with the assistance of the justices, and with the well-known duties of the clerk otherwise provided for, it seems to justify the conclusion that the clerical work mentioned is to be mainly performed by the clerk. But whatever may be the correct construction in that respect, we feel clear that the making of the abstracts is a combined work of three persons designated, and the clerical labor can not be said to be the work of any one of them, unless it is the clerk.

As no other statute has been brought to our notice under which the claim of the defendants can be sustained, we conclude that there is no statutory provision authorizing the payment of compensation to justices for services rendered in making the abstract votes of an election.

It is probably true that this is a service for which compensation should be made; that it is one requiring care, skill and fidelity on the part of the person rendering it, and is of a laborious nature. But these

considerations are proper to be addressed to the legislature, and are not for the court.

The demurrer to the answer is sustained, and there will be a judgment for the plaintiff.

Judges TAFT and MOORE, concur.

I. J. Miller, for plaintiff.

W. A. Davidson & Fred. Hertenstein, county solicitors, for defendants.

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## TAXATION. 238

[Superior Court of Cincinnati, Special Term, 1889.]

ADAMS EXPRESS CO. v. FRANK RATTERMANN.

1. Under sec. 5851, Rev. Stat., providing that "if the plaintiffs in an action to enjoin the collection of taxes or assessments admit a part thereof to have been legally levied, he must first pay or tender the sum admitted to be due," the requirement is sufficiently complied with if only so much of the tax imposed as the plaintiff concedes as a matter both of fact and law to be due, is tendered or paid.
2. In actions under secs. 5848 and 5850, to recover back taxes illegally collected, the right of action is founded on the illegality of the collection, and the fact that the taxes were voluntarily paid is a defense the burden of proving which is on the officer making the collection.
3. Where a foreign express company in Hamilton county made the return of its gross receipts within said county from state and interstate business as required by sec. 2778, Rev. Stat., and, without demand by the treasurer therefor, made payment of the tax assessed thereon, protesting against the same as in violation of the constitution of the United States, and paying it only to avoid the penalties and destruction of its business imposed in sec. 2843 for a delinquency in payment, held, that such payment was involuntary, and that the facts stated constituted no defense to a suit to recover that part of the tax paid which had been imposed on receipts from interstate business.

TAFT, J.

The demurrers to the petitions in six cases have been heard together. Three of the petitions are for injunction against the county treasurer to prevent him from collecting from the defendants, who are foreign express companies engaged as carriers of goods in this state, and between this and other states, a tax upon their gross receipts in this county for such carriage, as provided in secs. 2777 and 2778, Rev. Stat. It was decided in May, 1887, by the Supreme Court of the United States in the case of the Philadelphia and Southern Steamship Co. v. Pennsylvania, 122 U. S., 326, that the taxing of receipts of an express company from interstate business was a violation of that section of the constitution of the United States which gives complete control of interstate and foreign commerce to Congress, and that any state law providing for such taxation was void. In the case of the Western Union Telegraph Company v. Ratterman, 127, U. S., 411, the same court decided that these sections of our statutes which apply equally to the taxation of express and telegraph companies, though invalid so far as they impose a tax on gross receipts from interstate business, authorized a tax on gross receipts from business done wholly within the state, and sustained the circuit judge in enjoining a tax upon the receipts from interstate business and refusing to [illegible]

join a tax upon state business. Upon the invalidity of the sections as to interstate gross receipts, it being a question of the construction of the United States constitution, the decision of the United States Supreme Court is, of course, final, and binding on every court in the land. The question whether the sections, so changed from the meaning intended, have still force to authorize taxation of state receipts, is a question of the construction and enforcement of state law upon which the United States Supreme Court is not so high authority as our own Supreme Court, but until our Supreme Court has decided otherwise, inferior courts should certainly follow the United States Supreme Court. Upon the allegations of the petitions for injunction, therefore, in view of the decisions cited, it is clear that the taxes which it is alleged, Rattermann seeks to collect on interstate receipts are illegal and plaintiffs are entitled to an injunction to prevent such collection under sec. 5850, Rev. Stat. unless the petitions fail to show compliance with requirements of sec. 5851, which is a condition precedent to relief by injunction provided in sec. 5850. The allegations of the petitions are that the express companies were taxed on their personal property like other persons, and, in addition, on the gross receipts from state and interstate commerce; that a tender of the tax due on the personal property was made and refused by the defendant unless the tax on receipts was also paid, which tax, the petitions allege, is in violation of the constitution of the United States. The petitions were framed on the theory that secs. 2777 and 2778 were wholly inoperative by reason of the unconstitutional taxation of interstate receipts. Section 5851 provides that "if the plaintiff in an action to enjoin the collection of taxes or assessments, admit a part thereof to have been legally levied, he must first pay or tender the sum admitted to be due." Counsel for defendant contend that as the allegations of the petition show, in the light of the decisions above quoted, that something was legally due on receipts from state business, and there is no averment of payment or tender of that, the demurrer must be sustained. The decision of the point urged turns on the meaning of the expression, "admit a part thereof to have been legally levied." Technically, the statement of facts justifying the levy of a tax, is an admission that the tax was legally levied, although such statement is accompanied by an express averment that the tax so levied is unconstitutional. This is because allegations of law are bad pleading generally, and do not change the legal effect of the facts alleged. But I can not think that sec. 5851 is to have any such narrow construction. This remedy is provided to test constitutional questions, and questions of the construction of statutes, as well as questions of fact under such statutes. The word "admit," is to be taken in its ordinary sense, and means that plaintiff concedes as a matter of fact and law, that a part of the tax is due. When he does so, he must pay or tender what he concedes to be due. To hold otherwise, would be to hold that in an action provided by statute for the very purpose of testing questions of law, if the plaintiff makes the mistake of claiming too much, he shall lose his remedy for all, although as to much of what he claims he is in the right. Such a forfeiture of rights by a mistaken claim, was never contemplated by the statute. Plaintiffs admit only that the personal property tax is valid, and aver a tender of that sec. 5851 is therefore complied with.

Plaintiffs are entitled to an injunction against the collection of taxes on the gross receipts of interstate business, on the allegations of the petitions. The demurrers will be overruled. If defendants do not care to plead further, the question will be as to the decree. Before entering

it, the receipts should be separated into state and interstate receipts. I believe this has been done. If not, a master may be appointed to determine the proper division. The decree enjoining collection of tax on interstate receipts, can only be entered on condition that the taxes on state receipts are paid. This has been done. The decree will be entered therefore, as indicated. Both parties have claimed more than they were entitled to in this case. The plaintiff has been found entitled to relief, but not for so much as he asked. The costs are in the discretion of the court. I will divide them equally between the parties. Creppen v. Hermaance, 9 Paige, 210.

The three remaining petitions are to recover taxes paid by plaintiffs on gross receipts from the entire business, domestic and interstate, in December, 1886, and in June, 1887. The following is the material allegation of the petition of the Adams Express Company. "In the month of May, 1886, the plaintiff delivered to the auditor of said county a statement as required by Rev. Stat. Ohio, sec. 2778, showing the receipts of said plaintiff in said county, for the year next preceding, in the carrying on of its said business, which said gross receipts amounted to the sum of $49,283, a large portion of which was for business done by the plaintiff between its offices in said county and points outside of the state of Ohio. That is to say, said receipts were largely for business and transportation pertaining to commerce between the states, and not for business and transportation between different points within the state of Ohio. And thereupon said auditor assessed a tax on said receipts for said year, amounting to $1,249.28. And the defendant required the plaintiff to pay the same; and the plaintiff did make payment thereof, to-wit; one-half thereof $624.64 on December 20, 1886, and a like amount on June 20, 1887. At the time of making said payment, the plaintiff duly protested against said tax on the ground that the same was unlawful and in violation of the constitution of the United States, and said payment was made by the plaintiff to avoid the penalties, disabilities and punishments provided by Rev. Stat., Ohio sec. 2843, which the defendant would otherwise have enforced to the interference, stoppage and destruction of the plaintiff's business." Then follows the allegation that the taxes were illegal and void, and a prayer for the recovery with interest.

To this petition and the two others of similar character, defendant demurs on the ground that the facts stated do not constitute a cause of action. It is claimed by counsel for the defendant, first, that under the facts alleged, the payment of the taxes was voluntary and they can not therefore be recovered back; and second, that even if payment was involuntary, the course of decisions upon the question of the legality of the tax by the Supreme Court of the United States, by which it was declared legal in 1868 and illegal in 1888, has been such as to create an estoppel against the recovery of taxes levied, collected, distributed and expended on the faith of the judgment of the highest tribunal, that they were valid.

Section 5848 provides that courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of the taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.

Section 5850, provides that * * * "actions to recover back taxes and assessments must be brought against the officer who made the collection, or, if he is dead, against his personal representative."

These sections have been construed in Stephan v. Daniels, 27 Ohio St., 527, and Wilson v. Pelton, 40 Ohio St., 306, and have been held to confer a right of action, having only an imperfect existence before their enactment, to recover from the collecting officer taxes illegally levied and collected by authority and process of law. To such a right of action, however, it is a good defense that the taxes were so paid as to be a voluntary payment. At common law, a recovery of taxes illegally collected could only be recovered on an allegation that they were collected under duress of person or property. In other words, the only difference which I can see between the recovery of taxes illegally levied, under the statute now, and at common law, when the latter right of action existed at all, is that it is not an essential element of plaintiff's case under the statute that the taxes were paid involuntarily, and voluntary payment is a defense, whereas at common law the declaration and plaintiff's proof must have shown the payment to have been involuntary. Under the statute taxes illegally levied, where collected by process of law, are presumed to be involuntarily paid, and the burden of proof to show that they were voluntary is on the defendant. At common law there was a presumption that taxes were voluntarily paid, and the burden to show compulsion was on the plaintiff. In this view, the allegation of the plaintiffs that the taxes now sought to be recovered, were illegally placed upon the duplicate of the county, and the defendant as county treasurer, required them to pay the same, would be a sufficient statement to entitle the plaintiffs to recover the taxes so paid, and the demurrers must be overruled unless the petition contains facts which make out the defense of voluntary payment. The only additional facts pleaded are that when the taxes were paid a protest was entered on the ground that they were collected in violation of the constitution of the United States; and that payment was made to avoid the heavy penalities imposed by law for failure to pay them, on the officers and agents of the company, amounting to a complete destruction of its business. Certainly these facts do not make out a defense of voluntary payment to rebut the presumption of involuntary payment from the preceding allegations. The demurrers must be overruled and the defendant given leave to answer, when he can set up the defense of voluntary payment. But if it be admitted that I am wrong in my deductions from the cases of Stephan v. Daniels and Wilson v. Pelton, and that the common law rule prevails requiring the plaintiffs to make out a case of involuntary payment, I am still of the opinion that the petitions state a good cause of action. The language of the petitions is that the plaintiffs were "required by the defendant to pay the tax." Construing this language in its ordinary sense it would mean that the treasurer had made demand of the plaintiffs with the duplicate as his warrant authorizing him to seize the personal property of the plaintiffs, and summarily sell the same for taxes. Section 2838. Payment on such a demand would be an involuntary payment. Preston v. Boston, 12 Pick., 14; Nichodemus v. East Saginaw, 25 Mich., 456; Atwell v. Zeluff, 26 Mich., 118; Glass Co. v. Boston, 4 Metc., 181. But even if it be admitted that the construction most favorable to the defendant must be given to the petition, and it means that the plaintiffs after making the return of their gross receipts as required by sec. 2778, went to the treasurer's office and without demand made payments of

the taxes assessed thereon, protesting against them as in violation of the constitution of the United States, and paying them only to avoid the penalties and consequent destruction of their business imposed in sec. 2843 for a delinquency in payment, I am of opinion that this payment as made was involuntary.

In Mays v. Cincinnati, 1 Ohio St., 268, it was stated as a general rule, that "to make the payment of an illegal demand involuntary, it must be made to appear that it was made to release the person or property of the party from detention or to prevent the seizure of either by the other party having apparent authority to do so, without resorting to an action at law."

This rule was modified in Baker v. Cincinnati, 11 Ohio St., 534, where Judge Gholson shows that the authorities warrant broader language, and that a payment may be involuntary if there be an immediate and urgent necessity, or the payment is made for the purpose of redeeming or preserving one's person or property. In that case, the city exacted from the plaintiff, as a charge for a license to give theatrical exhibitions for six months, $63.50, and a fee of $1.00 for issuing the license. Plaintiff alleged that the $63.50 was illegal, but fearing prosecution for violating the ordinances of the city, by giving theatrical exhibitions in the city without license, and moved by the heavy penalities for violating the same, paid the whole amount, under protest against the right of the city to exact the same. This payment was held to be involuntary, as made under an immediate and urgent necessity. Judge Gholson says: "These cases show that money may be properly held to have been paid involuntarily or under coercion, where the position or interests of a party were such as to require from another the performance of a duty enjoined by law, and he was illegally compelled to pay the money to induce such a performance. Undue advantage is not to be taken of the party's situation." Now, in the case at bar, the tax imposed on the gross receipts of a foreign express company, is a required payment for the privilege of doing business in this state, and a delinquency of twenty days in the payment thereof, excludes the company from the state, and makes all agents and railroads doing its business thereafter, liable to fine and imprisonment. Telegraph Co. v. Mayer, 28 Ohio St., 521. Payment of the tax required for such a purpose, is exactly like the purchase of the license in Baker v. Cincinnati.

Without a hearing in court upon the question of legality of the tax, the business of the company must cease, or its employees run the risk of being wrongdoers and criminals. It seems to me that under such a section of penalties, payment of the tax, however illegally levied, is made under an urgent and immediate necessity.

In Catoir v. Watterson, 38 Ohio St., 319, where by the Pond Law a saloon keeper was required to pay a tax at a certain time, and give bond, or his continuance in business thereafer without doing so would make him subject to fine and imprisonment, it was held that his payment under protest of the tax to avoid these penalties was involuntary and entitled him to recover the tax so paid, the Pond Law being unconstitutional.

In Western Union Telegraph Co. v. Mayer, *supra*, the plaintiff sought to recover taxes paid under the very sections we are considering (sec. 2778 and 2843) accompanied by a protest against their legality, to avoid the penalties of sec. 2843, and the Supreme Court held that such

payment was not voluntary because of the total exclusion of the company from business on default of payment without a day in court.

It is claimed by counsel for the state that the case of Western Union Telegraph Co. v. Mayer is distinguishable from the one at bar for two reasons: 1st, because the return here was made without protest, while there it was made under protest; 2d, because the protest covered the whole tax in the Mayer case and the hypothesis of the court was that the whole tax was illegal, while at bar the protest covers the whole tax and only part is illegal, the treasurer having no means of dividing the receipts to receive what was lawfully due. I can not see how the voluntary making of a return can reflect upon the character of the payment made thereafter. A commendable desire to comply with the law as far as possible without making payments whose enforcement was unconstitutional might very well induce such voluntary return. The protest in this case was against the whole tax on receipts on the ground that it was in violation of the constitution of the United States. Part of the tax was found illegal on that ground. Judge Johnson says in Stephan v. Daniels, *supra*. "It is said the object of a notice of such suit, or of payment under protest, is that the officer may protect himself. If, on inquiry, he finds the demand illegal he may decline to proceed, or if he collects, he may withhold the money from payment until the question is settled." Was the protest in this case not enough to call the attention of the defendant to the fact that the plaintiffs relied on the very ground upon which they have urged their suit *i. e.* the conflict of the tax with the federal constitution, and thus to enable him if he considered the ground doubtful to withhold the payment of the money received until the question was decided? It would be unreasonable to require that a protest shall state the objection to the tax with as much particularity as a petition for injunction. Even in such a petition the failure to separate state and interstate receipts has not made the petition bad on demurrer. The question of voluntary payments is to be determined by the law of Ohio. The decisions of the Ohio Supreme Court on this subject are not entirely in accord with each other. When we look at decisions in other states, we find even a wider conflict. An examination of all the Ohio cases, however seems to me to clearly show that the payment at bar was involuntary. Counsel for the county treasurer relies on the case of McKean v. Whitbeck, in which our Supreme Court held, by a divided court, two judges dissenting, that plaintiff who had paid the Scott Law tax under protest could not recover it back after the law had been declared unconstitutional. The case is not reported, presumably for the reason that three members of the court constituting the majority did not agree upon the ground for their conclusion. It is certain that two of the majority, Judges McIlvaine and Johnson, regarded the Scott Law as constitutional, (see Butzman v. Whitbeck, 42 Ohio St., 223), and on that ground they might well have refused to give judgment for the recovery of the tax paid. The judgment in the case, therefore, can have no weight as an authority upon the question of voluntary payments. Moreover the Scott Law, unlike the Pond Law, and the statutes imposing a tax on foreign telegraph and express companies now under discussion, did not make a failure to pay the tax and subsequent conduct of the business a misdemeanor punishable by fine and imprisonment. As to the second ground urged in support of the demurrer, namely that the change in the decisions of the United States Supreme Court gives rise to an estoppel against recovery of the tax, it can not apply to the June, 1887, tax, because the

decision in the Philadelphia Steamship Co. v. Pennsylvania, 122 U. S., 326, in which the court reversed its former decision and declared the tax on interstate receipts unconstitutional, was rendered in May, 1887. As to the December, 1886, tax, it is sufficient to say that it does not appear from the petition that the tax received by the defendant has ever been turned over to the various public corporations entitled to it, or that they have ever incurred expense relying on this tax as a means of defraying it. If these facts can raise an estoppel as to which I find it unnecessary to express an opinion, they should be raised by answer. The demurrers to the petitions will be overruled.

Lawrence Maxwell, Jr., for the Express Companies.

Thomas McDougall, and Wm. A. Davidson, county solicitor, for Rattermann.

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## MORTGAGE OF TRUST PROPERTY. 254

[Hamilton Common Pleas, April Term, 1889.]

JAMES O'DONNELL ET AL. v. MARY M. HOLDEN ET AL.

A tract of land having been conveyed to John B. Purcell, Archbishop of the Cincinnati Diocese of the Roman Catholic Church, for a nominal consideration, and the evidence showing the plot was so conveyed for the use and benefit of a particular congregation, to-wit, The St. Gabriel's Church of Glendale, and that they have taken possession of it, occupied, improved and used it for church and school purposes. Held, that the archbishop could not mortgage it to secure his individual debt.

MAXWELL, J.

The history of the case is briefly as follows: John B. Purcell, the late Archbishop of the Roman Catholic Diocese of Cincinnati, was individually indebted to John T. Hooper in the sum of one thousand dollars, upon a promissory note, made, as was shown by the testimony, for money borrowed prior to March 3, 1878. The affairs of the archbishop being in a desperate condition, Hooper through his attorneys made an effort to obtain security. The result of this effort was that on March 5, 1879, the archbishop, executed a mortgage, dated on the third. I do not know that the fact of apparent discrepancy between the date and the execution of the mortgage cuts any figure in this case, in the way I view it. I do not assume that it reflects in any way on the manner in which the mortgage was given. The mortgage itself was dated on the third and the note corresponding with it was also dated on the third. The archbishop's assignment or conveyance to his brother was made on the fourth, and the mortgage was not actually acknowledged and I may assume executed until the fifth; but whether there had been a valid assignment or not, in my view of it, makes no difference. This mortgage covered lots 7, 8, 10 and 11 in Gross and Dietrich's subdivision in Glendale, and was made to secure a note payable in one year after date, which was in effect a renewal of the old note. The note and mortgage were not paid when due, and on March 6, 1880, that would be, I assume, the last day of grace, Mary C. Holden claiming to be the assignee of the note and mortgage, brought suit in case 61694 against John B. Purcell, Edward Purcell and John B. Mannix, assignee for the benefit of credit-

ors, to foreclose the mortgage, and such proceedings were had that on April 16, 1880, immediately after default was made, a judgment and order of sale were taken. July 23, 1880, after the expiration of the term at which the judgment and order of sale were taken, the plaintiff in this case moved to set aside the judgment and order of sale. The plaintiff in this case was the pastor of what was known as St. Gabriel's church, at Glendale, which claimed to be in occupation of this property, and the other plaintiffs joining with him in the case were trustees or acting in some such capacity with reference to the church. On June 22, 1881, the plaintiff in case 61694, that is, Mary G. Holden, assigned the decree in that case to William F. Goodrich. October 9, 1886, a new motion to set aside the judgment in 67694 was filed, and upon that a number of new parties representing the St. Gabriel's church were brought into the case. December 2, 1886, the order of sale was returned and filed, and a motion to confirm was made; also a motion to set it aside. December 31, 1886, an entry was made confirming the sale and overruling the motion to set it aside. This case was appealed to the circuit court and there the judgment was affirmed evidently upon the ground that the motion to set aside the judgment was filed after the term, and that no remedy could be had in that way.

William F. Goodrich, purchased the property at the sale, and assigned his bid to W. Austin Goodman, who took the title, as he claims, as trustee for himself and Goodrich. That is to say, when the case was finally closed, the deed to the real estate was made to him, and he held it for himself and for Goodrich, to whom the decree had been assigned by Mary G. Holden.

The case at bar is number 63460. It was brought November 20, 1889. It was brought by James O'Donnell, the plaintiff in this case and others claiming to be interested in the church on behalf of the Roman Catholic church of St. Gabriels, to set aside the mortgage above described, and the proceedings in foreclosure upon it, upon the ground that John B. Purcell as archbishop held the lands in controversy in trust for the St. Gabriel's church, and had no right of authority to mortgage or convey them for his individual benefit; and further claiming, that the mortgage was made to secure his individual debt. Issue was joined upon this claim by the joint answer of W. Austin Goodman and William F. Goodrich, and the case was submitted upon the issue so made up.

There was no controversy, as I understand the case, with reference to the claim made by O'Donnell and others, that the debt of Hooper was an individual debt of John B. Purcell. At any rate, there is no testimony to show that this debt was in any way connected with this church, or was incurred for the benefit of this church, or in any way connected with the property.

It was a matter of public notoriety that Edward Purcell was carrying on what might be called a banking business, and it would appear that John B. Purcell was to some extent connected with that business, and in the course of time a very large indebtedness was incurred which, whether or not it had been incurred originally for the benefit of the diocese, became finally an individual indebtedness of John B. Purcell and Edward Purcell by the manner in which they transacted the business. So I assume in this case that this Hooper claim was an individual liability of John B. Purcell.

In disposing of the case I shall assume certain facts to be proved; and I shall assume certain propositions of law to be settled by the late

decision of our Supreme Court in Mannix against Purcell. I assume it to be a fact that the title to the property, that is to these lots in controversy, was in Archbishop Purcell, leaving for consideration the nature of the title. I assume it to be a fact that he made the mortgage to secure his individual debt, and that the debt was one which in no way benefited St. Gabriel's church. I assume the law to be as settled in the case of Mannix against Purcell, recently decided by our Supreme Court, that if Archbishop Purcell held the property in controversy in trust for St. Gabriel's church, then he could not encumber that property by a mortgage to secure his individual debt, the incurring of which debt in no way benefited St. Gabriel's church.

The syllabi of the case referred to will sufficiently explain, what I have said in the brief synopsis I have given of the law. The first one is:

"First—It is competent to prove by parol evidence that land conveyed to a grantee by a deed absolute on its face is in fact held by him in trust for charitable uses, but such evidence should be clear, convincing and conclusive.

"Second—Where such grantee is in fact archbishop of the Roman Catholic church for this diocese, its canons and decrees, regulating the mode of acquiring and holding church property, are competent evidence to show that the property so held by him is held in trust for the purposes of public religious worship and other charitable uses.

"Third —Such a trust is one of which the courts will take cognizance and assume control of for the purpose of preventing its abuse, perversion or destruction.

"Fourth—Where such property is held by the archbishop in trust, to be devoted to the uses of public religious worship, cemeteries, orphan asylums and schools, each church, cemetery, asylum and school is held upon a separate trust and for its own separate use, and one piece of property so held is not chargeable with any part of the expense of improving any other, nor of improving church property generally in the diocese.

"Fifth—Property held upon such trusts by the archbishop does not pass to his assignee in insolvency by a deed of assignment made in his individual capacity for the payment of his individual debts.

"Such an assignment passes to the assignee no better or different title to the assigned property than the assignor held, and *cestuis que trustent* may assert as against the assignee and the creditors of the assignor the same rights as they could against the latter as if no assignment had been made."

In my opinion, the sole question remaining in this case, since the decision of the case of Mannix against Purcell is, whether Archbishop Purcell, by the form or intent of the conveyance of the property to him, held the property in question in trust for the benefit of St. Gabriel's church, or whether it was a conveyance to him personally and individually, to be held by him as he pleased and disposed of by him as he pleased. The lots in question, 7, 8, 10 and 11, with other lots lying in Glendale, formed a rectangle about one thousand feet long by three hundred feet wide. The tract is comprised in the subdivision made by Andrew Gross and Clement Dietrich, and was divided into eleven lots, five of which were about three hundred feet by one hundred feet, and one three hundred feet by two hundred, all fronting on Church avenue, and three were one hundred feet by two hundred and sixteen each fronting on Sharon avenue, which were at right angles to the others. The recorded

deeds were somewhat defaced by the fire, but as near as can be made out the first deed was made in 1857. This deed purports to convey to John B. Purcell in fee in consideration of ten dollars, lot 6, two hundred feet by three hundred feet, lying about the center of the tract. The deed is in the ordinary form. The next is dated August 31, 1865, and purports to convey to John B. Purcell, in consideration of one dollar, lots 1, 2, 3, 4, 5, 7, 8, 9, 10 and 11, or all the remaining lots in the tract. This deed is also in the ordinary form. The consideration expressed in the deeds raises the presumption, which is not rebutted by any evidence, that the conveyances were gifts to the archbishop, whether for his individual use or in trust. In other words, the property was not purchased by Archbishop Purcell as an ordinary individual would purchase property for a valuable consideration. Passing any question as to the nature or kind of trust upon which he held it, upon the face of the deeds it appears to have been a gift to him, which would tend, to a certain extent, to bring it under the canon and decrees of the Roman Catholic church with reference to trust property. The testimony as to the trust is necessarily very meagre, bearing in mind the fact that these conveyances were made in 1857 and 1863; that Dietrich was dead at the time this case was begun, and Gross was in advanced old age and apparently physically unable to give his testimony in any satisfactory manner. The want of their evidence leaves the case to be determined upon such testimony as could be gathered from various sources and pieced together. Mrs. Dietrich, by deposition, testifies that the property was given for the use of St. Gabriel's church. That may be said to be rather an opinion or conclusion of her's than a statement of fact, but I have not wholly excluded it, but have considered it just as it is here. She further testifies, which may be considered as a matter of fact within her knowledge, that the only condition attached to the conveyance of the property was that Father Carey, who was then pastor of the church, should pay the orphan asylum at Cumminsville twelve hundred and fifty dollars.

There was no testimony showing what the value of the property was at the time the conveyances were made. At the same time the court may, to a certain extent, use its general knowledge as to the value of the property at that time. Considering the location of it in the village of Glendale, and what does appear from the evidence, that it was in an entirely unimproved condition, it is tolerably evident that the property was not worth more than twice as much as the twelve hundred and fifty dollars which was to be given by Father Carey to the orphan asylum at Cumminsville; so to a certain extent, there was provided a consideration to be paid by the church for this property, for Father Carey at that time represented the church, and there is no evidence that any consideration was paid by Archbishop Purcell. Mrs. Dietrich further testified that Gross and Dietrich and their families were Roman Catholics; and that the property was improved and used, and the burying ground used before they left Glendale. It also appears by the testimony of Julia Barron, who was formerly connected with the orphan asylum at Cumminsville and kept the accounts, that the following entries appear: "December, 1863, Rev. Mr. Carey, Glendale, 100 dollars; July, 1865, Rev. F. Carey, on note, 450 dollars; November, 1865, legacy of Gross and Dietrich, 200 dollars; aggregating in all, $750. These entries corroborate Mrs. Dietrich's testimony.

There is attached to Father O'Donnell's deposition, a note of Father Carey, dated December 4, 1863, to the orphan asylum at Cumminsville

for $1,250, described as being the sum agreed to be paid out of the donation of land in Glendale, made by St. Gabriel's church. Now, it is true that the recitals of that note are not binding and conclusive upon the court in this case, but a recitation in a document of that age to that effect, and when there was no interest in any one to state other than the facts as they then appeared, must be taken to have some weight. This tends to corroborate, in fact it shows almost conclusively, that there was an agreement by the church, or Father Carey representing the church, to give to the orphan asylum at Cumminsville, $1,250, in consideration of the conveyance of this property by Gross and Deitrich to Archbishop Purcell. The presumption would be, naturally, that the property while conveyed to Archbishop Purcell to hold the title, was actually conveyed for the use and benefit of the congregation at Glendale.

It also appears, from the testimony of Richard Cox by deposition, that he bought, somewhere in 1862 to 1865, the exact time is not given, two of the principle lots, 4 and 5, of this subdivision. I may remark, in passing, that it appears from the testimony that lots 1, 2 and 3 were occupied for cemetery purposes, and that lot 6 was at first used by the church for the erection of a building for church purposes. Richard Cox testifies that his negotiations were with, and that he purchased these lots of Father Carey, then pastor of the church, though the deeds were made by Archbishop Purcell; but he says he did not see Archbishop Purcell in reference to the purchase, and that he paid Father Carey the money. He says he paid in cash, notes, and work for the church in improving the property; and attached to his deposition, there are notes which appear to have been paid, receipts and other papers, going to show that his negotiations and transactions were actually held with Father Carey, and that Archbishop Purcell had nothing to do with the transaction, except to execute the deed; and that the consideration for these lots went into the hands of Father Carey, and was by him used in connection with the church property. Father O'Donnell testifies also, that he borrowed money for the use of the church from Edward Purcell, and repaid it to him. He also testifies by deposition, that the church borrowed money from the Glendale Mutual Savings Association, and for this, a mortgage was executed upon a portion of the church property by Archbishop Purcell; but it is very evident that the money was received by Father O'Donnell and used for church purposes, and was repaid to the Building Association, in the manner in which such payments are ordinarily made, by the church congregation, and that Archbishop Purcell had nothing to do with this, except execute the mortgage.

The remaining facts in the case, without going through them at any great length, may be summed up as general evidences of occupation, and use by the congregation of the property. It appears from the evidence, that from the time this conveyance was first made, the congregation at Glendale took charge of the property, cleared it off, improved it, placed it under fence, keeping it in one enclosure, treating the property as really one lot. For that reason I speak of it as a rectangular lot of a certain size. It is clear that this property was never actually divided off into separate enclosures according to the terms of the original subdivision, but that from the time the conveyances were made, the church kept it as one lot, occupied it, and controlled it, entirely and exclusively. They have made all the improvements upon it, they have placed upon it a church, a school, a residence for the priest and a residence for the sisters employed in teaching the school, beautified the grounds by [illegible]

ting out shade trees, by laying out walks and drives, apparently without any reference to the subdivision of the lots or lot lines.

The lots mortgaged in this case, as the testimony shows, do not have upon them any buildings, and it would seem that some one must have gone there prior to the execution of the mortgage and ascertained just what lots there were which had no buildings upon them, because the lots that are embraced in this mortgage are the only lots in the sub-division that have no actual buildings upon them, but yet they have upon them walks and drives in connection with the church property occupied by buildings, and they have upon them the improvements and evidences of occupation to which I have already referred that have been made by the church during the time they have used and occupied them. If we are to assume, as I think we may safely assume, that if the controversy were between the assignee of John B. and Edward Purcell, and this church, there would be no doubt that the property would have been decided by the court to be held by Archbishop Purcell in trust for the church, still it may be said in this case that John T. Hooper was an innocent purchaser; that he parted with a valuable consideration for the mortgage, in that he agreed to extend the mortgage for a year, although the mortgage was given for an antecedent debt. If, however, John T. Hooper was fairly advised by the facts in the case, and all the surrounding circumstances, that Archbishop Purcell, although he held the title in fee to this lot, still held it in trust for the church, then he is in no better position than the assignee would have been.

It is settled now by the decision of Mannix against Purcell, that the archbishop was the only person who could take the legal title of property. None of these congregations, so far as I am aware, were incorporated, and by the canons and decrees of the church the archbishop was the proper person to hold the title to property of the church, but he held it for church uses and church purposes, and as our Supreme Court have held, he held the separate tracts for the uses of the separate churches so far as they actually occupied and used those tracts, or so much as may have been necessary for such church use.

Now, if we consider the question whether John T. Hooper was advised of this trust sufficiently, so that he could not be reasonably called an innocent purchaser, then all this evidence of use and occupation comes in. The fact that the deed was made to John B. Purcell for a nominal consideration; the fact that all these conveyances that had been made inured to the benefit of the church, could have been easily ascertained. The fact that the church was in the actual use and occupation of the property, in the manner in which they were, treating it all as one tract, could be seen and no doubt was seen, and the fact that they were not only occupying it and using it, but that they had improved it, and had brought it to the condition it now is from an entirely waste and improductive tract of land, uninclosed, unused in any way, all could have been ascertained.

It seems to me I have indicated enough to show that in my opinion the plaintiffs in this case should prevail, and that a decree should be granted in their favor.

Lincoln, Stephens & Lincoln, for plaintiff.

Healy & Brannan, for defendant.

## INJUNCTION. 258

[Hamilton Common Pleas.]

HARRY DIXON v. BIRD VARNISH CO.

A judgment of a justice of the peace of this state, the record of which shows service of summons on the defendant, will not be enjoined on the ground that there was in fact no service, where the judgment plaintiff was not guilty of any fraud, collusion or coercion, and the debt was in fact due so that another trial would not result differently.

SHRODER, J.

The action was for an injunction to restrain the enforcing of a judgment rendered by a justice of the peace, and for a decree setting the judgment aside. The plaintiff was not served with summons, and did not know of the proceedings until too late to take the case to the common pleas, but the record set forth that at the trial the parties appeared, and the return of the constable was that the plaintiff was served with summons at his residence. Upon the evidence the court found that the plaintiff was owing to the defendant the amount of the magistrate judgment. No misconduct, fraud, collusion or coercion were chargeable to the defendant or his attorneys.

*Held:* It is settled in this state in respect to domestic judgments of courts of general jurisdiction, when it appears by the record that the court has found affirmatively the fact on which its jurisdiction rested, that such jurisdiction can not be collaterally questioned. 13 Ohio St., 446–455. 16 Ohio St., 182; 35 Ohio St., 552; 39 Ohio St., 366; 43 Ohio St., 78. Where the jurisdiction appeared on the magistrate's record, his judgment is as impregnable against collateral attack as those of any other tribunal. 43 Ohio St., 78. If relief is sought in a court of equity, either to set aside the judgment or enjoin its enforcement, it will not be granted unless the case is founded upon some ground of relief, such as fraud, collusion, coercion or some misconduct securing defendant an unconscionable advantage, and where the plaintiff has a meritorious defense, so that the result, if the judgment were set aside, would be other or different from that already reached. 43 Ohio St., 85; 37 Ohio St., 502; Arrowsmith v. Harmoning, U. S. S. C., 102, 103.

Petition dismissed.

H. Muller, for plaintiff.

Burch & Johnson, for defendant.

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## RAILWAY—CONTRACTORS. 275

[Superior Court of Cincinnati, Special Term, 1889.]

FARMERS' LOAN AND TRUST CO. v. THE CINCINNATI, WASHINGTON & BALTIMORE RAILROAD CO. ET AL.

1. Section 3398 of the Revised Statutes should be fairly construed so as to effect the purpose for which it was enacted.

2 In an action to marshal liens where the holder of a judgment for "materials and supplies" furnished in accordance with the provisions of that section, claims priority over mortgages existing before the supplies were furnished, the burden of proof is upon such claimant to show not only that he has obtained such judgment, but also that the cause of action upon which it was obtained was such as to come within the terms of sec. 3398.

3. Other holders of liens upon the railroad were not necessary or proper parties to the original action in which the judgment was obtained, and the question of priority can properly be heard and determined in a subsequent action to marshal liens.

4. Claims for supplies furnished under sec. 3398, may be assigned and judgment thereon taken by the assignee, who thereupon obtains the same right of priority as the original claimant would have obtained if the judgment had been taken by him.

PECK, J.

The only questions in the case arise upon the answer and cross-petition of the Baltimore & Ohio Railroad Company, which has been made a party defendant, and alleges, in substance, that it is the holder of an unsatisfied judgment for the sum of $1,220,307.62, rendered in this court against the Cincinnati, Washington & Baltimore Railroad Company, for materials and supplies furnished to the last named company since the date of its reorganization under the laws of Ohio in the year 1888. It is also alleged that although the materials and supplies were furnished since the date of plaintiff's mortgages, March 31, 1883, and the judgment therefor obtained in the year 1888, the judgment is, nevertheless, a lien upon the property of C., W. & B. Railroad Company prior to the lien of any of the mortgages, and the sale of the road and satisfaction of the judgment from the proceeds of the sale are prayed for. The plaintiff, in reply formally denies the allegations of the cross-petition.

At the hearing of the case evidence was offered by the Baltimore & Ohio Railroad Company, showing the rendition of the judgment by confession upon an account stated for materials and supplies furnished, and certain officers of the C., W. & B. Company were called as witnesses, who testified, in substance, that it was discovered soon after the reorganization that the income of that company was insufficient to pay fixed charges and running expenses, and thereupon an understanding was had with the officers of the B. & O. Company, in pursuance of which the officers of the C., W. & B., one of whom was also an officer of the B. & O., from time to time purchased materials and supplies necessary for the operation of the road, the bills for which were paid with funds of the B. & O. Company, remitted upon drafts for that purpose, and as each bill was paid, an assignment of the same was taken from the holder thereof to the B. & O. Company. Blank forms were provided for the purpose, and separate accounts of these transactions were kept by the officers of each company. The accounts were offered in evidence, and, upon comparison, found to agree, and to show that the supplies furnished were such as are ordinarily used in the operation of railroads, and it was further shown by testimony that the supplies were received and used on the C. W. & B. road.

There is no room for dispute about the facts, and the only questions relate to the construction and effect of sec. 3398 of the Revised Statutes. The C., W. & B. Railroad Company having been reorganized under the chapter of the statutes of which that section is a part, and the mortgage having been executed as a part of the scheme of reorganization, the holders of bonds secured thereby are, necessarily, bound by the terms of the statute. When they elected to reorganize under these statutes,

they must be presumed to have consented to the following provisions contained in them: Section 3398, "The lien of mortgages and deeds of trust authorized to be made by the preceding section shall be postponed to the lien of judgments recovered against the company for labor thereafter performed for it, or materials or supplies thereafter furnished to it, or for damages, losses or injuries thereafter suffered or sustained by the misconduct of its agents, or in any action founded on its contract or liability as a common carrier thereafter made or incurred." It is urged that this section should be strictly construed so as to limit the effect upon existing liens as narrowly as possible. The purpose of the statute is obviously to secure to the road, in any event, the supplies necessary to the ordinary conduct of its business, so that in case of insolvency its running may not be suspended for want of credit, and that the natural equity inherent in the claims of persons under such circumstances furnishing it with articles necessary to its existence shall be protected. The equity is much stronger in cases like the present, where the earnings of the road for and during the time when the supplies were being furnished, were applied to the payment of interest on the liens with which it conflicts. Fosdick v. Schall, 99 U. S., 235; Miltenberger v. Logansport R. Co., 106 *id.*, 286; Union Trust Co. v. Souther, 107 *id.*, 594; Burnham v. Bowen, 111 U. S., 776; Union Trust Co. v. Morrison, 125 U. S., 612; St Louis Ry. Co. v. Cleveland Ry. Co., 125 U. S., 673. If the running of cars upon the road should be interrupted for want of such supplies, not only would the public, for whose convenience railroads are built, be discommoded, but the earnings wherewith to pay interest upon the bonds would cease. In view of the objects sought to be accomplished by the statute, and the fact that mortgagees can only be subjected to its terms by their own consent, it does not appear to be a case for strict construction, but rather one where the language is to be fairly interpreted so as to effect the legislative intent. This appears to have been the spirit in which it was considered by the Supreme Court of the United States in Jeffrey v. Moran, 101 U. S., 285, 288.

It is urged that as the plaintiff was no party to the former action, it is not bound by that judgment, and that the effect of the judgment can not now be enlarged by extrinsic evidence as to the nature of the cause of action for which it was rendered. The first of the two propositions is indisputable. Plaintiff is undoubtedly entitled to a day in court upon the question of priority, and as it was not a party to the former action, it remains to be ascertained whether that question can be properly determined in this. Plaintiff was neither a necessary nor a proper party to the former case, which was an action upon an account stated. The section in question neither conferred the right of action, nor created the judgment lien, both of which existed without reference to it. The whole effect of the section is to give preference to the lien of such a judgment, when obtained, over the other classes of liens therein mentioned. It is of no effect until after judgment rendered, and hence could hardly be held to effect any change in the procedure necessary to obtain judgment. Nor can we assume that it was intended that in every action at law upon a claim for labor, materials or supplies, all such lien-holders as the plaintiff should be made parties. They are in no way interested in such actions, and if made parties could have offered no defense other than that which could as well be made by the company without them. It is only when the lien of a judgment so obtained is brought into conflict with the liens held by them, that they have a right to be heard.

When a priority over them is asserted they may dispute not only the validity of the judgment, but, also, the cause of action upon which it was based. The usual method of asserting and determining priorities is in an equitable action to marshal liens, and such is the object of the cross-petition herein. As the other lien-holders were not proper parties to the former action, and yet have the right to be heard upon the question of priority, there would seem to be no other way in which the judgment creditor can assert his claim to priority than in the subsequent proceedings where the other lien-holders are parties, and as their right to be heard extends to the foundation of his claim, there is thus thrown upon him the burden of proving both the nature of his original cause of action and the fact that a judgment thereon was rendered in his favor. I can perceive no reason why the B. & O. Railroad Company should not assert and prove its claim to priority in this action, nor how the other lien-holders can be deprived of any advantage by permitting that to be done. Coming as that company does with the burden of proving both the nature of the original cause of action, and the rendition of the judgment thereon, the plaintiff has a day in court under circumstances as favorable as it could have had at any previous time.

The fact that a judgment was rendered is not disputed. The accounts submitted show beyond question that materials and supplies were furnished by various persons to the C., W. & B. Company; that the bills for the same were paid by the B. & O. Company and the claims assigned by the holders thereof to the latter company. On these facts two propositions are urged by counsel for plaintiff. First, that the priority given by the statute to this sort of liens is in the nature of a personal right, as has been sometimes held of mechanic's liens, and, therefore, is not assignable, so that the B. & O. Company can not stand in the shoes of the persons who originally furnished the materials and supplies. As I read the statute, it is not personal, but the right to priority is made to depend upon the nature of the claim upon which the judgment is based. It is not the person who has furnished materials and supplies who has a lien, nor is priority conferred upon the person who obtains a judgment for materials or supplies furnished by him, but the lien of judgments for materials and supplies is declared prior to other liens. Claims of this sort have always been assignable in this state, and judgments thereon procurable by the assignees. In view of this well-known practice it is to be presumed that if the legislature had intended that the right to priority should be limited to the person who furnished the materials and supplies, language adapted to the purpose would have been used instead of words which ignore the person of the judgment creditor, and fix upon the nature of the claim as a test of the right to priority. See Union Trust Company v. Walker, 107 U. S., 596, and; Putnam v. News Co., 6 Dec. Re., 1231.

The other claim advanced in behalf of plaintiff is, that the transaction was not in reality a furnishing of materials and supplies, but was a loan of money by one company to the other. This claim is based upon the fact that the purchases were made, pursuant to a previous arrangement, with money furnished for that purpose by the B. & O. Company. The effect of the previous arrangement would, in this aspect of the case, seem to be that the supplies were furnished by the B. & O. Company, acting through one of its own officers, and the officers of the C., W. & B. Company, or perhaps through the latter company itself. The authority was to purchase a specified class of articles, the bills to be paid by the B.

& O. Company. There was no advancing of money for general purposes, and no authority to use the credit of the B. & O. Company in any way, except to make the purchases of supplies. All this would indicate that the C., W. & B. Company was the agent of the B. & O. Company for the making of the purchases, and the fact that the supplies were for the use of the agent does not alter the case. Whether we regard it as a furnishing of supplies directed by the B. & O. Company, or by other parties of whom the B. & O. Company is assignee, the result is the same. And it seems quite clear that it was one or the other, and not a mere loan of money.

The lien of the judgment is prior to that of the mortgages and a decree may be entered accordingly.

Herbert B. Turner, Wheeler H. Peckham, Edward R. Bacon, for plaintiff.

Harmon Colston, Goldsmith & Hoadly, for B. & O. R. R. Co.

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## JUDGMENT IN DIVORCE CASES. 277

[Hamilton Common Pleas, April Term, 1889.]

### †MULLANE ET AL. v. FOLGER ET AL.

A decree in a divorce suit, allowing the wife alimony in gross and making the same a charge upon the husband's lands, if not kept alive by issuing executions at proper times, becomes dormant like an ordinary judgment at law and ceases to be a lien.

MAXWELL, J.

This was a proceeding to partition lands. The commissioners reported that the lands could not be divided by metes and bounds, and thereupon an order of sale having issued, the lands were sold and the proceeds brought into court for distribution. One of the defendants is Virginia C. Webster, formerly Virginia C. Dennis. She was formerly married to Obed F. Dennis, but was divorced from him at the October term, 1874, of this court. The court, at the same time it granted the divorce, allowed her the sum of $1,000.00 as alimony in gross and ordered that the same should be charged upon any lands or interest in lands that Obed F. Dennis might have, and that the lien should continue until the $1,000.00 was paid. No part of this sum has ever been paid, nor has anything been done to enforce the payment. Obed F. Dennis is dead, and his interest in the lands sold in this case will, it is said, be insufficient to pay his debts. Virginia C. Webster claims that the decree in her favor for the $1,000.00 is still a valid and existing lien upon the interest of Obed F. Dennis in the lands sold, or the proceeds in court, while his other creditors claim that her decree has become dormant; that she has lost her lien, and must share *pro rata* with the other creditors.

The history of legislation on the subject of alimony as connected with divorce, in this state, is briefly as follows:

The first act will be found in 1 Chase, 192, published July 15, 1795, to take effect October 1, 1795, and was adopted from the Massachusetts statute.

†A contrary opinion is found in Webster v. Dennis, 2 Circ. Dec., 566.

It reads—"the woman shall be allowed out of the man's personal estate such alimony as the court may think reasonable. The judges may use such kind of process to carry their judgment into effect as to them shall seem expedient."

The second act will be found in 1 Chase, 493, passed Dec. 29, 1804. It reads —"the woman shall be allowed out of the man's real and personal estate such share as the court shall think reasonable."

The third act will be found in 2 Chase 1210, passed January 11, 1822, and is in the same language as the second act.

The fourth act will be found in 2 Chase 1408, passed January 7, 1824. The only difference between this act and the second act is that the word "husband's" is substituted for "man's."

In 32 Ohio Laws, page 37, sec. 3, it is provided that divorce proceedings shall be as in chancery.

The next act will be found in 51 Ohio Laws, p. 379, sec. 7. It reads —"the wife shall be allowed such alimony out of her husband's real and personal property as the court shall think reasonable, which alimony may be allowed to her in real or personal property, or both, or by decreeing to her such sum of money, payable either in gross or in installments, as the court may deem just and equitable."

Section 5699, Rev. Stat., contains the same provisions as the act in 51 Ohio L.

A glance at the various acts will show that the legislature began with the idea of setting off to the wife, or dividing, the personal property of the husband; then they progressed to a setting off, or dividing, both personal and real property, and finally they gave the courts power in so many words, to decree or award, to the wife, a sum of money, payable either in gross or in installments. It would seem, however, from an examination of our Supreme Court Reports, that the court assumed the right to decree a sum of money to the wife before the legislature had reached that point.

The Supreme Court has also, in the case of Olin v. Hungerford, 10 Ohio, 268, held, that the court may make alimony a lien upon the real estate of the husband.

The syllabus of the case is, "a decree for alimony to be paid in installments does not operate as a lien upon the real estate of the defendant, unless made a charge thereon by the decree itself."

In the opinion, the court say, "that it is within the legitimate power of the court to make such a decree a charge upon real estate we have no doubt."

What the exact nature of that lien is, and how long it continues without any effort to enforce it, under the law as it is now, the Supreme Court has not decided, unless we may consider that certain expressions in various opinions are to have decisive weight.

In Mattox v. Mattox, 2 Ohio, 233, the court speak of a divorce proceeding as an equitable one. This case was decided in 1826, before the passage of the act providing that divorce proceedings should be as in chancery. Yet, in the case of Olin v. Hungerford, *supra*, the court say: "We consider liens of this description to be creatures of the statute." And again, "it is a statutory proceeding throughout"; again, "prior to the amendatory act of March 1, 1834, there could be no more propriety in calling the proceedings in a divorce case, proceedings in chancery, than there would be in calling proceedings for the partition of real estate, under the statute regulating that subject, proceedings in chancery."

The court in this case clearly say, that in the absence of the provision of March 1, 1834, not in force now, divorce proceedings are purely statutory. This position would require no argument, were it not for a notion prevalent now, that a divorce proceeding is an equitable one.

In the case of Cooper v. Cooper, 24 Ohio St., 488, the court speak of a wife who has a decree for alimony against her husband, charged upon his lands, as a judgment creditor of her husband.

Part of the difficulty, no doubt, has grown out of the legal position, that a judgment can not be rendered against either husband or wife in favor of the other. But passing this legal fiction, what is a decree for a sum of money as alimony in favor of the wife against her husband but a statutory judgment against him? It is for a certain sum of money, ordered by the court to be paid, and it can only be enforced by an execution. That is held, in almost so many words, in the case of Olin v. Hungerford, *supra*. The only difference between such a judgment and judgments at law seems to be that it is not strictly a judgment against the person, for the reason that a judgment can not be rendered in favor of the wife against the husband, as a person.

It seems clear to me that a decree for alimony, being a statutory judgment, and being, in all respects but one, an ordinary judgment at law, it is subject to the limitations imposed upon ordinary judgments under sec. 5380, Rev. Stat., and therefore the decree in favor of Mrs. Webster, not having been kept alive by execution, has become dormant, and is not a lien on the estate of Obed F. Dennis.

**Reuben Tyler for Mrs. Virginia C. Webster.**

**Paxton & Warrington, for the creditors of Obed F. Dennis.**

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## INSANITY. 279

**[Hamilton Probate Court.]**

**IN RE LAST WILL OF J. W. UNDERHILL.**

**The cocaine habit, producing hallucinations, which do not appear to be of a kind which influenced the disposition of property, may yet involve a degree of unsoundness of mind and impairment of general faculties as to be fatal to testamentary capacity.**

GOEBEL, J.

Dr. J. W. Underhill, on the tenth day of September, 1886, executed a paper writing, purporting to be his last will and testament, in which he devised substantially, his property equally between his children, and appointed J. Wm. Johnson as executor, and Theodore Spear, guardian for his minor children. On the eighth day of January, 1887, he executed a paper writing, purporting to be a codicil to his last will and testament, revoking the appointment of Theo. Spear as guardian, and appointing Dr. Chas. A. Burhaus as guardian of his minor children.

Dr. Underhill died on the twenty-eighth day of January, 1889. This paper writing is now offered for probate. In support thereof, Wm. H. Jones, Dr. Trush and Dr. Thacker, subscribing witnesses to the will, Charles F. Klayer and Wm. Catinaud, subscribing witnesses to the codicil, were called, together with other witnesses.

Dr. Underhill was, for many years, a physician in good practice in this city. He became addicted to the use of morphine, and, subsequently to the use of cocaine, and was using these drugs at the time of the execution of this paper writing, and up to the time of his death.

To what extent he was using cocaine at the time of the execution of this paper, the testimony does not disclose. It is evident that the habit grew upon him, and from time to time he increased the doses, so that during the latter period of his life, he was taking sixty grains per day.

Prior to, and after the execution of this paper he was laboring under hallucinations, that persons were pursuing him, and intended to do him bodily harm; that he was in danger of his life, and carried fire-arms; he imagined that friends (whom he considered enemies), intended to incarcerate him in an asylum. He secluded himself from them, writing insulting letters, and complaining of their actions and conduct towards him, when there was nothing to complain of. When remonstrated with, he would apologize, and again make the complaint.

At the time of the execution of this paper, he was at the Hotel Emery, in this city, having returned from a place in Kentucky. He was then under medical treatment by Doctors Trush and Thacker, two of the subscribing witnesses. On that day, these hallucinations did not manifest themselves.

Prior to, and at that time, and after the execution of this paper, he was laboring under an illusion of having bacteria. He imagined that they were present in his body, and were creeping through his skin; he constanty spoke of them, and insisted upon a microscopical examination of specimens of scrapings which he had sent to Dr. Thacker. He could not be persuaded that he did not have bacteria.

At the time of the execution of this paper, he was under the influence of cocoaine. Aside from the hallucinations and illusions, at times he would talk rationally upon subjects, and then his mind seemed to be clear. At the time of the signing of the paper, Mr. Jones believed him to be of sound mind; Doctors Trush and Thacker that he was of unsound mind.

There is no conflict in the testimony as to this habit. As to his mental condition at the time of the execution of this paper, whatever it may have been, the hallucinations and illusions were of a diseased mind, the rsult of a continued and excessive use of cocaine.

Was Dr. Underhill at the time of the execution of this paper, a person of sound mind and under no restraint? Until permanent disorder is proved to exist no presumption of insanity can arise; sanity, being the normal condition of the human mind, is favored by the general presumption. Under section 5929, Rev. Stat., the burden of proof is upon the party offering the will for probate.

The American and English authorities hold that a partial unsoundness, not affecting the general faculties, and not operating on the mind of a testator, in regard to testamentary dispositions, is not sufficient to render a person incapable of disposing of his property by will.

It must be conceded that the hallucinations and illusions, in point of fact, had no influence whatever, on the mind of the testator, in regard to testamentary disposition. Persons of unsound mind are not wholly without reason. In the midst of lunacy, the logical operations of the mind, though disturbed, are not necessarily extinguished. The innate force of logic frequently reasserts itself in the midst of incoherency, and gives consistency of action; again, such persons may do right, or do

wrong in a particular matter. Hence, having made such disposition of his property as the law would have made, in the absence of a will, affords no conclusive test of the soundness of his mind.

Nor can we conclude therefrom, that he had testamentary capacity. The question still remains, was he of sound mind? Or rather, how far is the degree of unsoundness of mind involved in the hallucinations and illusions under which Dr. Underhill labored, as would make it fatal to a testamentary capacity.

This being a question of fact to be determined from the evidence, our conclusion is, that by a long continued and excessive use of cocaine, his general faculties became so impaired that, at the time of the execution of this paper writing, he was of unsound mind.

Wm. H. Jones and Johnson & Levy, for the executor.

Ramsey, Maxwell & Ramsey, for heirs.

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## LIBELS. 292

[Superior Court of Cincinnati, General Term, 1889.]

COMMERCIAL GAZETTE CO. v. ANNIE GROOMS.

1. A newspaper corporation is liable in exemplary damages for the publication of a libel where the agent to whom was entrusted authority and discretion to publish the article containing the libel, was in so doing, guilty of actual malice toward the plaintiff, or of that degree of wanton recklessness which in law is the equivalent of actual malice.
2. One of the elements of damage from a libel to be considered by the jury in their estimate of compensatory damages is the mental suffering of the plaintiff. Upon the question of the amount of such suffering, the plaintiff is a competent witness.
3. To admit evidence of unconscious acts done and words spoken by the plaintiff in the presence only of her husband is a violation of sec. 5241, clause 3 of the Rev. Stat., and is error which may be taken advantage of in a reviewing court if at the trial objection was made to the question and a motion was made to rule out the answer, and the ruling of the court was excepted to in each case without stating the ground.

TAFT, J.

This was an action for libel resulting in a verdict and judgment at special term for a substantial sum in favor of the defendant in error, Mrs. Annie Grooms. The Commercial Gazette Company seeks to reverse that judgment for errors committed by the trial court. It was in evidence that the city editor of the defendant below received a telephone message that an important item of news could be obtained at a fire engine station, at Ninth and Freeman streets in this city; that he sent Johnston, a regular reporter of the paper, to get the item, that Johnston found a man named Myers; a fireman, who told him a story which he embodied in an article for publication, charging Mrs. Grooms with adultery with a fellow fireman of Myers; that he handed the article to the managing editor who glanced at it and sent it up to be printed, relying on Johnston's assurance that all the statements in the article could be corroborated. It was further in evidence that Johnston was a careful reporter. Counsel for the company asked the following charge:

"If you find that the publication complained of was false; that the same was prepared by Johnston, a reported of defendant, on investigation

made by him; that the defendant did not know or have reason to know that it was false, and that the defendant was not negligent in selecting and retaining Johnston as a reporter, then the defendant is exempt from what are called punitive damages in this case, and is held only to such damages as plaintiff has actually suffered." The court refused to give this charge, and the refusal is relied on as error. It is argued that a newspaper can not be held for exemplary damages unless express malice is brought home to it, and that malice of its agents can not be imputed to it for such purpose. It is said in Cooley on Torts, 219, and the Post Co. v. McArthur, 16 Mich., 447, that a newspaper proprietor can not be mulcted with exemplary damages for malice or wanton recklessness of a reporter unless it appear that there was negligence in selecting the reporter, or the paper is in the habit of publishing sensational reports derogatory to the character of people. This is to hold in effect, that a newspaper proprietor can not be made liable in exemplary damages unless he has expressly authorized a wanton libel, and supports the claim of counsel for the company. See also Eviston v. Kramer et al., 57 Wisconsin, 577.

We do not think, however, that the rule laid down in the cases cited is supported either by the Ohio authorities, or the weight of authority generally. In this state, exemplary damages may be allowed in all actions for tort where the act complained of involved malice, insult or fraud. Roberts v. Mason, 10 Ohio St., 277. Peckhams Iron Co. v. Harper, 41 Ohio St., 100, it appeared that Harper fraudulently procured a sale of iron to his firm from the plaintiff and appropriated the proceeds of his fraud to himself without informing his partners of the transaction, although acting in the name of the firm in making the sale. It was held that it was a case where exemplary damages might be allowed against all the members of the firm notwithstanding the fact that Harper was the only member cognizant of the fraud or deriving benefit from it.

The decision was put upon the ground that the making of the sale was within the scope of Harper's agency for the firm, and the firm was therefore civilly liable for the fraud so committed with all its consequences although enjoying none of its fruits. It is difficult to see why, if a principal is liable in exemplary damages for the fraud of his agent's acts within the scope of the agency, when the principal derives no benefit from the fraud, he should not also be liable in exemplary damages for the malice of his agent in acts within the scope of the agency. It certainly is no less the policy of the law to discourage malice than fraud.

But we are not left to the analogy between fraud and malice for the rule in this state. In Railroad Company v. Dunn, 19 Ohio St., 162, our Supreme Court lay down the following as the law:

"A corporation may be subjected to exemplary or punitive damages for tortious acts of its agents or servants done within the scope of their employment, in all cases where natural persons acting for themselves would be liable to such damages." The principle was there applied to the act of a railway conductor in using unnecessary force to eject a passenger from the train of the defendant company. It was within the scope of the conductor's authority to decide for the company, when a passenger should be ejected and how much force should be used. For the malice or its equivalent, the wanton recklessness of the conductor in the exercise of such authority, the company was held liable in exemplary damages. Judges White and Welch dissented from this decision, but for

more than twenty years, the majority decision has stood unshaken as the law of Ohio.

In the case at bar, it was within the scope of Johnston's agency for the newspaper company, to investigate the facts in regard to the news-item upon which he had been detailed, and to decide upon the truth of the information which he was to embody in an article for publication. If in the discharge of this duty and the exercise of the authority thus imposed, he was guilty of malice or wanton recklessness toward the person who was the subject of the article, for such malice or reckless disregard of the rights of another, the newspaper company is clearly liable in exemplary damages, upon the authority of Railway Co. v. Dunn, just cited. Indeed, the case of a newspaper and its reporter is a stronger case for the application of the principle there laid down, than that of a railroad company and its conductor. In the latter case, the tort is committed before any other agent of the company itself has any notice, while in the former, at least in cases of libel *per se* like the one at bar, the company is put upon notice of the possible character and effect of the article when presented for publication, and may be said by the publication to knowingly assume all its consequences. The principle we follow is expressly upheld in Massachusetts, in Lothrop v. Adams, 133 Mass., 471, where the action was for libel against three partners who were publishing a newspaper. By the statutes of Massachusetts, the defendant may give in evidence the truth of the matter charged as libellous, "and such evidence shall be deemed a sufficient justification, unless malicious intention shall be proved." It appeared that only one partner knew of the article or its publication. Counsel asked the court to charge that the other two partners could not be held liable for the one who published the article. This the court refused to do, but told the jury that as the one was the agent of the other two, they were liable for his express malice. The Supreme Court of Massachusetts held that this was not error. Judge Field, in an elaborate opinion, shows, by numerous authorities, that the malice or fraud of agents, when characterizing and accompanying acts done by them within the scope of the business entrusted to their discretion, is imputable to their principals; and that this is true of corporations as well as individuals. He suggests that if the ground of holding a principal for the fraud of his agent is that the principal profits thereby, so, by analogy, a newspaper should be made liable for the malice of its agents, because it has received whatever of benefit there may be in the publication of the libel. See also Reed v. Home Savings Bank, 130 Mass., 443; Philadelphia, Wilm. & Balt. R. R. Co. v. Quigley, 21 How., 202; Whitfield v. South Eastern Ry., Ellis Bl. & El., 115; Mackey v. Commercial Bank L. R. 5 P. C., 394.

From what has been said, it follows that where a newspaper corporation employs a reporter to write articles containing statements which, if untrue, are libellous on their face, and publishes them, the corporation may be held liable in exemplary damages for the malice or wanton recklessness of its reporter. The charge requested was rightly refused.

The other principal ground of error complained of is the admission of evidence tending to show mental suffering by Mrs. Grooms produced by the publication of the article. Mrs. Grooms was permitted to testify as to its extent. Her physician, who attended her when ill subsequent to the publication, was allowed to testify of the presence of mental disturbance in that illness which could be attributed to no other cause, and Mrs. Grooms' husband gave evidence which was received of Mrs. Grooms'

somnambulism to which she was not subject before the publication, and during which her acts and words were wholly of the libel and its author.

The most natural result from an injury to reputation is mental suffering and it is a proper element to be considered in estimating damages in a libel suit. In Terwillinger v. Wands, 17 N. Y., 54, and Wilson v. Goit, 17 N. Y., 442, the suits were for slander for words not *per se* actionable, and it was sought to make them so by the sole allegation of special damage to feelings. It was held that no action would lie, because the gist of the action being injury to reputation, where no such injury was alleged, there was no slander. So in Sheffil v. Van Dousen, 13 Gray, 304, it was held that words, otherwise slanderous, uttered only in the presence of the plaintiff, though injurious to his feelings, gave no right of action. But these cases do not in any way conflict with the proposition that injury to feelings caused not by the charge itself, but by the loss of reputation from its publication, is a proper element of damage when the libel or slander is in fact proven. Hamilton v. Eno, 16 Hun., 599; affirmed 81 N. Y., 122; Chesley v. Thompson, 137 Mass., 138; Wilson v. Noonan, 35 Wisc., 321; Rea v. Harrington, 33 Vt., 151; Zeliff v. Jennings, 61 Texas, 453; Swift v. Dickerman, 31 Conn., 295. In Ohio the only decision expressly affirming the principle is in Van Ingen v. Newton, 2 Disney, 432, a decision by Judge Gholson. But in Smith v. The Railway Co., 23 Ohio St., 10, an action for physical injury, the Supreme Court held that "in an action for a personal tort, an injury to the feelings naturally and necessarily resulting from the wrongful act, may be considered by the jury in their estimate of compensatory damages." And the reasoning of Judge McIlvaine leaves no doubt that the rule must be applied in cases of libel. It is claimed by counsel for plaintiff in error that even if mental suffering is to be compensated for in a libel case, the amount of such suffering is to be determined from the nature of the libel and circumstances, but not from direct evidence of such suffering. It is urged that such evidence ought not to be received any more than evidence of attorney's fees where the jury is authorized to allow a reasonable amount in the verdict. We think that there is no analogy between the two. Mental suffering is a painful condition of mind. Intent is a condition of mind. The same kind of evidence is competent to prove either. In Coal Co. v. Davenport, 37 Ohio St., 194, it is held that where a person's intent in doing an act is in question that person may be permitted to testify what his intent was. Say the court, "whatever may be thought of the truthfulness of such witness, it is clear that his means of knowledge are ample; and certainly it is no objection to the competency of a witness that his means of knowledge as to the fact, to-wit: the intent, surpass the means of any other witness as to the same fact." So as to mental suffering, if it is in issue, it would seem to follow that the evidence of the plaintiff herself, who knows better than any one what she has suffered, woud be competent. Accordingly in Chesley v. Thompson, 137 Mass., 136, the Supreme Court of that state holds that evidence of the plaintiff as to his mental suffering is competent evidence.

Whether persons other than the plaintiff can testify to her mental suffering is a much more doubtful question. They can only judge by her actions and words, and as these are more or less under her control, such evidence partakes of the nature of hearsay. It has been decided in Stowe v. Heywood, 7 Allen, 123, and Rea v. Harrington, 58 Vt., 181, that such evidence can not be received because of the danger that mental

suffering may be feigned. The court below distinguished the evidence of the physician in the case at bar from the cases just cited on the ground that his knowledge was founded on his expert observations of the illness following the publication and mental disturbance following that attack. The evidence of the husband as to his wife's somnambulism was admitted, on the ground that this was an unconscious expression of mental suffering, and could not be said to be hearsay. These distinctions may be sound, but there is another objection, presented for the first time in this court, which makes the admission of the husband's evidence upon this point a fatal error. By paragraph 3 of sec. 5241 Rev. Stat., it is provided that neither husband nor wife shall testify "concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or the act done, in the known presence or hearing of a third person competent to be a witness." Counsel for the defendant in error rely on the case of Westerman v. Westerman, 25 Ohio St., 500, where the Supreme Court in considering an alleged error of the trial court in admitting conversation between husband and wife say the evidence that a third person was present at the time of making such communications, or doing such acts, is for the court and not for the jury and, on error will be presumed to have been given to the court unless the contrary appears. It is contended that there is no evidence that a third person was not present in the case at bar, and, under the case cited, it must be presumed that the court had evidence that there was. We are of opinion, however, that the circumstances raise a presumption of fact that no third person was present. It is in evidence that the plaintiff and her husband rented and lived in one room. This somnambulism took place at night after both husband and wife had retired to bed and after she had gone to sleep. The known presence of a third person at such time, and under such circumstances, would be unusual. We think that the evidence tends to show that no one was present but Mr. and Mrs. Grooms. The admission of the husband's evidence upon this point was, therefore, error. The objection and exception taken to its admission stated no particular ground. The fact that the violation of sec. 5241 was not specifically urged as a reason for its rejection on the trial does not, we think deprive the plaintiff in error of a right to complain of its admission on that ground in this court. An objection was made to the question, and a motion was made to strike out the answer, and each was overruled and exception taken. The evidence was of a character apt to impress a jury with the intensity of Mrs. Groom's mental suffering and we can not, therefore, say that its admission was not prejudicial to the plaintiff in error. As there must be a new trial, we have thought it best to consider other questions presented on the record to serve as a guide therein, although they were not necessary in reaching our conclusion here.

Judgment reversed and new trial ordered.

PECK and MOORE Judges, concur.

Follett & Kelley, for Mrs. Grooms.

T. M. Hinkle and I. M. Jordan, for Com. Gazette Co.

## 295 CONTRACTS—COVENANTS—PLEADING.

[Superior Court of Cincinnati, General Term, 1889.]

ROBT. C. SMITH, WM. E. SMITH ET AL. v. GEORGE A. SMITH'S, ADMRS.

1. In a contract signed by more than two parties containing a variety of conditions and covenants, the question whether any one party is bound by any particular covenant is to be determined from the language of the whole contract read in the light of surrounding circumstances on principles similar to those used in reaching the meaning of any such covenant between the parties who are bound thereby.
2. Where the petition alleges a contract made by the defendant, and the proof shows a contract made jointly by the defendant and another, this is not a variance entitling defendant to a non-suit. At common law, the defendant might have pleaded the joint contract in abatement to the suit, and by failing to do so, waived the objection.
3. Under the code, formal pleas of abatement are probably abolished, but they may be alleged in the answer as a defense, and a failure to make such defense waives the objection of a non-joinder of the other joint contractor.

TAFT, J.

Plaintiffs and Geo. A. Smith, defendants' intestate, were adjoining property owners on Walnut street, in this city. Plaintiffs allege that Geo. A. Smith, who was constructing a building upon his lot, agreed with them that in excavating below nine feet for his foundation and cellar, he would protect their lot and the houses thereon, from any injury by reason of such excavation; that he failed to so protect their building, and that they thereby suffered damages. Defendants, administrators of George A. Smith, first deny generally, and then for a second defense say that if any injury has happened, it has been repaired. The case was tried to a jury, and a verdict returned for the plaintiffs for seven hundred dollars. The case was reserved for the decision of this court on defendants' motion to set this verdict aside and for a new trial.

Defendants' main ground for complaint of the verdict, is, that there was such a variance between the allegations of the petition and the proof, as to entitle them to a nonsuit. It is claimed that the contract introduced in evidence was a joint contract of George A. Smith and Fidelia C. Smith, while the contract declared on was one which bound him alone.

The agreement introduced in evidence, was substantially as follows:

"This agreement, made this thirteenth day of October, 1886, between George A. Smith and Fidelia C. Smith, his wife, parties of the first part, and Robert C. Smith, Wm. E. Smith, A. Denniston Smith, Anna B. Smith, Martha C. Smith, parties of the second part:

"Witnesseth; Whereas said George A. Smith of the first part, is the owner (then follows the description of his lot); and whereas said parties of the second part are the owners (then follows a description of their lot).

"And whereas said George A. Smith, party of the first part, is about to erect a building of eight stories above the street, on the premises owned by him.

"And whereas it is desired by said parties to construct a party wall, which shall stand equally on the property of said parties; said wall to be eight stories high above the street, and with a basement and subcellar below the street.

"Now, therefore, said parties agree with each other as follows:

"First—The said George A. Smith of the first part, agrees to construct said party wall" (then follow a detailed description of the wall.)

The second article provides for a payment by the parties of the second part, for future uses of the wall above their present building.

Third, said parties covenant and agree with each other for themselves, their heirs and assigns, that so long as said wall shall remain it shall be a party wall for common use, and further that said wall shall not be torn down by either party without the consent of the other for twenty-five years.

Fourth contains a stipulation that parties of the second part shall have the right to use the party wall to the height of their present building for nothing.

"It is further agreed that said George A. Smith, party of the first part, in taking down the present partition wall and building the wall provided for by this agreement, shall protect, at his own expense, the premises of said party of the second part to the extent that may be necessary by reason of his excavating the cellar on his premises below the depth of nine feet from the curb."

In testimony whereof, said parties have hereunto set their hands and seals the day and year aforesaid.

Signed, George A. Smith,
Fidelia C. Smith
and the others.

The contract is acknowledged by all parties with a separate examination of Fidelia C. Smith.

It is claimed by counsel for defendant that Fidelia C. Smith is jointly bound with her husband to the performance of every condition of this contract. We do not think this to be a reasonable construction. Fidelia C. Smith is named as the wife of George A. Smith in the recitals. The contract is one which was supposed and intended by the parties to mutually exchange easements in land to continue for twenty-five years. George A. Smith's wife, with her inchoate right of dower was a very proper party to the conveyance of such an easement. In those clauses of the contract where the right of the easement is secured, the reference to the parties in the contract is general so as to include Mrs. Smith, but in those clauses which are agreements for the doing of something George A. Smith is alone mentioned. This occurs in the first and last provisions. It is claimed by counsel that the last clause should be read to mean "It is further agreed by George A. Smith and Fidelia C. Smith, that said George A. Smith, party of the first part in taking down, etc., will protect at his own expense." Now it is true that one person may contract that another shall do a thing at his own expense even, if the contracting party is the wife of the person whose expenditure is contracted for. But certainly it is not usual, and in view of the circumstances referred to, we do not think such a construction reasonable. What this last provision means is that George A. Smith, party of the first part, agrees to protect, at his own expense, etc. We have no doubt that such would be the construction if Fidelia Smith had been made a party to this suit and it had been sought to hold her for a breach of this covenant. It must be conceded that simply because one signs her name to a contract where there are more than two contracting parties and there are many covenants of different kinds, she is not necessarily bound by every one. The contract must be taken up by the four corners and the intention of the parties as to which of the parties is to be bound to each covenant must be

reached on the same principles which govern us in coming to a conclusion as to the meaning of any of its terms. By this method, we are convinced that George A. Smith was alone intended to be bound by the covenant for a breach of which this suit was brought.

But even if we are wrong upon this point, we are still of the opinion that there was no variance, and that even if this was a joint agreement, it sufficiently sustained the allegations of the petition. At common law, if one of a number of joint obligors were sued and the declaration did not show that the obligation was joint, the defendant might plead in abatement the fact that there were joint obligors with him who should be made parties; but if he failed so to plead and proceeded to trial on the general issue, he was held to have waived the right to object to proof of the joint contract and a recovery thereon against him. Dicey on Parties, pp. 230, 560, 562, rules 49, 115, 116; Pomeroy's Remedial Rights, secs. 279, 299; Sheldon v. Banks, 10 Gray, 401; Whelpdale's case, 5 Coke Reports, 119; Cabell v. Vaughan, 1 Saunders' Reports, 291 note 4; Rice v. Shute, 5 Burr. Rep., 2611; Gilman v. Rives, 10 Peters, 299, opinion by Justice Story; Gilmore v. Bank, 3 Ohio, 503. Under the code, pleas in abatement are probably abolished, and what could be formerly so pleaded is now matter of defense. Bliss on Code Pleading, sec. 345; Swett v. Tuttle, 14 N. Y., 465; Gardner v. Clark, 21 N. Y., 399. A failure to allege that the contract was joint, in the answer, would seem, therefore, to have the same effect as a waiver that a failure to plead in abatement had before the code. Especially is this the case since our code has not changed the common law rule as to suing on joint contracts, Bazell v. Belcher, 31 Ohio St., 572; Aucker v. Adams, 23 Ohio St., 543.

Another ground of error urged by counsel for defendants is the admission of evidence of a conversation between George A. Smith and a tenant of plaintiff's in which Smith said that he was going down more than twenty feet and that it would be dangerous for the tenant to stay. The conversation was had before the contract. The evidence was admissable to show that when George A. Smith entered into the contract to protect this building from injury he knew that a breach of that contract would deprive plaintiffs of the use of their building for renting premises, and therefore to show that loss of rent was within the contemplation of the parties to the contract as a probable result of its breach, and a proper element in calculating the damages.

It is further claimed that the court erred in refusing to give a charge asked by defendants as to the duty of defendant to reduce damages. In the general charge the court referred to the subject as follows: "I have been asked to give you special charge upon the duty of the plaintiffs to diminish their damages. It is true that if the plaintiffs had reasonable ground to anticipate damage and by the exercise of ordinary care might have prevented it, they can only recover what it would have cost them to prevent it, with interest on that amount from the time when it would have been used. In other words, they must have been reasonably diligent to prevent the occurrence of the injury which a reasonable man would have anticipated. If loss of rent might have been prevented by reasonable diligence on the part of the plaintiffs, then they can only recover for the rent during the time necessary to exercise that reasonable diligence, and as I have said what it would cost in the exercise of that reasonable diligence to prevent the loss of rent." We think this charge

certainly as favorable to defendants as the law justifies, and perhaps more so.

Lastly defendant's counsel urge that the verdict is excessive. A calculation shows that on plaintiff's evidence a verdict of not more than five hundred dollars should have been rendered. The verdict will be reduced therefore to $500 from $700 if plaintiffs consent. If their consent is withheld then a new trial will be granted

PECK & MOORE, JJ., concur.

Franklin T. Cahill, for plaintiffs.

Simeon Johnson, Albert Bettinger, for defendants.

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## STREET ASSESSMENTS. 297

[Superior Court of Cincinnati, General Term, 1889.]

### †HENRY KNORR ET AL. V. CINCINNATI (CITY.) ET AL.

1. The requirement of sec. 2264 of the Rev. Stat., that council shall determine in advance what part of the cost of a street improvement shall be assessed upon abutting property, is a condition precedent to the exercise of the power to assess, and where the declaration of council is such as to exclude a particular item of the cost of the improvement from the assessment, a subsequent assessment including such item is to that extent invalid.
2. The provisions of sec. 2193, requiring the board of improvements, in cases where an assessment is required, to report to council, "with an estimate of the amount to be assessed," are applicable to the board of public affairs of the city of Cincinnati, and where that board reports a resolution declaring the necessity of a certain improvement, with a recommendation that it be passed attached to an estimate of the cost of the improvement, which estimate sets forth the amount to be assessed upon the abutting property in such a manner as to exclude the belief that it was their intention to include the amount of damages paid to the abutting owners as part of the assessment, it is to be presumed that the statement of the amount to be assessed was made by the board to the council in pursuance of the duty imposed by sec. 2193, and council in adopting the resolution with such estimate and statement attached, is presumed to have accepted and adopted as its own, the declaration of the amount to be assessed.
3. The estimate required by secs. 2213, 2214, is only an estimate of the cost of construction, while that provided for by sec. 2193 is an estimate of the amount to be assessed, which may include any or all the items mentioned in sec. 2284.

RESERVED on the pleadings and evidence.

PECK, J.

The purpose of the action is to enjoin the collection of a part of an assessment levied by the authorities of the city upon the property of the defendants abutting on Hunt street between a point 740 feet south of the Montgomery road and McMillan street, to pay the cost of improving Hunt street between the points aforesaid. Two objections to the assessment are set forth in the petition, but one of them, viz., that it exceeds twenty-five per cent. of the taxable value of the property, need not be considered, because it is conceded by the city solicitor to be well taken, and wherever the assessment exceeds that amount it will be reduced to the proper sum.

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†This judgment was affirmed by the Supreme Court without report, October 28, 1890.

The real controversy in the case respects the claim of plaintiffs that the $42,603.66 damages paid to owners of abutting property for injury caused to the same by the construction of the improvement was included in the assessment, thereby increasing the same to the extent of about $5 per foot front. The plaintiffs claim that it was illegal to include such damages in the assessment for several reasons.

First, because the statutes provide for a different mode of proceeding in cases where property is to be appropriated and the cost of appropriation is to be assessed upon the abutting property. That in such case it is required that notice of the proposed assessment for condemnation shall be given as well as of the assessment for improvement; that the two are distinct; and that notice of the one does not include notice of the other, and that the resolution and ordinance to improve adopted by council in this case only gave notice of the intention to assess the cost of the construction of the improvement upon the abutting property.

It will be observed that this claim is wholly based upon the proposition that the proceedings to assess damages are in effect proceedings in appropriation, and that the assessment to pay the damages should be levied in accordance with the provisions of the statutes providing for assessments to pay the cost of property appropriated. This proposition is based upon the further claim that the record discloses that the damage to the abutting property was caused by a large fill, and that damages paid under such circumstances are to be presumed to have included an easement of support for the fill so made, and that an interest in the property is thereby acquired. As matter of fact the record does not disclose with any degree of clearness how the damages were caused. It does disclose the fact that a fill was made, but how much of the injury for which compensation was paid to the abutting owners was thereby occasioned does not appear. It does not necessarily follow that compensation for the damages included any acquisition of an interest in the property. It is true that an easement of support for a roadway may be appropriated without also appropriating the fee. Dodson v. Cincinnati, 34 Ohio St., 276; but it does not follow that the payment for damages occasioned by a fill constitutes the appropriation of such easement. Circumstances may be readily imagined where the compensation so paid would extend only to the direct injury to the improvements on the property. In fact, the filling of vacant property up to the grade of the street is usually regarded as a benefit, and the circumstances would have to be peculiar to authorize the recovery of any damages for such filling, and this is so well known as almost to authorize a presumption of fact that when damages are paid for injuries occasioned by the filling of a street extending over upon abutting property, it is the injury to the improvements for which compensation is being made.

An examination of the statutes relating to the assessment and payment of damages in such cases will, we think, show that it was not contemplated that such proceedings should include the appropriation of any interest in the property. Provision is made for the filing of claims and the assessment of damages, either before or after the completion of the improvement, by the verdict of a jury, and in certain cases by three disinterested free-holders—secs. 2315 to 2334—but the damages so to be assessed, are such as the property holder might recover in an action at law—and he could hardly enforce an appropriation of his property upon the city by such action. That the damages to be assessed are of the sort indicated, is shown by various provisions of the statutes, but

especially by secs. 2325 and 2326. The latter, to a certain extent, regulates the bringing of actions for such damages, and the former provides that if the property-owner does not accept the award of the assessors, but brings his action, and does not recover more than the amount allowed by the assessors, he shall pay the costs. On this point we conclude that in the absence of any direct evidence showing that the compensation assessed was intended to or did include payment for any interest in the property, it is to be presumed that the assessment only covered damages such as could be recovered by the property-holder in an action brought by him. It is therefore unnecessary to consider plaintiffs' other proposition on this point.

It is next contended that no preliminary determination to assess the damages as a part of the cost of the improvement upon the abutting property, was made by the council as required by sec. 2264, which provides that the council may decline to assess the cost of the improvement or any part thereof except as thereinafter provided, on the general tax list, "in which event, such cost and expenses, or any part thereof which may not be so assessed on the general tax list, shall be assessed by the council on the abutting and such adjacent and contiguous or other benefitted lots and lands in the corporation, either in proportion to the bnefits which may result from the improvement, or according to the value of the property assessed, or by the feet front of the property abutting upon the improvement, as the council, by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made."

We are not disposed to dispute the proposition that this section requires of the council a preliminary determination as to the part of the cost to be assessed upon abutting or benefitted property, the mode by which the assessment is to be levied, and the lands to be assessed.

The question to be determined here, is whether the council has complied with these requirements. The resolution declaring the necessity of the improvement, and the ordinance to improve, indisputably determine that the assessment shall be by the foot front, and upon the property abutting upon the improvement; and the only question discussed, is whether either of them contains a determination as to the part of the cost to be assessed, so worded as to include the damages mentioned.

The resolution sets forth that "the expense of the said improvement, is to be assessed per front foot upon property bounding and abutting thereon, according to the law and ordinances upon the subject of assessments." The provisions of the ordinance as to the assessment is that "the expenses of said improvement, including interest on bonds, if they be issued, shall be assessed per front foot, upon the property abutting thereon according to the laws and ordinances on the subject of assessments, etc., and as to the damage it contains the following:

"SEC. 3. That the damages to the abutting owners who have filed claims for damages by reason of said improvement shall be determined before the construction of said improvement is commenced, and the city solicitor is directed to proceed to ascertain the amounts of damages without delay." Pursuant to these provisions the damages were ascertained before the making of the improvement, and were included in the amount assessed upon the property as before stated.

The language of both resolution and ordinance is broad enough to include the damages, for it is quite clear that the payment for the damages was a necessary part of the "expense of the improvement." The

statute, sec. 2234, expressly provides that the cost of any improvement shall include "the damages assessed in favor of adjoining lands." It is claimed, however, that because there is a special provision as to mode of ascertaining of the damages, and a special provision that interest on the bonds if they are issued shall be included, it is to be inferred that the council did not intend to provide that the damages should be included in the assessment. If the general language of the ordinance is broad enough to cover the damages, then we can perceive no reason for excluding them from its operation because of the provisions as to the time when the amount of damages should be ascertained—a provision which the statute required council to make. Sec. 2316. Language which includes the total cost of the improvement, necessarily includes the damages paid which were caused by the improvement, and such a provision as that contained in sec. 8, of the ordinance *supra*, in no way limits the meaning of the same. So also of the provision as to interest, as to which there were reasons for special mention, not applicable to the matter of damages.

The real controversy on this point arises out of the fact that along with the resolution to improve was transmitted an estimate which upon its face purports to set forth the total cost of the improvement to be assessed, which estimate of cost is made up entirely of items of construction, such as grading, masonry, and the like, so that it necessarily excludes the idea that damages formed any part the estimate, and it further contains the statement that the "expense to property owners," shall be about $8.96 per foot, which is about what the assessment would be if damages were excluded, while it is about $14.00 per foot front including damages. If the estimate is to be treated as a part of the resolution, it may limit the words therein " the expense of the improvement shall be assessed," to the expense of construction as shown by the estimate; but if it is not to be treated as a part of the resolution, the language of the latter is, as we have seen, broad enough to include the damages. It is claimed that sec. 2214 makes it the duty of the board of public affairs to transmit to council with the resolution an estimate of the cost of the work—and that this estimate was transmitted in accordance therewith—and is, therefore, necessarily to be treated as a part of the resolution for any and every purpose. There is a difference between such expressions as "the cost of the work," or "the cost of construction," and the phrase "cost of improvement," which difference is clearly recognized by sec. 2234. The former would ordinarily mean only the cost of the work and materials necessary to construct the improvement, while the latter includes every sort of expense incident to the improvement, including damages.

The provisions of sec. 2214, requiring the transmission of an estimate, we take to relate to an estimate of the cost of construction, because the next section contains the provision that " no contract shall be awarded to any bidder the cost of which will exceed the estimate transmitted to council." These sections taken together plainly indicate that the required estimate is intended as a limitation upon the power to contract for the construction of the work—and the matter of the damages to be paid to abutting owners has no connection with determining what shall be paid a contractor for his work and materials—and hence has no place in an estimate of the cost of construction. It follows that if the estimate was transmitted solely in compliance with sec. 2214, it was and is to be understood as an estimate of the cost of construction only, and

connot limit the words "expense of the improvement" found in the resolution and ordinance, so as to exclude the damages from the assessment.

The question, however, remains as to the effect of sec. 2193, which is in the chapter relating to the board of improvements. There is no such board in this city, but sec. 2212 provides that the board of public affairs shall have all the powers of such board of improvements and shall be governed by the same rules, when not inconsistent with the provisions of the chapter relating to the board of public affairs. As we find nothing in that chapter inconsistent with sec. 2193, we conclude that the provisions of the latter are applicable to the board of public affairs, and so applying it, we find it to be the duty of that board, when an assessment is required, to report the same, "with an estimate of the amount to be assessed, to the council, which shall take such action thereon as may be deemed proper." It is to be presumed that when the board reported to the council that the amount to be assessed should be the cost of construction of which the estimate consisted, it was not intended to include anything else in the assessment. It will be observed that the estimate provided for in sec. 2193 is not the same as that required by sec. 2214. The former is an estimate of the amount to be assessed, and the latter, as before stated, of the cost of construction only.

In Hubbard v. Norton, 28 Ohio St., 116, it was held that the requirement now embodied in sec. 2193, as to the transmission of an estimate, is not a condition precedent to the exercise of the power to assess—but the learned judge who delivered the opinion in that case, speaks of it as one of the duties of the board, and such it undoubtedly is; and when, as in the case at bar, the board undertakes to perform its duty in that behalf, due effect must necessarily be given its action as affecting the purposes and intention of the municipal authorities. It did transmit an estimate of the amount to be assessed, with the resolution to improve, and upon the same sheet of paper. The resolution as framed by the board, if taken alone, contained expressions which are broad enough to include the damages in the assessment there provided for, but the same board in the estimate, specifically stated the amount to be assessed, so as to exclude the damages—and if we were endeavoring to get at the intention of the board of public affairs alone, we should unhesitatingly say that the amount which its members intended to be assessed upon the abutting property, is there so explicitly stated as to leave no room for doubt, and that amount is made up solely of the cost of construction. It is difficult to perceive why the same rule of construction shall not be applied to the action of council in this case. The latter body received the resolution with the recommendation and estimate attached to it, and adopted it without the change of a letter. It is to be presumed that these bodies were aware of their statutory duties, and endeavored to perform them. They were attempting to estimate and declare the part of the cost of the proposed improvement to be assessed upon the abutting property. Taking it altogether, as we must, we conclude that council did not declare that these damages were to be included in assessment, but their declaration was such as to necessarily exclude them from the assessment, and as such declaration is a condition precedent to the exercise of the power to assess, the assessment which includes the damages is to that extent invalid.

We do not regard this as strict construction, but rather that it is the only construction, which under the circumstances can be put upon the

action taken, but if it be strict construction, that is what is enjoined upon us by sec. 2327.

The ordinance to improve is to be presumed to have been passed with reference to the resolution, the passage of which is a jurisdictional step in such proceedings, Stephan v. Daniels, *supra*, and the ordinance is to be construed in connection with the resolution accompanied by the estimate and recommendation, all of which form part of the same proceeding, Cincinnati v. Seasongood, ante 46 O. S., 296; so that the language of the ordinance is likewise limited by the estimate of the amount to be assessed transmitted by the board of public affairs. This conclusion is strengthened by the fact that a copy of the same estimate is attached to the resolution to contract for the construction of the improvement—the last step taken prior to the actual performance of the work.

The judgment is for the plaintiffs, enjoining the collection of that portion of the assessment which includes the damages paid the owners of abutting property.

TAFT and MOORE, JJ., concur.

Wm. Worthington, F. C. Ampt and Oliver B. Jones, for plaintiffs.

Horstman, Hadden, Foraker & Jones, *contra*.

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## 301 WILLS—IMBECILITY.

[Hamilton Probate Court, 1889.]

IN RE GUARDIAN FOR NANCY TEMPEST.

A guardian for a person will not be appointed on the ground of imbecility (R. S., sec. 6302) where a clear-headed person has by reason of age and infirmity become weak in mind, susceptible to influence, of impaired memory and less careful than formerly, if capacity to manage property still exists. There must be more than would constitute absence of testamentary capacity.

GOEBEL, J.

Hannah Donaldson and Mary Jane Stanley allege in their petition that they are the daughters of Nancy Tempest, a resident of this county, who is the owner of an estate consisting of real and personal property; that the said Nancy Tempest is an imbecile, and is totally incapable of properly taking care of and preserving her property, and is, in fact, disposing of the same without consideration, and is otherwise improvidentially and injudiciously administering and caring for her said estate, so that the same will be entirely lost, unless the court shall interpose. And they pray for the appointment of a guardian to take charge of the estate of the said Nancy Tempest.

To this petition Nancy Tempest files her answer, maintaining that she is not an imbecile, or that she is incapable of taking care of, or preserving her property, or that she is disposing of the same without consideration. That she is in good health physically, of sound mind, and entirely capable of managing her own affairs. Upon this issue the parties went to trial, and the testimony discloses the following facts:

Nancy Tempest is in the 65th year of her age. She came with her husband, Michael Tempest, from England to this country 40 years ago, without means. He established a little business of manufacturing earthen-

ware in which he was greatly assisted by her. As the business increased, it was enlarged and became very profitable, and he was thereby enabled to accumulate property. He died in 1886, leaving a last will, in which he made provisions for his wife, and devised the remainder of his estate to Hannah, Mary Jane, and James, his children, in equal shares, and constituted James a trustee to hold in trust, the shares of Hannah and Mary Jane during their lives, and to pay to them the income and profits; the fee to the children of Hannah and Mary Jane.

Nancy Tempest, in her early days, was a woman possessing great physical endurance, of robust constitution, of positive character, attentive and economical in the management of her household. Her husband would make her an allowance for household expenses, and out of this, during a period or many years, she was enabled to save quite a sum. With this amount, she purchased real estate, and made investments in gas stock, street railroad stocks and Little Miami R. R. stocks.

Hannah and Mary Jane were married, and after that did not make their home with their parents. James is unmarried, was for many years in the employ of his father, always devoted to his parents, exemplary in his habits and made his home with his parents.

Nancy Tempest, desiring to make a disposition of her property to some extent, during her lifetime, and considering the devotion and attention which James had given her, endorsed, transferred and assigned to him, certain stocks to the value of $5,000.00, and executed a paper writing in which she divides the balance of the stocks in three parts, between Hannah, Mary Jane and James. These stocks to be held by James in trust during her lifetime, and to pay her the income; after her death, to make an equal distribution between Hannah, Mary and James, after deducting therefrom, an amount that Hannah had received from her father, and an amount James had loaned her, from her share.

She also executed a paper writing in which she devised her real estate in three parts, giving to Samuel Hatheral the shares of Hannah and Mary, in trust, to pay them the income during their lives, devising the fee to their heirs; and gives to James his share absolutely.

Her reason for making such disposition in reference to Hannah and Mary Jane, was that her husband has made a similar disposition of his property. She had confidence in her daughters, but not in their husbands. And this was a subject much talked about between her husband and herself, and was the reason why he made such disposition.

About five years ago, Mrs. Tempest went to Florida, and, while there, was seized with a violent attack of dysentery. She returned home, and was quite ill. Dr. Trush was called and attended her until about the middle of February. He was succeeded by Dr. Bradford, who said that she had recovered from her attack of dysentery, when he found that her mind was affected. She could not carry on a connected conversation, would forget what she had said, and seemed to have no memory. He advised that Dr. Everts be consulted.

Thereupon Mrs. Tempest, together with her husband, did see Dr. Everts. He examined and questioned her, and found that she was suffering from premature *senile dementia*, that it was organic. He does not remember whether he prescribed for her, and did not see her again until four years thereafter. He then had occasion to see her again, and this examination confirmed him as to his first diagnosis.

Mrs. Tempest made her home for a considerable part, with Mrs. Donaldson, her daughter. She noticed that her mother was restless and

flighty at night, would talk incoherently, and attempted to jump out of the window. She was irritable, and, at times, melancholy. After the first attack, Mrs. Tempest made a trip to England, attended to the duties of her household, nursed her husband and one daughter through their last illness, and there is no further evidence which would call forth any criticisms upon her conduct, until in the fall of 1888, when she was again attacked with dysentery and rheumatism.

Dr. Owens was then called to attend her, and he observed nothing which would disclose any mental trouble. She seemed to have recovered, and then went to her daughter, Mrs. Stanley. Mrs. Stanley says that she was restless and despondent, was feeling badly and Dr. Countryman was called to attend her. He came to see her three times, prescribed for a stomach derangement, and did not observe any mental unsoundness. Fearing that her mental troubles would return, she again consulted Dr. Everts; and this is the occasion already referred to, in Dr. Everts' testimony.

She returned home, and Dr. Geohegan was frequently called to attend her for rheumatism and other ailments. He observed nothing unusual in her conduct, nothing that attracted his attention as to any mental trouble.

Dr. Lyle, a friend of the family, frequently visited her, observed nothing wrong with her mind. During the progress of this case, Dr. Comegys was called to make an examination with reference to her mental condition. After a careful examination, he was of the opinion that she is not suffering from *senile dementia*, or that she is a person of unsound mind.

The petitioner called one —— Nettleton, who has been employed as a nurse, and had remained four or five weeks in attendance upon Mrs. Tempest. Her testimony does not throw any light upon the question whether Mrs. Tempest is of unsound mind; it is directed exclusively, to the conduct of James, with reference to his mother, and the influence which he seemed to exercise over her. Nor does the testimony of Mrs. Craig, who was an old friend of Mrs. Tempest, throw any light upon this subject.

About that time, she had lost her husband and daughter, she had been seriously ill, and was then suffering from some stomach trouble. Dr. Priest, a very intelligent gentleman, pastor of Westminster Church on Price Hill, a neighbor and a friend of the family, a frequent caller before and after the death of Mr. Tempest, having opportunity of observing her conduct, found her to be an intelligent, rational, and a person of more than average firmness of character.

Mr. Oldham, member of the Bar, who had made his home with Mrs. Tempest, from the middle of July to the middle of August, 1888, had spent a number of evenings during that period with her, and found her exceedingly quaint and interesting. He was struck with the shrewdness of her observations, and by the force and clearness of expression of ideas. They conversed upon current topics, discussed religion, values of property, investments, etc.

Samuel Hatheral, Mrs. Hatheral and Mrs. Lyle, all have known her for many years, and have found her to be a woman of positive character and more than average firmness and intelligence.

Prior to 1872, no authority existed for the appointment of guardians for imbeciles. By section 6302 of the Revised Statutes, the authority is extended. Under the prior statute (sec. 41, S. & C., 387), three things

were requisite to the jurisdiction of the court. 1st. That the person is an idiot or a lunatic. 2d. That he is a resident of the county, having legal settlement in some township thereof. 3d. That such appointment is necessary for the preservation of his property. Under the present statute, the necessity for the appointment of a guardian to preserve property is omitted, leaving but two things requisite, namely, is he an idiot, lunatic or imbecile, and is he a resident of the county.

Our first inquiry, therefore, would be, is Nancy Tempest an imbecile? If she is, it must follow that her property and the management thereof, goes in the custody of a guardian. Until permanent disorder is proved to exist, no presumption of insanity can arise. Sanity, being the normal condition of the human mind, is favored by the general presumption, and the burden of proof is upon those asserting the contrary.

Mere weakness of mind is not a ground for interference. If there be a capacity to manage as the result of sanitive reasoning, although the management might not be such as an intelligent, vigorous and skillful mind may approve, a jury will not be justified in finding him insane. Re. Schneider, 59 Penn. St., 328.

Weakness and infirmity coupled with old age, and when easily susceptible of influence which would authorize the setting aside of a will, would not amount to unsoundness, to warrant the appointment of a guardian. Re. Collins, 18 N. J. Eq., 258.

It must appear that the mind is so unsound, that it can not apply its faculties to the management of its affairs or the government of himself. Re. Linsey, 15 A. T. Report, 1. Supreme Court of Errors and Appeals, N. J.

Nor would the fact that memory is greatly impaired, warrant the appointment of a guardian. 4 N. H., 60; Fairfield v. Gulliver, 49 Me., 360.

Nor would the fact that a person, less careful of his property than formerly, or subject to the influence of extravagant children, and wasting his property, justify the appointment of a guardian. Darling v. Bennett, 8 Mass., 129.

Chief Justice Campbell, in the case of Re Storick, 31 North Western Reporter, 584, in charging the jury, said: "The infirmity must be such as to render her incompetent to have charge of any affairs, or do any business. If it does not extend that far, then she should not be found by you incompetent. If Mrs. Storick is possessed of ordinary sagacity, and insight into affairs, so that she knows how to care for her house and table, and clothing; to deliver and transact ordinary affairs, and is not so insane, nor so foolish or imbecile, as to have no mind or intelligence regarding ordinary matters and affairs which she is accustomed to know of, then you are not to find her incompetent." Whether the court can find Nancy Tempest to be an imbecile, depends upon the testimony as presented. The recognized ability of Dr. Everts as an expert on insanity, has made us waiver somewhat in our conclusions. Whatever may be the state of her mind, the testimony does not warrant us in finding that Nancy Tempest is suffering from senile dementia, and to this extent, we think Dr. Everts was mistaken in his diagnosis. That Nancy Tempest was suffering from some mental trouble four yeare ago, is apparent, but we are not prepared to say, from the evidence before us, that she is an imbecile.

We have had opportunity to examine and observe her for many days, during the progress of this case. Our conclusion is, that, while she is

not an educated woman, she has exercised in her relations to her affairs, judgment, economy and prudence, and we ought not to interfere.

It is not within our province in this case, to determine whether she has testamentary capacity, nor are we called upon to say whether the paper writing, in reference to the disposition of her personal property, was a just or unjust disposition, or whether the gift to James, was unworthily bestowed. The acts done do not call for an expression as to her mental condition.

The application is denied and the petition will be dismissed.

Bateman & Harper, for Nancy Tempest.

Judge Worthington and F. M. Coppock, for the petitioners.

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## 313 PLEDGE OF SHARES OF STOCK—PLEADING.

[Superior Court of Cincinnati, General Term, 1889.]

FREDERIKA KREBS v. ARTHUR FORBRIGER ET AL.

1. An answer by a judgment debtor to a creditor's bill that the choses in action sought to be subjected to the judgment are not the property of the debtor, raises no issue, and it is error upon such answer and evidence adduced in support thereof, for the court to find that the choses in action are not the property of the debtor, and to dismiss the bill.
2. Where a pledgor delivers to his pledgee, as the pledge, a certificate for shares of stock in a corporation, and endorses the same with words of assignment in blank and with an irrevocable power of attorney to transfer the same on the books of the corporation, also in blank, the pledgor is estopped to assert any title to said stock against an innocent purchaser for value from the pledgee, although the pledgee in making such sale has violated the contract of pledge as to terms of sale.
3. The doctrine of lis pendens does not apply to certificates of shares of stock transferable by such blank endorsement and power of attorney.

TAFT, J.

This was an action in the court below in the nature of a bill in equity by the plaintiff, Frederika Krebs, a judgment creditor of Arthur Forbriger to subject to the payment of such judgment, shares of stock in the Krebs Lithographing Company of the par value of $10,000.00. The company made no answer and was in default. Arthur Forbriger answered, alleging that he had before this action pledged all his stock to his sister to secure a debt owing by him to her. Subsequently he was given leave to amend his answer to conform to the proof as to just what had been done with the stock. The judgment debtor and the corporation were the only parties to the suit. On the hearing the plaintiff proved that, on the transfer book of the corporation, the shares were still in the name of Forbriger, the judgment debtor, proved his judgment and rested. Then, over the objection of plaintiff, Arthur Forbriger was permitted to show what in fact had been done with the stock. The court below made a finding that on the evidence adduced, George Forbriger had no interest in the shares of stock sought to be subjected, and that the petition should be dismissed. Plaintiff made a motion for a new trial which is reserved to this court for decision.

In the first place, we are of opinion that the answer of George Forbriger, either in its original form, or as amended to conform to the

evidence, was no defense to the action, and that, as supporting its allegations, no evidence on its behalf should have been admitted. If A's property is sought to pay B's debt, it is for A. to make defense, and not B. This is clearly brought out in the case of Langdon & Bro. v. Conklin & Martin, 10 Ohio St., 439, where it was held not competent for a defendant in attachment to move the court to discharge the attachment on the ground that the property attached did not belong to him, and that it was error for the court to grant such motion. With the evidence adduced by Forbriger excluded, the evidence for the plaintiff made a perfect case for a decree for sale of the shares against the corporation to pay Forbriger's debt. It is clear, therefore, that the finding of the court below, on the evidence properly before it, was erroneous, and that a new trial must be granted.

In so holding, however, it becomes necessary for us to consider what the proper course trial court will be when the case comes up for a new trial. Whether evidence adduced by Forbriger was relevant to the issue before the court below or not, we presume that being before the court, it was within the power of the court to consider it for the purpose of determining whether it was proper or necessary to make new parties to the action, and that we may make the same use of it. The action is an equitable one, the subject-matter of which is the sale of stock to pay a debt. Under secs. 5006 and 5018, Rev. Stat., it is clear that the court may order any person having or claiming an interest in that stock to be made parties. While a decree for sale could only affect the actual interest of Arthur Forbriger in the stock at the time the action was begun, it would be unusual for a court of equity, with the power to bring all claimants before it, to attempt to sell what, though clearly a nominal interest, may in fact be nothing more. This brings us then to the question in the case which has been most discussed. Does the evidence set forth in the bill of exceptions disclose an interest in the stock in others than George Forbriger, making it proper to have such others made parties?

The evidence discloses the following state of fact. George Forbriger was the owner of $10,000.00 of the par value of the company's stock in 1887. In 1888, several months before the bringing of this action, he pledged the stock to his sister to secure a debt owing by him to her. In July, 1888, as agent for his sister, he took the stock to a broker to be sold under the pledge. The certificate was in the usual form. "This is to certify that George Forbriger is entitled to one hundred shares in the capital stock of the Krebs Lithographing Co. of Cincinnati, transferable only on the books of the company in person or by attorney on surrender of this certificate." Signed and sealed by the officers of the company. The certificate was indorsed "For value received the undersigned hereby sell and transfer to ———— shares of stock within mentioned and described, and hereby appoint ———— true and lawful attorney irrevocable (with power of substitution) to transfer said stock on the books of the company," and signed by George Forbriger. On the fourteenth of September, 1888, the summons in the present action was served upon the Lithographing Company and Forbriger. At some time during the last week of September the broker, in whose hands Miss Forbriger had put the stock, exchanged it for stock in another company, delivering the certificate to the purchaser. Miss Forbriger, the sister, had an interest as pledgee in the stock with power of sale and with notice of such sale given to the pledgor, when plaintiff's suit was begun. Her right to sell to pay her debt could not of course be affected by plaintiff's action. It

is claimed however for plaintiff, that while she might have sold for cash, she could not exchange, and that her transferee took no title to the stock under such tortious exercise of her power, except that of pledgee *i. e.* the same right which Miss Forbriger had. The claim is based on two grounds, first that stock is non-negotiable and second, the action by plaintiff was *lis pendens* and notice to the world of plaintiff's right to subject Forbriger's interest as pledgor in the stock.

As between the pledgor and the pledgee of stock, the pledgee holds neither the equitable nor the legal title, but only a special property. And so in Henkle v. Salem Mf'g Company, 39 Ohio St., 547, 553, it was held that the pledgee of stock who had not transferred the stock into his name on the books of the company, was not liable as the equitable owner of the stock to creditors of the corporation. But it is to be borne in mind that although as between pledgor and pledgee, the pledgee had only the special property, the pledgor had given to the pledgee all the indicia of full equitable title by a written assignment with an irrevocable power to confer the legal title. The Supreme Court Commission of Ohio, in Combes v. Chandler, 33 Ohio St., 178, 185, quotes the following from Pomeroy on Legal Remedies, 160. "The owner of certain things in action not technically negotiable, but which, in the course of business customs, have acquired a semi-negotiable character as a matter of fact, may assign or part with them for a special purpose, and at the same time may clothe the assignee, or person to whom they have been delivered, with such apparent indicia of title, and instruments of complete ownership over them and power to dispose of them, as to estop himself from setting up against a second assignee, to whom the securities have been transferred in good faith, for value, the fact that the title of the first holder was not absolute and perfect." In the case referred to, the principle was applied to a non-negotiable note, which has been assigned to a *bona fide* purchaser by a fraudulent indorsee. There is also cited by the court, in support of this principle, and therefore with apparent approval, a case from New York, in which the rule was applied to stock assigned by indorsement with irrevocable power of attorney to transfer. McNeil v. Tenth National Bank, 46 N. Y., 325. The application of the principle to the particular facts of Combes v. Chandler may have been somewhat blown upon in Osborn v. McClelland, 43 Ohio St., 284, but we do not understand the Supreme Court in the last named case to dissent from the case of McNeil v. Tenth National Bank, or the principle as stated by Pomeroy. But it is said that this is only the doctrine of *bona fide* purchaser for value in equity, and that it can only apply in favor of the holder of the legal title; Anketel v. Converse, 17 Ohio St., 11, and that in New York the endorsee of a certificate of stock without transfer holds the legal title, while in Ohio, he only holds the equitable title. Conant v. Seneca Co. Bank, 1 Ohio St., 298. It is to be observed, however, that the pledgee in this case held more than a mere assignment of the stock in blank, and thus the apparent equitable title. She also held an irrevocable power of attorney in blank, with power of substitution to make transfer of the legal title. The holder of the legal title has thereby estopped himself to assert any control over the legal title against an assignee of the certificate for value from the payee.

Therefore it is not material with reference to the rights of a *bona fide* purchaser of such a certficate, so indorsed, whether his assignor held the equitable title with full power to dispose of the legal title conferred by its holder, or had the apparent legal and equitable title in himself. The

authorities, with regard to the rights of an innocent purchaser for value of stock so endorsed, are numerous, and are found not only in states where the indorsee of a certificate holds the full legal title, but also in such states as New Jersey and Illinois, where he holds only the equitable title. Mt. Holly Co. v. Feree et al., 17 N. J. Eq., 117; Otis v. Gardner, 105 Ill., 436; Cook on Stock and Stockholders, section 473, and cases cited.

This we understand to be the intimation of the court in Norton v. Norton, 43 Ohio St., 509, although it was not necessary in that case to so decide. The *bona fide* purchaser from the pledgee by exchange took absolute ownership to the stock with power to take legal title which Forbriger could not deny.

The only other ground upon which counsel for plaintiff relies, is the doctrine of *lis pendens*. He says that plaintiff's action was notice to all the world of his right to subject Forbriger's interest as pledgor in the stock to the payment of the debt, and created a lien, of which the purchaser was charged with notice. Section 5055, provides that "when the summons has been served, or publication made, the action is pending, so as to charge third persons with its pendency; and while pending, no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title." This is merely a statutory enactment of the principle of *lis pendens* prevailing before the code, and is, of course, to receive a construction in accordance with that doctrine. The third person, therefore, to whom the suit is to be notice, are the same persons who before the code would be chargeable with notice by *lis pendens*. The doctrine of *lis pendens* is based, not upon the theory that a pending suit is constructive notice to all the world, but upon the ground that the law will not allow litigation, rights to the property in dispute, so as to prejudice the opposite party, and defeat the execution of the decree to be entered in the cause. Dovey's Appeal, 97 Pa. St., 153; Bellaney v. Sabine, 1 DeGex & Jones, 580; Bennett on *Lis Pendens*, sec. 17. It can only affect those acquiring an interest *pendente lite* from one of the parties to the litigation. Irvin's Lessee v. Smith, 17 Ohio 226; Hunt v. Haven's, Adm., 52 N. H., 162; Davis v. Rankin, 50 Texas, 279. Bennett on *Lis Pendens* section 243. Now it may be seriously questioned, whether in as much as Forbriger had conveyed to his sister the apparent equitable title, with complete power of disposition before the suit was begun, a *bona fide* purchaser from her as against whom Forbriger himself would be estopped to deny that he ceased to have any interest in the stock after such transfer, may not claim to hold a title derived from him before the suit. The only act of Forbriger by which the stock passed from him completely, was done before the *lis pendens* began and it would seem that the purchaser could hardly be affected by a suit concerning Forbriger's interest in the stock when so far as the purchaser was concerned. Forbriger's interest had ended before the suit was begun. But whether this argument is founded on a correct view of the doctrine of *lis pendens* or not, there is another ground for holding that *lis pendens* does not affect the purchaser.

It is well settled in this country and England that *lis pendens* applies generally to all kinds of personal property. Bennett on *Lis Pendens* 139, and cases cited. Chancellor Kent in Murray v. Lylburn, 2 Johns. Ch., 441, suggests as an exception to the general rule, cash, negotiable paper not due, and perhaps movable personal property such as horses, cattle, grain, etc. He thinks no exception should be made of bonds and mortgages because they are not the subject of ordinary commerce. In Stone

v. Elliott, 11 Ohio St., 252, 253, it is held that the doctrine has no application to negotiable paper. In County of Warren v. Marcy, 97 U. S., 105, it is held not to be applicable to county bonds. Justice Bradley in that case says "But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor Kent in one of the leading cases on the subject in this country, and has been confirmed by many subsequent decisions." In the present mode of doing business, stock evidenced by indorsed certificate with irrevocable power of attorney to transfer has certainly become an article of commerce, and as between indorsees with power to transfer legal title, by the operation of estoppel explained before, has required a quasi negotiable character. In accordance with the suggestion of Chancellor Kent that the doctrine of *lis pendens* should be limited by commercial necessities, it would seem to be a proper holding, that stock so evidenced by certificates had acquired such a commercial character as to require that *lis pendens* be not applied to it. Accordingly the Court of Appeals of New York in two cases, Holbrook v. Zinc Co., 57 New York, 616 and Leitch v. Wells, 48 New York, 586, has held that *lis pendens* does not apply to stock. Now the usual commercial mode of transferring stock is by delivery of certificates with blank assignment and power of attorney. As we have explained in such case, the negotiability by estoppel applies where the assignee without transfer takes only the equitable title as well when he takes the full legal title. The reason for making stock an exception to the doctrine of *lis pendens* is its commercial character of quasi negotiability. This it has in Ohio, as we have seen, as well as in New York. Therefore the New York authorities are applicable notwithstanding the difference in the rule between that state and this as to the legal title. We think the reasoning of the court in these New York cases to be forcible and to be in accordance with the more modern and liberal view of the hard doctrine of *lis pendens*, and are quite willing to rest our decision of this case upon the principle maintained in those authorites.

With this view of the rights of persons, not parties to the action, in the subject-matter thereof as they appear on the evidence adduced, we think the court below should have directed the pledgee and purchaser to be made parties, and have then determined what interest, if any was subject to plaintiff's bill; so that in decreeing a sale of Forbriger's interest in the stock, it should not do a vain thing and only cloud the real owner's title. The motion for a new trial will be granted with directions to the trial court to make the purchaser and pledgee parties.

PECK and MOORE, JJ., concur.

Wilby and Wald for plaintiff.

J. J. Glidden and G. Tafel, *contra*.

## TAXATION. 315

[Hamilton Common Pleas, 1889.]

### CHATFIELD & WOODS v. HAMILTON CO. (COM'ERS.)

**Neither the county commissioners nor auditor have any power to refund excessive taxes for back years, caused by the assessor having, in valuing a new building, failed to deduct for the destruction of an old building, where the error is not clerical; that is, when there is nothing on any of the records or returns giving data or directing an allowance for the old structure. So that any action by the commissioners would be reviewing and reversing the tax officers in fundamental as distinguished from clerical matters.**

SHRODER, J.

This is an appeal from the County Commissioners' rejection of plaintiffs' claim for refunding of taxes. In 1882, the plaintiffs destroyed a structure on their land worth $8,000 and rebuilt a new one at a cost of $22,000, which included the cost for water-power. The assessor, in 1883, under Rev. Stat. 2753, 2730, 2731, returned the new structure at a valuation of $20,500. The plaintiffs having paid the taxes for 1883, 1884, 1885, 1886 and 1887, on July 17, 1888, upon their application, the auditor favored reducing the valuation by $7,000, and submitted to the decision of the Commissioners the refunder claim for taxes paid the preceding five years. In claims of this kind, the jurisdiction of the Commissioners can be found only in sec. 1038, Rev. Stat., and is as to collected taxes, similar to that of the auditor as to taxes for the current year.

The authority of the auditor to make corrections on his current duplicate, is contained in Rev. Stat., secs. 1038, 2800, 2801, 2802, 2803 (78 Ohio L., 47). Mainly, these sections respectively treat of distinct subjects for correction.

Section 1038 (found in Rev. Stat., in chapter for "County Auditor") and sec. 2800 (found in chapter for "Assessing Real estate"), relate to the correction of errors which are wholly clerical in their nature State v. Comrs., 31 Ohio St., 271; Butler v. Comrs., 39 Ohio St., 168; State v. Cappellar, 9 Ohio Dec. Re., 1015; Perin v. Comrs., 6 Ohio Dec. Re., 1085.

In sec. 1038, the errors therein referred to, are described as "erroneously charged," which expression, when used in connection with the tax list and duplicate, indicates a clerical error (see Hoglen v. Cohan, 30 Ohio St., 442). These erroneous charges, when they belong to the current year and on the unsettled duplicate and as to the particulars named in the section, are to be settled by the auditor, but when their connections affect moneys collected upon past duplicates and in the treasury, are to be referred to the Commissioners, whose inquiry is restricted for their determination of what is "so erroneously charged" Comrs. v. Eckstein, 6 Dec. Re., 843; Ridderman v. Comrs., 6 Dec Re., 939; Ives v. Comrs., 6 Dec. Re., 1079. But in all the cases the error is one which has not arisen from the investigation of facts, but is one found on the face of the record Ins. Co. v. Cappellar, 38 Ohio St., 560,574.

The other sections confirm and are consistent with this construction.

Rev. Stat., sec. 2800 (2d portion), prohibits the auditor from making any deductions from the valuation of any lot unless by order of Board of Equalization or State Auditor, and sec. 2801 authorizes corrections of valuation in case of erection or destruction of structures, and then only "agreeably to the return" of the assessor under Rev. Stat. 2753. This

is the limitation upon the auditor. Here the error is clearly not clerical. The Commissioners are vested with no authority; but relief is given under Rev. Stat., sec. 2804, by complaint to the Board of Equalization.

Rev. Stat., sec. 2892, confers power upon the auditor to add to tax list, real property omitted by the decennial district assessor, and here again the assessor fixes the value, and the auditor is authorized to do this only in case of his neglector's inability. The omission is here a fundamental error.

Rev. Stat., sec. 2803 (78 O. L., 47), provides for cases of omissions of the property in assessor's returns. or escapes from taxation by the auditor's errors. But he is required to ascertain the value thereof, thus necessarily implying that the property was such as had not previously been valued for taxation. From this catagory is therefore excluded property which is found entered on any of the duplicates and returns, because these had already been subjected to valuation and are not within the purview of that section.

Rev. Stat., sec. 2753 requires the assessor to list and value property omitted by decennial and previous appraisers, and to correct mistakes as to values of improvements by previous assessors, upon proper notice to property-owners.

These sections under review are calculated to provide for all the probable cases of omissions or corrections under the tax system. They relate either to such property as have been wholly omitted from the tax list and duplicate by every assessor and auditor, or to such as have been entered thereon but required correction: first, as to valuation by reason of their report in assessors' returns, or by order of Board of Equalization or State Auditor, and second, by reason of errors in making charges or entries in the duplicate. The corrections are here classified into those which are made from the face of the records, that is, clerical, and those which are made and directed from other sources of information. The jurisdiction conferred upon the County Commissioners in the cases of the first description, argues that they are clerical in character, since, were it otherwise it would be conferring upon that body in matters of violation a power to review and reverse the decision of other officers—a result in conflict with the theory and scheme of tax laws and systems of the state.

In this case the error complained of was one regarding the valuation of the property. There is no record, either return of assessor, minutes of Board of Equalization or tax duplicate, which directs a deduction for the old structure. It was not embraced in any of the particulars mentioned in sec. 1038, and was on that account not clerical in its nature. Neither the auditor nor the Board of Commissioners was empowered by statute to grant the relief sought; and consequently the action of the Commissioners was according to law. On this appeal the jurisdiction of the court as to the subject-matter, can not exceed that of theCommissioners.

The petition is dismissed.

Jordan & Jordans, for plaintiffs.

Davidson & Hertenstein, for defendants.

## TAXATION. 316

[Hamilton Common Pleas.]

JOSEPH TENHUNDFELD v. HAMILTON CO. (COM'RS.)

**Where a retunder for three years is asked on the ground that by a mistake in reading the assessor's return of the value of a new structure it was placed on the duplicate at a valuation greater than the assessor returned, the county commissioners should allow the refunder, and cannot refuse it on the ground that they think the valuation grossly inadequate, for they have no power to review the action of other officers in fixing valuations, but can only correct clerical errors.**

SHRODER, J.

This is an appeal from the rejection by the County Commissioners of the plaintiff's claim for refunder of taxes for 1884, 1885, 1886. The transcript of the Commissioners' records states that the claim was rejected "for the reason that the valuation seems to be grossly inadequate, and from a personal examinaton of the property it would seem that the applicant is not entitled to a refunder as prayed for."

The only authority vested in the County Commissioners to order refunder of taxes is found in sec. 1038 Rev. Stat. This section confers upon the Commissioners a jurisdiction in refunder claims which is as limited as that given to the auditor, and is confined to clerical errors. The power and duty of fixing and passing upon valuations for tax purposes are under the tax laws and system of this state, to be exercised by the special agencies created by the statutes for such purposes: Such as assessors, auditors of county and state, board of equalization and of revision, and the like. The course taken by the Commissioners as declared in the transcript, was an undertaking to review and reverse the judgment of the assessor and board of equalization, upon the valuation; and as this was without any sanction of law it cannot be sustained.

It appears that for 1883 the assessor returned plaintiff's unfinished structure at a value of $1,200 to which the city board of equalization for that year added $400. For 1884 the assessor returned the finished structure as follows: "total value $2,600, partial value reported last year to be deducted $1,200; amount to be added to the duplicate for the structure $1,400 finished." The minutes of the board of equalization read: "Assessor returned $2,600—add $400 finished." From this minute it was for the auditor to perform the clerical duty of entering the conclusion of the board on the duplicate. This conclusion was to add $400 to the assessor's return, and a reference to the return filed and kept in the auditor's office according to law, would directly indicate that $1,200 was to be deducted. The failure to make this reduction was not the result of the exercise of judgment, or of the investigation of facts, but was due to faulty examination of the records, from which the auditor was to make his entries in the duplicate. It could be said of this case: "No fact is to be inquired into. Every necessary fact appears on the face of the return." Ins. Co. v. Cappellar, 38 Ohio St., 574. It was clerical work only. To the extent of $1,200.00, it was an erroneous charge on the duplicate for 1884, 1885, 1886. The Commissioners' jurisdiction under Rev. Stat., sec. 1038 was limited to the inquiry as to such erroneous clerical charges; Comrs. v. Eckstein, 6 Dec. Re., 843; Ridderman v. Comrs., *Ib.* 939; Ives v. Comrs., *Ib.* 1079; and the inquiry of the

court on this appeal is subject to the same limitation. From the evidence the plaintiff is entitled to a refunding of the taxes as claimed.

Judgment is therefore for plaintiff.

O. J. Cosgrave, for plaintiff.

Davidson & Hertenstein, for defendants.

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317 TAXATION.

[Hamilton Common Pleas, 1889.]

GEORGE B. HARTE v. HAMILTON CO. (COM'RS.)

*Error in Assessment—Jurisdiction of County Commissioners.*

SHRODER, J.

This appeal filed December 31, 1888, was from the Commissioner's rejection of the plaintiff's refunder claim, of taxes paid since December, 1885, upon the valuation of $1,940.00, which before that year had been fixed upon an old structure which was destroyed and replaced that year by a new one. The new one was valued by the assessor and board of equalization at $8,000. Plaintiff claims that no deduction was made for valuation of the destroyed structure.

Under the rulings in Chatfield & Woods case, *ante* 512, this claim not being founded upon a clerical error, was properly rejected by the commissioners.

Petition is dismissed.

G. S. Baily, for plaintiff.

Davidson & Hertenstein, for defendant.

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317 TAXATION.

[Hamilton Common Pleas, 1889.]

H. A. TATEM v. HAMILTON CO. (COM'RS.)

When the auditor of state orders a reduction in the valuation of lots for gross inequality after the legal settlement of the duplicate, the county commissioners have no power to order a refunder for the previous year, for the error is fundamental, not clerical.

SHRODER, J.

This appeal filed December 31, 1888, from the rejection of plaintiff's claim for a refunder of taxes paid in 1886, upon lots in Baker's subdivision. It appears that the valuation on these lots was reduced by order of the state auditor for gross inequality. This was done in September, 1887, and after the legal settlement of the duplicate of 1886. The claim for refunder is based upon an erroneous valuation, which is a fundamental but not a clerical error. The commissioners had no jurisdiction and their action was therefore correct. The ruling in the Chatfield & Woods case governs this claim.

Petition is dismissed.

Davidson & Hertenstein, for defendant.

## TAXATION. 317

[Hamilton Common Pleas, 1889.]

### H. W. DERBY v. HAMILTON CO. (COM'RS.)

*Error in Assessment—Jurisdiction of County Commissioners.*

SHRODER, J.

This appeal was filed January 2, 1889, from the rejection by the commissioners of plaintiff's claim for the refunding of taxes paid by him for 1887 upon the valuation of $5,170, being the valuation of old structures destroyed and replaced by a new building (the present temporary city building) on the Fourth street near Central avenue. He claims that the assessor and board of equalization valued the latter at $10,000 for taxation, but made no allowance and deduction for the destroyed structure.

This claim presented no clerical error, and was therefore not a subject within the jurisdiction of the commissioners and was properly rejected. Under the ruling in the Chatfield & Woods case, *ante* 512, the petition is dismissed.

Boyce & Boyd, for plaintiff.

Davidson & Hertenstein, for defendant.

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## TAXATION. 317

[Hamilton Common Pleas, 1889.]

### HENRY WAGNER v. JOHN ZUMSTEIN, TREAS.

Where an assessor valued a partially finished structure at its then value, and subsequent assessors never added any amount for the completed building, the auditor's act in entering charges for delinquent taxes for the years since for the value of the completed building, is proper and will not be enjoined on the claim that the subsequent assessors added nothing because they intended to equalize the value of the whole property, which had depreciated from floods. The assessor had no such power, and, moreover, his official acts are to be embodied in his return and nowhere else.

SHRODER, J.

This action is for an injunction against the treasurer's collecting taxes charged upon the 1888 duplicate upon plaintiff's real property on west side of Biddle street. The auditor added $2,500 for new structure on the land, begun in 1883 before April, and finished in July; and also entered charges for delinquent taxes for 1884, 1885, 1886 and 1887. Prior to 1883 the property was on the duplicate at $6,260. The assessor of 1883 in his returns on or before the third Monday of May, added $1,500 for new structure as of that time. No return for the structure as finished (in July, 1883), was made in 1884 or thereafter. The auditor in 1888 upon discovery of the omission, and after notice to plaintiff, ascertained the value of the new structure to be $4,000, and making allowance for the $1,500 theretofore added, made the entries complained of. If the 1884 assessor omitted to return this structure as finished, the sec. 2803, Rev. Stat., required the auditor to do what is here objected to by plaintiff This structure as finished became subject to taxation for the first

time in July, 1883, and could not be returned before the assessor's return in 1884. And that year's assessor and subsequent assessors omitted to make any return of same for taxation. Plaintiff claims that the assessor of 1884 noted the finished structure, at the same time declaring that he would make no addition beyond the $1,500, intending thereby to allow and equalize the value of the whole property, whose value had depreciated by reason of the floods of that year. Various provisions of the statutes (sections 1029, 1528, 2749, 2753, 2755, 2803), relative to assessors and their duties, determine the form in which the assessor's listing and valuation is to be made, and what is to constitute the evidence of his decision. His official acts are by virtue of these sections embodied in his return only, and in no other document. And sanction for his assuming to equalize the value of this property by setting off the additional value of new structure against the depreciated value of his whole real property cannot be found anywhere in the statutes. Consequently the plaintiff's claims are clearly untenable. The auditor's action was lawful, and constituted a lawful warrant to the treasurer to collect the taxes charged. The petition is dismissed.

Von Seggern, Phares & DeWald, for plaintiff.

Davidson & Hertenstein, for defendant.

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## TAXATION.

[Hamilton Common Pleas, 1889.]

WILLIAM GIBSON v. JOHN ZUMSTEIN, TREAS., ET AL.

The power of the auditor to add for an additional structure not returned by the assessor is not barred by the board of equalization having acted on the property before the completion of the new structure, for their authority is over those returned for the current year, and therefore they, presumably, did not decide on this structure.

SHRODER, J.

This action was brought for an injunction to restrain the Auditor from placing an addition of $40,000 on the 1888 tax duplicate, and the Treasurer from collecting charges on the same on the 1887 duplicate, for taxation, for new structures on plaintiff's lots on west side of Walnut, above Fourth street, Cincinnati. This property had been entered upon the duplicates of 1881 to 1884, inclusive, at the gross valuation of $200,260. The new structure was begun in 1885, and completed in the fall of that year. On August 17, 1885, the city Board of Equalization deducted $18,000 from the valuation, reducing it to $182,260 upon the duplicates of 1885, 1886 and 1887. In 1887 the Auditor discovered the omission on the part of the assessor for 1886, to return this new structure as required by Rev. Stat., secs. 2753, 2730. After notice to plaintiff, the Auditor proceeded to ascertain and make a valuation of it, and accordingly entered it as an addition to the 1887 duplicate in the sum of $40,000, placing the additional tax charge of $553.60 for December, 1887, of $553.60 for June, 1888, and of $1,047.60 for delinquent taxes thereon for 1886.

The Auditor's action was in discharge of his duty under the act of March 11, 1881 (78 Ohio L., 47), unless the proceedings of the board of equalization on August 17, 1885, interposed a bar to his power in the matter. To have this effect, they must have been taken upon the new

structure. Section 2805, Rev. Stat., (79 O. L., 71), authorized the board to take action as to valuation of real property, regardless of any act on the part of either Auditor or assessor (Humphreys v. Safe Deposit Co., 29 Ohio St., 608, 610; Gazlay v. Humphreys, 8 Ohio Dec. Re., 102; Mitchell v. Treas., 25 Ohio St., 157, 161; Wagoner v. Loomis, 37 Ohio St., 571, 574 and 5). In the absence of proof of fraud, corrupt discrimination, arbitrary action without evidence or like ground for interference of a court of equity, a decision of the board is final and conclusive (Wagoner v. Loomis, *supra*; Fratz v. Mueller, 35 Ohio St., 397, 404-5; 103 U. S. S. C., 735). The sole question in this case is, then: Did the board decide upon this new srtucture? Its minutes of August 17, 1885, show that after finishing its transactions upon "all new improvements," it took up for consideration "complaints on real estate," thus manifesting that it made a distinction between "improvements" and "real estate." Under the latter head, the deduction of $18,000 was ordered. At this date, the structure had not yet been completed. It was not then susceptible of valuation, nor in condition to be a factor in the appraisment of the "real estate." This circumstance argues that the new structure was not passed upon by the Board on August 17, 1885. Were the minutes less explicit, the provisions of the tax laws would raise a presumption against this structure's being before the Board in its 1885 session. Section 2846 requires the holder of land to list it for taxation on or before the third Monday of May, after it becomes subject to taxation, and section 2730 places new structures within this requirement. Sections 2805 and 2807, limit the board's authority for equalization of assessments of new structures to such as are returned for the current year by the assessors; which must consequently be those returned between the second Monday of April and the third Monday of May (Rev. Stat. secs. 2753, 2755, 2736, 2846, 2730). The action of the board must therefore limit and direct itself to this date. The act of May 19, 1886, 83 Ohio Laws, 232 (subsequent to these transactions) seems to favor this construction. It specially provides for deductions to be made by the auditor on account of the destruction of new structures, among other things by flood, tornado and otherwise, between the second Monday of April and the first day of October, a provision unnecessary were the powers of the board as to valuation not limited to the time spoken of. Such being the lawful duties of the board, the presumption that it acted in conformity therewith requires the finding that the deduction of $18,000 did not refer to the structures which were scarcely begun in the spring of 1885. Hence its proceedings of August 17, 1885, did not preclude the auditor from his action.

The completion of the structure in the fall of 1885 made it duty of the assessor for 1886, to make a return of it. He omitted to do so. It follows that the course pursued and intended, to be pursued by the auditor, and that intended by the treasurer were lawful.

The petition is therefore dismissed.

Chas. W. Baker, for plaintiff.

R. B. Smith, Wm. A. Davidson and Fred Hertenstein, for defendant.

319 **TAXATION.**

[Hamilton Common Pleas, 1889.]

HERMAN LACKMAN v. JOHN ZUMSTEIN, TREAS.

**The treasurer will not be enjoined from collecting taxes on an addition placed on the value of real estate by a city board of equalization, on the ground of its being disproportionately in excess of other property where the board had investigated this question on notice to plaintiff and there is no evidence of fraud. Nor will the fact that the board's aggregate of additions and deductions at such meeting do not balance, and that the result of their whole session was to add largely to the duplicate, render this particular addition illegal under R. S., sec. 2804.**

SHRODER, J.

The plaintiff prays an injunction against the defendant's collecting taxes upon an addition of $2,500, placed upon the 1888 duplicate for taxation by order of the City Board of Equalization, upon his property southwest corner Stone & Sixth streets. The authority of the board to make this addition and the conclusiveness of its decision were considered and upheld in the case of Wm. Gibson v. Zumstein et al. Wagoner v. Loomis, *supra*; Fratz v. Mueller, 404-5; 103 U. S. S. C., 735; Gazlay v. Humphreys. 8 Ohio Dec. Re., 102.

It is objected that the valuation of this property by the board is disproportionately in excess of that of neighboring property. This objection cannot be sustained, because there is no evidence of fraudulent discrimination against plaintiff and it is proved that the board came to its decision after due investigation upon notice to plaintiff and for the stated reason of the inequality of value. It is also objected that the aggregate additions and reductions of the particular meeting of the board on which this addition was made, did not balance; also that the whole aggregate to the tax duplicate for the whole session exceeded by $23,940 the duplicate of 1887 exclusive of new structures. The Rev. Stat., sec. 2804 makes neither objections valid. The restriction referred to in the objections apply to the total reductions only, and these for the whole session, at the time when the work of the board is in condition to go into effect upon the tax duplicate. The plaintiff therefore presents no equity which entitled him to the relief sought; and the petition is therefore dismissed.

Von Seggern, Phares & DeWald, for plaintiff.

Davidson & Hertenstein, for defendant.

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346 **CONTRACT—LEASE.**

[Superior Court of Cincinnati, General Term, 1889.]

JACOB ELSAS v. ADOLPH MEYER & CO.

1. Where a party to a contract notified the other party in advance of the stipulated time for performance of his intention not to comply with the contract, the other may treat such notice as a breach and as a waiver of conditions by him to be performed, and sue for damages; but if instead of treating the contract as at an end, he still insists on compliance, he can not rely on the notice of an intended breach as a waiver of any conditions by him to be performed and in order to recover for an actual breach of the contract, he must show full compliance on his part of all conditions precedent in the contract.

2. In construing a contract for a lease where the future lessor agrees to make certain improvements in the premises to be leased before occupancy by the lessee is to begin, Held:

First, that the promise of the future lessor, is a single one, i. e., to put the premises in a certain state of repair, and that substantial compliance with such promise is a condition precedent to liability of the other party on the contract to take the lease.

Second, that technical, unimportant and inadvertent omissions and defects in making the promised improvements will not defeat the right of the future lessor to recover for a breach, but the other party may recoup for the same in damages.

3. Where the word "satisfactory" is used to describe the required condition of certain improvements under the contract in connection with other words descriptive of the degree of excellence of such improvements, the rule is that if such improvements come up to the described standard, the party to be satisfied must be satisfied, and can not base dissatisfaction on a mere whim.

This was an action for the breach of a contract for a lease. The trial before jury resulted in a verdct of some eleven hundred dollars in favor of the plaintiff. The motion for a new trial by the defendant was reserved to this court. The defendant at the same time made a motion for judgment notwithstanding the verdict, which was also reserved, and the case is now here for decision of the two motions.

The contract signed by the parties, which was the basis of the suit, was as follows:

"This agreement witnesseth, Whereas, Jacob Elsas, party of the first part, has agreed with Messrs. Adolph Meyer & Co., a firm doing business in the city of Cincinnati, Ohio, party of the second part, to make certain improvements in the buildings, known as Nos. 136 & 138 Race street, in the city of Cincinnati, now owned by the party of the first part. It is agreed by and between the parties aforesaid as follows: Adolph Meyer & Co. agree to lease from the said party of the first part, the premises as above set forth, in part, namely: 1st, 2nd, 3rd, 4th, 5th, 6th floors and basement of No 138 Race street, and 2nd, 3rd, 4th, 5th and 6th floors of No. 136 Race street. The consideration of said lease to be $4,500 per annum, for a period of five years from July 1, 1887; said amount to be paid in equal monthly installments, and the said Adolph Meyer & Co. to have a further option of retaining the said premises for a further period of five years from the expiration of the first period of five years. upon an annual rental of $5,000.00, to be paid in equal monthly installments. It is understood that in case the said party of the second part elect to continue the lease as above set forth, they shall give to said Elsas, a written notice of such desire, six months prior to the expiration of the first period of five years. In consideration of the agreement above set forth, the said party of the first part agrees to make certain improvements and alterations in the said premises, as exhibited in the plans and drawings of the same, now in the possession of S. A. Hannaford, architect, and which are made a part of this agreement. In addition to the said plans and specifications, it is understood by and between the parties aforesaid that the said buildings shall be ready for occupancy on a day in June prior to the tenth of June, 1887, and that the said party of the second part, are to have free use of the same for fifteen days subsequent, at the expiration of which fifteen days, they are to pay rent for said premises at the rate of $4,500.00 per annum, until July 1, 1887, at which time, the lease herein provided for, shall commence. * * * In accordance with terms above set forth, the said Elsas is to have in position in said buildings, the followng improvements not now existing

therein: The cellar to be finished and heated with satisfactory heating apparatus, and the two lower floors of No. 138 and the 2nd floor of No. 136 to be likewise heated. Openings are to be made in the division wall between the buildings of size and position satisfactory to the said Adolph Meyer & Co. Water-closet and wash rooms to be placed one on the first floor and one in the basement of No. 138; a suitable modern elevator in the building, and an area elevator and freight chute under the side walk of No. 138; speaking tubes with modern improvements, "cut-off" to connect the office with every other floor of the building. An office of satisfactory character to be built in the first floor of No. 138. Gas fixtures of satisfactory kind to be supplied by said Elsas. Adolph Meyer & Co. agree to "pack" the elevator when necessary, and said Elsas to keep it otherwise in repair. The buildings to be painted and whitened throughout by said Elsas, and the floors all through the building to be put by him in satisfactory good condition and repair, and the entire building when complete, to be modern and first-class in every respect."

The answer of the defendants was that plaintiff had not fulfilled his contract either in having the building ready for occupancy on the tenth of June, or in making the improvements stipulated in the contract, and that for this reason, they refused to take the lease. The reply pleaded a waiver of such conditions in the contract as were not performed. It was admitted by plaintiff that the building was not ready by the tenth of June, but he testified that by agreement the time of occupancy was postponed to begin July 1st. On the twenty-second of June, defendants through their attorneys sent a letter to plaintiff, declining to take the premises on the ground that Elsas had not complied with his contract. To this plaintiff's attorney replied that his client would not accept this declaration as final and asked an interview in which to agree upon the terms of the lease, and stating that in the event of a continuing refusal his client would rent the building and hold them for damages for the difference. On the thirtieth of June, plaintiff's attorney made a tender of a lease which was refused. Upon this evidence which, plaintiff claimed, showed a waiver of any right on defendant's part to require compliance by plaintiff with the contract thereafter, the court stated to the jury as follows in the general charge. "If you find that, by agreement between the parties, the time for the completion of the contract was postponed until the first of July, then the defendants, before refusing to complete the contract on their part, must have waited until the first of July; and if, before the first of July, they announced that they would not complete the contract, then the plaintiff is relieved from further compliance with the contract beyond that time. But he cannot recover unless he shows that he was able, ready and willing to comply with all these conditions by the first of July.

TAFT, J.

The defendants claim that the charge as to the effect of the letter of June twenty-second, as a waiver, was error, and we think it was. The authorities are without conflict to the effect that where a party to a contract announces in advance of the time of his compliance that he will not fulfil his contract, the other party may elect to consider such announcement an anticipatory breach and sue for damages, or he may treat the contract as still in force. If he treat the contract as still in force, he must fulfil all the conditions on his part to be performed before having a right of action for the breach. Johnson v. Willing, L. R., 16 Q. B. D.,

407; Smoot's case, 15 Wallace, 36; Dringley v. Ohler, 117 U. S., 490; Cleveland Rolling Mill v. Rose, 121 U. S., 255; Leake Contracts, 872 and cases there cited.

In this case it is quite clear that the letter which plaintiffs attorney sent to defendants, was not an election to treat the announcement by defendants that they would not take the lease, as an anticipatory breach, but rather was an election to consider the contract as still in force. This election is further shown by the tender of the lease on the thirtieth of June. The plaintiff therefore can not now avail himself of the letter from defendant's attorney of June 22d, as a waiver by defendant of plaintiff's compliance with the conditions, and the charge of the court that it might be so considered was error for which a new trial will be granted.

Coming now to consider the defendant's motion for judgment, a question is made on the construction of the contract. Defendants claim that all the improvements to be made by the plaintiff were conditions precedent to defendant's taking the lease. Plaintiff contends that only the addition of two stories to the building according to the architect's specifications was a condition precedent, and that this condition was admittedly fulfilled; that the other improvements were in the nature of independent covenants, a breach of which entitled defendants to damages, but a failure to comply with which would not release defendants from their contract. The court below held that they were all conditions precedent, and we agree with that holding. The contract is inartificially drawn, but considering the surrounding circumstances, we think its meaning cannot be mistaken. The opening clauses show that the agreement to take the lease was the consideration for certain improvements. To hold that these improvements are limited to the alterations provided for in the specifications of the architect because the other improvements are spoken of in a subsequent clause is, we think, in view of the whole character of the contract which was not drawn by a lawyer, too narrow a construction. The evident intent of the parties was that Elsas should put his premises in a certain condition for leasing, and that the defendants should then take a lease. The condition in which Elsas was to put his premises was described with considerable detail and the specifications were part of them described as being in possession of the architect, and part of them were set forth in the contract. The promise on his part was a single one, namely, to put his premises in a certain condition, just as an agreement to build a house according to certain specifications is a single promise. This is an answer to the effort of counsel for plaintiff to apply to this contract, Sergeant Williams', 3d canon of construction in determining whether a covenant is a condition precedent or an independent covenant. Notes 1 Wms. Saunders, 548. That canon is as follows: "When a covenant or promise goes only to a part of the consideration, and a breach thereof may be paid in damages, it is an independent covenant or promise. And an action may be maintained for the breach of it by the defendant without averring performance or readiness in the declaration." In the case at bar, the elevator, the office, the water-closet, the whitening and the other details were not covenanted for as independent promises which aggregated together were the consideration. The promise was single to have a house ready furnished in the way specified with all these features in it. The 3d canon quoted does not apply but rather the following which is the 2d. "When a day is appointed for the payment of money or the doing of any other act (in this case the taking of the lease and premises) and the day is to happen after

the thing which is the consideration of the money or other act, is to be performed, no action can be maintained for the money or for not doing such other act before performance." Neale v. Ratcliff 15 Q. B., 916. Hickman v. Royl, 55 Ind., 551.

The overhauling, repairing and refurnishing the house, then, was a condition precedent to the obligation resting upon the defendants to take the house. Defendants claim that there is no evidence to show that this condition was complied with, and therefore that they are entitled to judgment. This requires an examination of the evidence. If there was any evidence to show compliance, it became a question for the jury. And here it may be well to note that the condition to be performed by Elsas was very much like the contract of a carpenter to build a house. The evidence showed an investment on his part on the faith of the contract, of some fifteen thousand dollars. We think that the circumstances require the application of the rule so often laid down in building contracts, though applicable in a general way to all contracts, which require substantial compliance, but excuses technical, inadvertent and unimportant omissions and defects, and allows a recoupment in damages for such deficiencies. Mehurin v. Stone, 37 Ohio St. 49; Goldsmith v. Hand, 26 Ohio St., 101.

Reverting now to the parts of the condition precedent, let us examine the contract in detail.

It was conceded that the improvements in accordance with Hannaford's plans, were made.

The next requirement is that there should be satisfactory heating apparatus in the cellar, to heat the cellar, first and second floors. This was not put in, but there was a considerable evidence to show that the performance of this was postponed by agreement, until after the lease began.

Openings were to be made in the wall, of size and position satisfactory to Meyer & Co. The evidence showed this to have been complied with. The water-closet and wash rooms were also put in. A suitable modern elevator was in and running on the first of July. There was evidence to show that the freight chute was put it. The area elevator was not put in, although Elsas had ordered it made, and it was ready to be put up. It was not put up because the defendants said they would not have such an elevator, and would not accept it. It was in evidence that the elevator which Elsas proposed to put in, was of the kind in ordinary use in such buildings, and that it would have complied with the contract. The action of the defendants in declining to have such an elevator put in, upon which Elsas acted and put none in, constitutes, we think, a waiver of this omission, if in fact, their declination was not based on good grounds. The speaking tubes were ordered and could and would have been put in without delay, so Elsas says, but it appears that it was impossible to know where to put them until defendants arranged their furniture in their office. If this were true and speaking tubes could not be put in until after occupancy by defendants, putting them up could not be a condition precedent. An office was built under the direction of defendants, and by a carpenter selected by them. The evidence seemed to show that it was satisfactory. Gas fixtures (new) were hung on the first floor, and others were put on each of the upper floors but not screwed on the pipes. This we think might well be described as a slight technical inadvertent omission. The buildings were to be painted and whitened throughout by Elsas. He testified that

this was substantially done. A point was made as to whether the ceilings were whitened or whitewashed. He said he employed a man to whiten, and he thought he had done so. The floors were to be put in satisfactory good condition and repair. Elsas testified that they were in as good condition as it was possible to put old floors. Finally the entire building when complete was to be modern and first class in every respect. Elsas testified that it was and so did other witnesses. A point is made in reference to the provision that the floors and gas fixtures were to be satisfactory, that satisfactory here means satisfactory to Meyer & Co., and that unless they suited the whim of defendants, the condition could not be complied with. Where a man agrees to furnish an article to the satisfaction of another without other qualification, the rule undoubtedly is that if such satisfaction does not appear, whatever the reason for its absence, the contract is not fulfilled. But where the expression is used in connection with other words of qualification, there a different rule applies. Now, at bar, all these things were to be modern and first class in every respect. If they came up to this description, the defendants ought to have been satisfied, and a mere whim can not be urged successfully as a defense. We follow in our views of the word "satisfactory" in this contract, the case of Doll v. Noble, 18 Abbott New Cases 45, where in an elaborate note all the cases are collated and distinguished.

We have thus gone through the details of the contract, and we think we have shown that there was evidence for the jury to consider tending to show either a compliance with or a waiver of all the requirements of the contract. We must therefore overrule the motion of defendants for judgment, and send the case back for a new trial.

PECK & MOORE, JJ., concur.

Victor Abraham & John F. Follett, for plaintiff.

Louis Kramer & Lowry Jackson, for defendants.

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## HUSBAND AND WIFE. 366

[Hamilton Probate Court.]

IN RE ESTATE OF PHILIP KOCH.

Money which a wife had in a building association and which was with her approval and consent drawn out by her husband and used by him to improve his real estate and pay debts, does not become a debt against his estate, unless a promise by him to repay is proven. No promise is implied.

GOEBEL, J.

In the matter of the estate of Philip Koch, deceased, Emma Koch, the widow of Philip Koch, and the administratrix of his estate, presented a claim in the sum of $2,574.70, and asked that the same be allowed as a valid claim against the said estate. This sum, less the accrued interest and dividends, was paid to the Price Hill Eagle Loan and Building Association upon twenty shares, which stood in the name of Emma Koch, and was withdrawn in installments by the husband, with the approval and consent of the wife, and expended by him in the improvement of his real estate and the payment of debts. The allowance of this claim was resisted by the heirs.

Upon trial Emma Koch testified that her husband had on two occasions promised to repay her, or convey to her certain property in settlement thereof; that he died without making such payment or conveying the real estate. To the testimony relating to the declarations of the husband, objection was made. It subsequently appearing that such declarations of the husband were not made in the presence of a third party competent to be a witness, and having been admitted subject to such objection by the heirs, the testimony relating to the declarations of the husband to the wife was ruled out by the court.

In deciding the case the court say: "There was no other testimony offered to prove a promise on the part of the husband. We think that the testimony is sufficient, however, to warrant us in holding that this money was the separate property of the wife, and that the husband in his life-time did not repay the same. There being no competent testimony to establish a promise on the part of the husband to repay, the question arises whether the law will imply an undertaking by the husband to repay the wife for money given him under such circumstances.

"By the rules of the common law, married women are placed under many and severe disabilities, both as to their personal and property rights. The husband's dominion over the person and property of his wife is fully recognized. She is utterly incompetent to contract in her own name; her personal chattels are absolutely his.

"Under sec. 3109, Rev. Stat., as it stood before the amendment of 1884 (Ohio L., vol. 81, p. 209), the wife could hold personal property separately, and the husband could not reduce it to possession without her express assent. By the amendment the wife may hold her separate property under her sole control, and she may in her own name during coverture contract to the same extent and in the same manner as if she was unmarried. She could contract with reference to it even with her husband, and when such property comes into his possession she could not be divested of her right, but may sue for its recovery.

"The object of this legislation was to abrogate the disabilities imposed by the common law. But we do not think these provisions, either in letter or spirit, affect the question before us. The mutuality of interests between husband and wife which arises out of the relation is, in our judgment, not affected by this legislation. The presumption is that when a wife makes advancements to her husband, in view of the mutual benefits which are likely to accrue from such advancements, she has no claim against him or his estate, unless there be an express promise to repay her. In the absence of such promise she cannot recover against her husband, his creditors or his heirs. The law will not create, under such circumstances, the relation of debtor and creditor. 68 Md. 540; 72 Iowa, 48; 121 Ill. 250; 2 N. W. 461.

"We do not mean to say that she could at no time be a creditor of her husband. The court will enforce the contracts of parties, if any exist, but it will not imply an agreement when the parties have not entered into a contract. If such money or other separate property has been received by the husband without an express promise to repay her at the time, no implied assumpsit, either legal or equitable, will arise to support a claim against the husband or his estate. 63 Md. 496.

"To support the claim of the wife for money received by the husband, against the rights of *bona fide* creditors of the husband, it must appear that it was received by the husband under an agreement to repay her or to invest it for her use. 65 Md. 245.

"It is maintained for Emma Koch that the money given by her to her husband cannot be treated as a gift. It is not claimed by the heirs that it was a gift, nor does a presumption arise that it was; nor is it claimed that it was held in trust. But the claim is that the money so given by her to her husband was a loan, and the case was tried upon that issue. And we place this decision on the ground that, there being no testimony of an express promise to repay the money by the husband, an implied promise to repay cannot arise, and he was therefore in no legal sense her debtor, and she cannot recover. Her claim will be rejected, as not being a valid claim against the estate."

Albert Bettinger, for Emma Koch.

Ferris, Morrow & Oldham, for the heirs.

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## CONSOLIDATION OF RAILWAYS.

[Cuyahoga Common Pleas, 1889.]

### STEVENSON BURKE v. CLEVELAND, COLUMBUS, CINCINNATI & INDIANAPOLIS RY. CO.

1. Where two railway companies, owning lines of railroad, seeking consolidation, are connected by the tracks of a "Union" company, organized by several railway companies to secure union depot and terminal facilities for such roads; and where by the provisions of the act authorizing such "Union" company "the interest of each proprietary company in the union company, in its capital stock, and in its property and effects of every kind, shall be deemed an appurtenance to the railroad of such proprietary company, and shall not be transferable or alienable otherwise than with and as a part of the railroad of such proprietary company," etc. *Held:*
1. That proprietary railway companies so connected, have such a property interest in such union company as that they do "unite and form a continuous line" within the meaning and requirements of sec. 3380 of the R. S.
2. The lines of two or more railway companies, which are not, "in their general features parallel and competing," may become consolidated into one corporation under secs. 3380 to 3384 R. S.
3. Railway companies seeking consolidation, under the consolidation act, secs. 3379 to 3388 R. S., may agree upon the number and amount of shares of the proposed consolidation company; may classify such new stock into "common" and "preferred," and may issue a greater or less number of shares than that of the aggregate of the constituent companies to secure a just and equitable division of property between the shareholders of the constituent companies.

STONE, J.

In March of the present year the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, the Indianapolis & St. Louis Railway Company, and the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company, by and through their respective boards of directors, agreed upon a contract of consolidation, by the terms of which the companies named were to become one company, to be known by the name of "The Cleveland, Cincinnati, Chicago & St. Louis Railway Company," this agreement being subject to the ratification of the stockholders of said companies, the new company to succeed to all the property, rights, and franchises of the several companies, and to be bound to the payment of all the liabilities and obligations of each of the several companies, parties, thereto. The capital stock of the companies forming the agreement is as follows:

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| The C., C., C. & I Railway Co., (common stock) | $15,000,000 |
| The C., I., St. L. & C. Co., (common stock) | 10,000,000 |
| The Ind. & St. L. Railway Co., (common stock) | 500,000 |
| Making their present aggregate capital | $25,500,000 |

By the terms of the tripartite agreement, the capital stock of the consolidated company is to be $30,500,000, divided into common and preferred stock, as follows: Two hundred and five thousand shares of one hundred dollars each, amounting to $20,500,000, of common stock, and one hundred thousand shares of $100 each, amounting to $10,000,000 of preferred stock, the net earnings of the consolidated company in each year to be divided as follows: First not exceeding 5 per cent. (in quarterly installments) to the holders of the preferred stock, and the residue, as may be ordered from time to time by the board of directors, among the holders of the common stock, beginning with the fiscal year next after the ratification of the agreement.

The manner of converting the capital stock of each of the constituent companies into the stock of the consolidated company is provided for as follows: For each share of the present capital stock of the C., I., St. L. & C. Railway (the Big Four) shall be issued, upon the surrender thereof to the consolidated company, one share of the preferred stock and 30 per cent. of one share of the common stock of the new company. For each share of the capital stock of the C., C., C. & I. Railway Company surrendered shall be issued to the holder thereof common stock of the consolidated company at the rate of one hundred and thirteen and one-third dollars in stock of the consolidated company for one hundred dollars of the stock of the said C., C., C. & I. Railway Company. The entire capital stock of the Indianapolis & St. Louis Railway Company being now the property of C., C., C. & I. Railway Company, five thousand shares of the stock of the consolidated company are to be issued therefor to the holders of the stock of the C., C., C. & I. Railway Company in proportion to their respective holdings of stock in the last named company, being at the rate of three and one-third dollars in stock of the new company, for each share of the C., C., C. & I. Railway Company. Accordingly, the stock of the consolidated company is to be divided as follows:

To the stockholders of the Big Four:

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|---|---|
| Preferred | $10,000,000 |
| Common | 3,000,000 |
| To the stockholders of the Bee Line: | |
| Common | 17,500,000 |
| Making the total | $30,500,000 |

It is further provided that the consolidated company shall not issue any evidences of funded debt or execute any lease of railway property which may entail fixed charges, except by the consent of a majority in interest of the holders of the preferred stock, to be expressed in writing, or declared at a meeting of such preferred stockholders called for that purpose, the agreement for consolidation to take effect upon its being adopted by the directors of the constituent companies, and upon ratification and adoption by the stockholders of each of the constituent companies. It appears that the stockholders of the several companies named

at separate meetings called for that purpose, have by a vote of at least two-thirds of the stockholders of each of said companies, voted to ratify and adopt the contract of consolidation made by their respective boards of directors.

The agreement contains many other provisions as to details, not necessary to be referred to or recited here.

The plaintiff alleges that he is a stockholder in the defendant company, and seeks in this action to enjoin the defendant from confirming and carrying into effect the contract of consolidation, for the reason that such contract is unjust, inequitable, and illegal in several respects, and especially does he charge illegality and want of lawful authority in the particulars now to be considered, and,

*First*—It is charged that these railways, proposed to be consolidated, do not intersect each other so as to form a continuous line or lines of railroad; that they do not intersect at Indianapolis or elsewhere; that there is no actual physical connection between the consolidating roads; therefore, the situation does not fulfill the requirements of sec. 3380 of the statutes of Ohio, by which it is provided:

Section 3380—A company organized in this state for the purpose of constructing, owning, and operating a line of railway, or whose line of railway is made, or is in the process of construction to the boundary line of this state, or to any point either in or out of the state, may consolidate its capital stock with the capital stock of any company in an adjoining state, organized for a like purpose, and whose line of road has been projected, constructed, or is in process of construction to the same point where the several roads so united and constructed will form a continuous line for the passage of cars," etc.

The facts submitted show that the "Big Four" extends from Cincinnati to Indianapolis, thence to Lafayette, Indiana, (and thence to Kankakee, Illinois), and is a corporation of the state of Indiana; the Indianapolis & St. Louis Railway Company extends from Indianapolis to Terre Haute, and is an Indiana corporation; the "Bee Line" road extends from Cleveland to Indianapolis, and is a consolidated company of Ohio and Indiana. These roads, therefore, all run to Indianapolis. Within the limits of the last-named city is a railway company known as "The Indianapolis Union Railway Company" (an incorporated company), its object and purpose being to furnish union depots, car-sheds and other structures and appurtenances deemed necessary to facilitate the transaction of the business of the various railway companies centering at Indianapolis. Its tracks are some three or four miles in length. The tracks of these consolidating companies unite with the tracks of the Union Railway Company, so that trains pass thereon from either road to the other. The break, then, between the Indianapolis termini of these companies is occupied by the "Union Company." This break, or lack of immediate connection, it is said, renders the proposed consolidation obnoxious to the section of the statute just quoted. The relation of these consolidating companies to the "Union Company," and the character and objects of the "Union Company," become important in this connection. An act of the Legislature of Indiana, passed in 1885, authorizes two or more railway companies owning railroads in the same city to form a union railway corporation. Such railway companies uniting in the formation of such union company are designated by the law itself as proprietary companies. The board of directors of such union company is to consist of one representative from each of the proprietary

companies. By the terms of section five of the act in question, "the interest of each proprietary company in the union company, in its capital stock, and in its property and effects of every kind, shall be deemed an appurtenance to the railroad of such proprietary company, and shall not be transferable or alienable otherwise than with and as a part of the railroad of such proprietary company. The union company shall issue to each proprietary company a certificate, setting forth the interest or stock of such proprietary company in such union company, but such certificate shall express upon its face that it is not transferable except as appurtenant to the railroad of such proprietary company."

Prior to 1885 several railway companies centering at Indianapolis joined in a union railway scheme, conveying their separate properties within certain limits to the union company. After the passage of the act of 1885, above referred to, they accepted its provisions, and this Union Company is now operating thereunder as an incorporated company. The Big Four and Bee Line are proprietary companies in the Union Company, each owning a fifth interest in its capital stock and property. In the case of the State v. Vanderbilt, 37 Ohio St. 590, it is decided that two railroad companies, owning lines of railroad connected only by other roads which such companies hold by lease, are not authorized to become consolidated into one corporation. In that case the consolidating roads were connected by a leased line from Dayton to Springfield, a distance of twenty-four miles. But in this case the relation of the consolidating companies to the "Union Company" can hardly be that of lessee and lessor.

If consolidation is effected (the "Big Four" and "Bee Line," each having a one-fifth interest in the "Union Company"), the new corporation will have a two-fifths interest as a proprietary company in the "Union"—an interest made by the statute an appurtenance to the road, and not transferable or alienable otherwise than with and as a part of the railroad itself. These are the indicia of ownership, and the "Big Four" and "Bee Line" have this sort of ownership in the "Union Company." Considering the character of the ownership of these companies in the "Union Company," and as well that the purpose and object of this "Union Company" is simply to secure centralized and union terminal and depot facilities for several proprietary companies, for their mutual and better accommodation and the accommodation of the public, we are of the opinion that these roads do meet and unite and form a continuous line for the passage of cars. It appears in evidence that to avoid any possibility of doubt on this point, a new connection has been projected and is in process of construction between the Bee Line and the Big Four in Indianapolis. However this may be, there seems to us to be no such hiatus at Indianapolis as to warrant the court in interfering for this reason. We think that these roads do "unite and form a continuous line" within the meaning and requirements of section 3380.

Second—It is urged further that the lines of railway proposed to be consolidated are competing lines, and therefore their consolidation would be in violation of the statute, and contrary to the policy of the state.

In the case of The State v. Vanderbilt (37 O. S.) the Supreme Court held that "the lines of two railroad companies, which are in their general features parallel and competing" cannot become consolidated into one corporation under section 3379 of the Revised Statutes. In that case the two roads, with their leased lines, run from Cincinnati, northerly, one to Cleveland and the other to Toledo, and for sixty miles,

or from Cincinnati to Dayton, the roads are parallel and near to each other. These roads, (the C., C., C. & I. and C., H. & D.) the court found were, in the general features, not only parallel but competing—a fact apparent from the mere statement of the location of the road.

In the case now before us the Big Four and Bee Line are in no sense parallel—indeed it would be nearer the fact to say that they run at right angles to each other, since the general direction of the Bee Line is from the northeast to the southwest, while that of the Big Four is from the southeast to the northwest. Are they competing lines? It is said a reference to the map of the two lines clearly shows that they are. The westerly connection of the "Bee Line" makes southwesterly from Indianapolis to Terre Haute and St. Louis, while that of the "Big Four" makes northwesterly to Lafayette and Kankakee. The points reached are widely divergent, and the idea of competition would hardly occur to the popular mind from an inspection of the map. Yet it is not to be doubted that there is some competition for through business destined to and from the seaboard and Eastern States and also for business at points west of Indianapolis, resulting more, perhaps, from crossing and intersecting other lines that serve as feeders than that the two roads in question tend in the same direction or to the same commercial centers, for we think such is not the case; and while there is incidental competition between these roads, as there is between either one of these roads and many others that might be named, we are disposed to hold that in no proper, legal or commercial sense can they be said to be "in their general features" and from a geographical standpoint, competing lines.

Third—It is further objected that the consolidation act, section 3379 to 3388 Revised Statutes, confers no authority to create any capital stock of the consolidated company greater than the aggregate amount of the stock of the constituent companies, or to create preferred stock where none existed before.

Section 3381 provides, among other things, that "the directors of the several companies may enter into a joint agreement * * * for the consolidation of the companies, and prescribing the terms and conditions thereof, the mode of carrying them into effect, the name of the new company * * * the number of shares of the capital stock, the amount of each share and the manner of converting the capital stock of each of the companies into that of the new company," etc.

There seems to us nothing in this section that justifies the claim that the number of shares of the new company must be the same as the aggregate of the old companies or that the amount of each share must be the same. If such was the intent of the Legislature they would undoubtedly have said so, but experience and our common knowledge of railroad affairs clearly demonstrate that no such thing was intended. It seldom happens that the stocks of consolidating companies are of equal market value, so that it would be just and equitable to issue by the new company, share for share, to the stockholders of the several constituent companies. Indeed, the practice in Ohio and elsewhere has been for years, in cases of consolidation, to issue a greater or less amount of stock of the new and consolidated company, than the aggregate of that of the consolidating companies, in order to secure just and equitable distribution of the stock of the new company. The right to do this, so far as I am advised, has never been denied by the courts (where fraud is not charged, and fraud is not charged or claimed in this case,) but has been approved. 112 U. S. 465.

Corporations have such powers, and such only, as the act creating them confers, and are confined to the exercise of those expressly granted, and such incidental powers as are necessary for the purpose of carrying into effect powers specifically conferred. 5 Ohio State, 60. The right to fix the number and amount of the shares of the new company is expressly given by the statute, and we hold it to be one of the incidental powers necessary for the purpose of giving effect to this statute, and within its fair intendment, that these contracting corporations may agree to issue stock of the new consolidated company, in an amount greater than the aggregate stock of the constituent companies, in order to secure an equitable division.

It is said, however, that it is inequitable and illegal to issue preferred stock, all such stock going to the stockholders of the "Big Four." The right to classify stock in the organization of a consolidated company will hardly be denied. A consolidation is the organization of a new company, and every shareholder of the defendant company purchased or held it subject to the right of two-thirds of the stockholders, not only to consolidate, but in the organization of the consolidated company to make such terms and conditions as to them should seem best, provided such terms were lawful. The facts submitted show that the "Big Four" has for several years paid an annual 5 per cent. dividend (payable quarterly) on its capital stock. The "Bee Line" for several years has been a non-dividend paying road. Taking this fact, with other circumstances into consideration, the boards of directors of these constituent companies have agreed, and this agreement has been ratified by the requisite majority of the stockholders of the respective roads, that it would be fair and equitable, before the new company should declare any general dividend upon its stock, that $10,000,000 of the stock issued by the new company to the original stockholders of the "Big Four" should be preferred in this: That the holders thereof should receive a 5 per cent. dividend thereon before any general dividend or division of earnings should be made. Upon the facts submitted this does not seem inequitable; we think it is not unlawful—it violates no express provision of law. It seems a reasonable exercise of the powers granted. If (in a supposed case) the value of the "common" stock of two roads about to be consolidated stand as three to one in point of value, and you can issue of the new "common" stock in the ratio of three to one in order to equalize values, may you not, by the same token, in the absence of express statutory inhibition, agree that where one new share is issued for one old share, a certain number of these new shares shall receive a dividend before a dividend is declared on the balance? I see in this nothing inequitable or unlawful.

Furthermore, usage in this regard would seem to approve the method employed here. In 1868 the "Pan Handle," the Steubenville and Indiana road, and the Holiday's Cove Railroad consolidated as the Pittsburg, Cincinnati & St. Louis Railroad Company, with a capital stock of $10,000,000. Of this stock $3,000,000 was issued as preferred, and $7,000,000 as common stock. (Ohio Railway Reports, 1870.)

When the Ohio & Mississippi Railroad Company was organized as a consolidated company out of Ohio, Indiana and Illinois corporations, its capital stock was fixed at $23,500,000, divided into $20,000,000 common and $3,500,000 preferred stock. (Ohio Railway Reports, 1870.)

In 1856, the Ohio & Pennsylvania Railroad, the Ohio & Indiana Railroad, and the Fort Wayne & Chicago Railroad consolidated as the Pittsburg, Fort Wayne & Chicago Railroad Company; capital $16,000,000.

The stockholders of the Ohio & Pennsylvania Company received for each $100 of their stock $120 of the stock of the new company, the stockholders of the Fort Wayne & Chicago Railroad $107 for every $100, and the stockholders of the Ohio & Indiana Railroad $50 for every $100 of their stock.

In 1867 the Columbus & Indianapolis Central Railway Company, the Union & Logansport Railroad Company, and the Toledo, Logansport and Burlington Railroad Company consolidated, with capital stock fixed at $9,000,000. Stockholders of the Union & Logansport road, for each $100 of stock held by them, received $100 of stock of the consolidated company. The holders of preferred stock of the Toledo, Logansport & Burlington Railroad Company, for each $100 held by them, received $135 of the common stock of the consolidated company; and the holders of the common stock, for each $100 of the stock, received $50 of the stock of the consolidated company. The stockholders of the Columbus & Indianapolis Central, for each $100 held by them received $100 of the stock of the consolidated company, and in addition thereto, 50 per cent., payable in income bonds or stock, as each stockholder might elect at the time of surrender of his certificate of the old company. (Ohio Railroad Reports, 1870.)

These are but samples of the many consolidations that have taken place in Ohio within the past twenty years, and all without criticism or objection by courts, so far as I am advised. No legal objection is apparent when the agreement is fair and equitable, and not tainted by fraud.

Fourth. Again, it is said that under the contract of consolidation a preference as to control is given, as follows:

"The consolidated company shall not issue any evidences of funded debt, or execute any lease of railway property which may entail fixed charges except by the consent of a majority in interest of the holders of the said preferred stock, to be expressed in writing under their signatures respectively or declared at a meeting of such preferred stockholders, to be called for that purpose."

That this gives to the holders of the preferred stock a sort of veto power, and limits the powers of the directors and stockholders which is conferred on them by law, and therefore in conflict with the statute. Particularly it is said to be in conflict with section 3243, which provides that "the coporate powers, business and property of corporations formed under this title must be exercised, conducted and controlled by the board of directors," etc., and with section 3257, providing that "upon the written assent of not less than three-fourths of the stockholders of any company, may borrow money, not exceeding one-half its actual stock paid in," etc. This provision in the contract can hardly be said to give the preferred stockholders any veto power upon the board of directors, for their powers refer to the *ordinary* business transactions of the corporation. (18 Wall., 233.) The directors alone, and without the matter being submitted to and approved by the stockholders, would have no power to issue evidences of funded debt, or to lease or to execute a lease of any railway. These are not within the ordinary business transactions of the corporation; they are of an extraordinary character, and require the assent of the owners of the property, for whom the directors act, to-wit: the stockholders. Manifestly, from the standpoint of the directors, there is nothing designated in this provision of the agreement to restrict or limit them in transacting the ordinary business, such as purchasing rolling stock, improving right-of-way, and road-bed, the building of depots and

freight houses, or the making of temporary loans to meet current obligations and necessities. We think the power of the board of directors is not abridged by this provision of the contract, and section 3248 is not violated thereby.

Upon the other proposition, that this provision places in the hands of the preferred stockholders a power over other stockholders, and possibly over a majority of all stockholders, so as to limit or prevent them from exercising their lawful statutory functions, is a question of much greater difficulty. Suppose the stockholders of the new company, representing two-thirds of its capital stock (over $20,000,000), under authority of sections 3300 and 3301, decided and voted to lease some other road, or to purchase a part of some other road, or to aid some other railroad in the construction of its road, as they may lawfully do under the sections named. Can a majority in interest of the preferred stockholders (representing, say, $5,000,100), say they may not do it? Suppose under authority of section 3286, Revised Statutes, a majority in interest of the stockholders decided to issue bonds for the purpose of increasing its machinery or rolling stock, or double-tracking its road; or suppose under section 3257, three-fourths in interest of the stockholders decided to borrow money not exceeding one-half its capital paid in; can a majority in interest of the preferred stockholders ($5,000,100 out of $30,500,000), say them nay?

We seriously question the validity of this section of the contract in this particular. But whether or not it be *ultra vires* we deem it unnecessary now to determine. Suppose it is in conflict with the statute: Would the court be justified in holding therefore that the whole contract must fail and consolidation be prevented? The contract has for its primary and main object the consolidation of three railway companies into one new company, and the equitable division of the new stock among the shareholders of the old companies. This particular section has to do only with the question of power of corporate control in the new company—a limitation sought to be put upon the power of the new company; and if illegal it may be rejected and still leave the contract complete and perfect in all essential particulars. Authorities are not wanting to the effect that where the legal can be separated from the illegal, you may reject the bad part and retain the good. Particularly is this true as to executed, or partially executed contracts. Laskey v. Bd. of Ed., 35 Ohio State, 519; 1 Wall., 221; Pollock on Contracts, 43; State v. Findley, 10 Ohio 51; 35 N. J. L., 240. Eliminate this provision from the contract, and it leaves the contract complete as a contract of consolidation; eliminate it as a question of power, or the conferring and limiting of power in the new company, and it leaves the new company to exercise the powers conferred by law. Again the contingency may never arise when the provisions of this section of the contract will be invoked against the new management; and it is urged with reason that it will be time enough to resort to a court of equity for relief when such contingency arises. We see no ground for interference here. We are persuaded that danger or loss of damage to plaintiff's rights is so exceedingly remote as to this feature of the contract that a court of equity would hardly be warranted in staying the performance of a contract, if otherwise lawful.

Fifth. It is said that consolidation means the annihilation, the destroying of the defendant company, and that consolidation can not be had without the unanimous consent of the stockholders. Undoubtedly, consolidation means the wiping out of existence of the three constituent

companies; and while, as a matter of sentiment, we may regret that an old and honorable corporation like the "Bee Line," whose name has been a household word in Ohio for many years, should pass out of existence as a distinct corporation, our only answer must be the laws of Ohio permit it. While the general rule may be as stated that consolidation requires the unanimous consent of the stockholders, yet, under the laws of the state, we understand that every shareholder in this company (the "Bee Line" was organized in 1868 as a consolidated company, if we remember right) took his shares, and every purchaser of stock holds his shares, subject to the right of two-thirds in interest of the stockholders to consolidate, and his only remedy, if he does not assent, is to take pay for his shares according to the market value thereof in the way provided in the statute. The charter provision for consolidation with other companies enters into the contract between the company and its shareholders, and, under provisions of this sort, consolidation may be effected on a vote of two-thirds in interest of the shareholders.

Other objections have been urged against this proposed consolidation, but upon the whole case we find no just ground for interference.

Temporary injunction refused.

Burke & Ingersoll, for plaintiff.

S. E. Williamson, Ashbel Greene, John F. Dye, and H. H. Poppleton, for defendant.

## LIFE INSURANCE. 37

[Superior Court of Cincinnati, Special Term.]

### †W. W. Trimble v. Connecticut Mutual Life Insurance Company.

Harmon, J. (orally).

It has been manifest to me since I first comprehended this case, that it turns on the construction of the contract between the parties which is as follows:

"This agreement entered into by and between The Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, and George W. Fackler and Montgomery Rochester, both of Cincinnati, Ohio, partners under the name of George W. Fackler & Co.

"*Witnesseth*, That the said Life Insurance Company do and by these presents appoint the said George W. Fackler & Co. their general agents for the states of Ohio and Indiana, to act by and under the instructions of said company, during the pleasure of the directors thereof, to solicit applications for insurance, deliver policies thereon and renewal receipts thereof, and to receive the premiums therefor, and to appoint, supervise and superintend all sub or local agents in said states as specified, as may be necessary for a successful prosecution of said life insurance business in said states, and to have the general management and direction of the business of said states as specified, being responsible to said company for all premiums and policies collected by them or their sub or local agents.

Said George W. Fackler & Co. agree to devote their entire time and attention in a faithful and industrious manner to the general business of

†This judgment was reversed by the circuit court, and the circuit court was reversed by the Supreme Court, without report, January 29, 1889, thus affirming this judgment. This case is a re-report of 9 Dec. Re., 414.

life insurance for said company in said states, in canvassing and soliciting applications, appointing or supervising sub or local agents, collecting the premiums on policies delivered to them or their sub or local agents, and upon the renewals thereof, and to remit promptly every month to said company all such moneys collected by them or their sub agents for premiums, deducting therefrom only such commissions and expenses as are hereafter stipulated; and it is understood that said George W. Fackler & Co. hereby expressly agree that they are to give their whole time and attention to the business of life insurance for said Connecticut Mutual Life Insurance Company, and that they shall not solicit applications for, nor place any risks into any other life insurance company, except in cases where the said Connecticut Mutual Life Insurance Company have already taken the full amount of risks allowed by their rules to be placed on any one life, or where said Connecticut Mutual Life Insurance Company objects and refuses to take such risks.

In consideration of the faithful performance of the foregoing specified duties and services by said George W. Fackler & Co., and all other services, pertaining to and necessary for a successful prosecution of the business of life insurance in said states, and for full compensation therefor, the said company stipulates and agrees to allow and pay the said George W. Fackler & Co. a commission of twenty-five (25) per cent. upon all the first premiums collected by them or their agents on policies issued upon applications received from them, and ten (10) per cent. commissions each year for four years on the subsequent or renewal premiums thereof, and five per cent. on all extra premiums, and five per cent. on all single premiums. The aforesaid ten per cent. renewal commissions to commence on policy No. 100,000.

On the outstanding or present existing policies in said states numbering below 100,000, are to be allowed and paid by said company six (6) per cent. commissions each year, for five years, on all renewal premiums of policies issued by said company in said states, and collected by said agents (with the exception aforesaid on extra premiums and single premiums), issued and numbered prior to 100,000: and the said George W. Fackler & Co. are to pay out of the aforesaid specified commissions, to their solicitors and sub-agents, such sums as may be agreed upon for their services, so that no claim further shall accrue or be made upon the company for their services. Postage for correspondence with the company and sub and local agents, and express charges and exchange are to be paid by said company, who are also to furnish such blanks, circulars and printed matter as are issued from the office of said company; and to this agreement the parties bind themselves and legal representatives firmly by these presents.

"This contract is to take effect from the first day of February, 1870, and is ratified and confirmed to that date.

"In witness whereof, said company by W. S. Olmstead, secretary duly authorized, and Geo. W. Fackler & Co., have set their hands and seals this eighteenth day of January, A. D. 1871.

"(Signed)
"Connecticut Mutual Life Ins. Co.
"by Woodridge S. Olmstead, Sec'y,
"GEO. W. FACKLER,
"M. ROCHESTER.
"Witnesses: NATHAN F. PECK,
"H. S. HOLMES."

The plaintiff to succeed must certainly establish the claim, as his counsel frankly admit, that by the terms of this contract he obtained, while the agent of the company, a vested right to renewal premiums and to unpaid portions of first premiums which fell due after his agency was terminated; it being admitted that the company had a right, with or without cause, to terminate the agency when it pleased.

Assuming that the contract is sufficiently indefinite to justify the court in looking to the subsequent conduct of the parties (for we can not look at their previous correspondence or transactions), to see whether they have by mutual assent—whether evidenced by conduct or language—put a construction on the contract, we will first consider that question.

There were three occasions when it might naturally be expected that the construction of this contract would be a subject of consideration—for of course the fact that one did or the other did not claim that a certain construction should be put upon it, would have no weight, unless the occasion would naturally call for such a claim.

The first one was when Rochester transferred his interest in the contract to Fackler. It is contended for plaintiff that the fact that a transfer was made, showed that Fackler must have had in mind the construction now contended for by the plaintiff, and that such transfer having been sent to the company, and at least tacitly assented to by it, shows that the company must have assented to such claims. But I do not think that such transfer and assent necessarily had anything to do with the right to commissions after the agency terminated, which is the question here.

Neither Rochester, nor Fackler, nor the company had in view a termination of the agency. What they all had in view was merely Rochester's retirement and Fackler's remaining.

If Rochester had made no assignment of his right to Fackler, the company, on their separation, would not have been justified in paying Fackler alone any money then in its hands due to both; for on all premiums which it may have received directly, it was bound to pay the commissions to the firm.

Besides the right to continue in the business, and earn future commissions, was a subject of transfer, because the company, having bargained for the services of both, could not be required without its consent to put up with the services of one only. So it seems to me that there was no necessary allusion in the conduct or language of either party to the question whether, if the agency should thereafter terminate, there would be a continuing right to commissions on future premiums as a compensation for what had already been done.

In other words, what took place on that occasion seems to me to indicate, and quite clearly so, a mere intention to transfer to Fackler the commissions already earned and the right to continue the agency alone.

The second occasion was in 1874, when the company desired to separate Indiana from the territory covered by the agency, and a correspondence took place between the parties, which resulted in such a separation by giving Indiana to another agent, and in some agreement between Fackler and that other agent as to the division of commissions on renewals upon policies obtained while Fackler's agency included Indiana. The parties were not considering what the rights of either would be if the agency should afterwards terminate. The agency was an entirety so long as Fackler should retain it, and he unquestionably had by his contract a right on Indiana policies while his agency lasted. The

testimony shows, and the conduct of the parties, that their relations were satisfactory. The company did not of course desire to offend an agent whom it then wished to retain, and the object of this correspondence was to see if they could not agree upon some terms upon which Fackler would be willing to act for Ohio alone, and let Indiana go. Fackler, with the same human nature which crops out in all transactions of men, of course wanted to do as well as he could for himself in the bargain, and naturally wanted what the new agent was willing to concede, at least a share in an easily earned commission on renewals upon policies which his labor, and that of his agents, for which he had already paid, had secured. It seems perfectly clear to me that this transaction did not reflect at all upon what the parties then thought of the question now presented. Of course Fackler had a vested interest in the renewals, provided his agency continued. It was vested in a sense to be the subject of bargaining. If the company had attempted to take Indiana from him without terminating his agency, he could very well have said, "go ahead, but I stand on the original contract; I am going to have my renewals." But the language of the parties shows that there was simply an amicable attempt to modify the agreement; and neither party had any thought of what would be the effect if the company should terminate the agreement.

The third time when this question would naturally have arisen, was when the agency ended. I have not heard what counsel have to say on that subject, but it is perfectly evident that this of all times, was the one when we would expect something to be said on the subject.

1st. Because the very thing that would most likely bring that to the minds of the parties was the termination of the agency.

2d. Because Fackler was then found to be short in his accounts with the company.

3d. Because he was then put to the humiliation of calling upon a relative, and that not a blood relative, to let him have the money necessary to pay to make his account good, and it was well known that interests of this sort have an ascertainable value by the tables of actuaries. So that it seems to me that if we should concede that from what took place on the other two occasions an inference might be drawn in favor of the plaintiff, the fact that Fackler did not on this occasion allude in any way to this claim or seek to have its value taken by the company as a part of his large indebtedness to it would prevail, and the plaintiff is given the benefit of the doubt if the court shall say that he comes out even on the question of the effect of the conduct of the parties, so that we are put back at last to look at the agreement simply in the light of its own terms.

It must be admitted that this agreement like a good many others, drawn by persons who have some knowledge of legal terms, but are not really learned in the law, while it has a sound of great profundity and clearness on a loose reading is really open to attack for obscurity, and that obscurity, as is often the case with such contracts, arises from an effort to display too much learning, Counsel for plaintiff with great ingenuity have taken advantage of this, and certainly have raised some doubt, if we are to look at the contract as they look at it, but it seems to me they have failed to observe the well known rule of construction, which requires us to take the contract by the four corners, as the saying goes, and look at it altogether.

The points made by counsel are, that when the contract reaches the place where the compensation of Fackler is provided for, it appears as though his collection of some premiums is the condition upon which he was to receive a commission, but that he was to have other commissions whether he collected premiums or not.

In the first place I am not at all sure that this is true. Only a very critical reading of the contract would suggest it. It would not arise from an ordinary reading, although one might say it is a possible construction when once suggested.

"The said company stipulates and agrees to allow and pay the said George W. Fackler & Co. a commission of twenty-five per cent. on all the first premiums collected by them or their agents upon policies received from them, and ten per cent. each year for four years on the subsequent or renewal premiums thereof, etc."

Assuming what may be, and I rather think is the case, that there was an intent in the location of the phrase "collected by them," it does not follow that such intent was that the agent is to have the commission on renewals after his agency has ceased, it being expressly provided that it may cease whenever the company so wishes. Is it not equally referable to an intention to allow the agent his commission in cases where the insured might transmit his premium directly to the company as would very probably be done, as suggested by counsel for plaintiff, where extra premiums were paid, they being, as the testimony shows, a special additional premium paid for some reason not contemplated by the policy. It seems to me fair to say that the one is as proper a construction as the other, and that both were not necessarily meant.

And we must remember that we naturally expect men, when they are providing for what the one is to do and the other is to pay, to have in mind merely the state of affairs while the contract continued, and that a stipulation for what one shall have after the contract is ended is not ordinarily to be looked for except in express terms. It is conceded by counsel that the only effect of the location of the phrase; "collected by them," in the next clause relating to the commissions on premiums on existing policies, has only the effect of giving the agent the commissions in case the premium should not pass through his hands, and that fact would strengthen the view that such was the only effect of the same clause elsewhere, considering the principle that I have already spoken of that parties are supposed to be stipulating (unless the contrary appears), for the time covered by the contract, and not for something to happen afterwards.

I am unable to discover any such meaning in the use of the words; "allow and pay" as is contended for by counsel. In the first place, both words are proper. First premiums being always collected by the agent, the term, "allow," would naturally apply to them as well as to all other premiums collected by him, and as the parties contemplated the payment of some premiums directly to the company, the use of the word "pay," was appropriate as to them. But if that were not true, it is only a part of that verbiage which is well illustrated in the use of the pompous terms, "stipulates and agrees." It certainly could not be contended that there is anything but a desire to display command of legal terms to be seen in the use of both those words.

This being the case, it seems to me that it would be straining a point to say, if we look no further, that the intent of this contract was to provide that the agent was to have something after his agency terminated.

But looking at the entire contract, it seems to me perfectly clear that the parties had no such thing in view, and why? The language in the undertaking on each side is as follows: "Fackler & Co. agree to devote their entire time and attention, and in a faithful and industrious manner, to the general business of life insurance for said company in said states, in canvassing and soliciting in said states, collecting premiums on balances delivered to them or their sub or local agents," etc.

But the parties do not proceed to provide a separate payment for those separate services. They do not say the party shall have so much for getting the application and securing the insurance, so much for the commissions, etc., but they say expressly; "In consideration of the faithful performance of the specific duties by said George W. Fackler & Co." they shall receive the commissions named.

Now it is true sometimes, where a number of things, whether articles to be delivered or services to be rendered, are specified, and afterward a series of payments therefor are provided, that by the operation of the maxim of construction *singula singulis redenda*, particular payments will apply to particular items.

But it seems to me absolutely impossible to apply that maxim here, because the sum to be ascertained by a certain percentage on commissions, is expressly said to be payment, not only for the specific things to be done by Fackler & Co. in the foregoing portion of the contract, but for all other services pertaining to, and necessary for the successful prosecution of the business of the company. That being the case, it seems to me perfectly plain that what the parties are stipulating for is what the agents shall do and what the company shall pay them for it both *in solido*, while the agency should continue, and that it is impossible to find in the contract the meaning contended for by the plaintiff, viz: that the intent of the contract was to provide: "That for getting applications of insurance in this company, the agent shall be entitled to twenty-five per cent. upon the first premium and ten per cent. on renewals for four years." That would require us to hold that each one of these commissions was intended to be payment for the specific services in each case. For the reasons just stated, it seems to me that the terms of this contract preclude any such meaning.

That being the case, it seems to me the controversy is settled. It may be said that it is eminently fair that the company should continue to pay; it may be said that it is a hardship on the agent after having sowed the seed with much toil, not to be permitted to pluck the fruit when the task of plucking is comparatively easy, but the answer is, that where the parties make a contract, they stand or fall by it, and if the agent intended to secure to himself such a right, it was easy to so provide. He might have done it by separating the various compensations or commissions provided for, and making each one a payment for some specific service.

In that case, if the contract had provided that for getting the insurance he should have twenty-five per cent. and ten per cent. commission on renewals thereof, he would have had a vested right, but, as stated, those percentages were lumped together as the sum that he is to get for every service he was to render, and he cannot say he is entitled to them after his agency has ceased and he has therefore ceased to render any services whatever.

I am sorry, now that this view has so ripened in my mind as to lead me to decide the case without hearing from the counsel for the defense,

that the argument was not insisted upon at the time the motion was made; but at that time I did not fully grasp the entire scope of this contract which I had only heard read over once.

Kittredge & Wilby, for plaintiff.

Jordan & Jordan, for defendant.

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## LIMITATIONS—ACTIONS. 63

[Washington Common Pleas.]

### NELSON M. CLARK v. BENJAMIN EDDY.

#### I. STATUTE OF LIMITATIONS.

1. The act of 1831, sec. 4, applied only to cases founded on contracts, express or implied, made out of this state, by non-residents.
2. The Code in 1853, sec. 22, enlarged the operation of the earlier act, by extending it to all causes of action arising out of this state between non-residents.
3. The revision of 1878 omitted any express requirement as to the residence of parties (Rev. Stat., sec. 4990), and made the bar of a foreign statute to depend solely on the fact that the cause of action arose out of this state. *Held:*

That the effect of this change is to enlarge the operation of the provision, inasmuch as causes of action may arise in another state or country, in favor of persons resident in this state, which would be clearly within its present terms, but which, because of the non-residence clause in both of the earlier acts, would not have been covered by either.

#### II. ACTION—RIGHT, CAUSE OF.

1. An action is a "judicial proceeding for the prevention of redress of a wrong."
2. A right of action is the right which, upon the commission of a wrong, *ipso facto* arises from the law of remedy, to the injured party, of redressing the wrong done him, by a suit against the wrongdoer.
3. A cause of action *in personam* is the wrong done or threatened, which gives to a party injured, or whose legal rights otherwise would be invaded, the right, by an action, to redress the one or prevent the other.

#### III. WHERE CAUSE ARISES.

1. Generally, the *locus* of a cause of action is the place where the wrong, which constitutes it, is done or threatened, if that be also the jurisdiction in which, when it arose the wrongdoer could be sued.
2. Where the cause of action is a breach of the personal obligation of a contract, it is to be regarded as arising at the place where the delinquent party resided and could have been sued, when the breach occurred; and the facts (1) that the contract is by deed, and relates to land; and (2) was to be performed elsewhere, will not vary the rule, if the action be *in personam*, and for damages only.

Therefore, where C. and E. domiciled and being in Ohio, the latter for valuable consideration, conveys to the former lands in Illinois, by deed in fee, covenanting therein against incumbrances, and warranting title; and thereafter the entire estate in the lands is lost to C. by the failure of E. to discharge a tax lien existing when the deed was made and delivered—both parties continuing to reside and be in this state. *Held:*

In an action by C. against E. to recover damages for the breach of said covenants, that the cause of action arose in Ohio, and not in Illinois.

STATEMENT OF THE CASE.

I. The petition alleges that, September 25, 1875, the defendant, in consideration of $1,000, since paid, by his deed of that date, conveyed to the plaintiff, in fee simple, certain lands situate in the state of Illinois; that in said deed the defendant also covenanted that the lands conveyed were free and clear of all incumbrances, and warranted the title thereto. It is further alleged that when said conveyance was made, the lands were incumbered by a lien for taxes, under the laws of Illinois, which are set out, by virtue of which, June 8, 1874, they had been sold; that the plaintiff had two years from that date, in which to redeem the lands by the payment of said taxes, penalty and costs, but this he wholly failed to do, whereupon, June 9, 1876, the lands were, as shown by facts set out, duly conveyed to the purchaser at said tax sale, in fee simple, and he put in possession thereof, which title and possession he ever since has held. The petition also avers that when the conveyance of said lands was made to the plaintiff, as aforesaid, both of the parties were residents of, living in the state of Ohio, and so ever since they have continued to be.

The third count of the answer, without denying any fact alleged in the petition, says that the cause of action therein set up, arose in the state of Illinois; that by the laws of that state, in force and effect prior to September 25, 1875, and ever since, all actions on written contracts, covenants and agreements, are barred in ten years after the cause of action shall have accrued; that no action can be brought thereon unless within ten years from the time the cause of action accrued; and then avers that this action was not brought within ten years from the time it accrued, and so is barred by the laws of Illinois.

To this count a general demurrer was interposed, and on the issues thus made, after full argument, the case was submitted.

II. In view of the whole record, the contention of the counsel for the plaintiff is, that this third count shows no defense, under the relevant provision of our statute (Rev. Stat., sec. 4990), for the reason that the contract sued on was made in Ohio, the parties continued to reside and be here when the breach occurred, and the action being *in personam*, for damages merely, the cause of action must be held to have arisen here. Upon the other hand, counsel for the defendant claim that as the contract sued on is contained in a deed conveying lands in Illinois, and the incumbrance in question was for taxes, it must be held (1) that the law of the state determines its construction and effect; (2) that Illinois was the place where it was to be performed; and (3) was also the place, on default in that regard, where the breach occurred, and so where the cause of action arose; in which view this count shows a defense under Rev. Stat., sec. 4990.

J. W. McCormick, and W. B. Loomis, for plaintiff.

L. W. Ellenwood, W. G. Way and A. D. Follett, for defendant.

OPINION.

SIBLEY, J.

I. The foregoing statement makes it clear that a ruling on this demurrer involves the construction and application of sec. 4990, Rev. Stat. As it is believed that a glance at the history of this provision will materially aid in its interpretation, that will first be taken.

An act for the limitation of actions, passed February 18, 1831, sec. 4, first gave the right to litigants in Ohio, of interposing in bar of an action, the provisions of a foreign statute of limitations. It is in these words:

"That in all actions on contract, either express or implied, made between persons resident without this state at the time such contract was made, and which are, or hereafter may be, barred by the laws of the state, country, or territory, where such contract was made, shall be and continue barred, when brought in any court of this state." III Chase, 1769.

This remained the law until our civil code went into effect, July 1, 1853—Ch. IV, sec. 22 of which was as follows:

"Where the cause of action has arisen in another state or country between non-residents of this state, and by the laws of the state or country where the cause of action arose, an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state." II S. & C., 950; III Curwen, 1941.

No change was made in these provisions until the act of May 14, 1878, (75 Ohio L., 597), to revise and consolidate the laws, etc., sec. 17 Ch. II, Title I of which enacted what is now sec. 4990, Rev. Stat., reading thus:

"If by the laws of the state or country where the cause of action arose, the action is barred, it is also barred in this state."

In comparing these several statutes, or rather revisions of the act of 1831, for the purpose of getting a true reading of sec. 4990, Rev. Stat., the rule long settled in this state, that the same construction will prevail as before the revision, unless the language of the new act plainly requires a change to conform to the legislative intent, State v. Com'rs, 36 Ohio St., 326; Conger v. Backer, 11 Ohio St., 1, is to be borne in mind. Simple inspection, however, makes obvious the purpose, in 1853, to extend the application of the bar in the act of 1831, beyond cases founded on contract, and, so far as respects the class of persons to which it should apply, make it commensurate with the entire field of civil litigation. It appears equally clear to me, that the revision of 1878, along the same line with that of 1853, still further enlarges the scope of this provision. As now framed, it omits the clause common to each of the earlier acts, by which the non-residence of both the litigants, at the time the contract was made, under the first, or the cause of action arose, under the second, was requisite to render the foreign bar available; and makes its efficacy to depend solely upon the fact that the cause of action arose in another state or country. Therefore, if there be found cases to which in its present form, this section clearly would apply, but that prior to the revision could not have been included within its operation because of the force of the words omitted, the change in verbiage must be held to manifest an intention of the legislature that the bar of the statute should be correspondingly enlarged, and it will properly be read and applied accordingly.

Such a case this would be if, when the covenants were entered into and broken, the defendant had resided or in fact been in Illinois, and afterward, coming to Ohio, the action was brought. On those facts, it seems perfectly clear that the cause of action would arise in the former state, and not in this, and the bar of its statute therefore, under Rev. Stat., sec 4990, would be good, as plead here, though not under either of the former acts, because the plaintiff was all the time in Ohio. To

that extent then, the revision of 1878, enlarged the operation of the code enacted in 1853, sec. 22. As the law now stands, in other words, the bar of a foreign limitation is not, as heretofore, by our statute made to depend on any express provision respecting the residence of the parties to a suit, but wholly upon the law governing the locus of the cause of action. This renders the section in question as comprehensive in its scope, as the principle which it evidently was intended to embody, but which its earlier forms operated in some degree to limit. That principle clearly is, that in litigation in the courts of this state, to assert rights arising under foreign law, a defendant is entitled to the benefit of the foreign statute of limitation, equally with the other defenses he might have interposed, had the action been brought where the cause for it arose.

This construction of our statute evidently transfers the controversy to the general law which governs the locus of a cause of action; but before entering upon a consideration of that, one or two preliminary propositions may well be stated.

II. The doctrine is settled, that the "law of the state in which land is situated, governs its alienation and transfer, and the effect and construction of deeds conveying it, wherever they may be made." McGoon v. Scales, 9 Wall., 23; Tillotson v. Pritchard, 60 Verm., 94; s. c. 6 Am. St. R., 95.

But as there is nothing in this record to show that the law of Illinois relating to the construction and effect of the deed in controversy, is different from that of Ohio, it will be presumed to be the same, at least so far as it depends upon principles of the common law. Monroe v. Douglass, 5 N. Y., 447; 1 Whart. on Ev., sec. 314; Rorer's Inter-State L., 122.

Again, while it is a settled law that, "in the absence of anything indicating the contrary, the place of the making of a contract is presumptively that of its performance," Bishop on Cont., sec. 1391, yet a "deed or mortgage of land is a contract to be performed where the land lies" (Ibid, sec. 1395; Phelps v. Decker, 10 Mass., 267.) Hence, in view of the general principle thus stated, the character of the incumbrance here in question, and the place where the lien creating it would naturally be discharged, if the defendant did his duty, this contract would seem to be the one to be performed in Illinois, the locus of the land to which it relates. But when all the facts in the record are considered, it by no means follows that this is also the place where the cause of action in this case arose. To make that clear, however, and in order to show where the cause of action here set up did arise, a more extended discussion of the meaning of that phrase than is usual in the books, may with propriety be entered into.

III. What has been termed the substantive law, determines the legal relations of persons within the sphere of its operation, and by general rules, which become standards of civil conduct, defines their respective rights and obligations. As, however, there can be no real legal right, without a means of redress, if it be violated, Holland on Jurisp., 64; Ashby v. White, 1 Smith's L. C., *386; Cooley on Torts, 25, alongside of the great body of substantive law, lies what we call the law of remedy—"the means whereby rights and duties are enforced" (1 Bishop Cr. Proced., sec. 1). In its most comprehensive sense, the law of remedy includes all lawful modes of redressing violations of legal rights. But as more commonly used, it covers only the forms of redress which may

be had through the agency of courts of justice, and in that sense the term is made use of here.

The ordinary judicial means of redressing wrongs, is by an action. This, indeed, is defined as a "judicial proceeding for the prevention or redress of a wrong," Bliss. C. Pl., sec. 1, 513; 3 Black., 113; Brown's Com. on C. S., *74; Boavier's Inst., sec. 2643—2d ed.

Between the substantive law and the law of remedy, there is this important distinction: the former, *proprio vigore* operates upon all persons within its field, while the latter may truly be said to operate only upon occasion—when something is threatened, or has been done, in violation of a legal right.

When one's rights, as they are defined or recognized by the substantive law, have been violated, what in legal sense is denominated a "wrong," has been committed, 3 Black., 2; Cooley's Torts, 64; Bishop on Cont., sec., 1418. "The wrong may be done by the denial of a right; or by the refusal to respond to an obligation; or it may arise from mere neglect in the performance of a duty; or it may be an affirmative injury," Bliss, C. Pl., sec. 113.

When a legal right has been violated, and so a wrong done by one, to the injury of another, the relations of both to the law of remedy are changed in vital particulars. Before that neither could invoke its aid, nor be compelled by its process. In potential sense only could either be said to have a right under or by virtue of it. But upon the commission of the wrong, all this changed. Then the party injured could do what before was impossible—go into a court of competent jurisdiction and, for purposes of redress, put the law of remedy in motion against the wrongdoer. The conjunction of the wrong with the law of remedy, gave a new right to the party injured—a right of action. This, however, is to be distinguished from the right, a violation of which, gives rise to it. Holland's Jurisp., 242. As respects the wrongdoer, a corresponding change in his relation to the law of remedy, also took place. He by his wrong became amenable to its demands, and subject to its compulsion. All this is obvious, yet the statement seems of value as a ground from which clearly to perceive what are the essential elements of a wrong, and right of action, and finally the real cause of action.

Plainly, a wrong is made up of the act by which a right under the substantial law is violated, and the rule of the law which it violates. These coalesce to constitute the thing which in legal conception is a "wrong." And manifestly with that, the law of remedy has no connection. On the other hand, the right of action is wholly independent of the substantial law, except as it furnishes the rule by which to determine when a wrong has been done. That being ascertained, the wrong and the law of remedy, together, give a right of action. Hence that right includes, as its essential elements; (1) the existence of a wrong, and (2) the law which provides redress—the law of remedy. We are now in position to see what is a cause of action.

Obviously the substantive law cannot enter into the cause of action, for the reasons which exclude it as an element in a right of action. So, neither the substantive law, nor that of remedy, nor both, as already shown, *per se* give a right of action to anyone. Only when some act has been done which violates a duty under the former, and so makes a "wrong," in legal sense, can there be any actual right of action. But the wrong being done, from the law of remedy the right *ipso facto* arises. Is it not then perfectly clear that the wrong, and it alone, is the cause of

action. With this conclusion is the great weight of authority. Bliss says that the "cause of action is the wrong." Code Pl., sec. 113, *et seq.*, 2d ed. "Whatever the form of action, the breach of duty is substantially the cause of action." Hornell v. Young, 5 B. and C., 259; Veeder v. Baker, 83 N. Y., 156.) So it has been held that the cause of action is the "act on the part of the defendant, which gives the plaintiff his cause of complaint." Jackson v. Spitall, L. R 5 C. P., 542; Durham v. Spence, 8 L. R. 6 Ex., 46. Mr. Pomeroy alone differs from this view by calling into a cause of action the relative right and duty of the parties, under the substantive law. Remedies, sec. 452, 519. But (1) his analysis seems incomplete, and (2) he is not in accord with the analogy of the law in another branch, for the reason that he makes a remote cause, if it can be called such, a proximate cause, of action. As well might one say the physiological law that death must ensue from preventing aeration of the blood by cutting the air off from the lungs, is an element in the crime of murder by strangling. Like the existence of life, it is a condition of the crime, but obviously no part of the cause of action against the murderer.

The doctrine which the foregoing discussion and authorities establish, as to what is the cause of action, in purely personal actions, applied to this case, plainly finds in the defendant's breach of his covenants, the "wrong" which is here to be regarded is the plaintiff's cause of action. Hence we are brought to the last point in the controversy—its locus.

IV. The argument for the defendant, on this question is, that if Illinois be regarded as the place where these covenants were to be performed, it must *ipso facto* be held to be the place of their breach, and so of the cause of action—the place where the deed was made and the parties have always resided, being wholly immaterial. In support of this conclusion, Burkle v. Eckhard, (3 N. Y., 132) is relied on, but is not in point, for the reason that the facts are essentially different from those in this case. There, the contract was made in New York, where the plaintiff resided, but was to be performed in Canada, which was the residence of the defendant, then and at the time of the breach, and also the place where he could have been sued. On that state of fact, the court held that the cause of action arose at the place of performance, as manifestly it did. But it does not touch the exact point here—what is the locus of a cause of action given by breach of contract, to be performed in one state, while the defendant always resided and was in another. Far more pertinent is Veeder v. Baker, 83 N. Y., 156. This case was under a N. Y. statute requiring companies organized under it to file and publish a report of their condition, signed by the president and other officers. It was also provided that, if the report was "false in any material representation, all the officers who shall have signed the same, knowing it to be false," should be liable for debts of the company, contracted while they were officers. The action was against the president of such a company, to enforce its debt against him, on the ground of his making a false report. The debt originated in one county, the report was filed in another. The action was brought in the county where the debt arose, and the defendant had been refused his motion to transfer it for trial to the county where the report was filed. The law was that it must be tried in the county "where the cause of action or some part of it arose. The contention was that as the debt arose in the county where the suit was brought, a "part" of the cause of action arose there, which would be enough to uphold the jurisdiction. But the court held, (1) that the cause

of action against the defendant was "the false report, and nothing else;" that it was "the cause of his liability;" and (2) that it "arose in Monroe county"—the one in which the report was filed. The court below was accordingly held not to have had jurisdiction, and its action was reversed. See also, Dunham v. Spence, 8 L. R., 6 Ex., 46, in which it was held that "where a promise of marriage was made outside of England, and the breach took place in England the cause of action arose in England." Hover v. Pa. Co., 25 Ohio St. 667.

These cases, it is agreed are not to the exact point under consideration. But do they not strongly tend to the proposition that the locus of the person whose act or failure to act is the wrong complained of, is also the place of the wrong itself, and consequently, of the cause of action, if that be the wrong? This seems to me quite clear, and is therefore held to be the principal which is controlling, in a case of this kind. Moreover, it brings the law into accord with the reality. The breach of a contract by which a party is obligated to do a certain thing that he fails to perform, is certainly a personal act, though of negative kind. Hence, if that act is a wrong, and the wrong be a cause of action, the latter arose where the person was when the breach occurred. Further, the contrary view involves what appears to be an absurd consequence. For if, in this case, the cause of action were held to have arisen in Illinois, where neither of the parties has been, as the record shows, and where therefore no action could be brought, we would have the curious condition of a cause of action in a place where there was no right of action. For, says Lord Holt, in Ashley v. White, "want of right and want of remedy, are reciprocal." Hover v. Pa. Co., *supra*.

V. From the nature of the action, then, the character of the wrong complained of, and the residence of the parties, the cause of action set out in the petition must be held to have arisen in this state, and not in Illinois. The finding therefore is that the demurrer is well taken, and it is accordingly sustained.

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## STREET RAILWAYS.

[Cuyahoga Common Pleas.]

### F. W. Pelton et al. v. East Cleveland Railroad Co.

1. The consent of abutting lot-owners upon a street occupied by a street railroad is not required, and is not a condition precedent to the right of the council to grant a renewal of the franchise of such street railroad company, under sections 2501 and 2502 of the Revised Statutes.
2. In the operating of a street railroad, the change in the motive power from horses to that of electricity applied by means of the overhead wire system, does not constitute a new and additional burden upon the street, entitling abutting lot-owners to compensation before such change is made; or to an injunction to prevent such change.

Stone, J.

The plaintiffs (about one hundered and twenty-five in number) seek in this proceeding to enjoin the East Cleveland Street Railroad Company from applying and operating the electric system of motive power in the running of its street cars. now in use on its road east of Wilson avenue

to the easterly limits of the city of Cleveland, on its line and tracks west of Wilson avenue, extending along Euclid avenue to Case avenue, thence along Case avenue to Prospect street, thence along Prospect street and to the Public Square.

This railroad company was incorporated in 1859, and constructed its road under the provisions of a general ordinance of the city of Cleveland, regulating the construction and operation of street passenger cars drawn by horses or mules, passed September 20, 1859. It had the consent of the city council, and the requisite number of property-owners owning property abutting on the streets named, to construct a single track road, with all the necessary turn-outs and switches, and it was so constructed and operated until 1878, when the city council authorized the company to lay a second or double track along the streets named, and the majority of abutting property-owners gave written assent thereto.

In 1879, its charter being about to expire, the railway company applied to, and obtained from the city council by ordinance, a renewal of its charter or grant, to maintain and operate its railroad in all the streets named, for the further period of twenty-five years. The assent of the abutting property-owners to this renewal of the grant, was not asked for or given. On the thirteenth of July, 1888, the city council passed an ordinance granting to the East Cleveland Railroad Company, then operating its cars by horse power, the right to erect and maintain poles and wires and all necessary appliances for producing and conducting currents of electricity as the motive power in operating its cars on that part of its line on Euclid avenue east of Wilson avenue to the city limits, and on its Cedar avenue branch east of the Cleveland & Pittsburgh R. R. crossing.

Section 8 of this last named ordinance, provides that "whenever the council shall so require, the said company shall use the same system as herein provided, on the entire length of its main and Cedar avenue lines." This ordinance was accepted by the railroad company, and in pursuance thereof, it erected its electrical plant, and ever since has operated its cars by electricity over the parts of its road so authorized.

On the thirteenth of May, 1889, the city council by resolution, authorized the railroad company to extend the use of its electrical system westerly, over that portion of its road now in controversy. This resolution was accepted by the company, and it proceeded with the placing of wires along its track, until interrupted by the restraining order in this case.

The assent of the property-owners along the road west of Wilson avenue, to the proposed change from animal power in moving cars to that of electricity applied by the overhead wire system, was never asked or given. It is now contended by the plaintiffs, who are owners of property abutting on Prospect street, Case and Euclid avenues between Wilson avenue and Erie street, that this company is proceeding illegally and without lawful authority, and,

I. It is said there is no lawful renewal in 1879, of the grant to operate this railroad for the further period of twenty-five years; that the renewal of the grant is essentially a new contract to be fixed by ordinance, which the city council could no more enter into or grant without the consent of the abutting lot-owners, than it could grant the right to construct the railroad in the first instance without their consent.

Section 2501 of the Revised Statutes, provides in substance, that "no corporation, individual or individuals shall perform any work in the construction of a street railroad, until application for leave is made to the council in writing, and council by ordinance shall have granted per-

mission and prescribed the terms and conditions upon, and the manner in which, the road shall be constructed and operated. * * * And cities of the first and second grade of the first class, may renew any such grant at its expiration, upon such conditions as may be considered conducive to public interests."

The next section (2502), provides in part, that "no ordinance for such purpose shall be passed, * * * and no such grant shall be made, except to the corporation, individual or individuals that will agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property-holders on the line of the proposed street railroad, represented by the foot front of lots abutting on the street along which such road is proposed to be constructed," etc.

It seems clear that the ordinance provided for in the section first quoted (2501), has reference only to the original construction of the railroad; that it means simply this: Before any street railroad shall be constructed, city council shall, by ordinance, grant permission and prescribe the terms and conditions of such construction and operation, but that the council may renew such grant at its expiration, upon such terms as shall be conducive to public interest. Then the next section (2502), says that no ordinance or grant for such purpose shall be passed or made, without first obtaining the consent of a majority of the abutting property-owners, represented by the feet front upon the street along which the road is proposed to be constructed.

This consent very clearly has only to do with, and is required only in cases of original occupancy of a street for a street railroad and original construction, and not to the renewal of a grant.

In the case of the State of Ohio on relation of the prosecuting attorney against The East Cleveland Railroad Company, 8 Circ. Dec., 471, recently decided by the circuit court of this county, that court in considering the rights of this railroad company in respect to its Garden street branch, gave construction to these sections of the statute in these words, Upson, J.: "It seems to us that the natural construction of the language restricts the operation of those provisions of section 2502 to which I have referred, to the ordinance, which is the only ordinance mentioned in section 2501, providing for the original construction of a street railway. It was not intended by the legislature that upon a renewal of such a grant either a publication of notice or the consent of the property holders upon the line of the road should be requisite, the law providing that the council in cities of the first and second grades of the first class, may renew such grant upon such conditions as may be considered conducive to the public interest, leaving the matter, as we understand it in that respect, entirely to the judgment of the city council as to what conditions will and what will not be conclusive to the public interest. We hold, then, that the ordinance to which I have referred, which renews this grant of the franchise to maintain a street railway on Garden street between Brownell street on the west and Wilson avenue on the east, is not invalid for the reason that notice was not given, and the assent of property holders was not obtained previous to its passage."

This decision seems clearly in point and decisive of this question. We hold therefore that the consent of abutting lot owners was not required, and not a condition precedent to the right of the council to grant a renewal of the franchise of this company in 1879.

II. Again it is urged by plaintiffs that the putting up of the poles and wires, and use of a current of electricity and the running of cars at an increased rate of speed, constitutes a new and additional burden upon the street—a new burden upon their property not contemplated by the original contract and grant, and cannot lawfully be done without compensation being first made. This involves the general question as to what is an additional burden upon the street not originally contemplated for which the abutting owner may have compensation.

It has been determined in numerous decisions, and without dissent except perhaps in New York, that the use of a street by a horse railroad constructed and operated in the ordinary manner, falls within the purposes for which streets are established and maintained; and consequently that for any damages resulting from such use to the abutting owner, he can recover no compensation whether the fee of the street is in him or in the public.

Lewis on Eminent Domain, sec. 124, and cases cited.

Judge Dillon says: "The appropriation of a street for a horse railway constructed and used in the ordinary mode is such a use as falls within the purpose for which the streets are dedicated or acquired under the power of eminent domain. When authorized or regulated by the public authorities this is a public use within the fair scope of the intention of the proprietor when he dedicates the street or is paid for property to be used as a street. Such proprietor must be taken to contemplate all improved and more convenient modes of use." 2d Dillon's Mu. Corp., sec. 722

Judge Ranney, in the case of the Cincinnati and Spring Grove avenue Street Railway Company against the village of Cummingsville, [14 O. S., 523] says, "The use of such highway for the purpose of carrying passengers over the same, in this particular manner differs in nothing from the exercise of the common right of carrying them by coaches or omnibuses; and everything needing a grant, or the further authority of law, is the right to place and maintain in the highway the necessary conveniences for this new description of carriages. When this grant is confined to a mere occupation of the easement previously acquired by the public, although its enjoyment may require a restriction upon former modes, we can see nothing in it but the control, regulation and adjustment of a public right, so as to make it best answer the purpose and meet the wants of all classes of the community. It does not exclude or seriously interfere with the original modes in which the highway was used, but simply adds another in furtherance of the general object."

Elsewhere in the same opinion he says: "In either of the modes known to our laws by which lands are acquired for a public highway, an interest commensurate with the attainment of the objects of the acquisition vests in the public at large, and is necessarily placed under the exclusive control of the law making power. Whatever is fairly within the contemplation of a grant, whether voluntary or forced and necessary to its beneficial enjoyment, is within the legal operation of the instrument or proceeding by which it is effected."

Again he adds: "We see nothing in the street railroad act which induces the belief that the legislature intended to authorize either companies or public authorities, to grant to railway companies anything more than an interest in the public easement; nor do we see any reason to doubt that such a location may ordinarily be made as to bring the necessary structures for the use of these companies within that interest, and

without any invasion of private right; * * * but where these new structures and new modes of travel devolve additional burdens upon the land, and materially impair the incidental rights of the owner in the highway, they require more than the public has or can grant, and the deficiency can only be supplied by appropropiating the private right upon the terms of the constitution." It is to be borne in mind that in the Cumminsville case just quoted from, the learned judge was dealing with a case where the street railway track was located on one side of the street, close to the sidewalk or curbstone, and it was found as a fact by the court "that the railway track, laid upon the side of the street as proposed, will be an obstruction to the convenient access to the houses and other improvements on the northwestern side of said highway," etc., and hence the court said that the "justice of the constitution" required compensation to be made in such a case before the private right could be thus invaded. We have given the general rule and whatever modification prevails in Ohio. The rule for our guidance, then, would seem to be this: When the street car tracks are so located and the structure in the highway is of such a character as not to substantially invade private rights; that is, the right of convenient ingress and egress, and such other incidental uses of the street as may be necessary to the convenient use and enjoyment of abutting private property, then the owner must be taken to have contemplated such modes of use and has no claim for compensation. If, on the other hand, the construction is of such a character and is so located as to substantially invade private rights, then the individual is entitled to compensation.

We think we may safely assert that this structure of the defendant in the streets named, as now used and as it has been used for the past sixteen years, since the laying of the double track, has not been and does not now constitute an invasion of the rights of these plaintiffs; indeed, we hazard nothing in asserting that this railroad has been of substantial advantage to these plaintiffs and the public generally as a convenient mode of travel.

Now it is proposed to dispense with horse power in the moving of the cars and apply instead the electric motor, operated by a current of electricity from overhead wires, suspended from poles located on either side of the street. The great weight of opinion thus far expressed by the courts is that steam railroads impose a new servitude upon a street which will entitle abutting lot-owners to compensation. Horse railroads as a general thing do not. Now we have to deal with a new energy, a new agency as a motive power in propelling street passenger cars. Does it constitute a new servitude—a new burden—an additional burden upon the street? Is it a radical and substantial departure in the manner of occupancy of the highway when this new power is applied in the manner here proposed? Is it a move away from the horse railroad toward the steam railroad in its physical relations to the street and its effect upon abutting property and public travel, so that it may be said to be a use of the highway not contemplated in the original grant of the highway?

The superior court of Cincinnati in the case of Clement against the City of Cincinnati, 9 Dec. Re., 688, held that a "street railroad does not cease to be such because a grip cable is substituted for horses as the motive power." In that case a horse railroad was in operation on Gilbert avenue in Cincinnati, and council by ordinance granted the owners the privilege of laying a cable road to be operated by steam power. The court among other things, say: "The progress of invention among a

people famous for fertility in that regard, especially with respect to rapid transportation, the growth and change of location of population and the teachings of experience, are apt to make such modifications necessary to accomplish what was intended in the creation of agencies of this kind. It is the nature of the use, not the motive power, which determines whether the road belongs to one class or the other. When a road is laid in a street, on the surface of the street, because it is a street and to facilitate the use of the street by the public, it is a street railroad whatever the means used to propel cars over it."

The circuit court of Hamilton county in 1888, in the case of the Mount Adams & Eden Park Inclined Railway 2 Circ. Dec., 240 Howard Winslow and others, had occasion to consider the right to operate an electric system of motive power on the lines of street railroads owned by that company. In that case the court found the facts to be that as an essential part of the system, poles eleven inches in diameter at the bottom, and twenty-seven feet in height, were placed about 100 feet apart on each side of the street and opposite to each other, close to the curbstone; a single wire is stretched on each side of the street from the top of one pole to the top of another on the same side, and from the top of each of said poles a wire extends to the top of the pole on the opposite side of the street. The object of the wire across the street is to support the two other wires, one of which runs parallel with and immediately above each of the two tracks on which the street cars of the plaintiff, propelled by horse power, have been running for several years past."

It will be seen that the general plan of construction in that case is very like that proposed to be applied here.

"The tracks of the street railroad continue in the condition in which they have been for several years past; the only addition or change which has been made to adapt it to the use of the electric motor being the poles and wires before referred to. If the structure of the plaintiff in the street so long in use is not an invasion of the rights of the defendants, (though the same must in the nature of things be some obstruction to the highway, but largely compensated in a populous city by the advantages of this mode of travel,) it is difficult to see why the mere placing of a pole of this size on the margin of the sidewalk, at once and necessarily gives to the owner of the adjacent premises the right to prevent it, or have it removed. The sidewalk is only a part of the way, and is to be dealt with as such, and it seems to us that a structure erected thereon stands on the same principle as those in the center of the street. And why should the planting of the pole in this instance be held, on the evidence, to entail any special damages to the defendants? It is not objected that it is unsightly in appearance, or unsuited to the purpose for which it is used; all that is claimed is that it impedes the access to defendants' premises, and that the electric system in use is unsafe. We have found as a fact that neither of these objections is well founded. The margins of the sidewalks in cities for centuries past has been appropriated for the placing of shade trees, public lamp posts, hitching posts and similar structures, and when they are suitably placed, and at sufficient intervals, cannot, we think, be any obstruction to the access to the premises adjacent thereto, or be said to impose new burdens upon the land, the right to impose which has not been acquired by the public. * * * But it (the public highway) was acquired that the public might travel over the same, on foot or horseback or in vehicles of various

kinds, and as we have before stated, we think it is the law of this state that the use of cars drawn by horses on rails permanently placed in the roadway is not to be considered of itself an unlawful or improper change of the use of the highway, or as imposing an additional burden upon the adjacent land. And if this be so, then the use of it in substantially the same way, but with a different motive power, would not alter the case. It is still a mode of travel over the same highway."

The Cincinnati case and the one now before the court differ in this, that in that case the action was brought to compel the removal of posts, wires, etc., already in use, while this case is brought to prevent their erection. But the circuit court put their decision upon the broad ground of the right to prevent as well as remove the alleged obstructions or burdens. We have quoted the Cincinnati case at some length since it throws considerable light upon the questions here involved.

We may now recur to our question. In the case before us—will the proposed change, if made, constitute a new burden or servitude upon the street? It is urged that the operating of cars by electricity is dangerous, and dangerous in that electricity is a dangerous agency to employ. The proof clearly establishes the opposite, that it is safe, suitable and practicable. The tracks are in no manner changed. The cars employed in point of size and appearance are not substantially different. Is more of the traveled and paved roadway occupied by the electric system than when horse power is used? No, but is lessened by the removal of several hundred horses from the street. It is claimed that the speed, twelve miles an hour as proposed, will be a dangerous rate on a street the width of Prospect street. This is a matter within the control of the council, with full power to limit the rate of speed to a suitable and safe rate, and one consistent with the uses of a public highway. The court would hardly be warranted in assuming that a dangerous and unlawful or unreasonable rate of speed will be authorized or permitted.

That the cars operated by the electric motor are in perfect and absolute control of the operator is sustained by the proof, as well as by our common observation. That these cars can be stopped quickly, or moved forward or backward at a slow or rapid rate is apparent.

It is claimed further that these poles or iron posts and the wires constitute an obstruction to abutting property; that they are unsightly and a burden upon the street. It is clear that they add nothing to the beauty of a street, but that they amount to a burden or obstruction seems to us more fancied than real. Certainly the proof does not justify such conclusion. One of these poles is no more of an obstruction than a lamp post or an electric light post. If the Cincinnati court found that poles eleven inches in diameter and twenty-seven feet high constituted no obstruction or burden, we would be entirely safe in saying that poles only six inches in diameter and twenty-five feet high do not.

It can not be said in seriousness that these poles and wires will obstruct the light or air from the premises of the plaintiffs, or will interfere with ingress and egress to their premises, for it is not pretended or believed that the defendant will so place these poles as to obstruct driveways or other places designed for passageways to and from the street.

It is urged also that the electric motor frightens horses and makes it unsafe to drive along the street in carriages or other vehicles. This was undoubtedly true in the beginning, in the first occupancy of the streets in this city, and it is likely such would be the effect on Prospect street for a brief period of time. But it can not be doubted from the facts sub-

mitted, as well as from our common observation, that this difficulty soon disappears and horses soon become accustomed to the change. In fact, these motor cars are probably no more cause of alarm to horses than were the more primitive horse cars when first introduced into the public highway. Whether a particular structure authorized by public authority is consistent with the uses of a street, as a street, must be largely a question of fact, depending upon the nature and character of the structure authorized. The true distinction, we think, must be found, not in the motive power of the railway, but it depends rather upon the question whether the railway constitutes a thoroughfare, or whether on the other hand it is a mere local convenience consistent with the uses of a street thoroughfare. While the purpose of streets is primarily for public travel, yet in populous districts it has been the immemorial custom to employ them for other purposes of a public nature, which though having little or no connection with the uses or improvements of the street as a highway, are not inconsistent with such use. Lewis on Eminent Domain, sec. 126.

We are of the opinion that the use here contemplated is a consistent use; that it is not in the nature of an original grant imposing new and greater burdens for which these plaintiffs may have compensation, and in so holding we think we are in accord with the judicial thought in this state, and do no violence to the justice or judgment of the constitution. Temporary injunction refused.

Burke & Ingersolls, for plaintiffs.

J. M. Jones, R. P. Ranney, Richard Bacon, for defendant.

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## 98 FRAUDULENT CONVEYANCES.

[Superior Court of Cincinnati. General Term, 1889.]

PIERCE v. WHITE.

Where, in a bill of exceptions, an admission is made by counsel for one party, the meaning and effect of such admission is to be determined from the language used in connection with all the circumstances under which it is made, including the other evidence adduced by that party.

The defendant in an attachment proceeding based on her alleged conveyance of real estate with intent to hinder and defraud creditors, admitted through her counsel that she was insolvent, and that the deed of the real estate complained of was "without consideration," and then offered evidence to show that the deed was executed with the intention of receiving full consideration from the grantee, and was recorded by mistake before the grantee had any knowledge of its execution, and that, upon learning of the deed, the grantee refused to accept it, or to pay the consideration mentioned in the deed. *Held:*

1. That the admission must be construed to mean that no consideration passed, because the deed never took effect, rather than that the deed, on its face for value, was in fact voluntary.
2. That it was competent to ask the defendant whether she intended, by such conveyance, to put her property beyond the reach of her creditors.
3. That there is no conclusive presumption of fraud arising from an intent on defendant's part to turn real estate into money.
4. That a deed, unaccepted by the grantee, derives no force as a deed from being recorded.
5. That evidence of an attempt to convey by a deed which never took effect, does not sustain an allegation in an affidavit for attachment, that defendant has disposed of and conveyed her property, and that, in the absence of amendment, such variance requires the dissolution of the attachment

TAFT, J.

This is a petition in error to an order of the special term discharging attachments in two cases between the same parties, and involving, so far as the ground for attachment was concerned, the same facts. The actions below were on promissory notes signed by Ambrose White, and endorsed by his mother, Harriet White. The attachments were issued on affidavits filed by the plaintiffs, alleging that Harriet White had disposed of her property with fraudulent intent to hinder, delay and defraud her creditors. In one suit the attachment was issued on a debt before due, under section 5564. In the other, the attachment was issued on the same ground, under section 5521. The motion below was heard on oral evidence. The bill of exceptions does not purport to contain all the evidence, and of course, we are unable to consider the case on the weight of the evidence. But counsel for plaintiffs rely upon certain admissions of the defendants in the bill of exceptions, which they claim, entitled them to an order overruling the motion, whatever the other evidence was, for they say, having admitted certain facts in open court, they could not be permitted to contradict such admissions. The admissions in effect were, that in March, 1888, Harriet White was the owner of four different lots in this county, and that this was all the property she had; that two of these lots she conveyed on the twenty-second of March, 1888, to the Commercial Bank for $26,000; and the other two, she executed a deed for, to Peter A. White, for the recited consideration of $12,000; that at the time of the making of the latter deed she was insolvent by reason of debts arising from accommodation endorsements for her son, Ambrose White, and that this latter deed was without consideration. It appears from the evidence in the case, that the deed to White, which is made the ground for attachment, never took effect, because it was never delivered to and was never accepted by the grantee named therein. Moreover the evidence discloses, that when made, it was expected, that upon delivery to the grantee he would pay the purchase price mentioned in the deed. The admission, therefore, that the deed to White was without consideration, must be taken to mean that nothing in fact was paid, because it never took effect, and not that it was a deed on its face for value, but as between the parties voluntary. In this view the admission amounts only to this, that Harriet White wished to sell her property, and made a deed to a person whom she expected to buy the property for the price named, but who declined to take the deed and pay the price. Clearly, from an attempt to sell property by an insolvent, there is no necessary presumption of an intent to defraud creditors, and we cannot therefore say that an admission of such an attempt required the court to sustain the attachment, without regard to the other evidence in the case.

The next error complained of is in the court's permitting the following questions over plaintiff's objection.

Q. State what, if any, intention you had at the time you signed that deed to Peter A. White, as to the disposition of that property or the proceeds of the sale of it? A. It was given up to enable all to get as much as they could; that was my understanding of it.

Q. State whether or not in signing that deed you had an intention to place the property beyond the reach of your creditors? A. I had not the slightest intention of that kind.

We think both of the questions competent. The intent of Mrs. White in making the deed was in issue, and could be testified to by her. Coal Co. v. Davenport, 37 O. S., 194, 196.

The first question was neither leading, nor did it involve a conclusion of law. The second question was leading, but whether a leading question shall be put, is within the discretion of the trial court. That a person intends to put his property where his creditors cannot reach it, is a fact which does not involve a conclusion of law. Whether what is done has any such effect, may be a question of law; but the intention to produce that effect, seems to us to be a fact involving no conclusion of law by the witness interrogated with reference to its existence in his mind.

Error is also claimed in the refusal of the court to permit questions to be asked of witnesses in rebutal, whether Ambrose White had been indicted for embezzlement of the proceeds of goods consigned to him on commission.

This evidence was offerred to show a motive for Ambrose White to use the proceeds of the sale of the property attached to pay debts arising from these criminal transactions. No offer was made to show that Mrs. White had any knowledge, either of his extremity or of such an intent.

If he had used the money for such purpose, it would simply have been a breach of trust on his part to his mother therefore, and a motive for a breach of trust on his part toward her could hardly be evidence of her intent in making the deed. The court also refused to admit certain admissions of Ambrose White, as to other fraudulent transactions of his, in a deposition taken in another case. On the issue of this motion, the parties were Mrs. White and the plaintiffs; certainly Mrs. White could not be affected by admissions of Ambrose White in another case.

Finally, the attachment was discharged on the ground that Mrs. White had not disposed of her property with intent to hinder, delay or defraud creditors, which was the ground of the attachment.

There was no evidence at all to sustain this ground. All the evidence that plaintiffs adduced tended to show only that she was about to dispose of her property, and failed to do so. Though the deed to Peter A. White was recorded, it never took effect. Younge v. Guilbean, 3 Wallace, 636. There was no offer to amend the affidavit in attachment to conform to the proof, by alleging that she was about to dispose of her property, and no leave of court for that purpose asked. The evidence does not tend to sustain the allegation of the affidavit, and without regard to the question already considered, the action of the court below must be affirmed on this ground alone.

PECK and MOORE, JJ., concur.

Black and Rockhold and J. J. Glidden, for plaintiff in error.

Healy & Brannan, *contra.*

## RAILWAY MORTGAGE—PREFERRED STOCK. 99

[Superior Court of Cincinnati, General Term, 1889.]

† GRIFFIN T. MILLER, EXR., v. FRANK RATTERMANN.

Where a railroad company issues so-called preferred stock, and a mortgage to secure it, by the terms of which the trustee for the stockholders under the mortgage is given power in case of default in the payment of eight per cent. dividends, guaranteed on the stock, to take possession of the road, and after paying all lawful prior charges and running expenses, to pay up defaults in dividends and the same as they accrue, or, at his option, to foreclose and sell, and after paying all lawful prior charges, to pay the preferred stockholders the par value of their stock from proceeds of sale, the company covenanting not to incumber the road by any deed or instrument to the prejudice of the preferred stockholders, by means whereof the equitable lien of the said preferred stockholders shall be impaired or their security in any way lessened, but stipulating that the companies may make mortgages the lien of which shall be subsequent in time and right to the lien of this mortgage. Held,

1. That the lawful prior charges were those arising on prior mortgages and liens by law prior to them;
2. That the terms and conditions of the certificate and mortgage made the obligation of the company to pay the so-called dividends prior to the unsecured debts or subsequent mortgage debts;
3. That such priority was inconsistent with the liabilities of stockholders under the constitution and laws of this state, and that the so-called preferred stockholders were in fact owners of a perpetual annuity secured by mortgage upon the property and income of the railroad company, with a right in case of default to secure from the sale of the assets of the company payment of an agreed capitalized value of such annuity called the par value of the so-called stock;
4. That it was within the power of such company to renew old mortgage debts by issuing such annuities secured by mortgage;
5. That such annuities are taxable in the hands of their owners, and should be returned by them for taxation under secs. 2736 and 2737, and are not within the proviso of sec. 2742, whereby a resident of this state is not required to return for taxation shares of stock in a company the capital stock of which is taxed in the name of such company.

ERROR to Special Term.

TAFT, J.

The petition below was to injoin collection of back taxes on Dayton and Michigan preferred stock. The question was whether the stock so called was stock at all, and so within the exception clause of sec. 2742, whereby a person is not required to return for taxation shares in a company the capital stock of which is taxed in the name of the company. Defendant claimed that it lacked the essential elements of stock, and was in fact a debt. The court below so held and dismissed the petition. The kind of property which this so called preferred stock is, must be determined wholly by the contract, upon which its existence depends, between its holders and the company, and which is found in the certificates and a mortgage given to secure it. The certificate states that the stock is secured by mortgage and guaranteed by the C., H. & D. R. Co.; that it is issued in accordance with an act of legislature passed April 16, 1870; and on the terms of a resolution of stockholders endorsed on its back; that the dividends are payable quarterly at the rate of eight per cent. The resolution provides that preferred stockholders shall not vote, and also that no further or other mortgage than those already given upon the company's property and income shall ever be given to the prejudice of the holders of the preferred stock; and as security therefor, the rights of the preferred stockholders to their dividends shall be secured by a mortgage on the company's property and income. The mortgage given in accordance with this resolution recites the existence of five mortgages on the property, and that

†This judgment was reversed by the Supreme Court; opinion 47 O. S. 141.

this stock is to be issued to redeem the indebtedness so secured; also the various steps in the issue of the stock and the mortgage, and the lease from the D. & M. R. R. Co. to the C., H. & D. R. R. Co. Both companies then convey the road and its income to Stanley Matthews, trustee, in trust on several conditions. The first is that the two companies will not by any deed or instrument convey or incumber the road and its income to the prejudice of the preferred stockholders, by means whereof the equitable lien of said holders of preferred stock shall be impaired or postponed, or their security in any way lessened. "Provided, however, that nothing herein contained shall be so construed as to prevnt the companies from making mortgages, the lien of which shall be subsequent in time and right to that hereby created." The second condition of the mortgage provides that in case there is a default on prior mortgages or in the payment of the dividends on the preferred stock, the trustee may enter and run the road, and after paying from the gross earnings the running expenses, shall pay the arrears in the dividends after paying all lawful prior charges on said earnings; or he may foreclose the mortgages, and sell the road and its rights, it being stipulated that after payment of costs, the proceeds of sale shall be devoted to paying the par value of the preferred stock after paying all the lawful prior charges thereon.

The provision in the first condition recited above, that mortgages subsequent to this mortgage may be created, indicates clearly that it was the intention of the parties that subsequent debts might be created whose mortgage security should be subsequent in time and right to that of these stockholders. If mortgage debts were to be subsequent, a fortiori were unsecured debts. The provision that no encumbrance should be put on the property to the prejudice of the stockholders so secured by mortgage would seem superfluous in view of the mortgage itself, did we not consider that, as dividends so called were being secured which are by their nature postponed to all debts in a final distribution, it became necessary to expressly mention that the effect intended was to secure the dividends above subsequent mortgage debts. That these dividends and this stock were intended to be preferred to all debts but prior mortgage debts, appears also from the remedy for a default in the dividends. If the trustee enters he is to pay the necessary running expenses, and the dividends in arrears after paying all prior lawful charges on the gross earnings. If he forecloses, the preferred stockholder is to be paid his par value from the proceeds of sale after paying expenses of sale and the lawful prior charges. The term charge has something the same signification as lien, though perhaps a wider one. It means a claim in rem. "The distinctive significance of the term rests in the idea of obligation, directly bearing upon the individual thing or person to be affected, and binding him or it to the discharge of the duty or satisfaction of the claim imposed. In this view, a charge will in general terms denote a responsibility peculiar to the person or thing affected and authoritatively imposed." Merchants' Exchange Nat. Bk. v. Warehouse Company, 49 N. Y., 635.

An unsecured debt can hardly be said to be a charge upon the gross earnings or the property of the company in any such sense as this. Used in a mortgage expressly intended to secure an equitable lien and priority for its beneficiaries immediately subsequent to five mentioned mortgages, it seems to us that the term "lawful prior charges" can have reference only to such charges as arise out of the obligations of those prior mortgages, or such as are by law prior to them. It follows that the effect of this mortgage is to secure the payment of dividends before all debts except those of prior mortgages, and in case of a sale to secure the payment of the par value of the stock with the same priority. The word dividend ordinarily means a division of profits, and is always to be given that meaning in certificates of preferred stock; so that no matter how strongly worded the guarantee of a dividend, it is held to mean that such a dividend will be paid only in case profits are earned to pay it. Cook on Stockholders, sec. 270, and cases there cited. Where, as at bar, however, the stipulation is that dividends in their payment shall have priority over debts, it is impossible to reconcile this with a payment only out of profits. A dividend under such circumstances ceases to be a dividend properly so called, and is in fact a debt.

Again, a stockholder, under the laws of Ohio, in receiving pay for his stock on dissolution, is by the constitutional requirement of double liability, as well as by the very nature of his relation to the company, postponed to every creditor. Yet here we have preferred stockholders secured in a redemption of the par value of their stock against all creditors but the prior mortgagees. To call a man entitled to such priority a stockholder is a contradiction in terms. What is the result? It is either that the terms of the mortgage creating such priorities are void, or that the so called preferred stockholders are not stockholders at

ali. Effect should be given to the intention of parties, even if in so doing it must be held that there has been a misuser of terms. In the case at bar, the holders of these certificates are called preferred stockholders. They have no vote, and so, no voice in managing the company. They derive their income from the company without regard to whether it makes profits or not. They are secured by mortgage on the company's assets to the par value of their stock, without regard to any debts but those of prior mortgagees. They venture nothing more than a creditor in the business of the company. There is nothing of the stockholder about them but the name. It is said by counsel that they can not be creditors for their stock, first because there is no time fixed for its redemption, and second, because there are no words imposing a liability upon the company for its payment, even on dissolution, but the holder can only look to the assets. This is true; but because they are not creditors for the par value of the stock, is not an argument for their being stockholders. The dividends, as we have seen, are debts. The exact relation made by the certificate and mortgage between the holders of this stock and the company, is that of perpetual annuitants with a right in case of default to subject the assets to the payment of the par value of the so-called stock, or more properly, an agreed upon capitalized value of the annuity. In other words, the company has by this mortgage charged its road and income with a perpetual annuity or ground rent. This construction of a contract, by which, in violation of ordinary meanings, things are called by their right names, finds authority in a case decided by our own Supreme Court, where the facts were somewhat similar to those of the case at bar. I refer to the case of Burt v. Rattle, 31 Ohio St., 116.

In that case was involved the construction of an act of the legislature purporting to confer upon manufacturing corporations the power to issue preferred stock, to guarantee dividends thereon, to pay the par value of the stock after a certain time with the option to the holder of converting it into common stock, and providing that holders of the stock should not have the power to vote and should not be liable to creditors of the company; and providing further that the unpreferred creditors should not be paid except out of the surplus of profits after the expenses and dividends on the preferred stock were paid.

The company in issuing the so-called preferred stock gave a mortgage to secure it and the dividends. The Supreme Court held that the relation of the so-called preferred stockholders to the company, under the act, was inconsistent with the legal and constitutional rights and liabilities of a stockholder, and that the act must be construed to mean "bonds" where "preferred stock" was mentioned, and "interest" where "dividends" were spoken of. Says Judge Welch on page 130 "to call a thing by a wrong name does not change its nature. A mortgage creditor, although denominated a "preferred stockholder," is a mortgage creditor nevertheless, and interest is not changed into a dividend by calling it a dividend. Nothing is more common in the construction of statutes and contracts than for the court to correct such self-evident misnomers by supplying the proper words. To use the language of the court in Corcoran & Riggs v. Powers, 6 O. S., 15, 19, "the question in such cases is not what did the parties call it, but what do the facts and circumstances require the court to call it."

The case of Ryan v. Ry. Co., 6 Ohio Dec. Re., 1071, has nothing in it opposed to the views we take. In that case there was no mortgage. There was a denial of the right to vote to the preferred stockholders but that is quite consistent with their being stockholders.

It may be suggested as a difference between the case of Burt v. Rattle, supra, and the one at bar, that there the court was construing a statute and found the misuse of terms in the law itself, while here we are construing a contract, and by our construction find in it a misuse of terms, although it purports to be made in accordance with a particular statute which itself is subject to no such criticism. It must be conceded that the act of April 16,1870, to which express reference is made in the certificate and mortgage at bar, as the source of power in the company to issue such an obligation, provides for the issue of preferred stock, which, if issued in accordance with its terms, would be lawful preferred stock, and further that the reference to the act in the certificate and mortgage requires us, if possible, to construe the contract, so evidenced, to be in accord with the act. But the act makes no provision for a mortgage to secure the payment of dividends, and the terms of the contract are, as we have pointed out, utterly inconsistent with that between a stockholder and the company, and so are not to be reconciled with the terms of the act, except by rejecting altogether the plain conditions of the contract by which the so-called preferred stockholders are preferred to creditors, both in receiving their so-called dividends on taking possession of the road, and in the re-

demption at the par value of their stock on foreclosure and sale. If no power existed for making such a contract, then these conditions must be rejected as ultra vires, and void. But if such power can be found elsewhere, then in spite of the erroneous reference to the act of April 16, 1870, as its source, the intention of the parties as derived from the language of the contract in all its parts must be given effect. It will be conceded that the company would have had a general power to renew its bonds and mortgages, or to issue new to take up the old. We think included in such general powers is a power to charge by a perpetual mortgage, for that is what has been done here. It is merely creating a perpetual mortgage, securing an annuity.

By secs. 2736 and 2737, the plaintiff was required to list for taxation annuities, held by him for himself or others. The stock in question came under that head, and he should have returned it. The decree dismissing his petition was right, and is affirmed.

PECK and MOORE, JJ., concur.

Ramsey, Maxwell & Ramsey, for plaintiff in error.

Wm. L. Avery and L. W. Goss, contra.

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## 106 SETTLEMENT OF ESTATES—TAXATION.

[Erie Common Pleas.]

### †ERIE CO. (TREAS.) v. T. G. WALKER ET AL., EX'RS.

1. The act of April 14, 1886, amending the act of May 11, 1878, and requiring county auditors to go back five years for ascertaining property omitted by a party in his tax return, and to add 50 per cent. penalty to all additions for each of the five years back, while the act of May 11, 1878, only required him to go back four years, and add the penalty of 50 per cent. only to the current year, and only simple taxes without any penalty were chargeable for the former years—so far as it increases or adds the penalty for omissions to list property for taxation before the year 1886, is a retroative law, and is therefore unconstitutional.
2. The court holds further that the legislature would not have amended and repealed the act of May 11, 1878, but for the sole purpose of empowering the auditor to attach a penalty at 50 per centum to the value of the property for each of the five years named in said section, and that such section as amended is therefore unconstitutional.
3. A party holding a claim against an estate, may bring suit against the administrator or executor when, having presented the claim for allowance, and after ample time and opportunity for examining its merits, the same has been unequivocally rejected by the administrator or executor.
4. A formal indorsement of rejection on the claim by the administrator is not a prerequisite to the right to bring suit.
5. The inventory of an estate sworn to and filed by executors or administrators in the probate court, is in the nature of an admission by them of the property described therein and its value, and is competent evidence before the auditor for the purpose of correcting the tax return for the estate made by the executors, and placing omissions therein on the tax duplicate.
6. The statute sec. 2782 Rev. Stat. which gives the auditor the power to hear evidence and determine the question of omissions in tax returns does not provide for an appeal from his decision by the person who feels aggrieved thereby; nor does it make provision for prosecuting error to his decision, in case on the hearing he admits and hears incompetent testimony, or in case his decision is manifestly against the weight of the evidence or for any other errors he may commit. He is the exclusive judge of the sufficiency of the evidence upon which he acts, and his decision, if honestly made, if supported by any evidence at all, however weak it may be, is final and conclusive.

†See also Wade v. Kumberly, 3 Circ. Dec., 18; Mergenthaler v. Crites, 2 Circ. Dec., 663; Id. 48 O. S., 12; Ratterman v. Ingalls post, 24 B., 433; Id. 48 O. S., 468.

DEWITT, J.

This action is brought by the treasurer of this county to recover the sum of $4,703.81, which sum he alleges stands charged upon the tax duplicate of Erie county against Mary Barney, deceased.

This form of action is specially authorized by section 2859, which provides, "when any personal taxes heretofore or hereafter levied shall stand charged against any person, and the same shall not be paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of such personal taxes, is hereby specially authorized and empowered to enforce the collection by a civil action in the name of the treasurer of such county against such person for the recovery of such unpaid taxes, and it shall be sufficient, having made proper parties to the suit, for such treasurer to allege in his bill of particulars or petition that the said taxes stand charged upon the said duplicate, and such treasurer shall not be required to set forth in his petition any other or further special matter relating thereto, and said tax duplicate shall be received as *prima facie* evidence on the trial of said suit of the amount and the validity of such taxes appearing due and unpaid thereon, and of the non-payment of the same, without setting forth in his bill of particulars or petition any other or special matter relating thereto; and if, on the trial of the action, it shall be found that such person is so indebted, judgment shall be rendered in favor of such treasurer so prosecuting such action as in other cases, and the judgment debtor shall not be entitled to the benefit of the laws for the stay of execution or exemption of homestead, or any other property, from levy or sale on execution in the enforcement of any such judgment." The plaintiff on the trial of this suit having introduced in evidence the tax duplicate of this county, in conformity with the provisions of said section 2859, and it appearing therefrom that there stands charged as taxes the sum of $4,703.80 against the estate of Mary Barney, deceased, a *prima facie* case is made out in favor of the plaintiff against the defendants.

As a first ground of defense to the plaintiff's action, defendants plead: That no claim was ever presented to them, as executors, for the amount claimed in the petition for allowance, as required by law.

The evidence on this question is substantially as follows:

On the eleventh day of April last the plaintiff handed to Perry G. Walker, Esq., one of the defendants, a written statement of the taxes standing charged upon the tax duplicate of this county against the estate of Mary Barney, deceased. About ten days or two weeks thereafter plaintiff spoke to Mr. Prout, Walker's co-executor, about the payment of the taxes. Prout then requested him to defer payment for a short time for the purpose of determining whether an adjustment of the matter might not be reached. A short time after the above conversation he again met Mr. Prout, when he (Prout) said "all I can say in reference to the tax matter is, No."

The right of a party to maintain an action against the personal representatives of a deceased person, on a claim against such deceased person's estate, depends upon the presentation of such claim to such representatives for their allowance, and their disallowance of the same.

Statute, sec. 6092, Keenan v. Saxton's Adm., 13 Ohio, 41; Harter v. Taggart, 14 Ohio St., 122; Kyle v. Kyle, 15 Ohio St., 15. These decisions clearly show that there must be a presentation for allowance and a rejection of the claim, before suit can be brought.

How is the presentation for allowance and the rejection of the claim to be made? It is claimed by counsel for defendants that the right to sue depends upon an indorsement on the claim of its disallowance, or upon the fact that the creditor has made a specific demand that the allowance of the claim be endorsed thereon. In support of this claim they cite the authorities above referred to, and also the last clause of sec. 6097, which reads as follows: "A claim shall be deemed disputed or rejected if the executor or administrator shall, on presentation of the vouchers thereof, refuse, on demand made for that purpose, to indorse thereon his allowance of the same as a valid claim against the estate. If the claim of the defendants be true, then the plaintiff had no right to bring this action, as the facts show that no disallowance of the claim was indorsed on it by the executors, and no specific demand made by the plaintiff that an allowance be indorsed thereon.

In Stambaugh v. Smith, 23 Ohio St., 594, the Supreme Court says: "It is claimed by plaintiff in error that on authority of Keenan v. Saxton's admr., 13 Ohio, 41, an action cannot be maintained against a decedent's estate until the claim has been duly presented for allowance, with a specific demand that its rejection or allowance be indorsed thereon." "We do not conceive that by the statute (sec. 90 of the act of March 23, 1840, S. & C. 582), or under the authority of the case referred to, the right to sue depends upon an indorsement on the claim of its disallowance, or upon the fact that the creditors made a specific demand that the allowance of the claim be indorsed thereon. That an unequivocal rejection of the claim should be obtained before suit, is undoubtedly true, but the only purpose of the last clause in the section of the statute referred to, is to make a refusal on the part of the executor or administrator to indorse his allowance thereon, when demand is made for that purpose, conclusive proof of its rejection." This is the latest decision of the Supreme Court on this question, and it conclusively shows that the position taken by the defendant's counsel is untenable.

The object of the statute referred to is to give the executor or administrator time and opportunity to investigate, and inquire into the merits of the claim and prevent needless and vexatious litigation and wasting the estate in useless costs and expenses.

It is the opinion of the court that the evidence shows that the executors had ample time and opportunity to inquire into the merits of the claim, and that upon mature deliberation they decided to reject it. And we are also of the opinion, as a conclusion of law, that a right of action on said claim accrued to plaintiff from the time such decision was reached by the executors, whether he was cognizant of such decision or not.

As a second defense, the defendants say that said sum of $4,703.80 charged against Mary Barney was placed upon the tax duplicate by the officers without any authority of law.

This defense leads us to inquire how the said sum of $4,703.81 came to be placed upon the tax duplicate.

Section 2781, as amended April 14, 1886, provides that "if any person whose duty it is to list property or make a return thereof for taxation, either to the assessor or county auditor shall, in any year or years, make a false return or statement, or shall evade making a return or statement, the county auditor shall for each year ascertain as near as practicable the true amount of personal property, moneys, credits and investments that such person ought to have returned or listed, for not exceeding the five years next prior to the year in which the inquiries and cor-

rections provided for in this and the next section are made, and to the amount so ascertained for each year he shall add fifty per centum; multiply the sum or sums thus increased by said penalty by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the county treasurer who shall collect the same as other taxes."

Section 2782 provides, that "the county auditor, if he shall have reason to believe or be informed that any person has given to the assessor a false statement of the personal property, moneys, or credits, investments in bonds, stocks, joint stock companies or otherwise, or that the assessor has not returned the full amount required to be listed in his ward or township, or has omitted or made an erroneous return of any property, moneys or credits, investments in lands, stocks, joint stock companies or otherwise, which are by law subject to taxation, shall proceed at any time before the final settlement with the county treasurer to correct the return of the assessor, and to charge such persons on the duplicate with the proper amount of taxes, to enable him to do which, he is hereby authorized and empowered to issue compulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the article or value of the personal property, moneys or credits, investments in bonds, stocks, joint stock companies or otherwise, and examine such person or persons on oath, in relation to such statement or return, and it shall be the duty of the auditor in all such cases to notify every such person before making the entry on the tax list and duplicate, that he may have an opportunity of showing that his statement or return of the assessor was correct; and the county auditor shall in such cases file in his office a statement of the facts or evidence upon which he makes such correction; but he shall in no case reduce the amount returned by the assessor without the written assent of the auditor of state given on the statement of facts submitted by the county auditor."

It appears from the evidence that on the fourteenth day of March last, the auditor of this county, acting under the above sections, notified the executors of the estate of Mary Barney, deceased, to appear at his office on the sixteenth day of March, at 9 o'clock a. m., to show cause why the tax returns of said Mary Barney, deceased, should not be corrected and the omissions placed on the tax duplicate for collection. Said executors failed to appear at the time and place specified in the notice, and afterwards, to-wit: On the fifth day of April the auditor gave them a second notice notifying them to appear at his office on the ninth day of April, and show cause why the sum of $11,000 for the year 1883, $16,500 for the year 1884, $20,500 for the year 1885, $17,000 for the year 1886, $24,000 for the year 1887, and $33,000 for the year 1888 should not be assessed and charged against said descendent's estate. Said executors failed to appear on the last mentioned date, and the auditor proceeded to make a finding, which is in the words and figures following: "The said A. W. Prout and P. G. Walker failing to appear at the hour named, and being fully advised in the premises by the evidence before me, I do find that in 1884, the late Mary Barney was the owner of personal property, moneys, investments in bonds, stocks, etc., which were not returned for taxation by her, in the sum of $16,500 in 1884, in the sum of $20,500, 1885; $17,000, 1886; $24,000 in 1887; and 1888, $33,000. I therefore as county auditor of Erie county, Ohio, have this

day entered upon the tax lists in my office against Mary Barney, deceased, the following amounts viz.:

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|---|---|
| 1884, $16,500, rate 32.1 mills, tax | $ 529 65 |
| 1885, $20,500, rate 35 mills, tax | 717 50 |
| 1886, $17,000, 50 per centum penalty added $25,500, rate 32 mills, tax | 816 00 |
| 1887, $24,000, 50 per centum penalty added $3,600, rate 30 mills, tax | 1,080 00 |
| 1888, $33,000, 50 per centum penalty added $49,500, rate 29 mills, tax | 1,403 50 |
| Total tax | $4,546 65 |

And have certified the same to the county treasurer for collection. Witness my hand and seal, this ninth day of April, 1889.

WILLIAM J. BONN,
Auditor of Erie County, Ohio."

This finding of the auditor is based upon an inventory of goods, chattels, moneys, rights and credits of the estate of Mary Barney, deceased, produced by her executors to the probate court of this county, on the twenty-seventh day of February, 1889, and also on a certain memorandum of credits furnished by the tax inquisitor of said Erie county. This evidence the county auditor placed on file in his office, as required by the statute.

This evidence and the finding of the auditor were offered in evidence on the trial of this cause, and admitted, subject to the exception of the defendants.

It is contended by the defendants' counsel, that the evidence upon which the auditor made his finding, is not only incompetent to be considered as evidence in a proceeding, but is also insufficient to support such finding.

They claim, in arguments, that an inventory is only *prima facie* evidence of the property described therein and its value. That it is not conclusive, either for or against, the executor or administrator or his sureties, but is open to denial or explanation, and is only competent in matters appertaining to the administration of the estate; that in collateral proceedings, it is incompetent evidence.

The inventory in evidence before the auditor, and a part of the evidence upon which he made his finding, has attached to it an affidavit, which is as follows: The State of Ohio, Erie County, ss: Before the subscriber, the judge of the probate court within and for said county. On the twenty-seventh day of February, A. D. 1889, personally appeared A. W. Prout and P. G. Walker, executors of the estate of Mary Barney, late of said county, deceased, and being duly sworn, they did depose and say that the foregoing inventory is, in all respects, a just and true statement of all the estate and property of the said deceased, which has come to the knowledge of said affiants, and particularly of all moneys, bank bills, and other circulating medium, belonging to the deceased, and of all just claims of the said deceased against the said affiants and all other persons, according to the best of their knowledge.

A. W. PROUT,
P. G. WALKER.

Sworn to before me, and signed in my presence, the day and year first above written. A. E. MERRILL, Probate Judge.

It seems to the court that the inventory sworn to by the executors as above stated, is in the nature of an admission by them of the property described therein and its value, and was competent evidence before the auditor, and was open to denial or explanation by the executors. The memorandum of the tax inquisitor, of the credits belonging to the estate of Mary Barney, deceased, stands on an entirely different footing. It is merely hearsay evidence, and on the trial of a cause in any court provided for by the constitution it would be error to admit it in evidence. But supposing all the evidence upon which the auditor based his finding, to be incompetent, could this court, on that ground, in this trial, disturb it or set it aside? The statute which gives the auditor the power to hear evidence and determine the question, does not provide for an appeal from his decision by the person who feels aggrieved thereby; nor does it make provision for prosecuting error to his decision, in case on the hearing he admits and hears incompetent testimony, or in case his decision is manifestly against the weight of the evidence, or for any other errors he may commit. He is the exclusive judge of the sufficiency of the evidence upon which he acts, and his decision, if honestly made, if supported by any evidence at all, however weak it may be, is final and conclusive.

As a third ground of defense, the defendants say that the said act of April 14, 1886, and under which the auditor acted, is in conflict with sec. 28, art. II, of the Constitution of the State of Ohio, which provides, among other things, that "the general assembly shall have no power to pass retroactive laws."

This statute was originally passed March 29, 1861, vol. 58, page 47, and is supplemental to the act of April 5, 1859. S. & C., 1438. The original act provides that "if any person whose duty it shall be to make a return or list of property for taxation under the provisions of this act for the assessment and taxation of all property in this state, and for levying taxes thereon according to its true value in money, passed April 5, 1858, shall make a false return, or shall evade making a return, it shall be the duty of the county auditor to ascertain the true amount of the taxable property, moneys, credits and effects that such person ought to have returned or listed in the manner prescribed in this 24th section of said act, and to add thereto 50 per centum on the amount so ascertained, and the amount so ascertained with said 50 per centum, shall be entered on the duplicate for taxation."

This act was amended and repealed by the act of May 11, 1878, vol. 75, 456. In the amendatory act it was provided that "If any person whose duty it is to list property or make return thereof for taxation either to the assessor or to the county auditor, shall make a false return or statement, or shall evade making a return or statement, the county auditor shall ascertain as near as practicable the true amount of personal property, moneys, credits and investments that such person ought to have returned or listed, to which amount he shall add 50 per centum and place the same on the tax lists, and the inquiry and corrections provided for in this and the next section may go as far back as the same can be traced, not exceeding the four years next prior to the year in which the inquiries and corrections are made, but as to former years no penalty shall be added and only simple taxes shall be claimed."

This latter act was amended and repealed by the said act of April 14, 1886.

These acts contain two provisions, namely: First, a remedy to enforce the collection of taxes upon property which the owner or owners thereof has willfully or negligently failed to return or list for taxation. Second, the infliction of a punishment for such omission of duty.

The law makes it the duty of every person residing in this state and owning property, to return or list it at its true value in money, for taxation. If any person fails to do so he is evading the discharge of an obligation or debt he owes the state, and the state without doubt has the constitutional right to enact a law providing a remedy for the enforcement of the payment of that which it is due. Sturgess v. Carter, 114 U. S., 511. The said original act only empowers the auditor to make inquiries and corrections for the current year, or the year in which the inquiries and corrections were made, and add the penalty for that year only.

The said act of May 11, 1878, authorized the auditor to go back four years next prior to the year in which the inquiries and corrections were made, but as to the former years no penalty was to be added, and only simple taxes were to be claimed. The penalty of fifty per centum was only to be added for the current year.

The act under consideration requires the auditor to go back for five years, and add a penalty of fifty per centum for each year, and this is what defendant's counsel claim gives to said entire section an unconstitutional character.

This part of the act is not calculated to aid the enforcement of a right or obligation or the collection of a debt due the state, but is only intended to inflict a pecuniary punishment for either a past or prospective omission of duty, to the time of the taking effect of the act. It is not remedial, but penal, and prescribes a different and greater penalty than any other statute in force before its passage.

It is contended by counsel for plaintiff, that this question has been fully decided by the Supreme Court of the United States in the case of Sturgess v. Carter, 114 U. S. R., 511. The substantive facts of that case may be briefly stated as follows: "The plaintiff in error for a number of years prior to and during the years of 1874, 1875, 1876 and 1877 was a resident of the city of Mansfield, Richland county, Ohio; for said years, 1874 to 1877 inclusive he listed his personal property, or a part of it, for taxation as required by law. The auditor of said county acting under the said act of May 11, 1878, notified him to appear before him at his office on the twenty-third day of June, 1878, to give information concerning his personal property, rights, credits, etc. Said plaintiff in error, in compliance with said notice appeared before the auditor. The auditor then proceeded to assess him on $100,000 of stock in the Western Union Telegraph Co., omitted property for each of the years 1874 to 1877 inclusive, and entered the same on a supplemental tax duplicate, and certified the same to the county treasurer for collection. The county treasurer brought suit against the plaintiff in error in the court of common pleas of Richland county to recover the amount of taxes due on said stock for said years.

The case was removed to the United States circuit court, where judgment for $10,726.65 was rendered in favor of the treasurer, and to reverse such judgment Sturgess carried the case to the United States Supreme Court on error. Justice Wood in delivering the opinion of the court, among other things, said:

"The plaintiff in error next insists that the law of 1878, by which the auditor assumed to correct the returns of the plaintiff in error for

the years 1874 to 1877 inclusive, and place his omitted property on the tax list, was retroactive and therefore forbidden by section 28, of article 2 of the constitution of Ohio, which declares the General Assembly shall have no power to pass retroactive laws."

"Before the passage of the act of May 11, 1878, the laws of Ohio, Vol. 2, Swan & Critchfield's Revised Statutes of Ohio, page 1535, provided that all property whether real or personal in the state, all moneys, credits, investments in bonds, stocks, etc., of persons residing therein should be subject to taxation, and entered on the list of taxable property for that purpose; and section six of the same act required the owner to make out and deliver to the assessor a statement under oath of all the personal property, moneys, investments in bonds or stocks required to be listed for taxation. This was the law in force during the years for which the taxes sued for were assessed, and are still in force." And as to the act of May 11, 1878, he said: "As this act took effect upon its passage, it authorizes the auditor in any future corrections and adjustments of taxes due to extend his inquiries back for a period of four years. It did not require him to wait four years after its passage before he could give it full effect.

"It is this amendment of May 11, 1878, which the plaintiff in error insists is retroactive, beause it authorizes the auditor to go back for a period of four years to correct false returns, whereas before its passage he could not for that purpose go behind his annual statement with the treasurer."

"The complaint is not that the auditor was required to add fifty per centum penalty to the value of the omitted property, for the old law authorized him to do that, provided, he did it before his annual settlement with the county treasurer. And the new law authorized him to make the addition of fifty per centum for the current year only, so that in this respect the new law did not change the old; but that it was not competent for the legislature to go behind the annual adjustments made of the taxes by the auditor with the tax-payer; that if the state had wrongfully assumed too much the citizen was barred, and that if the citizen had listed too little the state was barred. And that legislation which undertook to open these adjustments was retroactive."

We cannot agree with counsel for plaintiff in their claim, that the questions involved in this case as to the constitutionality of the penal part of the act of April 14, 1886, was decided by the U. S. S. C. in the case referred to. No such question was presented to said court by counsel for plaintiff in error and no claim made that the penalty part of the act of May 11, 1878, which only authorized adding a penalty for the current year only, was retroactive.

Is then the penalty part of the section under which the auditor acted in this case, retroactive?

Judge Story defines a retroactive, or as he calls it, retrospective law: "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past must be deemed retrospective."

Bouvier defines an *ex post facto* law to be: "A statute which would render an act punishable in a manner in which it was not punishable when it was committed."

He says: "There is a distinction between *ex post facto* laws and retrospective laws; every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law."

It is fully settled that the term *ex post facto*, as used in the Constitution of the United States, is to be taken in a limited sense referring to criminal or penal statutes alone, and that the policy, the reason, and the humanity, of the prohibition against passing *ex post facto* laws do not extend to civil cases; to cases, that merely affect the private property of citizens."

"Laws under the following circumstances are to be considered *ex post facto* laws within the words and intent of the prohibition:

1. Every law that makes an act done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2. Every law that aggravates a crime, or makes it greater than it was when committed.

3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

Could Mrs. Barney forsee for five years prior to April 14, 1886, that in case she failed to return or list her property, or any part of it, for taxation, that a different and greater penalty than was authorized by the laws in force prior to the said fourteenth day of April, 1886, would be imposed upon her?

Does the act referred to change the penalty and make it greater for omitting to return or list property for taxation from what it was and than it was five years prior to the passage of the act of April 14, 1886? If it does, in our opinion, it comes with the prohibition of section 10, Article 1 of the Constitution of the United States, which provides among other things "that no state shall pass any *ex post facto* laws."

If the penalty part of the act is unconstitutional and void, does it carry with it the remedial parts? This is to be determined by ascertaining whether the legislature would have passed the act with the penalty part stricken therefrom. If not, then both provisions of the act must stand or fall together. State v. Sinks, 42 Ohio St., 345, 350.

Conscious of the delicacy and intricacy of the question it is with the utmost embarrassment and reluctance that we proceed to decide it. We would fain shun the responsibility of deciding a matter wherein is involved and presented such great difficulties, and more especially so as we are unaided by any decision or dictum of any court of last resort on the subject. We are called upon to pronounce whether the legislature has transcended its legislative powers, and enacted a statute which is repugnant in its provisions to the fundamental law of the land. After careful and laborious research and inquiry we feel impelled by duty to say that we feel a clear and strong conviction that the penalty part of the section is incompatible not only with the constitution of the state of Ohio, but also with that of the United States. And further that the Legislature would not have amended and repealed the act of May 11, 1878, but for the sole purpose of empowering the auditor to attach a penalty of 50 per centum to the value of the property for each of the five years named in said section.

Having reached these conclusions, the judgment in this case is accordingly for defendants.

## NUISANCE—HIGH FENCE. 111

[Cuyahoga Common Pleas, August 13, 1889.]

†WILL T. PECK V. ELLEN BOWMAN.

**The erection of a high board fence near to the lot line of the defendant, though entirely on his premises near the windows of a neighboring house to shut out the view therefrom, not from necessity, but from malice alone, is a nuisance; it is a unjustifiable use of one's premises, and will be enjoined.**

STONE, J. (Orally.)

The case of Peck against Ellen Bowman is an action brought to enjoin the defendant from erecting a certain fence between the houses occupied by the respective parties; a fence which appears from the facts admitted is located near the boundary line between the premises of the parties, but wholly upon the lands of the defendant. It is alleged in the bill that this fence about to be constructed, the fence posts and cross bars and pieces being already in place, to some extent at least, that it will be a fence ten feet in height, of rough and unsightly boards; that the fence is designed to serve no useful or ornamental purpose, and that it will be a damage to plaintiff, an injury to his property; that it will have the effect to mar the beauty of the street, and will injure property on both sides of the fence, and diminishes value. The plaintiff seeks to enjoin the construction of such a fence at the place indicated, and an amount of proof has been submitted in the nature of facts in support of the motion to dissolve the restraining order heretofore allowed, as to whether it should be continued.

A motion to dissolve the restraining order has been made, but the motion to dissolve is made prematurely; it is really heard upon an application to continue the order, and the real question before the court is whether upon the petition and the amendment to the petition, no answer having yet been filed, whether upon the pleadings and the facts now submitted a restraining order can lawfully and rightfully be allowed in this case. This is not unlike other instances that have occurred in this and every community, happily not very frequently as it is to be hoped, but still occasionally occurring. Neighbors get into difficulty, and become unfriendly, and because of such unfriendly relations one seeks to shut off the view of his neighbor from his premises by some such structure as the one contemplated in this case. I have looked over the affidavits submitted; there is nothing clearer than the fact that these people, occupying houses on both sides of this proposed fence, for some reason or other became altogether unfriendly, and from that condition of things has arisen what is claimed to be on the part of the defendant the necessity for the construction of this fence. It is not easy to determine perhaps, the truth as to the causes that have led to the difficulties between these people. It is probably true, and such has been my observation in in cases of the sort, that neither party is wholly without fault, and yet it is very likely that one party may be much more at fault than the other.

It is alleged in the bill that the fence that is proposed to be built is to be built by the defendant from motives of unmixed malice, and will serve no purpose, either useful or ornamental, and the question made by the petition is as to whether, under the facts submitted on the averments of the bill, whether it is a proper case for an injunction. Of course I am not considering it now as it would be considered on the final trial, when all the facts would be submitted to the court by witnesses, with an

† See page 571 for the petition in this case.

opportunity to examine, cross-examine and re-examine upon all the facts material to an understanding of the case. I have had occasion, since the case was presented, to view the premises. I did so yesterday, and it is manifest upon the most casual examination, to draw it mildly, that things in these affidavits are quite wide of the real facts in the case; and this is to be said upon the facts submitted upon both sides. The fence that is proposed to be built, if we may judge from the structure as it now exists, is to run from the street back to nearly the upright part of the plaintiff's house, possibly as far back as to his own part of the house; but I am safe in saying as far back as the main part of the house; it is true, the fence is entirely on the defendant's land. The facts submitted show that, and the indications point the same way. The fence that now stands there in the nature of a permanent fence, is a picket fence and extending some distance back, fifteen feet, or perhaps, twenty, to a point as far as the front of the house, and thence to the rear of the house there is a tight board fence, perhaps not exceeding four or five feet high.

It is said that the fence to be constructed does not differ, essentially, from the other fences on the street. It has not been my fortune, heretofore, to find a street where people are so much attached to tight board fences as Halsey street; but they seem to be attached to tight board fences. But that is by no means saying that there are such fences as this is proposed to be, and while there may be said to be such as these people demand, it is safe to say none of them are as high as this. Most all of them near the street have decreased the height, and tapered them down so that they are no higher than picket fences. But if we can judge from the framework that already occupies a conspicuous position, it is not so in the present instance. It is said upon hearing, that it was proposed to extend the fence only within ten feet of the sidewalk. Whatever the fact in that regard may be, the construction now existing is to the contrary. The posts are very close to the sidewalk. I had no difficulty at all in standing upon the sidewalk and taking hold of the top rail, and certain it is, that from every indication now, it is contemplated to extend that fence out some distance beyond a line corresponding with the front of the main structure on the street. However, that perhaps, is not essential to determine just what point is set.

It is not true, as claimed on the part of the plaintiff, that this fence is from two to two and a half feet off the plaintiff's house. There is, certainly, a space of four or five feet, as anybody can see from casual observation; certainly room to pass on the side of the house. Neither is it a fact that the windows of the plaintiff's house are as high as claimed by the defendant. I think it will be certainly safe to say, a fence ten feet high will reach almost to the top of the windows; it would not be likely to exclude the light to the extent the plaintiff claims. There has been a pretty careless statement of the facts in this on both sides; I say careless, because I do not want to characterize it more harshly. It is very apparent, then, that the fence which is proposed to be built, is not in the nature of a line fence. It is not essential for the purpose of separation of the parties, in a sense of separation as effected by a useful structure. Nothing is clearer than that it is simply designed to shut off the view of the plaintiff from the premises of the defendant across it, on account of the bad state of feeling between them; and possibly it would have the effect, and serve the purpose the defendant claims; would prevent conversations, which have heretofore been

quite undesirable; it might possibly have the effect to prevent petty annoyances on both sides.

Now the question is presented, whether such a structure, ten feet high, extending from near the street, back past the house of the plaintiff, is of such a character, that this defendant has a right to construct upon his own premises, for the purpose for which he designs it? It is clear, that it would be under some circumstances; and it is claimed, that it is only designed for the single purpose that I have before indicated. Since the bill was filed an amendment has been made to the petition, by which it is claimed, that under the terms of the grant of the title to the premises, a limitation or a restriction was placed in the conveyance, by which the grantees were prohibited from erecting any structure nearer to the street than a certain distance, and it is argued by the plaintiff, that this is a structure within the meaning of the law, and one which, by the terms of the grant, this defendant has no right to construct. My own impression is, from the little time I have had to examine the case, that it is not an important amendment to the petition, and that the plaintiff's right substantially depends upon the facts stated in his original petition.

It may be the right exists in the original grantor to insist upon the enforcement of the condition of the grant. It is very doubtful whether it is of the character, that a person who is neither a party nor privy to the original contract, can maintain any action for its enforcement. In this preliminary matter, I do not find it necessary to pass on that, but will on other points dispose of it on the other ground, as a temporary matter.

The question is—whether a restraining order can be granted to prevent the erection of this fence? I have examined the authorities that were submitted on the hearing. The latest case, perhaps, bearing upon the question, is the Michigan case, Burke v. Smith, 25 Rep. 596. That was a case not unlike this in some respects. That was a case in which the adjoining proprietors got into a quarrel, that resulted in the defendant's finally putting up a screen or fence in front of the lower side windows of the plaintiff, as it was claimed covering, obscuring and darkening the windows, and shutting out the light therefrom. These structures the court saw fit to call screens in that instance, I suspect because they did not serve the purpose of a fence. They were two in number, and eleven feet high, and came up to the windows of plaintiff's house. They were built by setting posts in the ground, and nailing boards against them. They were left open at the bottom below the windows. In that case the court found that they served no useful or ornamental purpose, but were only useful to shut out light from the plaintiff's windows. The court held in that case, that an injunction was the proper and appropriate remedy. It is claimed that these screens were really designed as screens, and not as a fence. They were to cut off the view from one premises to the other to prevent an observation from one to the other; it could not serve any other legitimate purpose than to cut off communication, as they occupied their own premises. I am not prepared to say but that a case might exist, where a man might erect a suitable fence to render less anything undesirable from neighbors, but the question, after all, must be whether, in a case like this, this structure, if built, would subserve in its character any substantial, any useful purpose to the defendant, or would be in its nature a nuisance. I think the latter is its character; that it would serve no useful purpose, but is in its nature a nuisance. It

obscures the light and view, and serves no useful purpose. I think the facts make a ground for an injunction. I know it is quite a departure from the generally supposed doctrine.

In the 15th Wendell, a case in which the defendant had erected a screen of the height of fifty feet, for the sole purpose of annoying the plaintiff, the court was of the opinion that it was not a proper case for an injunction. Of course, under ordinary circumstances a man has a right to build a block, and occupy every inch of his land; and may do as he sees fit, and judge what is fit, so long as he does no injury to adjoining property, and do no more injury than this fence possibly could, and it would be an injury for which there is no remedy, it being a man's right to use his premises as will best subserve his purpose, when he is doing it in a lawful manner, and not doing it to injure or annoy his neighbor or adjoining property.

The Michigan court say in respect to the holding of the New York court, that "we apprehend that at this late day this is not the law in Michigan, and never was." The court said a man had no right to construct a window in the side of his house overlooking the land of his neighbor, so as to acquire an easement in his neighbor's land; that he had no rights that his neighbor was bound to subserve, even if his neighbor shut off the view of his window from motives of malice. The court say a man can not do that, and gain an easement to prevent his neighbor from the beneficial use of his property, and no lapse of time will make his right "ancient," so as to prevent an act to the detriment or total obstruction of air and light from the windows. But the Michigan court say, that it seems to me it is the good sense of the subject, and it is in the line, not only of the civil law, but also the moral, that such a structure should not be permitted, when it serves no useful or beneficial purpose. I say no useful or beneficial purpose; it possibly might have the use of preventing something that heretofore occurred, that could be called an annoyance; unpleasant talk, the interchange of language between these people; but I think their difficulties, ought to be met in some other way, than by the construction of a fence that in every essential particular is a nuisance, not to the abutting property, but to the whole street. I do not know of anything that, in its nature, would be more of a nuisance, than to have a structure of this sort, that can be seen the whole length of the street, that is no ornament, and in no sense useful. These differences should be settled in some other way, than the building of a Chinese wall between neighbors. I know in some communities it would not be considered out of place. I know in New Orleans, they build high brick walls; that grows out of the custom of building property close to the street, and making the rear part their gardens: that may be true in the old country; we have not got to that practice here; we use our front lawns and front porches, and still consider them to be private enough for all social and family purposes; and until the custom changes, I should be opposed to permitting a structure of this sort, that in the estimation of our people is regarded as useless, unneighborly and undesirable. Under the circumstances as they exist in this case, I propose to continue this injunction until the further order of the court, until an opportunity is given for a full hearing.

Willson & Sykora, attorneys for plaintiff.

Col. C. W. Broadwell, attorney for defendant.

The following is the petition for injunction relief filed in the above case:

Will T. Peck, plaintiff, v. Ellen Bowman, defendant. The said plaintiff, Will T. Peck, complains of the said defendant, Ellen Bowman, and says that the said plaintiff is the owner and in the occupancy of sublot No. 67 in original lot No. 409 on the west side of Halsey street in said city of Cleveland. Plaintiff says that he resides upon said premises with his family, and occupies the same as a family homestead.

Plaintiff says that said Halsey street is a street built up and occupied almost exclusively as a street for private residences, and that a large part of the comfort and enjoyment of said homestead arises from the fact that said houses and lots are kept neat, and are adorned with lawns, grass and flowers, and with neat and presentable fences and door yards, in which the residents along said street take a just and great pride.

Plaintiff says that said defendant, Ellen Bowman, is an adjoining proprietor to his said homestead, and owns and occupies the premises immediately adjacent to him in said street.

Plaintiff further says that said Ellen Bowman, not having the fear of God in her heart, but being thereunto instigated by the devil, threatens, and is about to erect on the line between their said properties, a fence ten feet high, of rough and unsightly boards.

Plaintiff saith that said fence is about to be so built by said Ellen Bowman from motives of unmixed malice, and is designed for no purpose of either ornament or use, and is a damage, and is a serious damage, not only to plaintiff's property, but also to the property of said defendant, and it would be an act of charity towards said defendant to enjoin her from erecting said fence, and would be a still greater act of charity for this court to appoint a guardian for said defendant, and save her from her own insane acts and intentions.

Plaintiff says that said fence, as proposed to be built by said defendant, will be unsightly; will mar the beauty of the whole of said street; will injure the property on both sides of said fence, and diminish the selling value of the same, and will be a constant source of irritation to this plaintiff, and to the other residents along said street, and will constantly threaten broils and breaches of the peace, and will be of no other use or benefit whatever to any person in the world.

Plaintiff says that said Ellen Bowman is insolvent, and that by the erection of said fence he will suffer great and irreparable injury.

Therefore plaintiff prays that the said defendant may be enjoined from building, erecting or constructing said fence as above described, or any other unsightly fence, or fence of unreasonable height, or any other fence from motives of malice, or with a design or purpose to injure property, or to do harm upon said boundary-line between this plaintiff and said defendant, and plaintiff prays for such other and further relief as equity and good conscience may require.

Willson & Sykora, attorneys for plaintiff.

A preliminary injunction was granted on this petition.

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## MANDAMUS—SALARIES. 113

[Cuyahoga Common Pleas, 1889.]

STATE OF OHIO EX REL. MIX ET AL. v. CLEVELAND (CITY.) ET AL.

1. Where a city auditor refuses to draw his warrant to pay a monthly installment of salary, mandamus is the appropriate remedy, for the claimant has not an adequate remedy at law if he must be driven to monthly actions and their incident delays.
2. The directors of the House of Refuge and Correction of Cleveland, under sec. 2039 Rev. Stat., have authority to employ the necessary subordinate officers, etc., and to fix their compensation. The city council has no control over the question of such compensation, and it is not necessary that council first pass an ordinance for the payment of such employees before the city auditor can be required to issue warrants for their payment.
3. Section 1698, Rev. Stat., that no appropriation of money shall be made except by ordinance, does not apply, for this is not an original appropriation but the payment of a debt, which the board had power to create out of the fund applicable thereto.

STONE, J.

This is an application made on the part of the board of directors of the House of Refuge and Correction for a peremptory writ of mandamus against the city of Cleveland and the city auditor to compel the payment of the compensation due to certain employees of the board of directors of the House of Refuge and Correction—compensation said to be due them for the months of May and June of the present year. These claims for compensation have been certified to the city auditor by the superintendent of the Workhouse, together with the approval of the finance committee of the board of directors as well, as the certificate of the president of the board that "the within claims are correct, and legally due the several claimants therein named." It appears from the petition, and the fact is admitted, that the auditor has refused to issue his warrants for the payment of these claims It is also alleged and admitted that there is money on deposit in the city treasury, and undisposed of, sufficient to meet the claim here presented. The relators charge that the auditor unjustly refuses to draw his warrants, notwithstanding the claims are properly presented, and properly certified to as being due. The case is submitted upon the petition alone.

The questions made are two:

First—It is urged on behalf of the defendants that the city council has passed no ordinance authorizing the payment of these claims; that the city auditor is not authorized by law to draw his warrant until an ordinance has been passed by the council, authorizing their payment.

Second—That mandamus is not the proper remedy; that these claimants have an adequate remedy at law—have their suit at law, if they have a claim against the city, and that such an action would be the appropriate remedy, and an adequate one.

The first proposition is one that involves the construction of perhaps two or three sections of the statute.

By sec. 2039, of the Rev. Stat., the board of directors of the House of Refuge and Correction has "power to appoint a superintendent, deputy superintendent, and such subordinate officers, guards and employees as may be necessary, fix their compensation and prescribe their duties, and to make all such regulations for their management and government as it may deem expedient." There is nothing in this section to indicate that the city council has any control over the question of compensation to be fixed to employees of the board.

It appears by section 2034, that in a certain class of cases, the council has authority in the premises. By this section it is provided that "the board shall elect, annually, at the first regular meeting in May, one of their members as president; and at the same meeting, appoint a secretary and clerk, who shall make a complete record of all its proceedings; and such other officers as may be necessary, and fix the compensation for their services, which compensation shall be subject to the approval of the council." The legislature has manifestly made a distinction between persons employed as secretary and clerk, who have to do with the official relation of the board—who, in a sense, belong to the personal of the board—assist in the executive management of the board —and other employees. The compensation of these officers that are spoken of as secretary and clerk, and such others as may be necessary, is subject to the approval of council; but by the first section (2039), the compensation of the superintendent, deputy superintendent, subordinate officers, guards, and such other employees as may be necessary, is to be

fixed by the board; and it therefore clearly appears that in making this distinction, the legislature intended that under the first section the council should be consulted in the matter of compensation, but that in the employing of subordinate officers, guards, teachers, and those necessary to perform such services and work as are necessary to the daily running of the institution, outside of executive work of the board, the approval of the council should not be required in fixing the compensation.

The council having no voice then, in fixing the amount of the compensation, the question is, is it essential to the payment of the salaries of these several employees, and a condition precedent to the drawing of a warrant by the auditor, that these claims should go into the regular pay ordinance, or any ordinance for the payment of claims, and passed and approved by the council?

In section 1693, it is provided that "no contract, agreement or obligation shall be entered into, except by an ordinance or resolution of the council, nor any appropriation of money for any purpose be made, except by an ordinance; every ordinance appropriating money, shall contain an explicit statement of the uses and purposes for which the appropriation is made," etc.; "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; but this section shall not be construed to impair the board of public works in any city to make contracts, or impair the power to contract, whenever elsewhere given in this title; or to delegate the power to execute such contracts."

This section is in the same title as the sections first quoted, 2034 and 2039, and it is clearly a case of delegated power to make these contracts; and it is a power not only to make the contract of employment, but to fix the compensation to be paid for the services to be rendered under the contract.

Now, we are inclined to think that under these provisions of the statute, no ordinance is essential to authorize the auditor to draw his warrant for the payment of these claims. True, it is provided in this section that no appropriation of money for any purpose can be made, except by ordinance. This can hardly be said to be an original appropriation of money. It is the payment of a claim which the board has power to create. Presumably the council has set apart by ordinance, a fund applicable to the payment of the ordinary obligations arising in the carrying on of the workhouse.

It is apparent, too, under the provisions of section 17 of the "Depositary Law" of 1888, that this class of claims is recognized as being of the kind authorized to be paid without the sanction of the city council. I read a part of section 17:

"Upon the passage by the common council of any city of the grade and class aforesaid of an ordinance, duly approved, providing for the payment of obligations of the city, the city auditor shall issue his warrants, subject to the provisions of sections fourteen and sixteen, for the payment of such obligation respectively; and he shall also, subject to the provisions of said sections, issue his warrant for the payment of any claim that shall be duly certified to him, in writing, as correct, and legally due the claimant, by any board of the city, authorized by law to incur obligations to be paid without the sanction of the city council."

The board had authority to incur these obligations, and the auditor is authorized by law to pay the same. He has authority to draw his warrant, in other words, to pay such obligations as the board has authority to create, without the sanction of the council; So that we think the auditor is clearly authorized by the various provisions of the statute under consideration to draw his warrant for the payment of these claims, (salaries due teachers and others) provided they are certified to by the proper authorities, i. e. the board of directors, as being correct and legally due the several claimants named. And upon this proposition there is no controversy as to the facts. It is admitted by the city solicitor that these persons have been employed, and the compensation has been fixed by the board of directors, that the salaries for the two months named are due and unpaid; and we hold that no ordinance is essential in order to authorize the auditor to draw his warrant for their payment.

On the other proposition, as to whether madamus is the appropriate remedy, very little need be said. I have no doubt that it is an entirely appropriate remedy under the circumstances. It would be far from being an adequate remedy, that every month when the salaries become due, a large number of claimants, each of them, must have his suit at law for the recovery of his salary, and still to perform services with the likelihood of being without such compensation for months, and perhaps years, awaiting the result of decisions, either in this or higher courts. It would be ridiculous and absurd to hold, that these claimants must be remitted to any such remedy as that, especially when the employment and services are admitted, and it being only a question of method of payment. It would be neither appropriate nor adequate.

We think the writ of mandamus is the appropriate remedy where an officer refuses to draw a warrant when it is clearly his legal duty so to do. A peremptory writ is allowed to require the auditor to issue his warrant for the payment of these several claims.

John G. White & John C. Hutchins, for relators.

Allan T. Brinsmade, City Solictor, for respondents.

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131 STREET ASSESSMENTS—TAXES.

[Lucas Common Pleas.]

TOLEDO (CITY) v. TOLEDO (CITY) ET AL.

1. The Act of the General Assembly passed March 19, 1889, requiring all cities of the third grade of the first class, to levy the cost of the intersections in street improvements on the general tax duplicate, and making its provisions applicable to improvements previously ordered for which no assessments have been made is not in conflict with Section 28, Article 2 of the Constitution of the State.
2. The taxes provided for by the said Act, are included in the aggreate of 14 mills to the levying of which such cities are by law restricted.

PUGSLEY, J.

This is an action brought by the city solicitor under section 1777 of the Revised Statutes, to enjoin the city of Toledo from making an assessment on abutting property of only a part of the expense of a certain street improvement, and from levying the balance of such expense upon all the taxable property in the corporation, and is before the court on a demurrer

to the petition. The following are the material facts upon which the question raised by the demurrer depends:

On May 28, 1888, the common council passed a resolution declaring it necessary to improve Nebraska avenue by grading and paving the same between certain points, and on July 9, 1888, it passed an ordinance directing that the improvement be made in accordance with the resolution. By section 3 of the ordinance it was ordered that all the expenses of the improvement (excepting a certain part to be paid by the street railroad company) be assessed upon the lots and lands bounding and abutting on Nebraska avenue between the said points, in proportion to the foot front.

By section 4 of the ordinance it was ordered that the contractor who shall do the work, shall be paid in cash within ninety days after the completion of the work and the acceptance thereof by the city.

Subsequently and during the year 1888 a contract was made by the city for making the improvement, and the work was commenced by the contractor.

On March 19, 1889, before the work was finished, section 2274 of the Revised Statutes was amended so as to read as follows: "Sec. 2274, When the council of a city, except in cities of the first grade of the first class and in cities of the first grade of the second class, determines to grade, pave or otherwise improve a street, alley or other public highway, and the improvement crosses or intersects another street, alley or public highway, the council shall levy and assess a tax in addition to that specified in the last section upon the general tax list of all the taxable real and personal property in the corporation, for the estimated cost and expense of so much of the improvement as may be included in the crossing or intersection of such street, alley or highway, which amount the corporation clerk shall certify to the couny auditor, and the same shall be enforced against such real and personal property as other taxes are enforced and collected; and such amount may be so certified and such levy made after the contract is let or said improvement completed, and the provisions hereof shall apply to improvements already determined upon or ordered and for the payment of which special assessments have not been made."

Section 2273, to which reference is made in the foregoing amended section, does not apply to Toledo, and need not be further noticed.

On June 3, 1889, the improvement was completed by the contractor and accepted by the city, and thereupon on the same day the city engineer made a report to the council of the expense of the improvement wherein, in accordance with the provisions of said amended section, he estimated the expense of the street intersections at the sum of $4,435 52, and the part of the expense to be assessed on the abutting property at the sum of $29,942.15.

It is alleged in the petition that according to law and the prior proceedings of the council, the engineer should have reported the aggregate of said sums as the amount to be assessed upon the abutting property, and that unless restrained by the order of this court the council will confirm said report, and wrongfully levy upon all the taxable property in the corporation the sum first mentioned, and wrongfully assess upon the abutting property only the sum last mentioned. On the filing of the petition a preliminary injunction, as prayed for, was allowed by one of the judges of this court.

The sole question presented by the demurrer is whether upon the facts stated the threatened action of the council in levying the cost of the street

intersections upon all the taxable property in the corporation is authorized by law. It must be conceded that such action is in strict accord with the provisions and requirements of the act of March 19, 1889 above quoted, but it is claimed that the act so far as it applies to street improvements previously ordered, is void as in conflict with section 28 article 2, of the constitution of the state, which is as follows: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligations of contracts." Is the act, as applied to pending improvements, a retroactive law that is, does it destroy or impair a vested right acquired under existing laws? Or, as so applied, does it impair the obligations of a contract?

The propositions contended for are in substance, First, That by passing the ordinance directing the cost of the improvement, including the cost of the intersections to be assessed on abutting property, and by making the improvement under this ordinance, the city acquired the vested right to have the cost of the intersections assessed according to the ordinance, and that the clause in the act requiring such cost to be levied on the tax duplicate, takes away such vested right, and is therefore retroactive within the meaning of the constitution; and Second, That the proceedings of the council under which the improvement was made, amount to a contract between the city and the taxpayers in the corporation that they would not be taxed for the improvement, and that by requiring the city to levy such a tax, the act destroys the obligations of a contract, and is therefore unconstitutional. Examination of the sections of the Rev. Stat. in force when this improvement was ordered, and consideration of the character of the proceedings in question, and of the established rules relating to the power of taxation possessed by municipal corporations, will, I think, show that neither of these positions is tenable.

By section 1692, among the powers granted to municipal corporations, is the power to establish and improve streets and keep them in order and repair.

By section 2683, the council in each city is authorized to levy taxes annually on all the taxable property in the corporation, for street improvements and repairs.

Section 2263, provides that when the corporation is possessed of property which it desires to improve for street purposes, the council may assess the expenses of such improvement, or of any part, upon the general tax list, in which case the same shall be assessed upon all the taxable real and personal property in the corporation.

By section 2264, it is provided that when an improvement of a street is made, the council may decline to assess the expenses of such improvement, or any part thereof, except as hereinafter mentioned, on the general tax list, in which event such expenses not so assessed, shall be assessed on the abutting and contiguous lots and lands either in proportion to benefits or according to assessed value or by the foot front of the property abutting on the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made, and in the manner and subject to the restrictions herein contained.

The words "except as hereinafter mentioned," contained in the foregoing section, refer to sections 2273 and 2274.

By section 2273, certain cities (not including Toledo) are required to assess 1-50 of the cost of the improvement on the general tax list.

By section 2274, certain cities (not including Toledo prior to the amendment of March 19, 1889), are required also to assess the cost of street intersections on the general tax list.

It thus appears that at the time this improvement was ordered, the council had the power to assess the whole or any part of the cost of the improvement, including of course the cost of the intersections, upon all the taxable property in the corporation, aud that to warrant an assessment of any part of the expense upon abutting property, an ordinance to that effect must be passed before the improvement, specifically describing the lots and lands to be assessed. The only change made by the amendatory act of March, 1889, is that now it is the duty of the council to do what before the act it had the power to do, namely, to assess the cost of the intersections on the general tax list.

The liability therefore to which by law the taxpayers were subject at the time the ordinance was passed, was not enlarged by the amendatory act. Clearly, at the time of the passage of the ordinance, it was within the lawful power and discretion of the council to direct a levy upon the general tax list to defray the costs of the intersections. But it is said that the council declined to exercise this power, and that by passing an ordinance directing the cost to be assessed on abutting property, its action was final, and all parties are concluded thereby, and authorities are cited to the effect that the rights and liabilities of the abutting owner are governed by the law in force at the time the improvement ordinance is passed. The Supreme Court have recently decided that a statute which did not by its terms apply to an improvement already ordered, and which when so applied would increase the liability of an abutting owner, beyond that fixed by the law in force at the time of the passage of the improvement ordinance, must be construed as operating only prospectively. Cincinnati v. Seasongood, 46 O. S. 296.

The rule laid down in that case can have no application to the law we are considering for the following reasons:

First—The statue involved did not by its terms provide that it should apply to pending improvements.

Second—It imposed a greater liability upon the abutting owner than could be lawfully imposed when the improvement was ordered.

Third—To charge the cost of an improvement upon the property owners, the law requires certain proceedings to be taken, among which is the passage of an ordinance before the improvement, prescribing the method and extent of the assessment.

It was not held that the improvement ordinace amounted to a contract between the city and the property owners that the law would not be changed against them, but the decision was based on the ground that the law required the method and extent of the assessment to be determined by ordinance before the improvement is made, and that the assessment should be made in the manner and subject to the restrictions prescribed by the law then in force, and that this was a vested right in the property owners, which would be impaired by a subsequent law increasing the amount of the assessment, if the law was held to apply.

There are no such restrictions upon the power of general taxation delegated by the legislature to municipal corporations. At the time this improvement was ordered, the law was absolute that the whole cost might be paid by general taxation without any limitation as to the time when, or the manner in which, the council must determine that the cost should be so paid.

There was, therefore, under the law, no vested right in the taxpayers of the city that the whole or any part of the cost of the improvement should be charged upon abutting property, and no new obligation was imposed on the taxpayers in requiring them to pay part of the cost. The ordinance created no such vested right. Even an express agreement on the part of the city that a general tax would not be levied would have no binding force or effect. Municipal corporations are subordinate agencies of the state, created by general laws to aid in the administration of local affairs, and are always subject in their public capacity to legislative control. They possess no powers except such as are expressly granted by law, or are fairly implied, as necessary to carry into effect those which are expressly granted. One of the most essential and important powers thus conferred is the power to levy taxes for public purposes on all the property within the municipality. It is a governmental or legislative power, and cannot be bartered or ceded away. They may make contracts with individuals in respect to matters within their delegated powers, and such contracts are binding, and are protected by the constitutional guaranty. But they have no power to make contracts, or pass ordinances, which shall deprive them of any portion of their legislative authority, or disable them in the performance of their public duties. These principles are well settled.

It is also an established rule that legislative acts are not contracts within the meaning of the constitutional provision. They may be amended or repealed at the pleasure of the legislature, when the rights of individuals are not invaded. The city has no right in a tax law by taking action under it, which will prevent an amendment or repeal of the law from taking effect according to its terms. The creditors of the city, or persons who have in good faith acquired substantial rights under the law which will be injuriously affected by the amendment or repeal, may complain, but no one else. In this case the contractor has no cause of complaint. He is to be paid in cash for his work. This contract is in full force, and its obligations are in no way affected by the law. The abutting owners cannot object, as the law is clearly for their benefit. State v. Peters, 43 Ohio St., 629, 651. And, as we have seen, no legal right of the taxpayers is invaded.

The following authorities discuss analagous questions, and support the views which I have expressed.

Retrospective taxation, so called, is not unconstitutional. A law requiring a municipal corporation to levy a tax for payment of a demand already incurred, which is just and equitable, although there is no legal liability to pay it, is not a retroactive law. The constitutional inhibition does not apply to legislation recognizing the binding obligation of the state, or any of its subordinate agencies, with respect to past transactions, but is designed only to prevent retrocative legislation injuriously affecting individuals. New Orleans v. Clark, 95 U. S. 644; Weister v. Hade, 52 Pa., St., 474; Thomas v. Leland, 24 Wend., 65; Sinton v. Ashbury, 41 Cal., 525. In Guilford v. Supervisors, 13 N. Y., 145, it was held that a law is valid which authorizes a tax to pay a claim against a town, although the claim is not recoverable by action against the town, and although the claim has been rejected by the voters of the town under an act authorizing its submission to the voters, and declaring that their decision should be final and conclusive.

A law authorizing the payment of bounties to veteran volunteers, and the levying of taxes for such purpose, is not a retroactive law,

although at the time of enlistment there was no law requiring payment of a bounty, and the enlistment was not made on the faith of a promise of bounty by the public authorities. State v. Richland, 20 Ohio St., 362; Cass v. Dillon, 16 Ohio St., 38; State v. Harris, 17 Ohio St., 608. In the case in 20 Ohio St., Judge White, in delivering the opinion of the court disposes of the constitutional objection as follows: "The objection that the act is in violation of sec. 28, article 2, of the constitution, which prohibits the passage of retroactive laws, was made to a similar statute in State v. Harris, *supra*, and was held by the court to be invalid. It was said in that case, that the validity of the law did not depend upon the existence of power in the legislature to create a contract between the country and the volunteers; nor was it an act which impaired vested rights or the validity of contracts. The authority for the act was found in the general grant of legislative power, which includes taxation in all its forms, both general and local, unless restrained by other parts of the constitution. A law designed to raise money by taxation, for a public object, and in the performance of what the legislature regards as a public duty, and which operates equally upon all, can not be regarded as a retroactive law."

A law exonerating a public officer and his sureties from the payment of public money which is lost without his fault, and directing a tax to be levied in the territory upon which the tax must fall to meet the deficit, is a legitimate exercise of the taxing power, and does not violate the constitutional provision against impairing the obligation of contracts. Board v. McLandsborough, 36 Ohio St., 227.

A law authorizing county commissioners to levy a tax to pay for the services of certain persons, rendered in proceedings to build a county ditch, which proceedings were subsequently dismissed, is not a retroactive law. Holtz v. Commissioners, 41 Ohio St., 423. The court say: "It is a law authorizing the levy of a tax to make good a deficiency. Whatever doubt may exist touching the power to add to assessments made upon abutting property, under a law providing for an improvement, by a subsequent enactment, we think it is plain that the legislature has full power to authorize levies upon the general duplicate, to make good deficiencies of the kind above referred to."

When a municipal corporation levies an assessment upon property which was not subject to be charged therewith, it is competent for the legislature to relieve the property, and require the amount improperly charged thereon, to be paid out of the funds of the corporation. State v. Hoffman, 35 Ohio St., 435.

After a road improvement was ordered by county commissioners, the legislature by an amendment to the law prescribed a different rule for apportioning the expenses upon the real property named in the order. The court held that the amendment was applicable to the improvement and was not in conflict with the constitutional provision against retroactive laws. Commissioners v. Greene, 40 Ohio St., 318.

In view of these decisions there seems to be no doubt that if the special assessment on abutting property provided for by the ordinance should for any reason be held to be void and uncollectible, a law directing a levy of general taxes to pay for the improvement would be a valid enactment, or that the legislature in a proper case might relieve an individual from the burden imposed upon him by the assessment, and cast it upon the general public. Indeed the power to abate or reduce special assessments and pay the deficiency out of the gen-

eral fund has been freely exercised for many years by the cities throughout the state without special legislative authority. The existence of this power seems to be recognized by the Supreme Court in R. R. Co. v. Connelly, 10 Ohio St., 160, 166. A law passed during the pendency of improvement proceedings directing a part of the cost of an improvement to be paid by the general public, is certainly no more subject to legal or constitutional objection than such a law passed after the proceedings are terminated. My conclusion is that the proceedings of the council relating to this improvement were not in the nature of a contract, and created no vested rights in the city or general taxpayers—and that the act of March, '89, as applied to the improvement, is a valid exercise of the taxing power and is not in conflict with the constitutional provision invoked.

Some reliance is placed by counsel for plaintiff on secs. 79 and 1539 of the Revised Statutes. Section 79 provides that whenever a statute is amended, such amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal. It is held in Commissioners v. Greene, 40 Ohio St., 318, that the terms "actions, prosecutions or proceedings" are used in the statute with reference to judicial matters and relate to the prosecution or defense of civil and criminal actions, and can have no just application to a statutory proceeding for the improvement of a county road.

Section 1539 provides that "all rights and property which were vested in any municipal corporation under its former organization shall be deemed vested in the same municipal corporation under the organization made by this title; and no rights or liabilities, either in favor of or against such corporation existing at the time of the taking effect of this title, and no suit, prosecution or proceeding shall be in any manner affected by such change, but the same shall stand or proceed as if no such change had been made." It is a serious question whether this section has any application to improvement proceedings instituted after the year 1880, when the Revised Statutes took effect. The change referred to in the section is evidently the change made by the Revised Statutes in the organization of municipal corporations. Am improvement proceeding, instituted after 1880, would necessarily be governed by the Revised Statutes or the amendments thereto and could not be affected by such change. The case of Raymond v. Cleveland, 42 Ohio St., 522, was cited. In that case an assessment was made under the municipal code of 1869, which was repealed by the act of 1878. The repealing act contained a saving clause similar to sec. 1539, Rev. Stat., and after the repeal the assessment was set aside as not made according to law. The court held that the various steps were a proceeding within the meaning of the saving clause, and that the council had the power to make a reassessment pursuant to the code of 1869. Whether the saving clause would apply to proceedings instituted after 1878, was a question not involved nor passed upon.

But whether secs. 79 and 1539 are or are not applicable to improvement proceedings, by municipal authorities instituted since 1880, they clearly do not apply to a case like this, where by the express terms of the amendatory act, its provisions are made applicable to improvements already ordered. The latter statute must govern, and the validity of the act must be determined independently of these sections. If the act is retroactive, or impairs the obligations of a contract, within the meaning of the constitution, no saving clause was necessary, and the act is

void. But if not unconstitutional, then these prior sections can not override the positive provisions of the act, and it must be held to be valid.

Another question is raised by the pleadings. By sec. 2689, Rev. Stat., as amended April 4, 1888, and now in force, the aggregate of all taxes levied by cities of the third grade of the first class, for all purposes, shall not exceed in any one year, the rate of fourteen mills on each dollar. It is alleged in the petition, that the common council have already, and since the passage of the act of March, 1889, levied for the year 1889, the full sum of fourteen mills. The question is thus presented, whether a levy for the present year, of the cost of the intersections in addition to the aggregate of fourteen mills, is warranted by law. The act does not provide that the levy may be made in addition to taxes already authorized, and I am of the opinion, under the decisions of the Supreme Court in State v. Humphreys, 25 Ohio St., 520, and State v. Strader, 25 Ohio St., 527, that the taxes provided for by the act, are included in the aggregate of fourteen mills, to the levying of which, the city of Toledo is by law restricted. It follows that the cost of the intersections, can not lawfully be levied on the tax duplicate of 1889, and to that extent the injunction was properly allowed. The act does not limit the time within which the levy must be made, and no reason now occurs to me why it may not be made on a subsequent duplicate.

It was stated in the argument that at the time of the passage of this act a large number of street improvements had been contracted for, with the understanding on the part of both the city and the property owners, that the entire cost of the improvement would be assessed upon the abutting property, and that unless the cost of the intersections can be so assessed, a considerable sum of money must be paid by the city to the contractors for which no provision has been made, and that even a levy on the tax duplicate of 1889 would not obviate the difficulty. It was also urged that under existing laws, unless the cost of intersections can be assessed upon abutting property, there is no way by which the city can acquire the means to pay such cost to the contractors, who under their contracts must be paid in cash. Whether this last proposition is correct there may be some doubt, but in any event, these considerations cannot affect the construction or validity of the law any further than to induce on the part of the court the most careful consideration of the questions involved. They might have been proper considerations to address to the legislature as reasons why the law ought not to have been passed. As is well understood, the remedy for unwise or unjust legislation cannot be administered by the courts. It is only when the law is clearly in conflict with some provision of the constitution that the court is authorized to declare it void, and every doubt must be resolved in favor of the law. Under this rule, the act of March, 1889, is in my judgment free from constitutional objection, and applies to the street improvement mentioned in the petition.

As the petition states a case for an injunction against levying the cost of the intersections on the tax duplicate of 1889, the demurrer will be overruled, but the injunction allowed at the commencement of the suit will be modified so as to permit the assessment of the expense of the improvement on the abutting property less the cost of the intersections, as reported by the engineer, and to restrain only the levying the cost of the intersections on the duplicate of 1889.

## 136 SPECIFIC PERFORMANCE.

[Superior Court of Cincinnati, Special Term.]

R. B. BOWLER ET AL. v. BRUSH ELECTRIC LIGHT CO.

1. A court of equity will decree specific performance of a contract for the lease of real estate where the only defense is, that the quantity of land described in the lease tendered is slightly less than that contracted for, if the court is satisfied that the defendant will thus receive substantially that which he agreed to lease.
2. If the deficiency in such case is sufficient to affect the value of the property, the court may decree specific performance with compensation to the defendant for the difference in value.

PECK, J.

This is an action for the specific enforcement of a contract for the leasing of real estate. There is little room for dispute as to the material facts, which are as follows: Plaintiffs in writing proposed to lease to defendant a lot of ground, which they described as "one hundred feet on east side of Broadway, back one hundred and seventy-five feet to Spring street," upon certain terms and conditions which it is unnecessary to mention. Defendant accepted the proposition by a writing in which the lot is spoken of as being "one hundred feet front, extending back to Spring street." After the contract was executed, it was discovered that the distance from Broadway to Spring street was only one hundred and sixty-five feet, and defendant declined to take the lot, because of the difference in depth. During the negotiation the statement had been made to the officers of the Light Co. by one of the plaintiffs that the lot was one hundred and seventy-five feet in depth, and there is no doubt that both parties believed it to be such at the time of the execution of the contract. The officers of the company had inspected the lot, and were familiar with its location and surroundings. The lot was open and unimproved, as was also Spring street, and the boundary between the lot and the street not well defined. The difference in depth resulted from the fact that Spring street turned out to be ten feet wider than either party had thought, and this was only discovered after an examination of the title and a survey had been made. It is beyond question that there was a mutual mistake as to the quantity of ground contained in the lot, and the question is, whether the mistake is of such a character as to defeat plaintiff's action, for it is admitted that they have tendered a lease, and complied with all the other conditions of the contract, so far as to entitle them to enforce it, unless they fail because of the mistake mentioned.

It is not every mistake as to quantity that will avoid such a contract. If the court is satisfied that the purchaser is getting substantially what he bargained for, he will be compelled to perform the contract, although there may be a difference between the amount conveyed and the amount contracted for. In some cases defendant has been compelled to receive the property and allowed compensation for the difference. Such was the case of King v. Wilson, 6 Beav., 124, where a lot was sold as 46 feet in depth which proved to be only 33. McQueen v. Farquaher, 11 Ves., 467; Winne v. Reynolds, 6 Paige Chy., 410; Calcraft v. Roebuck, 1 Ves. Jr., 221; Calverly v. Williams, id., 210, 212; Foley v. McKeown, 4 Leigh, 627; Scott v. Hanson, 1 R. & My., 128; Foley v. Crow, 87 Md., 51; Stoddard v. Smith, 5 Binney, 355; King v. Bardean,

5 John's Chy., 88; Fry on Specific Performance, sec., 1194; White v. Tudor, Ld. Cas., 1145.

Many of the cases go much further than the facts in the case at bar require me to go in order to enforce the contract, and it seems to me that this is a case fairly within the spirit of those authorities. In the acceptance of the contract written by the managing director of the company there is no mention of the depth, but the lot is only spoken of as extending from Broadway to Spring street. It does not appear that there is anything in the use which it is proposed to make of the lot, requiring it to be of that exact depth, or that its value to the company will be diminished except to the extent of the general value of the use of ten feet. When the defendant receives a lease of a lot 100 feet front, extending back to Spring street, and in all respects the same as that contracted for, save that it is less in depth by about one-seventeenth part than it was understood to be, it will receive substantially what was contracted for, and I am satisfied that if compensation be made for the difference in depth, if there is any material difference in value caused by the deficiency of quantity, which is a question of fact for further inquiry, both parties will have received that to which they are equitably entitled. The deficiency, while not sufficient to entitle defendant to refuse to perform the contract, is perhaps enough to entitle the company to compensation, depending upon the question of the differnce of value. If there is any material difference in the latter respect, the company is, in my judgment, entitled to a reduction to that extent, because their mistake as to the quantity was induced by the statements of plaintiffs. The mistake originated with the plaintiffs, and while innocently made, and not sufficiently important to avoid the contract, they are equitably bound to relieve the defendant from its consequences.

The question, what, if any, difference there is between the value of the lot as it is, and as it would be if 175 feet in depth, will be referred to a master for inquiry and report, and upon the coming in of the report, a decree for specific performance may be entered with the amount of compensation so determined deducted from the value fixed by the contract.

Kittredge & Wilby and C. B. Matthews, for plaintiff.

J. A. Jordan, for defendant.

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## POWER—SPECIFIC PERFORMANCE—TRUST. 144

[Superior Court of Cincinnati, General Term, 1889.]

†C. C. BREUER v. TIMOTHY HAYES.

1. A naked power of sale does not imply a power to lease.
2. In a contract providing for the exchange of a tract of land, purchased to be subdivided into suburban lots, for a farm and farm outfit and live stock thereon, title and possession to be delivered on May 1, held that time of performance was sufficiently material to make it inequitable to enforce a purchase on a title to the tract not perfected by the vendor until nine months after objection by vendee and the time fixed for performance.
3. Executors made a void lease under a naked power of sale and conveyed the reversion subject to the lease. *Held*, that the claim that the two acts constitute a lawful execution of the power is, at least, so doubtful that in the absence of the *cestuis que trust* a court of equity ought not to force upon a purchaser, a title dependent for its validity upon the deed of the reversion.

†For opinion in special term, which this judgment affirms, see ante 391.

This action was for specific performance of a contract to purchase a leasehold estate. The court below dismissed the petition, stating separately its findings of fact and conclusions of law. The motion to set aside the decree and for a new trial was reserved to this court. No exception was taken to the findings of fact, and the motion is based on them. After the opinion was delivered at special term, plaintiff applied for leave to open the case and to introduce further evidence, which was denied, and a bill of exceptions was taken. This ruling is made an additional ground for a new trial. From the findings of facts it appears, that some time before June, 1886, Pollock Wilson died, testate, the owner, among other things, of a tract of land lying partly within and partly without the city of Hamilton, Butler county, Ohio, containing two hundred and seventy-five acres, which is the subject of this action. By his will, which was probated June, 1876, he directed that his debts be paid as speedily as possible, and gave, devised and bequeathed to five of his children, naming them, all of his property real, personal and mixed, to hold the same to them and their heirs forever share and share alike. He appointed two of his sons-in-law, John Carlisle and Albert G. Clark, his executors without bond, and in the fifth item of the will provided as follows: "Fifth, I hereby authorize my said executors to sell to any person or persons, and for such prices and upon such terms as they may deem best, at public or private sale, any part of my real estate which they may think best to sell, either for the payment of debts, or for the purpose of making division of my estate amongst my heirs, and the purchaser from my executors shall not be bound to see to the application of the purchase money. And in case of the death, resignation, refusal or incapacity to act or removal from executorship of either of said executors, the other shall have the same powers."

By a codicil, the testator revoked the devise and bequest to William, one of the five children named in the third item of the will, and instead, gave the undivided one-fifth of his property to his executors in trust to convert the same into money, and the same to invest and keep invested in city, state or government bonds, and to pay the income to William during life, or until he should assign or incumber the same, or until it should be attached, or he should become a bankrupt, on the happening of any of which events, or his death, the bonds should go to his children or on his having no issue to take, to his sister Amy, and for the purposes of this trust, the executors are given authority to make sale and conveyance of real estate.

On December 1, 1887, the executors made a lease of the Hamilton tract of 275 acres to C. C. Breuer, the plaintiff, and two others, Potter and Parlin. The consideration of the lease was certain sums of money already paid, amounting to $10,000, and the annual rents reserved. The term is for ninety-nine years, renewable forever. The rent reserved is fifteen hundred dollars a year, payable yearly. The lessors convenant to convey by good and sufficient deed of general warranty the fee of the land, on payment by the lessees of $30,000, with the privilege of paying same in installments of not less than $10,000, reducing the rent *pro tanto*, and receiving deed for proportionate part of the tract, to be determined by agreement or arbitration. There is a paramount lien to secure rent and other covenants reserved by the lessors, and a clause forfeiting lease on non-payment of rent for thirty days, with a right of re-entry reserved to the lessors on such default.

On February 24, 1888, Breuer, plaintiff, entered into the contract with Hayes, defendant, upon which the action is founded. In consideration of the payment of $20,000 by Hayes, $10,000 cash and the balance in two mortgage notes for $5,000 each, and the conveyance by him of a farm owned by him in Pendleton county, Ky., of 560 acres, together with all the goods and chattels thereon at the time of the contract, including live stock, Breuer agrees that he will by good and sufficient deed of general warranty, sell and convey to Hayes, his heirs and assigns, the leasehold estate in Butler county in the 275 acres above referred to, "being the same premises now held by Charles C. Breuer and others under a lease from John Carlisle and Albert G. Clark, executors, with the privilege of purchasing the same for $30,000, as by reference to said lease will more fully appear. Said premises, when conveyed, to be clear and free from any and all claims whatsoever, or encumbrances, subject however, to the terms of the lease." The contract further provides that, "all conveyances above mentioned, and all payments of money, and all instruments hereinbefore mentioned, shall be made and executed and delivered, and possession of said real and personal estate delivered, on or before the first day of May, A. D. 1889. In testimony whereof the said parties have hereunto set their hands and seals the day and year aforesaid. It is understood that if, upon examination of the title to the leasehold estate, it shall appear that said John Carlisle and Alexander Clark, executors, have not full power and authority, without an order of court, to convey to said Timothy Hayes, his heirs and assigns, the fee simple estate in said described premises, then this agreement is not to be binding upon the parties hereto. C. C. Breuer, Timothy Hayes." Breuer made an arrangement with Potter and Parlin, his co-lessees, by which he was enabled to convey the entire leasehold estate to Hayes.

In the words of the court's finding, "Soon after execution of the contract, difference arose between parties, and after some negotiation, and investigation of title, Hayes declined to execute the contract, assigning as reasons for his refusal so to do, that he had been deceived by false statements of the plaintiff, made to him at and immediately before the execution of the contract, concerning the value of the property; also concerning the nature and extent of a water-right appurtenant to the premises, and that the title of the plaintiff to the premises was defective." Suit was brought on May 9th, and the pleadings raise the issues indicated by the terms of Hayes' refusal to execute.

The court below found that the charges of misrepresentation and deceit were not sustained by the evidence, but that, as a matter of law, the executors of Pollock Wilson had no power under the will to grant the perpetual lease; that plaintiff's title was therefore defective, and that even if it were not defective, it was of so doubtful a character as not to entitle plaintiff to specific performance.

The judge at special term, Judge Peck, delivered his opinion, holding the title defective at the December term, 1888 (Breuer v. Hayes, *ante* 391), and the plaintiff counsels thereupon requested separate findings of fact and law. To give time to prepare these, the cause was continued until the January term. Before the findings were entered in the January term, plaintiff made a motion for leave to open the cause to introduce further evidence, to show that any defect in the title had been cured by conveyances subsequent to the decision in the cause. The conveyances offered were two. The first was a deed from Wilson's executors of the fee in the tract, subject to the lease to Breuer and associates, to one F. C.

Mayer, and the second was a deed from Mayer to Breuer and associates, confirming and ratifying the lease by the executors. The motion to open the case was overruled, and a bill of exceptions containing the deeds offered and reciting these facts was allowed. The findings and decree dismissing the petition were then entered.

TAFT, J.

Plaintiff's counsel rely on three grounds for setting aside the decree. They contend: First, that by the terms of the contract, the parties, in effect, stipulated that a failure of title in the leasehold should not be ground for a refusal by Hayes to perform. Second, that Breuer's title to the leasehold was perfect when Hayes notified him of his intention not to perform. Third, that even if at that time there was a defect in the title, he had cured the defect before decree, and by a well established rule of equity the court should have then compelled performance.

First—The argument upon the first ground, which has been pressed on us, is that because the parties expressly stipulated that the contract should not be binding on either, if upon examination of the title it should be found that the executors could not convey the fee under the privilege of purchase without the sanction of court, they must be held impliedly to have agreed that the contract should be binding on both, whatever failure of title there might be in the leasehold. We think this to be an unwarranted application of the maxim *Expressio unius est exclusio alterius*. The plaintiff had expressly covenanted to convey a title to the leasehold free and clear of all claims. By all the ordinary rules of construction, such a covenant is a condition concurrent or precedent to Hayes' obligation to pay the purchase-money. By express words, of course, such construction could be modified, and the legal consequence of a breach could be avoided, but surely it can not be done by applying a maxim useful only for supplying a term in cases of doubtful construction. The estate, which Hayes contracted for, was a perpetual leasehold, collateral and appurtenant to which was a privilege of purchasing the fee, and we are asked in this argument to exercise the judicial discretion, reposed in courts of equity in cases of this kind, to enforce defendant's purchase of the privilege, even though Breuer has no leasehold to give. We are asked, in effect, to compel defendant to buy a mere chose in action when he contracted for a present and perpetual estate. This, it seems to us, would be the play with the character of Hamlet left out. It is evident from the place in which the clause, relied on, is inserted, that it was an afterthought, the result probably of abundant caution, and a fear that the covenant to convey leasehold free and clear, might not secure to Hayes beyond a doubt a valid privilege of purchase. We are satisfied that no one could be more surprised than the parties at the time of the contract would have been, had they been told that the effect of this clause was what has been contended for it at the bar.

Second—Whether Breuer had a good title to the leasehold, depends upon the power of the executors of Pollock Wilson to make a perpetual lease with a privilege of purchase. Under the third item of the will, four children of the testator took a fee in an undivided four-fifths of his real estate, subject to the naked power of the executors under the fifth item, to sell to any persons, for such prices and upon such terms as they might deem best, at public or private sale, any part of such real estate which they might think best, for the payment of debts, or to make distribution

under the will. As to these four-fifths, the power of the executors was not coupled with any interest. The four children were tenants in common with the right themselves to enter upon the land, to collect the rents and profits from this interest and enjoy the same, subject only to the exercise of the power of sale for the purposes mentioned. Hoyt v. Day, 32 Ohio St., 101; Nimmins v. Westfall, 33 Ohio St., 213; Neff v. Neff, 3 Weekly Law Gazette, 69.

The lease reserved to the executors an annual rent and the right of re-entry upon default. Unless this lease was a legal exercise of the power of sale of the divided four-fifths, it was void because in violation of the vested rights of the four devisees under the third item of the will.

The question is, then, does a naked power of sale imply a power to lease? It is a general rule that powers must be strictly construed. A leading case upon the point is in our own state; Taylor v. Galloway, 1 Ohio, 232; where our Supreme Court, through Judge Burnet, held that a power to sell and invest the proceeds; did not justify the donee of the power in conveying one-half of the land to clear the title to the other half, so as to sell the other half, because a power to sell did not include a power to exchange or barter. Again, in Clark's Lessee v. Courtney, 5 Peters, 319, the Supreme Court of the United States held that a power to sell, dispose of, contract and bargain for land, did not authorize a relinquishment of the land for the taxes.

But it is argued that a power to sell, includes a power to lease, because the whole includes its parts, and the greater the less. It is said that a leasehold is but the grant of a part of the fee, and a power which is conceded to confer the right to convey a fee, must therefore include the right to convey a leasehold. The fallacy in this statement is that the act of leasing is not a part of the act of selling, and differs in its nature. It imposes very different continuing obligations on the parties, from those growing out of a sale. By operation of law, it is true that when to the act of leasing is added a deed of the reversion, the two result in a conveyance of the fee, but in the merger of the inferior in the complete ownership, disappears the very obligation of the lessor under the lease, which, while it existed, distinguished it from a deed in fee.

The true application of the axiom that the whole includes its parts, to the construction of a power to sell, is that the power to sell real estate implies a power to sell it in parcels, in the absence of anything showing the contrary. But each act must be of the kind authorized, namely, a sale of the fee of part. If this were not the case, then the grant of any interest whatever in the property, justified by complete ownership of it, with a view to its final sale, would be authorized by a naked power of sale. Thus, under such a power, the executors might, in order to induce a purchase outright, allow the person whom they regarded as a likely purchaser, for a consideration, to take the crop, to cut timber, to remove the soil, or to take an easement. But this clearly cannot be done. In Hubbard v. Elmer, 7 Wendell, 446. an agent authorized to sell lands, under such power granted a license to a purchaser previous to conveyance, to enter and cut timber, with a *bona fide* intent to effect a sale of the lands. The license was held void. In Atwater v. Perkins, 51 Conn., 188, an executor, under a power to sell any of the estate according to his best judgment, on such terms as he chose, was held to have exceeded his power in granting in the deed to one lot an easement of drainage through another.

It is evident, then, that what is done under a power of sale, is not within the power simply because it would help attain the end sought in granting the power, and is the grant of a less interest than a fee. It may be that the encumbering a fee with a perpetual leasehold, and a sale of the reversion, will net more money than a sale of the fee "out and out," but it is enough to say that the testator did not expressly provide that mode of disposition, and from the mere power to sell, it can not be inferred. The privilege of purchase, in no respect can make the lease any more within the power, than if it did not contain it. It simply limits, forever, the power of the executors to sell the fee, confining them to one purchaser and one price, without binding the lessee to purchase at all. It is a disadvantage to the lessor, conceded not to make a sale but as a consideration for, and in order to secure the lease. It is true, the reversion subject to the privilege of purchase may be sold, but that would be a sale of the fee subject to a disadvantageous encumbrance. It is difficult to see, therefore, how the privilege of purchase makes the lease any more likely to produce a sale than without it. On the contrary, it seems to us to restrict the power of sale without securing a sale, and so to be in violation of the power. In Ives v. Davenport, 3 Hill, 373, it was expressly held that where, under a power of attorney to sell, the attorney made a contract with a stipulation that the vendee might cancel the contract by forfeiting his first installment of the purchase-money before delivery of the deed, the contract was not within the power. For the reasons given, we are of the opinion that a naked power of sale like the one given the executors under the fifth item of the will, does not imply a power to lease, and that as to an undivided four-fifths part of the farm, the lease was beyond the power of the executors, and void.

But it is said that the authorities are opposed to this conclusion, and three cases are cited, upon which counsel for the plaintiffs rely. They are: Hedges v. Riker, 5 Johnson's Chancery, 163; Jervois v. Clark, 6 Maddock's Ch., 96; and Williams v. Woodward, 2 Wendell, 492.

The first of these is a decision by Chancellor Kent. A testatrix had devised her real estate, a large portion of which was unproductive, to her executors to pay the income therefrom to her daughter during life for the support of herself and children, with remainder in fee to her children, or on default of issue, to be conveyed in twenty shares to others by the executors. The taxes and assessments for municipal improvements consumed nearly all the income, and it was impossible to lease unimproved real estate on such a precarious tenancy as for the life of the daughter. The executors were given a power "to sell and dispose of so much of the real estate as should be necessary to fulfill the will." The remaindermen were nearly all infants. The bill was filed by the daughter of the testatrix against the executors, and the remaindermen to secure a decree, ordering the executors to lease for twenty-one years. Chancellor Kent granted the decree on the ground, first, that such a lease was authorized by the power, because such a disposition was requisite to carry into effect the intention of the will, that the wife and daughter should be supported by an income from the property, and second that, even if the power did not authorize a lease, as chancellor he had the right, acting for the infant defendants the remaindermen, to consent to such a variation from the power. He says upon the first point, "A devise to the wife for life with power to dispose of the estate to the children was held in Life v. Saltingstone, 1 Mod., 189, to give a power to sell in fee if the

necessities of the daughter and her children should require it; and the greater includes the less, and will authorize in a case of like necessity a more confined and limiled exercise of the power." We do not think this case supports the plaintiff's contention for several reasons. The power under consideration was a power coupled with an interest, which is a material distinction in this, that the ordinary construction of such a power may have to be materially modified, as it was in the case cited, in order to carry out the intention of the donor with respect to the enjoyment of the interest. Again, a close examination of the chancellor's language shows that what he was considering the effect of, was the words "dispose of." He cites a case to show that those words have been held, under circumstances of necessity, to justify a sale of the fee and then, in effect, says that if those words will justify so extreme a measure as a sale, they will, on the principle that the greater includes the less, justify a lease, which is a more limited disposition of the estate. This is a very different thing from saying that a power to sell includes a power to lease, because the one is greater than the other. The term "dispose of" is a much wider term than sale or lease, and includes them both. Ordinarily the words "dispose of" used in connection with "sell," are limited to mean a sale, but the necessities of the case justified the chancellor in giving them their more extended, and usual meaning. But even if the words of this opinion are to be taken as claimed, there are two differences between that case and this, which prevent its application here; one is that no facts are proven in this case showing that a lease was a necessity, and the other is that the *cestuis que trust* are not parties as they were in that case, so that a decree finding the lease here a necessity would not bind them, and a decree of specific performance on such a ground would remit defendant to the likelihood of litigation with them as to the existence of such necessity. This, a court of equity will not do. Evans v. Jackson, 8 Simons, 217.

The next case upon which plaintiff's counsel is Jervois v. Clark, *supra*. It is very imperfectedly reported. The testator directed his estate to be sold. It was referred to the master to inquire if a grant of mining leases would be beneficial to the parties interested, and he reported that it would. The vice-chancellor doubted at first the propriety of this reference and report: but ultimately confirmed it, as the leases were also to be sold, and were only auxiliary to the sale of the estate. This was evidently a case in which the *cestuis que trust* were parties, and in view of the case of Evans v. Jackson, *supra*, to which allusion will presently be made, it was probably a case where the *cestuis que trust* were incompetent, and so were persons for whom the court of chancery had power to consent to any beneficial change in their estate. Mr. Platt, the author of a very accurate and exhaustive work on Leases, evidently regards this as the explanation of the case. For after referring to both Evans v. Jackson, *supra*, and Jervois v. Clark, he says, vol. sec. 347, "The result is that no one can be advised to rely on a lease by a trustee, without the concurrence of the *cestuis que trust* if competent to join, or the sanction of the court of chancery in case of their incompetency."

The only case cited, which is really in point for plaintiff, is Williams v. Woodward, 2 Wendell, 492. One question, which the court disposed of, (though, in view of the judgment rendered, it was not necessary to the conclusion reached), was whether, under a power of attorney, which recited that the land was too far distant for the grantor of the power to explore, examine, sell or settle, and appointed another his "attorney to

bargain, sell, convey and assure the same or any part thereof to any one inclined to purchase," the attorney had power to lease with a privilege of purchase, and it was held that he had. Say the court by Savage, Chief Justice.

"It is no doubt true that every power must be strictly pursued, and the attorney cannot exceed the powers delegated to him; 5 Johns. R., 58; 7 id., 390; yet it is a good execution of a power if it pursue the interest and design, though not according to the direct terms of it, Sugden on Powers, 446, 9. It has been held that a power to give includes a power to sell, as does also a power to charge (6 Vesey, 798,) and that a power to sell implies a power to mortgage, which is a conditional sale. 3 P. Wms., 9. By analogy, a power to make an absolute sale implies a power to make a conditional sale, as was done here; and, as *omne majus in se continet minus*, it seems to follow that a power to sell gives the attorney power to convey any lesser estate. In my opinion, therefore, the lease and contract in this case were well executed under the power."

In considering this opinion, it should first be said that the chief justice calls the lease with a privilege of purchase, at one time a conditional sale and at another a contract of sale, whereas, as we have already attempted to show in considering the privilege of purchase in the lease here, it is neither a sale nor a contract of sale, but a mere option, binding only on the lessor and restrictive only of his power to sell. The reasoning of the opinion is founded on the maxim that the greater includes the less, and is by analogy. The first analogy is in the holding that a power to give will be fulfilled by a direction to sell the fee and a gift of the proceeds. But in either giving or selling, no less an estate than the whole is conveyed. The second analogy is in the holding that a power to sell includes a power to mortgage, which is a conditional sale. This was by Lord Macclesfield in Mills v. Bank, 3 P. Wms., 9. The ruling has been so shaken by subsequent decisions, both in this country and England, that except in Pennsylvania where Mills v. Bank is completely followed, the rule now is that a power to sell *prima facie* does not include a power to mortgage, and such power is implied only where the sole purpose for which the sale is directed, is expressly of such a character that a mortgage will quite as well serve the purpose, and can be more easily effected. See Hoyt v. Jacques, 129 Mass., 286, and cases cited. Price v. Courtney, 87 Mo., 387; Terry v. Laible, 31 N. J. Eq., 506, and cases cited in the note.

The analogies relied on by the court fail to sustain the conclusion. Even if this case stood as authority in New York therefore, in view of the considerations stated heretofore, we should not follow it. But it is no longer an authority in New York, for it has been overruled in two cases, one Bloomer v. Waldron, 3 Hill, 361, and the other Coutant v. Servoss, 3 Barb., 128. These were cases in which, though the exact question discussed was only whether a power to sell included a power to mortgage, the language of the opinion in each case leaves no doubt that the conclusion in Williams v. Woodward, *i. e.* that a power to sell includes a power to lease, was repudiated. For Judge Cowen, in Bloomer v. Waldron, after expressly saying that the statement of Savage, C. J., that a power to sell includes a power to mortgage was erroneous, in referring to authorities cited in which a revocation, appointment or sale of a part was held to be within the power to revoke, appoint or sell the whole says, "admitting that these cases hold to the full extent insisted on * * * in each the trustee or attorney is found doing an act of the precise

nature prescribed by the power—an act of revocation, sale or appointment. He does not proceed by splicing two or three acts together, which in their whole effect work out a revocation, sale or appointment, by consequence or operation of law. On the power of sale, he sells part of the estate. He neither mortgages nor demises and afterward grants the reversion. He sells part of the land at one time, and part at another. So he may, under other powers, revoke or appoint as to different parcels at different times; but the act done is *in specie* the very act required by the power." So also Strong, P. J., in Coutant v. Servoss, *supra*. "It has been supposed that a power to sell confers a power to mortgage on the ground that the greater includes the less. That must be taken with this qualification, however, that the less must be of the same character with the greater, and essential to its execution. Were it otherwise, the power to sell might authorize the donee to make any less deposition of the land, such as granting leases, cutting down timber, or converting meadow into woodland. It has never, I believe, been contended that such dispositions would be authorized by the general power." Again he says, "the case in 2 Wendell, *i. e.* Williams v. Woodward, was overruled by the decision of the late Supreme Court in Bloomer v. Waldron, 3 Hill, 361, where the late Judge Cowan discusses the subject much at large, and with his usual ability."

In addition to the three cases upon which we have commented, counsel for plaintiff cite also, Collins & Bernard v. MacTarisy, 63 Md. 166, and Prather v. Foote, 1 Disney, 435, upon the point, but in these cases, by the express words of the power, leasing was included, and the question was, whether perpetual leaseholds could be granted thereunder. We do not think they have application to the case at bar.

We are not, however, without direct authority to support the view we take. In Seymour v. Bull, 3 Day, 388, the question was, whether the executors, with full power to sell and dispose of any and every part of the estate belonging to the testator, in such a manner as they might judge beneficial for the legatees, had the right to lease. The Supreme Court of Connecticut held that this was a naked power of sale, the fee vesting in devisees with the right of possession. The court say, "This power is to be strictly construed, and it gives no rights to the executors to enter upon the land, or to lease it." The lease was held void, and the defendant in ejectment, who relied on the lease, was ousted.

In Evans v. Jackson, 8 Simons, 217, the testator bequeathed a leasehold, which had several years to run, to his executors in trust, to sell and dispose of in the usual manner, and declared trusts of the proceeds for the benefit of persons not parties to the suit. The executors tried to sell the leasehold at public and private sale without success, and finally made a contract with the defendant, by which they were to grant a lease of the premises at an improved rent for the whole term remaining, lacking only a few days. The defendant refused to perform, on the ground that the executors had no power to lease. Vice-Chancellor Shadwell dismissed the executors' bill for specific performance without hearing from the defendant's counsel, saying "The will contains, on the face of it, an express trust that the executors shall sell the house; and *prima facie*, that is inconsistent with granting a lease." He added, that circumstances of necessity might justify the executors in departing from the words of the trust, but that in a case where the *cestuis que trust* were not parties he could not enter into that question, because if he were to decree the defendant to take the lease, he might subject him to the

ordeal of a suit by the *cestuis que trust* to show that the executors were not justified in granting the lease. This case is a strong one, because here was a power coupled with an interest, and but for the trust to sell the title, an absolute power of disposition over the leasehold would have been in the executors as a chattel real.

In Michols v. Corbett, 34 Beavan, 376, it seems to have been conceded by counsel, that under a power to sell the trustees had no power to lease, but the lease having been made without authority, the question for the Master of the Rolls was, whether, in the exercise of his power to change the form of the estate of infants, he should ratify the lease so made, and consent to a sale subject to the lease.

In Franklin v. Ball, 33 Beavan, 360; s. c. 10 L. T. N. S., 447 (where the statement of facts is fuller); s. c. 10 Jurist. N. S., 606; s. c., 34 Law Jour. Eq., 158; the bill was against a mortgagee for specific performance of a contract to lease the mortgaged premises, of which he seems to have been in possession. The mortgage contained a power of sale, and the mortgagor was in default. One defense was, that he had no power to lease, and that a court of equity would not compel a breach of trust. Counsel for defendant cited Evans v. Jackson, *supra*, on the question of power, and it seems to have been conceded that the lease of the mortgagee, notwithstanding his power of sale, could not bind the mortgagor after redemption under the mortgage. See Law Journal report. This was evidently the opinion of the Master of Rolls Romilly, derived from the language of his judgment.

On the whole, therefore, we are clearly of opinion that under the fifth item of the will, the executors were not given the power to lease the undivided four-fifths of the farm devised by the third item.

The remaining one-fifth was vested in the executors with directions to convert into money, and invest the proceeds into bonds. This was a power coupled with an interest. But no reason appears why the express direction to sell "out and out," should not have been complied with. The cases already cited and the language defining the purpose of this devise and power, negative in the clearest way the right of the executors to lease this one-fifth. It follows that the lease of this whole tract was void, and conferred no title on Breuer which he could convey to Hayes.

*Third*—But even if plaintiff's title was defective for want of power in the executors to lease he claims to have remedied the defect before decree, and to be entitled to performance. It is a rule, established early in the Court of Chancery of England, and followed in this state and country, that a vendor of land may have a decree for performance, if he perfects his title at any time before decree. However anomalous this rule may seem, in view of the non-mutuality of the remedy to which it gives rise, it is too late now to question it. Jenkins v. Hiles, 6 Vesey, 646; Coffin v. Cooper, 14 Vesey, 205; Wilson v. Tappan, 6 Ohio, 172; Hepburn v. Auld, 5 Cranch, 262; Waterman on Specific Performance, sec. 420 and cases cited.

But the rule is not applied in cases where the time stipulated for performance is of the essence of contract, or where there are special circumstances which would make its application inequitable. Richmond v. Gray, 3 Allen, 25; Dressel v. Jordan, 104 Mass., 407; 66 Texas, 43. It has been held in England, that where a man contracts to sell land to which he has no title, and can not acquire title except by the consent of a third person, the other party, when he ascertains this, may repudiate the contract. Forrer v. Nash, 35 Beav., 171; Brewer v. Broadwood, 22

Ch. D., 105; Wylson v. Dunn, 34 Ch. D., 577. But conceding that this qualification has no application here, because the plaintiff really thought he had title, and was acting in good faith, we are still of the opinion that the court rightfully refused to open the case, and allow the deeds offered to be put in evidence.

The nature of the property to be conveyed was speculative. It was a farm which it was proposed to turn into suburban lots. It was peculiarly subject to a sudden rise or fall in value. This is apparent from the fact that Breuer contracted to sell to Hayes in February, 1888, at a price in cash double that at which he purchased the leasehold from the executors four months before, and was to receive the Kentucky farm of 560 acres besides. The time of performance was, therefore, quite material. The character of the property to be given in exchange even more emphatically stamps upon the contract the importance of the time fixed. This was the Kentucky farm with the live stock and farm outfit. It was, in effect, a farm as a going concern in the spring of the year that was to be transferred. Delay would throw on Hayes the expense of keeping up the farm, feeding the live stock and the responsibilities and uncertainties of the management which the parties stipulated should end on May 1st. It has been held that in the sale of a public house as a going concern, time is of the essence of the contract. Day v. Luhke, L. R., 5 Eq., 343; Cowles v. Gales, L. R., 7 Ch. App., 12. And so of the transfer of any commercial undertaking. See remarks of Lord Cairns in Tilley v. Thomas, L. R., 3 Ch. App., 97. It would seem that there should be the same reason for giving time a similar importance in the transfer of a farm with all the outfit and live stock when the time fixed is the spring of the year. Read in the light of these considerations, the strong words of the stipulation as to the time of completion, have much significance. "All conveyances above mentioned, and all payments of money, and all instruments hereinbefore mentioned, shall be made and executed, and delivered, and possession of said real and personal estate delivered on or before the first day of May, A. D. 1889."

Without holding, however, that time was of the essence of this contract in the strict sense, which would not permit the delay of a day after the time limited, we do think that the considerations stated require us to hold that plaintiff's delay of nine months after defendant's objection to the title and the time fixed for performance before making a good title was unreasonable, and that enforced performance thereafter would have been inequitable. In Richmond v. Allen, *supra*, six months delay was held too great in a case, where the circumstances making time important were not so strong as here.

Another reason for sustaining the action of the court below in excluding the deeds offered, is that it is very doubtful whether they do perfect plaintiff's title to the leasehold. It is claimed that Mayer's deed confirming the leasehold perfects the leasehold, and so it would if the executor's deed to him was a lawful exercise of their power. If it was not, then his deed can not have the effect it purports to have. The question then is of the validity of the deed of the reversion to Mayer. We have found that the executors had no power to make a lease with a perpetual privilege of purchase. If they had no power to encumber the land with a lease, how can they have power to sell the land subject to such a lease, as they have expressly done here? The reversion was subject to a privilege of purchase at $30,000. This they sell for $25,000,

having received $10,000 for the lease, which is said to be equivalent to a sale "out and out" for $35,000. The two acts convey a fee and the consideration is money. But can it be safely said that the two acts are the same in fact as a sale of the property without a lease at all? The *cestuis que trust* are entitled to have the power strictly followed. It may be that the lease and sale of the reversion are more profitable than a sale of the fee unincumbered by a lease would have been, or it may be that they are less so. That is not the question. The beneficiaries under the will are entitled to have the executors exercise the power of sale, as the will directs, and we have found it did not direct or authorize a lease. To lease illegally, and then to sell subject to the illegal lease, seems to be attempting to make a right by two wrongs. In Bloomer v. Waldron, 3 Hill, 361, the power to sell was violated by a mortgage. The mortgage was foreclosed, and the premises sold, the debt paid, and the surplus paid to the trustee, who executed a deed to the purchaser reciting the proceedings and purporting in consideration thereof, and one dollar, and in execution of the power, to convey the land. Because the mortgage was beyond the power of the trustee, the deed was also held void. How can that case be distinguished in principle from the one at bar? It is said that the executors are estopped after taking the money to impeach their own deed.

The persons whose rights are prejudiced by the lease, and a sale subject to it, are the *cestuis que trust*. There is no evidence that they all consent to such a transaction, or that they all have knowingly received the benefit of the money so paid. Because the executors may have received money in their representative capacity, which they had no authority to take, can not estop them from maintaining the rights of those whom they represent, even to the extent of setting aside their own deed. Estoppels do not work in favor of a breach of trust. It is not necessary for us to hold that the deeds presented do not confer a title. It is sufficient for us to say that they do not so remove the question of the title from doubt or prospect of litigation over the construction and execution of the power under the will, as to justify a court of equity, in the absence of the *cestuis que trust*, in compelling a defendant to buy. Tiffin v. Shawhan, 43 Ohio St., 178; Ludlow v. O'Neil, 29 Ohio St., 181, Jeffries v. Jeffries, 117 Mass., 184; Evans v. Jackson, 8 Simons, 217.

The decree dismissing the petition was right, and the motion to set it aside is overruled.

MOORE, J., concurs.

PECK, J., not sitting.

Noyes & Fitzgerald, and Kittredge & Wilby, for plaintiff.

D. D. M. Woodmansee and C. W. Baker, for defendant.

## TRADE MARKS. 151

[Superior Court of Cincinnati, General Term.]

JOHN T. HOEB ET AL. v. R. M. BISHOP ET AL.

1. A small metallic frame containing a portrait fastened to a pin, so as to be used as a personal ornament, does not constitute a valid trademark when so attached to and sold with a cigar, as to be readily detached and used separately in the manner indicated.
2. An article having a distinct commercial value of its own, cannot be made a trade-mark for another article by being attached to and sold with it.
3. Where it is charged that the defendant has imitated the packages of the plaintiff, for the purpose of imposing the goods of the former upon the public as those of the latter, not only must the fact of imitation be shown, but it must also appear that the imitation was made with intent to impose upon the public as aforesaid, and such intention may be presumed from the fact of imitation, but the presumption is not conclusive, and may be overcome by facts showing that the imitation was for other and innocent purposes.

PECK, J.

The action below was prosecuted by defendant in error to enjoin plaintiff from infringing an alleged trade-mark, to which an exclusive right is claimed by Bishop & Co. as designating cigars of their manufacture. It is stated to consist of "a metallic tag or label attached to the end of a cigar, in connection with a box of peculiar form, in which, as ordinarily used, the cigars rest on, and, said box having an overlapping or fold down lid which is thrown back when open, exposing the ends o the cigars and their labels to view. That the tags or labels are small metallic frames of various shapes, stamped out of sheet brass, tin, etc, and contain a picture symbol, or name, usually a picture of a presidential candidate."

At a special term a decree for an injunction was entered, and plaintiff now seeks a reversal of the same—

It is claimed in behalf of the defendants that their case as presented to the court by the record of the pleadings and evidence entitled them to relief upon two grounds:

That Hoeb & Co. were infringing their trade-mark, and that they were also packing and making their goods in such manner to imitate the packages of Bishop & Co., and were thereby intentionally imposing the goods of Hoeb & Co., upon the public as the goods of the defendants. That these are two distinct grounds of action, appears to be established by the authorities. The right to restrain the infringement of a definitely established trade-mark is well known, but the right to restrain a defendant from intentionally palming off his goods upon the public by means of an imitation of packages and marks, although these do not constitute a definite trade-mark, has also been maintained. McLean v. Fleming, 96 U. S., 245, 254; Wollam v. Ratcliff, 1 Hem. & Mil., 259; Craft v. Day, 7 Beav., 84; Boardman v. Brittania Co., 35 Conn., 402; Wolf v. Burke, 56 N. Y., 122; Holloway v. Holloway, 13 Beav., 209.

As to defendants' first claim, it is to be observed that the petition stated the alleged trade-mark in a somewhat doubtful and indefinite way. Instead of alleging a single well defined mark, such as usually constitutes a trade-mark, it claims a number of marks of similar design and appearance. Assuming, however, that a trade-mark may be pleaded in that way, we have before us the question whether the evidence has

established the right of defendants to the use of any valid trade-mark which comes within the description of the petition.

Concerning the metal frame or tag to be attached to each cigar as above set forth, the petition contains the following additional allegation. "The tag or label is preferably attached to the cigar by means of a pin soldered or affixed to the rear of the tag so that the same when removed from the cigar may constitute an ornament or campaign badge to be affixed to the coat of the user."

This allegation seems to show beyond question that the pin or tag, has a value of its own, apart from its use as a trade-mark. All the samples offered in evidence consisted of small metallic portraits of the late presidential candidates attached to pins, which may be detached and worn in the same way as an ordinary scarfpin. It is not disputed that they are at times extensively sold as articles of commerce and much worn. It is claimed in behalf of plaintiff in error that a distinct article of commerce, having a value of its own, can not be converted into a trade-mark by attaching it to another article and selling the two together. The question is not free from doubt or difficulty, and authority on the point is scanty. Perhaps all that can be said of the adjudged cases is that they tend to establish the proposition that a trade-mark is not a thing in itself capable of ownership. 47 Am. Dec., 285, note.

In Harrington v. Libby, 14 Blatchford, 128, a claim to the exclusive use of a tin pail to contain paper collars and sold with the collars, was denied on the ground that it would be against public policy to permit anyone to monopolize such a use of a well known article of commerce. In Mooreman v. Hoge, 2 Sawyer, 78, a similar right to the use of a barrel of peculiar shape was claimed, but the claim was not sustained.

In the case at bar, it is urged that the effect of granting the injunction herein, was not to restrain the defendants below from selling campaign badges, or from selling such badges with cigars, but only to prevent them from attaching them to cigars; and that this demonstrates that it is not the intrinsic value of the badge of which Bishop & Co. claim the exclusive use, but only its value as a mark or designation. This argument is plausible and so ingenious, as to do credit to the powers of counsel—and had great weight with the court at special term—but upon careful consideration of all the facts, we do not regard it as sound. It is to be born in mind, that a pin is attached to and sold with each cigar. It is clear, that in that condition the pin answered a purpose other than that of a trade-mark. It assisted to sell the cigar because of its own value. Perhaps it is not too much to say that the pin would often form the principal inducement to the sale. The device is of the same sort as that so common nowadays, whereby a shop-keeper gives to each purchaser of a particular article, a toy, a picture, or something else as an inducement to the purchase. If the attachment of the pin to the cigar served only the purpose of a mark, the argument of defendants might be sustained; but the difficulty with their position is that it serves the double purpose of a mark and of adding by its own value, to the value of the article sold. The law does not favor monopolies; and he who seeks to establish an exclusive and perpetual right to a particular device, should be careful that it is such as can in no degree infringe upon the rights of others. All dealers have the right to resort to every legitimate device to expedite the sale of their wares, and if the attachment of a badge to a cigar in any degree tends to facilitate the sale of the latter, because the purchaser receives, or supposes he receives, a larger consid-

eration for his money, the dealer can hardly be prevented from doing so, on the ground that someone has previously made use of the same device, and that the badges also serve as trade-marks. The position of the articles might, perhaps, with equal propriety, be reversed—and the cigar claimed as the trade-mark of the badge. If the contention of defendant be correct, then almost any two saleable articles may be attached together, and the one designated as the trade-mark of the other. We do not think such a practice is authorized by the law.

As to the other claim that Hoeb & Co. have imitated the packages of Bishop & Co., even if there was not a valid trade-mark, it seems that the right of the latter to an injunction depends upon the purpose of the imitation. We have been cited several authorities to the proposition that the intention to deceive the purchaser, and impose upon him the goods of one make for those of another, is to be presumed from the fact of imitation. Taylor v. Carpenter, 11 Paige Ch., 292; Coffeau v. Bounton, 4 McLean, 516; Rodgers v. Nowill, 5 M. G. & S., 109; Blofield v. Payne, 4 B. & Ad., 410; Marsh v. Billings, 7 Cush., 322.

The cases of Rodgers v. Nowill and Marsh v. Billings, do not appear to sustain the doctrine. In the former the question of imitation was submitted to the jury, and then the question of the intention with which it was done was submitted separately, and the instruction was held correct. In Marsh v. Billings, the imitation and the intention to defraud being shown, it was held that the law would presume damage, which is different from presuming the intention. In Blofield v. Payne, the defendant had made use of the plaintiff's wrappers, not an imitation merely, but the same as those used by plaintiff, and the court held that in such case damages might be presumed. In Taylor v. Carpenter, and Coffeau v. Bounton, the intention seems to have been assumed from the fact of imitation, but those cases were decided, the one in the year 1844, and the other in 1849, before the law on this subject was well settled. It is also to be observed that in many cases, where the imitation is clearly shown, the fraudulent intention may be presumed, and where there are no facts or circumstances tending to show a different intention, the court would be warranted as matter of law in presuming that the imitation was made with intent to deceive, but to hold that such a presumption is conclusive in all cases, is going further, we think, than the authorities warrant. In Woolam v. Ratcliff, *supra*, Vice-Chancellor Wood speaking of the fact of imitation, there perfectly established, says: "This is of course, always an element of suspicion; but I cannot treat it as conclusive. I think there might be cases in which no man could doubt that the object of imitation was to deceive, but it requires very strong evidence indeed to raise such a case," and an injunction was refused, and the bill dismissed.

Farina v. Silverlock, 6 D. M. G., 214. Applying the rule how stands the case? Bishop & Co. first put their goods upon the market packed and marked in the way described, in June, 1888. The sale of them had but fairly begun when Hoeb & Co., in July following, sent out their goods packed and marked in a similar manner. From this fact it seems improbable that Bishop & Co. could have established a trade in the goods so marked at the time Hoe & Co. commenced to imitate their packages. Under such circumstances, it is difficult to perceive how there could be in the mind of any one a strong desire to imitate an article so little known to the public, or how could there be much probability of deception where the imitated article was so recently put upon the market. There is a fact already alluded to,

which seems to explain the purpose of the imitation, upon grounds other than of an intent to palm off the goods of Hoeb & Co. for those of Bishop & Co. The attachment of the pin or badge to the cigar, would perhaps, especially during a heated presidential campaign, be a very successful means of advertising the cigar, and inducing its purchase. All the evidence seems to indicate that Hoeb & Co. wished to avail themselves of this mode of advertising their wares, and to induce customers by offering to each a badge with a cigar, and that these were their reasons for adopting a mode of packing, and attaching a pin similar to but not identical with that of the defendants.

Judgment reversed and petition dismissed.

TAFT and MOORE, JJ., concur.

J. H. Cleveland, G. J. Murray and C. W. Merrill, for plaintiffs.

Simrall & Mack and Harmon, Colston, Goldsmith & Hoadly, for defendants.

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153 SIDEWALKS.

[Superior Court of Cincinnati, Special Term.]

CINCINNATI (CITY) v. LONGWORTH ET AL., EXRS.

Where a notice to repair sidewalk has been served upon the owner of abutting premises, it is for the city authorities, in the first instance, to decide whether the notice has been duly complied with, and such decision, if open to dispute by the owner, can only be overcome by evidence clearly showing compliance with the notice.

PECK, J.

The action is prosecuted to recover the amount of a sidewalk assessment levied upon the property of defendants by the city authorities. It appears from the evidence, that a notice to repair the sidewalk was duly served upon the agent of the defendants, and that the agent thereupon directed certain employees to repair the walk. The latter made repairs, which they testified were sufficient, and of such a nature as to put the walk in good condition. That proposition is disputed by the city engineer in charge of sidewalks, and by the inspector, who testify that the repairs were insufficient, and left the sidewalk in bad condition. After defendant's workmen had completed the repairs made by them, the inspector condemned the walk, and ordered it relaid—which was done by the city contractor—and the assessment in dispute is levied to pay for the work so done.

The controversy in the case resolves itself into the question whether the defendants complied with the notice to repair served upon them in pursuance of the statute, within the time specified—Rev. Stats., 2329, 2330, as amended, 81 Laws, 87. These statutes plainly vest in the city authorities the power to determine when sidewalks shall be repaired; and that by implication would seem to confer the power to determine the nature and extent of the repairs necessary. If, therefore, when a notice to repair is served upon an owner of abutting property, a dispute arises as to whether the notice has been complied with, who shall decide the controversy? The statute provides that if the repairs be not made within ten days, the board "may have the same done at the expense of the owner." The duty of determining whether they will cause the same to

be done at the expense of the owner, is thus cast upon the board, and seems necessarily to include the power of determining whether the preceding notice has been complied with. It is upon the failure of the owner to comply with the notice, that the power of the board to cause the same to be done at his expense, depends.

In this case, the board, by its officers and by the levy of the assessment, has said that the notice was not complied with. Testimony has been offered by both sides, to show, on the one side that there was compliance, and on the other that there was not. There is nothing in the evidence to show that the city authorities were acting otherwise than in good faith. In such case it seems quite doubtful whether the determination of the board is subject to review by the court. If the owner may allege that he has made the necessary repairs when the board say he has not, he may also dispute the necessity for repairs in the first instance, when notice is served upon him.

The power to open, improve and repair streets, is vested in the corporation, and is not subject to judicial control—1 Dillon Mun. Corp., secs. 94, 95; Iron R. Co. v. Ironton, 19 Ohio St., 299; Carr v. Northern Liberties, 35 Pa. St., 324, 329.

The city is liable in damages to any one injured by reason of the failure to keep the sidewalks in repair; and with the duty to repair is necessarily coupled the discretion to determine the time, and the extent of the repairs necessary. If the determination of the board as to the insufficiency of the repairs is open to dispute in any case, it would certainly seem incumbent upon the party resisting its order, to prove his claim by evidence so clear and convincing, as to leave little room for doubt, while in the case at bar, the evidence is very conflicting, and not unevenly balanced.

It is urged, however, that if the city officers were not satisfied with the repairs made by defendants, a further notice should have been given them, and another opportunity to repair. The statutes gave defendants a certain time within which to comply with the notice, and authorized the board to act in case they did not. It is not disputed that the time which elapsed between the service of the notice and the performance of the work by the city contractor, was at least as much as that allowed by statute. There is no provision for any further notice—nor is there anything in the law or public policy to require it.

Judgment for the plaintiff.

Oliver B. Jones, for plaintiff.

Thos. McDougall, for defendant.

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## PATENT RIGHTS CONTRACT. 165

[Superior Court of Cincinnati, General Term, 1889.]

JOHN BRYAN v. FREDERICK H. CHYNE.

**Where it is alleged that a defendant has contracted for the exclusive personal services of the plaintiff for the performance of a particular work, a court of equity will not interfere, by injunction, to restrain the defendant from securing the performance of the same work by other persons, if there is a doubt about the contract-rights of the plaintiff, or the intended breach by defendant.**

ERROR to Special Term.

PECK, J.

The error complained of consists in the refusal of the court below to grant an injunction restraining the defendant from disposing of a certain patent-right of which he is the owner. The ground upon which the injunction was claimed was, that defendant had entered into a written contract with the plaintiff, whereby the latter was to form a company for the purpose of introducing and selling defendant's patented device, for which service plaintiff was to be paid a certain per cent. of the stock of any company formed, and of any money received. No company had been formed, but plaintiff alleged that he was proceeding in good faith to do so, when defendant entered into some sort of an arrangement with other persons, whereby the patent-rights were to be transferred to them, a proceeding which plaintiff claims to be in violation of the rights secured to him by contract, and which, if permitted, will prevent him from performing his part of the contract, and securing the compensation stipulated to be paid for that service.

The basis of plaintiff's claim appears to be that the contract confers upon him the sole right of organizing the proposed company for a reasonable time after the date of the contract, and that he is therefore entitled to have the defendant restrained from doing anything which will interfere with the performance of the contract on his part.

After a careful consideration of the contract, we conclude that it does not confer upon plaintiff the *exclusive* right to control the disposition of the patent, or to organize a company for its introduction. The provision simply is that he "shall manage and negotiate the sale of the patents or certain interests in them, or use his best efforts to organize a company."

This is the language of the contract most favorable to plaintiff's claim, and in our judgment it does not preclude defendant from negotiating sales or organizing companies for the same purpose.

Plaintiff further contends that the company which defendant proposes to organize is not gotten up in good faith, and has no substantial foundation, and that if defendant is permitted to transfer the patent-rights to it, the plaintiff will be deprived of all the benefits of his contract, even if the per cent, of the capital stock therein stipulated for be delivered to him. On this point the evidence is conflicting, and leaves the matter in much doubt, and in that state of the case we do not think it proper to interfere by injunction. The remedy here sought is akin to that granted in Lumley v. Wagner, 1 D. G. M. & G., 604, and Lacy v. Heuck, 9 Ohio Dec. Re., 347, where persons who had contracted to perform certain personal services at a particular time and place, were enjoined from performing such services for any other person than the plaintiff at that time.

An examination of the cases wherein that sort of a remedy has been granted, will disclose the fact that it has been resorted to only where the contract rights of the plaintiff were clear, and the proposed breach undisputed. It is hardly probable that such a remedy would be granted in any case where the contract or the intended breach is in doubt. In such cases a court of equity would leave the parties to seek their remedies at law, and that, we think, was the proper course in this case. The temporary injunction granted in general term is dissolved, and the judgment of the court at special term affirmed.

TAFT and MOORE, JJ., concur.

C. W. Merrill, for plaintiff.

I. W. Herron, for defendant.

## ANNEXATION OF TERRITORY—GRADE OF STREETS. 194

[Superior Court of Cincinnati, February 15, 1888.]

CATHERINE CORRY V. CINCINNATI (CITY.)

1. Where a village had been annexed to a city, and as one of the terms of the annexation agreement it was stipulated "That all grades of streets heretofore established within, and by the proper authority of said village shall be respected, but the same may be altered with the consent of the property holders, or upon payment of damages that may be agreed upon, or as ascertained by law: "*Held*, that a municipal corporation cannot bind itself by an agreement not to change an established grade, and that the only effect of the annexation agreement was to put the grades established by the village authorities before the annexation, upon the same legal basis as grades established by the city authorities, and subject to change in like manner.
2. The act of April 25, 1885, (82 L. 156), authorized the Board of Public Affairs of Cincinnati to change established grades of streets of said city, without a petition from abutting owners, where the same are improved under that act, and it makes no difference that such change may be injurious to abutting property.
3. It is not necessary that there should be a petition of the owners of three-fourths of the property abutting on a street, to authorize an assessment for the improvement thereof, payable in installments, or the issue of bonds in anticipation of such assessment.
4. Assessments levied to pay the cost of improvements, of streets improved under the act of April 25, 1885, (82 L. 156), may include one-half the damages paid to abutting owners, for injuries to property caused by the improvement.
5. To show that a grade has been long established, and improved to by private owners and public authorities, and that a change thereof will cause damage to public and private property, is not sufficient to show that such change is unreasonable or an abuse of corporate power. It should be shown that such change is unreasonable with regard to the use of the street as a highway, before a court of equity will interfere under the statutes sec. 1777, to prevent the change as an abuse of corporate power.

PECK, J.

In one of these cases Mrs. Corry sues as a property holder to enjoin the improvement of Vine street, upon which she alleges she owns abutting property. In the other she alleges that she requested the city solicitor in writing to begin the action; that the solicitor declined, and that she commenced the action thereupon on behalf of the city, as a tax payer, in pursuance of the provisions of the statute.

The allegations of the two petitions are very much the same, and I shall speak of them both together without attempting to deal with them separately. The object of both petitions is to enjoin the proposed improvement of Vine street, upon which the grade is to be changed, the change at one place involving a cut of as much as nine feet.

The plaintiff owns property abutting on a portion of the street proposed to be improved, and it does not appear that she filed any claim for damages, nor is it alleged that she was not notified of the intention to improve the street. It is alleged that the city commenced a proceeding against a number of property holders there, and that there was an assessment of damages. The amount of the verdicts are set forth in the petition, and some of the proceedings in connection therewith, and it appears that Mrs. Corry was not a party to that action, and no assessment of damages in her favor has been made.

The first ground upon which it is sought to enjoin this improvement is that, by virtue of the terms under which that territory where the improvement is proposed to be made was annexed to the city, the power

to change this grade without the consent of the property owners, or at least of a majority of them, does not exist, the street having been improved to an established grade prior to the annexation. The stipulations in the agreement made between the officers of the village, which was annexed to the city, and the city council, are set forth in the petition, from which it appears that it was agreed "That all the grades of streets heretofore established within and by the proper authority of said village shall be respected, but the same may be altered with the consent of the property holders, or on payment of damages that may be agreed upon or ascertained by law;" and the plaintiff contends that the property holders have not consented, and that she, at least, has not been paid any damages under the provisions of this agreement.

The ultimate control of all the highways in the state rests with the state itself, to be regulated by the legislature, and it is a function of government; but it is a power which the state may, and does, delegate to subordinate departments of government, to county commissioners, to township trustees and municipal authorities. All these authorities act in pursuance of this delegated power from the state, and yet they are all exercising powers of government in ordering the grading and improvement of highways.

In the case of Goszler v. Georgetown, decided by Chief Justice Marshall, 6 Wheaton, 593, it was held that an ordinance providing for the improvement and grading of a street was an act of legislation, and that the corporation of Georgetown could not bind itself by an agreement with reference to grades.

If this annexation agreement is urged on the ground that the city cannot change the grade without the consent of the property holders, it cannot avail the plaintiff, because it was without the power of the city to make such an agreement; and if it is urged on the ground that the city should pay damages to the plaintiff before making the change, it is evident that such an agreement must be construed with reference to the laws on the subject, and she would be bound by the same rules as to making claims and ascertaining damages, as other people would with respect to established grades. In other words, the whole substance and effect of that portion of the agreement, so far as I am able to make it out, is to put these grades on the footing of grades established by the city, and to put people abutting on them, in the position of people owning property abutting upon an established grade. And as it is not alleged that she has filed a claim, as required by the statute of persons seeking damages by reason of a change of grade, she is not in a position to make this complaint.

It is alleged that it is proposed to change the grade without any petition of the property holders. The grade being regarded as one established, it is urged that sec. 2401, forbidding such change without petition, applies: and that would undoubtedly be the case, if it were not for the act passed April 25, 1885 (82 Ohio L., 156), in which it is provided that, "In cities of the first grade of the first class, the board of public works of such city shall have authority to cause any of the streets, avenues or highways of said city to be improved with granite block, asphalt pavement, or other material, and the method of procedure in such cases shall be as follows:" Then it goes on to specify the steps that shall be taken by the board in providing for any such improvement; and among other powers conferred upon the board, is this:

"Said board of public works shall have full and final authority in any such improvement, to make such change or changes in the grade of any streets, avenues or highways to be so improved, as it may be necessary to best conform the same to such contemplated improvement, and such change of grade shall be published with the advertisement provided for in sec. 2304."

And section three also provides that,

"The owner of a lot or of land bounding or abutting upon any such improvement, shall file his claim for damages as provided in sec. 2315, or be barred, as therein provided, from filing a claim or from receiving damages.

"And all other questions pertaining to such claims for damages and assessments of, or compensation for same, shall be governed by the provisions of law not applicable to like claims."

This, upon its face, would seem to give to the board of public works full authority to make such change as they deem necessary. The act has been construed by the general term of this court, in a case of Sheer v. City of Cincinnati, 9 Ohio Dec. Re., 477, in which it was held that it is constitutional, and that it authorizes the board of public works to take all necessary steps in the making of an improvement, and the levying of the assessment, without reference to council, so that whatever power it has on the subject of change of grade, would seem to be a power to be exercised by this board independent of council. But an ingenious argument is made on the language of this act. It is argued that power to change the grade, is only such as the board may deem necessary to best conform the same to such contemplated improvement, and the words granting the power to "include in said improvement, such reconstruction as it may deem necessary," are dwelt upon. The claim being that the purpose of this act is simply to authorize a repaving of an established street, and that the change of grade which the board may make, is only such as is necessary to conform to the new paving, and may extend but little, if any, beyond the curb. If the section stood alone, that construction might be correct; but it is immediately followed by a section which provides for the filing of claims and the assessment of damages in behalf of the property holders, and when we take that in connection with the broad language conferring the power, "shall have full and final authority in such improvement to make such change or changes in the grades of any streets, avenues or highways to be improved, as it may deem necessary to best conform the same to such contemplated improvement," it clearly appears that the power given to the board was not intended to be restricted within such narrow limits. It was evidently contemplated that the board should have power to make changes of grade affecting the property of abutting owners, while a change of grade merely extending to the curb, would hardly have such effect. The legislative mind was directed to the fact that abutting owners might be damaged by these improvements, and the method in which they shall file their claims and the damages shall be ascertained, is provided; and therefore it follows, by necessary implication, that it was the intention to confer a power to make changes of grade, such as might cause damage.

It is also contended that the corporation proposes to make an assessment payable in installments, and issue bonds in anticipation thereof without a petition of three-fourths of the property holders, as provided in sec. 2272 of the Rev. Stat., where it is provided that "In cities of the

first grade of the first class, when a petition, subscribed by three-fourths an interest of the owners of property abutting upon any street or highway of any description, is regularly presented to the council for the purpose, the cost of any improvement of such street, or highway, may be assessed and collected in equal annual installments, proportioned to the assessment, in a manner to be indicated in the petition, or if not so indicated, then in the manner which may be fixed by council; and the interest on any bonds for the improvement by the corporation, shall be assessed, together with the annual installments herein provided for, upon the property so improved; but where a lot or land of one who did not subscribe the petition if assessed, such assessment shall not exceed twenty-five per cent. of the value of his lot or land, after the improvement is made." This section, or rather, the provisions which I have read of this section, were first incorporated into the statutes in the year 1876, 73 Laws, 171, and the purpose of it was not, as will be seen by an examination of the statutes as they then stood, to give the city power to make assessments in installments, or to issue bonds therefor, but the purpose of it was to provide for an assessment which might exceed twenty-five per cent. of the value of the abutting property. The statutes as they then stood, and as they have been ever since the adoption of the municipal code in 1869, authorized the city to make an assessment in annual installments, and to issue bonds for that purpose. Section 2264, containing the power, was an original section of the municipal code of 1869, and sec. 2704, contains the power to issue bonds, and that power had been exercised under these various sections by various municipalities in the state before the passage of this sec. 2272.

The case of Steese v. Oviatt, 24 Ohio St., 248, was decided before the adoption of this section, which it is now claimed is necessary to be invoked in order to give the power, and it was there held, that interest on bonds issued to cover as assessment, payable in installments, might be included in the assessment; which shows that the Supreme Court recognized the existence of the power at that time. So that it is not necessary that there should be a three-fourth petition, to authorize the city to make an assessment in installments, or to issue bonds in anticipation of such assessment.

Then it is complained that the city proposes to include in the assessment one-half of the damages which were assessed in favor of the property holders, the amount of which is set out in the petition.

Section 2284 provides, "What shall be estimated as cost of improvement. The cost of any improvement contemplated in this chapter, shall include the purchase money of real estate, or of any interest therein, where the same has been acquired by purchase, or the value thereof as found by the jury, where the same has been appropriated, the costs and expenses of the proceeding, the damages assessed in favor of any one of the adjoining lands, the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and other necessary expenditure, and the cost of construction."

Now, while this act of 1885 is an act complete in itself, in that it authorizes the board of public works to make such improvement, and levy assessments therefor; yet it is an act supplementary to sec. 2293 of the Rev. Stat., and it is obvious that in many particulars it can not be construed without a reference to the other sections of the statutes on the same subject, as on this subject there is nothing that prescribes what are

to be considered the expenses proper to be included in the assessment, and we are left without guide in that particular, unless we can resort to sec. 2284 for that purpose. There is, too, in sec. 7 of this act of 1885 a reference to other costs of the improvement required to be paid by the corporation, without any statement of what they are, which plainly constitutes a reference to the other statutes on the subject. The power to include one-half of the damages in the assessment is plainly apparent.

There are two final allegations, which I shall speak of together. One is, that the grade proposed is an unusual grade; and the other is, that there will be an abuse of corporate power if the proposed improvement is permitted to be made. The elementary principle that I spoke of at the outset will go a long way in settling these propositions. The power to grade and improve the streets is vested in the corporation, and is not, ordinarily at least, subject to judicial supervision. Iron R. Co. v. Ironton, 19 Ohio St., 299; Carr v. Northern Liberties, 35 Pa. St., 324, 329; Dillon Mun. Corp., secs. 94, 95.

There is, however, under the statute, power in the court to interfere by injunction or otherwise, and prevent an abuse of corporate powers. Sec. 1777. This makes it necessary to examine a little the allegations of the petition. They are, in substance, that this grade was established by the road district; that it should be respected according to the terms of the agreement of annexation; that it has been recognized in various ways by the city; that the city has constructed improvements with reference to it, an engine house and a police station, and that the board of education has a schoolhouse also constructed with reference to it; and that the private property holders along there have been built with reference to it.

Nothing is said about the effect that the grade will have upon the street as a public highway. The principal use of the street and the principal thing which the city must regard in improving the street is to adjust it for public travel; everything else is appurtenant and incidental. A grade, to be an unreasonable grade, should be shown to be unreasonable in view of the necessities of the public. It may be true that there will be damage to private property. This very act contemplates that there may be damage to property. It may be true that there will be damage to public property; but the city, if it can cause damage to a private property holder can certainly bear the damage to its own property. It seems to me that allegations of that sort, of injury to adjacent property and of the fact that the new grade is a change of existing circumstances which have remained for a long time, and about which, perhaps, rights or interests have grown up, do not show an abuse of corporate power. There is no doubt there is discretion in this board to make a change of grade; and every change of grade, where there have been improvements, involves a change of conditions and perhaps damage to somebody. Therefore, to say that a change of grade can not be made where there is damage to a number of people or to public property is to deny the existence of the power under such circumstances, and yet the statutes vest this power in the corporation, and provide for the assessment and payment of damages when it is exercised.

I feel bound to hold that the allegations of the petitions do not make a case of an unreasonable grade or of an abuse of corporate powers. The demurrers to the petitions are sustained.

I. J. Miller, for plaintiff.

T. Horstman, *contra.*

## 197 RES ADJUDICATA.

[Superior Court of Cincinnati, General Term, 1889.]

†MARTHA KEOWN v. CHARLES C. MURDOCK, TRUSTEE ET AL.

1. Where a question has been adjudicated between parties, it is conclusive as to that point, in a subsequent action, even if the causes of action be not the same.
2. Whether the court may order that a finding upon a particular issue shall not prejudice the parties in a future action, query— but if such an order can be made to be effective, it should be clothed in unmistakable language.

RESERVED on the pleadings and evidence.

PECK, J.

The principal object of the action is to set aside a deed alleged to have been obtained from plaintiff by Stephen Clark by fraud and the abuse of confidential relations. The answer is a general denial.

At the trial the plaintiff offered in evidence the record of a former action and judgment, to which the plaintiff and defendants here were parties. The record was objected to as incompetent, but the objection was overruled and exception taken, and thereupon plaintiff rested her case. The defendants offered no evidence. In the record so offered it appears that plaintiff was claiming an interest in the property there in question as an heir of her mother, and that Murdock the trustee of Clark's estate sought to estop her from making such claim by reason of the clause of warranty contained in a deed which plaintiff has made to Clark in the life-time of her mother, and which is the same deed here in question. The decree rendered in that action contains the following finding of fact: "That the deed referred to in the reply of Martha Keown, was executed and delivered to said Clark by said Martha Keown, then Martha Crall, and Richard Crall, her husband, while the relation of attorney and client existed between said Clark and said grantors in said deeds, and were both without consideration other than the performance by said Clark, of services which he had already agreed to perform by said

†The question was raised but not decided, as to whether the court may order that a finding upon a particular issue shall not prejudice the parties in a future action. The point ruled by the court was that if such an order can be made, to be effective, it should be clothed in unmistakable language. The N. Y. Daily Register adds: This question is one which frequently appears now in various forms in practice, although it has not as yet gone much into the books. The better opinion is, we think, that a finding of fact not material to support the judgment is not an adjudication. The reason is that it is not just to treat it so because the remedy to review it by appeal does not exist. If in some exceptional cases it does exist, a party ought not to be required to resort to it merely for the purpose of getting rid of the adjudication. For instance, if a defendant answers, setting up payment and a general release as separate defenses, and proves payment, but fails to prove the general release, and the court find in his favor on the issue of payment and against him on the issue of general release, he can not appeal from the judgment because it is in his favor, and therefore can not get rid of the finding that there has not been a general release between him and the plaintiff; and therefore it is hardly just to allow the plaintiff to set up the finding that there was no general release as conclusive in some other action on another contract. Such a finding must necessarily follow a failure of evidence. A judge or referee can not regularly, under our system, find "not proven," but on a failure of evidence must find as on negative proof; and although such a finding, if material to support the judgment, would be conclusive, it ought not to be conclusive, when not necessary for that purpose and not capable of being reviewed by appeal by the party against whom it was rendered.

contract, and for which, said contract furnished the measure of compensation; that said deed were both fraudulent in law, and ought to be set aside and held null and void." And the court conclude that, "as between said devisees and said Martha Keown, it can not, in this action, abate, and annul as an entirety, said deed from said Martha and Richard Crall to said Clark, but only the covenants of warranty therein"—further—"That the court can not, in this action, vacate, annul and avoid the said deed from Richard and Martha Crall, and that for this and other reasons it will not decree a partition in this action." And the decree concludes with this saving clause: "This decree is without prejudice to such actions as the plaintiffs, and the defendants, Agnes and William Clugish, or any of them, may be advised to bring hereafter to obtain a partition of said lot under this decree, and set aside said conveyance by said Martha and Richard Crall to Stephen Clark."

The point to be determined is, whether plaintiff has made out a *prima facie* case by the offer of the record in evidence, for if she has, she must have judgment, as there is no other evidence, and if not, the judgment must be for the defendants.

The question of the admissibility of the record, depends upon whether or not it tends to show that any question here in issue was adjudicated between these parties in the former action. It is well settled that there may be a plea of *res adjudicata* not only based upon the identity of causes of action, but also upon identity of issues. Where a question has been adjudicated between the parties, it is conclusive upon both in a subsequent action, even if the causes of action be not the same. Grant v. Ramsey, 7 Ohio St., 157; Cromwell v. Sac Co., 94 U. S., 351; Shepherd v. Willis, 19 Ohio, 142.

The cause of action is not the same here as it was in the former case—so that the question is whether the determination of the court as to the deed, expressed in the decree, is now admissible evidence estopping the defendant from asserting the validity of the deed.

It will be observed that the finding was that the clause of warranty was invalid, because the deed had been obtained by fraud while Clark was attorney for the grantor, and without consideration. That is the very question at issue here, and although the court there limited the effect of its conclusion to the clause of warranty, the whole deed was necessarily involved in the finding. In order to determine the question there at issue, the court necessarily passed upon the question here at issue; and unless the saving clause of the decree changes the effect of the finding, it is admissible evidence against the defendants.

It is a question of some doubt, whether it is possible to limit the subsequent effect of a judgment or finding upon the rights of parties in that way. To render a judgment, and then say, that it should be without prejudice to a future action for the same cause, would be a self-contradictory order. A judgment necessarily precludes the parties as to the cause of action, and there is no reason now apparent to us, why it should not have the same effect as to the issues involved. But it is not necessary to the determination of this case, to hold that it is beyond the power of the court to make such an order. It is to be observed that the language of the saving clause, is such as to preserve the right of certain parties, to bring an action of partition "under this decree." Clearly that language was not intended to mean that the decree should not affect such an action, but rather that the subsequent action should be based upon it. It appears to have been put in as a precaution, because the court found

that a decree for partition could not be rendered in that action, and to prevent its being plead as a bar to a subsequent action for that purpose. The same purpose is also apparent as to the deed. The court could not avoid it in that action, for the reasons stated, and did not intend that the decree should estop a future action for that purpose. If it be within the power of the court to order, that its necessary findings shall be without prejudice to the parties in future actions, such order to be effective should certainly be made in unmistakable terms. In this case we are satisfied that it was not the intention of the court to do so, and as the record is the only evidence on the question of the validity of the deed, it at least makes a *prima facie* case for plaintiff, and judgment must be rendered accordingly.

TAFT and MOORE, JJ., concur.

Worthington and Marsh, for plaintiff.

Avery, for defendants.

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## 198 SUNDAY LAWS.

[Police Court of Cincinnati, September 19, 1889.]

STATE OF OHIO v. JAMES E. FENNESSY ET AL.

1. Criminal, or penal statutes must be strictly construed, and cannot be extended by implication to cases not falling within their terms.
2. A musical performance is neither a theatrical nor dramatic performance of any kind or description.
3. The Revised Statutes of Ohio, sec. 7032 *a*. (78 Ohio Laws, 126, passed April 9, 1881), does not forbid the giving of a musical performance on the first day of the week, commonly called Sunday.

ERMSTON, J.

The defendants are charged by information in this court with the misdemeanor of exhibiting and participating in a musical performance within the corporate limits of the city of Cincinnati upon Sunday, the fifteenth day of September, A. D. 1889. The information is drawn under section 7032 *a*. of the Revised Statutes of this State, which provides specific punishment for any person or persons who violate the following certain provisions of said statute, which is quoted here in full, to-wit:

"Whoever on the first day of the week, commonly called Sunday, participates in, or exhibits to the public, with or without charge for admittance, in any building, room, ground, garden, or any other place in this state, any theatrical or dramatic performance of any kind or description, or any equestrian, or circus performance, of jugglers, acrobats, rope-dancing, sparring exhibitions, variety shows, negro minstrelsy, living statuary, ballooning, or any base ball playing, or any ten pins, or other games of similar kind or kinds, or participates in keeping any low or disorderly house of resort, or shall sell, dispose of, or give away any ale, beer, porter, or spirituous liquors in any building appendant or adjacent thereto when any such show, performance, or exhibition is given, or houses or places is kept, he or she shall, on complaint made within twenty days thereafter, be fined in any sum not exceeding one hundred dollars, or be confined in the county jail not exceeding six months, or both, at the discretion of the court."

To the aforesaid informations, the defendants have filed their demurrers as the law provides, and seek to be dismissed, because the informations do not state facts sufficient to constitute offenses against the laws of said state. Under said demurrers it becomes the duty of the court to consider the question as to whether or not the demurrers are well taken and for that purpose to examine the law, to-wit: section 7032 *a.* and ascertain whether it was the intention of the legislature to prohibit the exhibition of a musical performance, or the participation therein, by any person or persons upon the Sabbath day. The legislature has clearly provided against the exhibition of any theatrical or dramatic performance of any kind or description, or the participation therein by any persons upon the Sabbath day, and prohibits the exhibition or participation therein of any person or persons of various other performances, exhibitions, or sports, but nowhere does the law prohibit the exhibition of a musical performance, or provide against participating in a musical performance. This is a criminal law of the state, and under the uniform authority of the decision of courts of last resort since the days of Blackstone, and especially upon the authority of the Supreme Court of our own state, in the following cases, Bloom v. Richard, 2 Ohio St., 387; Hall v. State, 20 Ohio, 7; Turner v. State, 1 Ohio St., 422; Hirn v. State, 1 Ohio St., 15; Shultz v. Cambridge, 38 Onio St., 659; Spice v. Steinruck, 14 Ohio St, 213; Board v. Swaringen, 1 Ohio, 395, the language used in any penal statutes of the state must be strictly construed because such penal statutes cannot be extended by implication to cases not falling within their terms. And for the very excellent reason that the statute does not prohibit the exhibition of a musical performance, and it having been admitted that there was not a dramatic nor a theatrical performance, exhibited nor participated in by said defendants upon said Sabbath day, and that said performance given did not resemble in any sense a dramatic nor a theatrical performance of any kind or description, I am of the opinion that the demurrers to said informations should be sustained, and the defendants are discharged.

P. J. Corcoran, for the state.

Rankin D. Jones and Francis B. James, for the defendants.

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## INSANITY AS A DEFENSE. 204

[Preble Common Pleas.]

### †Elmer Sharkey v. State of Ohio.

1. Insanity, when properly made out is a full and complete defense to all criminal charges.
2. As the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime, the burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury, rests with the defendant.
3. Where the defense is insanity, it is not sufficient it it shows merely, that such a state of mind was possible; nor merely that it was probable. The proof must be such as to overrule the legal presumption of sanity, and satisfy the jury that the accused was not sane.

†The holding in this case was reversed by the circuit court, opinion 2 Circ. Dec., 443.

4. It is not necessary that the defense be established beyond a reasonable doubt. It is sufficient if the jury is reasonably satisfied by the weight of preponderance of testimony that the accused was insane at the time of the commission of the act.

MERKER, J.

CHARGE TO JURY.

One of the defenses set up by the defendant under the plea of not guilty is that of insanity.

That is, that the defendant was insane at the time the crime was committed as charged in the indictment. That he was irresponsible to the law for said crime, by reason of insanity.

This defense is recognized by the law, and when properly made out, is a full and complete defense to all criminal charges.

Where, in a prosecution for homicide, the defense is insanity, 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 to have been probable. The proof must be such as to overrule the legal presumption of sanity; it must satisfy you that he was not sane. 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 the 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, especially 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 evading punishment. While, then, the plea of insanity is to be regarded as not less full and complete than it is a humane defense, when satisfactorily established, and while we should guard against inflicting the penalty of crime upon the unfortunate maniac, or insane person, we should be equally careful that we do not suffer an ingenious counterfeit of the malady to furnish protection to guilt.

Was, then, Elmer Sharkey insane and irresponsible to the law at the time he committed the act the state complains he did commit?

If you resolve this important question in the affirmative, you must acquit; but here your most earnest and careful attention is required. Look at all the evidence and circumstances touching this issue. You will examine all the detailed evidence touching upon the subject, and permit not your minds to be carried away by loose inferences and careless deduction; but you must examine this issue, this matter, carefully and candidly. You must consider it important both for the protection of the community, and the safety of the insane.

The plea of insanity presents an issue, the affirmative of which is upon the defendant. And here let me lay down to you the principles of the law. As the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime, the burden of establishing the insanity of the accused affirmatively to the satisfaction of the jury on the trial in a criminal case, rests upon the defendant.

It is not necessary, however, that this defense is established beyond a reasonable doubt. It is sufficient if the jury is reasonably satisfied by the weight of preponderance of the evidence that the accused was insane at the time of the commission of the act. Apply these principles to this case. Elmer Sharkey, by the law at the time of the crime charged, is presumed to have been sane, and to be fully responsible for the consequences of his own acts. Presumed to be of sufficient capacity to form the criminal purpose, and to deliberate and premediate upon the acts which malice, anger, hatred and revenge, or other evil disposition might impel him to perpetrate.

To defeat this legal presumption which meets the defense of insanity at the threshhold, the mental alienation relied upon by the accused must be affirmatively established by fair preponderance of evidence as aforesaid.

If, however, from a full and careful consideration of all the testimony of the case in its weight and character, the conclusion is fixed upon your mind that the defendant was insane at the time of the commission of that act, then it is your duty to find in favor of insanity.

But what is insanity? What is meant in law by insanity? What is meant in law by insanity that will excuse a crime?

Insanity, indeed, exists in so many shapes and forms, and manifests itself in so many different ways that it is almost impossible for science to comprehend it, or give it an intelligible definition. The learned and the unlearned differ about it

The classes, grades and manifestations are not well understood by any of us, learned or otherwise. Then how shall we determine the responsibility of man to the law? The policy of the law ought to fix, as far as it can, and does fix it.

Insanity in its general, legal sense is the inability or incapacity to distinguish between right and wrong, as applied to particular charges of crime. It is the inability or incapacity to distinguish between right and wrong, or the want of knowledge of right and wrong as to particular acts committed. If in the commission of a criminal act, the capacity of discriminating between right and wrong is overcome or destroyed, or the knowledge of such discrimination is buried in oblivion, or if his mind is diseased to such an extent that he is unable to restrain his acts, unable to choose between the right and wrong, no longer a free agent, to act or not act at will. Such an act would make a perpetrator irresponsible; and in the language of some judges, in well defined cases, that in order to constitute a crime, a man must have intelligence and capacity enough to have a criminal intent and purpose. And if his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power; or if through the overwhelming violence of mental disease, or from any other cause, his intellectual powers are for the time abdicated, he is not a responsible moral agent, and he is not punished for criminal acts. But a man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing, in knowledge and conscience that the act he is then doing is wrong and criminal, and may subject him to punishment, he having the power to desist.

In order to be responsible he must have the power of self-control, free agency, the power and freedom of will to avoid a wrong, no less than the power to distinguish between the wrong and the right. He must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right; his duties to others, and the violations of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his acts, and its consequences, if he has a knowledge that it is wrong, and criminal, and mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong, and be liable to punishment, and the power to choose and restrain his acts at will, such partial insanity is not sufficient to exempt him from responsibility for criminal acts.

Counsel for defense in this case have urged that we should disregard, or modify a rule adopted by the courts of this state in determining criminal responsibility, and the burden of proof in establishing insanity, and adopt the views to a modified extent of other states, which it is claimed are more in accordance with justice, and the enlightened humanity of the age. Whatever may be our private opinion on this subject we are not at liberty, as a court, to disregard the settled law of the state.

It is the court's duty to ascertain the law and give it to you. It is your duty to receive it, and apply it to the facts of the case. If there is any need of improvement of the law in this respect it is the duty of the legislature to furnish the remedy, or the Supreme Court to modify its rulings on this subject. Notwithstanding the able argument by counsel in cases in other states referred to, we are not convinced that a change should be made.

And here again, let me remind you, gentlemen, that you should before coming to a conclusion, carefully recall by aid of your memories all the evidence and circumstances bearing upon this question of insanity, since and before this act is charged to have been committed, to-wit: January 12, 1889, but all must relate and refer to the state of the defendant's mind at the time he is charged with the commission of the crime. For all the evidence given of defendant's condition, as he was before and after the homicide, as well as the condition of his relatives' minds, were offered and received by you for the purpose of assisting you in determining the condition of the defendant's mind, whether sane or insane, at the date said Caroline Sharkey was killed.

And, gentlemen of the jury, if you find by a fair preponderance of the evidence that when the defendant struck and killed the deceased, Caroline Sharkey, he was laboring under some mental infirmity, rendering him incapable of determining that it would be wrong to take the life of the deceased. That by reason of such mental disorder he was unable to know that his duty to his fellowmen required that he should abstain from so doing; that he would be punished by the law if he killed her under the circumstances shown in this case, and slew the deceased from the uncontrollable impulse of his mental disorder, without power or will or reason to see it was wrong and abstain from doing it, then you should ac-

quit him; but, on the contrary, if you find that the defendant did know that it was wrong and punishable by the law; if he could have restrained himself; if it was not the impulse of his mental disorder; if it was the impulse of the passion or anger or feelings of malice excited by the wrongs, if any, he may have suffered by the conduct of the deceased, then he was legally responsible; and if he killed Caroline Sharkey, he is guilty of one of the degrees of murder, or manslaughter, or assault, or assault and battery, embraced in said indictment, as defined and explained in the former part of this charge, as the evidence may warrant, under the law as given by the court.

I am asked by counsel to call the jury's attention to the testimony and opinions of witnesses, both as non-experts and experts on the question of insanity. The credibility to be given to the opinions of witnesses on the question as to the defendant's mental faculties, whether sane or insane, largely depends upon the facts the opinion is based upon. Where the witness has had the opportunity to observe and converse with the person whose mind is in question, and has conversed with and watched the facts and conduct of such person, and testifies to, and gives to the jury, such conversation, acts and conduct, he may give his opinion as to the condition of such person's mind. And such opinions are to be considered by the jury in connection with the facts, conduct and appearance of such person.

In determining whether the defendant's mind was sane or insane, at the time of the homicide, and such opinions are strong or weak, as it may or may not be, backed up by the facts and circumstances, etc., by such witnesses given to the jury.

The opinions of medical experts are to be considered by you in connection with all the other evidence in the case, but you are not bound to act upon them to the entire exclusion of other testimony. Taking into consideration these opinions, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the accused was, or was not, of sound mind at the date of the homicide.

You are not to take it for granted that the statements contained in the hypothetical questions, which have been propounded to the witnesses, are true. Upon the contrary, you must carefully scrutinize the evidence, and from that determine what (if any) of the averments are true, and what (if any) of the averments are not true.

Should you find from the evidences that some of the material statements therein contained are not correct, and that they are of such character as to entirely destroy the reliability of opinions, based upon the hypothesis stated, you may attach no weight whatever to the opinions based thereon. You are to determine from all the evidence what the real facts are, and whether they are correctly or not stated in the hypothetical question, or questions.

I need hardly remind you that an opinion based upon a hypothesis incorrectly assumed or incorrect in its material facts and to such an extent as to impair the nature of the opinion, is of little or no weight.

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We give also in this connection the following comments upon the decision of the circuit court.

The opinion of the circuit court in the case seems to be such a radical departure from the settled law of Ohio, that the writer asks space in the Bulletin to briefly review it.

As the evidence in the case is not before us, it is difficult to say whether the hypothetical question of the state was a fortunate or an unfortunate one for the prosecution.

It seems very singular that counsel, having any regard for the interest of the state, and their own success with the jury, should present a hypothecated case, to an expert witness, that was wholly imaginary, and which, there was no testimony in the case even tending to support, and if counsel did adopt such a hazardous course, it would seem that the danger of prejudicing the case in the minds of the jury would be rather in favor of the defendant than against him. A jury is always ready to go to any length to rebuke unfairness on the part of counsel, or a want of candor in dealing with them about the testimony in a case, and if the hypothetical question was so clearly without support in the testimony as is indicated by the opinion of the circuit court, it certainly could not have deceived or misled the jury, to the prejudice of the defendant, and therefore furnished no valid reason for reversing the judgments. Especially is this true when the trial court left the question of how far the hypothetical case was supported by the evidence in the

case, to the jury, under instructions which practically required them to disregard the opinion of the expert, in so far as it was not based upon facts supported by the evidence in the case. In the case of Williams v. Todd's, Ex'r, 28 Ohio St., 547, cited by the circuit court, the Supreme Court does not decide the case upon this point, but expressly say, "We would therefore hesitate to reverse the judgment of the courts below on this ground alone."

Following this point the court recites, at some length, the evidence in the case, and then say: "The case does not now seem to call for an expression of opinion as to the weight of the evidence. Its substance is stated to show the impropriety of an important portion of the charge. The defense of insanity was founded upon the heredity of the accused, and his appearance, and conduct throughout his life. There was no evidence in the case from which a simulation of insanity could be inferred. But the court instructed the jury, in part, as follows;" (here follows an exact quotation from the celebrated charge of Judge Birchard in the Clark case, 12 Ohio, 495); but before examining the position of the circuit court upon the charge in the Clark case, let us see, in the case under consideration, if "there was no evidence in the case from which a simulation of insanity could be inferred."

Simulation is not confined to any particular time, it may occur before, at the time of, or after the commission of the homicide. True, the question for the jury to determine is, was the accused sane or insane at the time he committed the homicide? Or, to speak with greater precision, was he responsible or irresponsible? But in determining this question, the jury are not limited to the precise time of the homicide, but may look to the conduct of the accused both before and after, as reflecting more or less upon the state of his mind, at the time of the homicide, and consequently every act or word of the accused either before, at the time of, or subsequent to the homicide, indicating a sane mind, would be evidence tending to prove that the insanity pleaded at the trial as an excuse for the crime, was simulated.

Tried by this test, we find even by the meager statement of the evidence given in the opinion of the circuit court, the following, at least tending to show simulation, because its direct tendency is to show a sane mind, which is inconsistent with anything but simulation. "Opposed to this was the testimony of many witnesses who knew the accused well, and had seen nothing in his appearance or conduct to lead them to doubt his sanity" * * * "testimony showing that he made some progress in school, and that he transacted unimportant business ordinarily well; the opinions of some medical witnesses, and the fact—which the evidence seems to establish—that after the homicide he cunningly broke doors and windows in the house to avert suspicion from himself." In the face of these statements, how can the court say, "There was no evidence in the case from which a simulation of insanity could be inferred?"

In commenting on the charge of Judge Birchard in the Clark case, the circuit court say: "It is to be inferred that some evidence in the case suggested the simulation of insanity." In a case presenting such evidence, it may have been proper to comment upon the circumstances under which the defense of insanity is "often attempted," and to caution the jury against "an ingenious counterfeit of the malady." "But such observations had no proper place in the case before us, where a counterfeit of the malady was not suggested by any evidence."

We would suggest, in this connection, Does not every case of genuine insanity suggest a counterfeit of the malady? And is it not by comparison of the known symptoms and characteristics of each with the other, and by reason, reflection and judgment thereon, that a jury, under proper instruction, would be able to distinguish the genuine from the counterfeit? If so, what objection can be urged to a charge which simply emphasises to the jury the vast importance of exercising their judgment in the most careful manner. To execute an insane man, and to turn loose on society a willful murderer, all will agree, are both great wrongs; but when the jury are alike cautioned against each of these extremes, the accused certainly has no ground to complain of the charge, and under the present system of trying the question of insanity, where the rich culprit can command the services of paid advocates, who come before the jury under the guise of expert witnesses, that judge would be recreant to his duty who should fail to give the jury every caution that would enable them to properly weigh the testimony and arrive at a just conclusion—a conclusion that should at once be just to the accused and to society as well.

Further along the circuit court say, "By it (the charge) the jury were informed that the defense here interposed was not sustained, if the evidence merely shows that the accused was probably insane when the homicide was committed.

It is submitted that this is not reconcilable with either reason, or the best considered authority in the state. To the commission of the crime charged, mental capacity for deliberation and premeditation was essential. If the evidence showed that this essential capacity was probably wanting, etc. * * * there was reasonable and substantial doubt of his guilt."

Without quoting further, at length the circuit court further criticise the word "satisfy" as used in the charge of the court below.

The position of the circuit court, carried to its legitimate conclusion is, that whenever the defendant raises a reasonable doubt, in the minds of the jury, of his sanity, he thereby raises a reasonable doubt of guilt and is entitled to an acquittal.

This doctrine is in direct conflict with the unbroken line of our Supreme Court from the Clark case in 1843 to the present time.

The Clark case was approved and followed in Loeffner v. The State, 10 Ohio St., 599. In this case the court held that the burden of establishing the insanity of the accused affirmatively to the "satisfaction" of the jury, rests upon the defense.

Both the Clark and Loeffner cases were cited and approved in Silvers v. The State, 22 O. S., 101.

The question again came before the Supreme Court in the case of Bond v. The State, 23 O. S., 349.

Welch, J., in delivering the opinion in this case, says, "The counsel for the defendant requested the court to instruct the jury that if they entertained a reasonable doubt as to the sanity of the defendant they should acquit. This instruction the court refused to give, and on the contrary, instructed the jury that in order to an acquittal on that ground, it was incumbent on the defendant to prove the fact of insanity by a preponderance of evidence. In this we think the court was right and the counsel wrong."

Again, in Bergen v. The State, 31 Ohio St., 111. Gilmore, J., in delivering the opinion of the court says, "The counsel for the motion admits that this is held to be the law in Ohio, but ably argues that it is not good law. If the question was an open one, a majority of the court would be in favor of the rule as it stands, and in as much as the rule has been so long established, and so repeatedly recognized in this state, as shown by the cases cited, the court is unanimous in the opinion that it should not be changed by judicial action."

What the circuit court meant by saying that the charge in the Clark case "is not reconcilable with the best considered authority in the state," we do not know, as they cite no authority in the state in conflict with or even criticising Judge Birchard's charge, while, as we have seen, that charge has been accepted by our Supreme Court as the settled law of Ohio, in every case in which it has been cited.

In view of these cases we submit that the decision under review is not only not good law, but is subversive of a principle of law in Ohio, that has been so long and so well established, as to become elementary.

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## 248 RAILWAY STOCK—PLEDGE.

[Superior Court of Cincinnati, General Term, 1889.]

### †CINCINNATI, NEW ORLEANS & TEXAS PACIFIC CO. v. CITIZENS' NATIONAL BANK ET AL.

1. Persons receiving certificates of stock in pledge from the secretary of a railroad company, whose duty it is to attend to the issue and transfer of certificates on behalf of the company, are bound to inquire as to the authority of that officer to dispose of the stock for his own use, and in the absence of such inquiry the company is not estopped to dispute the validity of the certificates so received, although they have the genuine signatures of the president and secretary of the company, and the corporate seal.

† For opinion on issues in this case see post, 24 B., 198. See also 9 Dec Re., 147.

2. Where the secretary of a railroad company has wrongfully issued to himself a large number of certificates of the stock of the company, and pledged the same to various persons as security for loans to himself and all the holders of such certificates assert them to be genuine, and many of them commenced actions upon such certificates against the company for a refusal to transfer the same; or to pay dividends thereon, *held*, that the company may unite all holders of such certificates as defendants in one action to cancel the same, so as to remove the cloud upon the title of the holders of the genuine certificates, and prevent a multiplicity of suits.

3. Where various persons, holding certificates purporting to represent a large number of shares of the stock of a corporation, all claim to derive title through certain genuine certificates for a much smaller number of shares previously held by the person through whom they claim, and all assert against the company a right to be treated as stockholders, such company may join all holders of such certificates as defendants in one action for the purpose of determining which of the certificates are valid.

RESERVED on demurrer to the petition and motion to dissolve restraining order previously granted.

PECK, J.

The plaintiff corporation was organized October 8, 1881, with an authorized capital of $3,000,000, divided into thirty thousand shares of $100 each, all of which were subscribed and paid for within a few days after the organization. Certificates of stock were duly issued to the subscribers, signed by the president and secretary of the company, and each of such certificates contained a recital of a by-law of the company to the effect that it was only transferable on the books of the company upon the surrender of the certificate. After that time, the president of the company signed a number of certificates in blank, and left the same in possession of the secretary for the purpose of making transfers whenever valid certificates were presented for that purpose. The secretary fraudulently filled up the blank certificates to himself for various numbers of shares, signed them as secretary, and unlawfully attached to them the corporate seal of the company, after which he pledged the fraudulent certificates to the various defendants as security for the repayment of loans by them respectively made to him at different times. When the loans were made, the defendants respectively knew that Doughty was the secretary of the company, and that he had been such at the date of the issue of the fraudulent certificates. The plaintiff is unable to state the sums of money loaned by each of the defendants, or to accurately state the number of false certificates so pledged, or the number of shares of the capital stock which said certificates purported to represent.

Doughty subscribed for and took 650 shares of valid stock, and it is alleged that certain of the defendants claim to be the owners of the certificates received by him for said shares, and as to 176 of said shares, that various persons of the defendants named, claim to be the owners, in amounts which plaintiff is not able to state. Doughty neither held nor owned any other stock in the company. He died May 25, 1882, leaving unpaid the promissory notes given for the loans secured by the pledges mentioned. His administrator claims to be the owner of 150 shares of the stock subscribed for by him. Twenty-one actions have been commenced against plaintiff in this and other courts, by the holders of certificates pledged to them by Doughty, alleging that plaintiff's officers have refused to transfer to them on the company's books, upon demand, the spurious certificates so held by them; and all of the defendants, plaintiffs, in said actions, claim that the spurious certificates are

valid by reason of the fact that Doughty, in his life-time, was the owner of the shares mentioned, and issued the certificates sued on, in lieu of his genuine certificates or some of them, upon their surrender as provided in the by-laws of the company—although the false certificates purport to represent a far greater number of shares than were ever so held or owned by Doughty. In two of the actions mentioned, verdicts and judgments have been rendered against the company, on the ground that the certificates there sued on were valid, because issued in place of valid certificates surrendered by Doughty.

Plaintiff avers that the outstanding of the false certificates and the pendency of said suits, have greatly depreciated the value of the genuine certificates of stock in the hands of *bona fide* stockholders, and still operates to depreciate the same, and to impede its business, and that the company suffers great loss by reason of the multiplicity of the suits, and cannot obtain justice by the separate trials of the validity of the claims of defendants, and has no remedy otherwise than by the determination in this action of the persons who are entitled to be recognized by it as the owner of the shares formerly owned by Doughty, and to that end the court is asked to require the defendants to set up their claims, and to determine which of them are valid, and to enjoin the holders of those which are invalid, from asserting any further claim, and to enjoin the respective defendants from prosecuting their separate actions.

Upon the filing of the petition containing the foregoing averments and prayers for relief, the court granted a temporary injunction against the defendants restraining them until further order from prosecuting their actions against plaintiff upon the certificates held by them. Thereupon the defendants moved to dissolve the temporary injunction, and also demur generally to the petition on the ground, that it does not state facts sufficient to constitute a cause of action, and specially on the ground that there is a misjoinder of parties defendant. Upon the demurrers and motion we are now required to pass. There is in one aspect of the case little difference between the two grounds of demurrer. The principal relief sought consists of bringing in all the defendants so that their claims may be sifted, and the true separated from the false, and whether it be termed misjoinder or want of a cause of action, the objection is much the same—except in this that if the allegations of the petition are such as to show that all the certificates are valid, or that the company is estopped to dispute their validity, then there can be no cause of action, and that without reference to the question of joinder. The facts alleged, plainly show that many of the certificates issued are invalid, and the only question of the sort that can arise upon the allegations is that of estoppel. On this point we have heretofore decided that the fact that the certificates bore the genuine signatures of the president and secretary of the company, and the corporate seal, did not of itself estop the company from disputing their validity. Perrin v. Railway Co., *ante* 113; Railway Co. v. Rawson, 9 Ohio Dec. Re., 709. It was also decided in said cases in the circuit court, Railway Co. v. Third Nat'l Bank, 1 Circ. Dec., 109, in the cases growing out of transactions related in the petition, that persons purchasing certificates of stock from Doughty while he was secretary of the company, and failing to inquire as to his right to dispose of them for his own use, took them at their peril, and that even if the company by the act of its president in leaving the certificates signed in blank in the hands of the secretary was guilty of negligence, yet the purchaser could not recover against the company, without

having first inquired into the rights of the secretary in the premises. See also B'd of Ed'n v. Sinton, 41 Ohio St., 504, and Moores v. Citizens' Bank, 111 U. S., 156. The petition herein alleges that defendant received their certificates from Doughty, knowing his official relation to the company, in the course of transactions had with him individually, and such knowledge was sufficient to put them upon inquiry, and until it appears that they made the necessary inquiries, the company is not estopped to dispute the validity of the certificates. As it does not appear from the petition that inquiry was made by any of them, the demurrer cannot be sustained upon that ground.

The question of joinder is however the principal point of discussion in the case.

The allegations of the petition show that there is perhaps no community of interest among the defendants, but they derive title from the same source, and the objection to the certificates alleged to be invalid is the same as to all; and it is further alleged that all the defendants claim their certificates to be valid by reason of the fact that Doughty, in his life-time was the owner of certain shares for which he held valid certificates which defendants all claim were surrendered so as give validity to the certificates held by them respectively. It is obvious that this claim can be more conveniently heard and determined by having all the parties claiming title under the same certificates before the court in one action, than if they were heard separately. In this respect it resembles a case where there are a number of claimants to a common fund. The ordinary practice of courts of equity in such cases is to bring all parties before the court, and require them to interplead, and so determine their rights once for all.

Apart from the questions arising out of the alleged claim of defendants to hold under the valid certificates held by Doughty, the petition does not appear to be open to the objection of misjoinder. The practice of courts of equity, before the adoption of the code of civil procedure, was quite liberal in this respect. Justice Story in his work on Equity Pleading, after a review of the subject, says, sec. 539, "The conclusion to which a close survey of all the authorities will conduct us, seems to be that there is not any positive, inflexible rule, as to what in the sense of courts of equity constitutes multifariousness, which is fatal to the suit on demurrer. These courts have always exercised a sound discretion in determining whether the subject matters of the suit are properly joined or not, and whether the parties, plaintiffs or defendants are also properly joined or not."

Instances of such joinder of parties may be found in the old cases wherein the lord of a manor was permitted to maintain a bill against the tenants, or *vice versa* with reference to some right in which each claimed a distinct interest, as a right of common, to cut turf and the like. So also, of a parson against his parishioners to establish a general right to tithes; and a claimant to a sole right of fishery, as against a number of persons each claiming a distinct right in the same waters. In such cases the objection to the bill for multifariousness was overruled. Storys Eq. Pl., sec. 121, *et seq.* Mayor of New York v. Pilkington, 1 Atk., 284.

It has been held in a number of cases, old and new, that parties holding under the same person, but by distinct conveyances, might be joined as defendants to an action on behalf of creditors, to set aside the conveyances as fraudulent, and that distinct and several judgment creditors might join in one bill, to set aside convevances made by their debtor

in fraud of his creditors. North v. Bradway, 9 Minn., 183; Hamlin v. Wright, 23 Wis., 491; 18 id., 456; Pomeroy on Remedies, 349 *et seq.*; Brincherhoff v. Brown, 6 John. Ch., 150; Dix v. Briggs, 9 Paige, 595; Sizer v. Muller, 9 id., 605.

In Glenn v. Waddel, 23 Ohio St., 605, 609, our Supreme Court held that a number of persons owning distinct tracts of lands subject to the same illegal assessment, might properly join in an action to restrain the collection of the assessment, the judge who delivered the opinion, saying: "The case, therefore, in the opinion of a majority of the court, is one which, under our former practice, a court of chancery had jurisdiction to prevent a multiplicity of suits, and one which may well be sustained under, at least, equally liberal provisions of the code." See also Upington v. Oviatt, 24 Ohio St., 282, 247.

The cases most directly in point however are, N. Y. & N. H. R. Co. v. Schuyler, 17 N. Y., 592, and Board of Supervisors v. Dyoe, 77 N. Y., 219. The former of these was a case closely analogous to the present in many particulars. An officer of the railroad company had caused an overissue of the stock of the company, and disposed of the fraudulent certificates to many persons who dealt with him as an individual, and some of them had commenced actions against the company based upon such certificates. Thereupon the company filed a petition, in substance much the same as that now before us, the object of which was to cancel the unauthorized certificates, and made all holders of such certificates defendants to the action. The court of appeals passing upon the question of joinder, speaking by Comstock, J., say: "In this case there is a single interest in the plaintiff's directly opposed to the interests of all the defendants. The common point and center of litigation is the stock, property and franchises of the plaintiff's corporation, in which the defendants claim specific shares and proportions as holders of the false certificates. The rights claimed by defendants are distinct, because they rest upon separate instruments as the evidence thereof; but they are of precisely the same nature, they turn upon the same question, and they are a cloud upon the same estate. Each certificate is a false muniment of the holder's title to a particular interest in the corporate estate, vested as a unit in the corporation, but equitably belonging to the holder of its actual stock."

The same case came again before the court of appeals, 34 N. Y., 30, and there the learned judge who delivered the opinion spoke of the practice in the case as "analogous, and to some degree without precedent," but the former decision was not overruled, and the opinion as a whole tends to support the practice. The judgment in the original action was fully sustained and followed in the latter case of Board of Supervisors v. Dyoe. The allegations of the petition there were, that a county treasurer had issued notes of the county to fifty-three persons, to some of whom the county was indebted and to others not, and thirty-one of them had commenced actions upon the notes. Thereupon an action was begun by the board against all the holders of such notes, for the purpose of having their respective rights and the liability of the county determined in one action. The objection that there was a misjoinder of parties defendant or causes of action was not sustained. See also McHenry v. Hazard, 45 N. Y., 580.

The petition in the case at bar is amply sustained, both by reason and authority. All the defendants make the same claims against the plaintiff upon instruments identical in every respect, received from the

same person under the same circumstances. Though their interests are distinct, the questions as to all are the same. The petition invokes equitable relief upon several grounds. By it the company seeks to quiet the title of the holders of valid certificates of stock upon which a cloud is cast by the existence of the spurious certificates; to cancel instruments alleged to be invalid, and to have been obtained through a fraud, upon which important and embarrassing claims are made against the company; to protect itself against the hazard of a double recovery if the separate actions are permitted to proceed; and finally, to avoid a multiplicity of actions. The demurrer is overruled, as is also the motion to dissolve the restraining order.

TAFT and MOORE, JJ., concur.

Harmon, Colston, Goldsmith & Hoadly and Ramsey, Maxwell & Ramsey, for plaintiff.

Kittredge & Wilby, and Paxton & Warrington, for defendants.

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## DEPOSITIONS. 250

[Greene County Common Pleas, 1889.]

†STATE OF OHIO EX REL. MCGAUGHEY V. GEORGE T. COST.

A party to an action though a resident of the county in which the action is pending and not intending to depart therefrom nor unable to attend court by reason of sickness or infirmity, and who expects and intends to be present at the trial, may be compelled by the adverse party to give her deposition, and, in case of refusal, may be imprisoned for contempt.

SMITH, J.

In the case of Alice McGaughey against Hooven and Allison now pending in this court and at issue, defendants served notice on plaintiff that at the time and place mentioned therein they would take the deposition of plaintiff to be used in evidence on the trial of said cause. In obedience to subpœna said Alice McGaughey appeared and was sworn as a witness and the following question was asked by counsel for defendants.

"State your name, age, and residence" and plaintiff, witness as aforesaid, answered "Alice McGaughey," but then and there upon the advice of counsel, refused to further answer; the reasons assigned for such refusal being reduced to writing by the notary, and being as follows:

"That witness is a resident of this county, that she is able to attend court, that she is not so sick or infirm as to prevent her attendance on the trial of this action, that she intends to and expects to attend and testify on said trial, that the defendants have no intention to read or offer the proposed deposition on said trial, that it is not proposed to be taken in good faith, but merely for fishing purposes, and to inform themselves by this means in advance of what the testimony of the witness will be at the trial, all of the above statements of fact, the witness offers now and here to prove."

† Cited and approved in In re. Minnie C. Humphrey, 7 Ohio Circ. Dec. 603.

And thereupon the notary ordered the witness to answer the question, which she again refused to do, and for such refusal, she was imprisoned under an order of commitment issued by said notary.

This is an application under sec. 5255 (amended vol. 82, p. 38) which provides that "a witness so imprisoned," under sec. 5254—may apply to a judge of the Supreme Court, circuit court, a common please court, or probate court, who may discharge him if it appear that his imprisonment is illegal. Sec. 5254 (amended vol. 77 p. 45), provides for the imprisonment for contempt by a witness. In a case where he refuses to testify, it provides that the court or officer may fine him in a sum not exceeding fifty, nor less than five dollars, "or may imprison him in the county jail there to remain until he submits to be sworn, testifies or gives his deposition."

The relator testifies that she is and for a number of years has been a resident of Xenia, Greene county, Ohio, that she expects and intends to be present at the trial of said action and to give oral testimony on her own behalf. While her appearance does not indicate good health but otherwise, yet she is not now so sick or infirm as to prevent her attendance on said trial.

The allegation of the petition that the proposed deposition was not to be taken in good faith by defendants; that it is not the intention to read or offer it at the trial, and that it is taken by defendants, Hooven and Allison, for fishing purposes merely, and to inform themselves in advance of what the testimony of the witness would be on the trial, is denied by defendants.

Evidence was offered by the relator on this point, tending to show that defendants declined to state at the time she refused to answer said question, that they intended in good faith to use said deposition on the trial, and that counsel for relator offered, if defendants would so state that they intended to use said deposition on the trial, to make no further objection.

Defendant's counsel testified that he was proceeding to take the deposition of plaintiff in good faith, to prepare for the trial of said cause; that he expected to use said deposition in the trial, in case the witness testified to the truth, as defendants understood and claimed it to be and if at the time of trial it could be used under sec. 5265: That defendant's claim was that there were allegations in the petition which were against her right to recover, and that one of the objects of the deposition was to develop the case in that respect; that there was no intention not to file the deposition.

The original papers in the action of the relator against Hooven and Allison, the notice to take the deposition, and the deposition so far as taken are also in evidence.

Can a witness—not a party—who resides in the county in which the action is pending, is not unable to attend court by reason of sickness or infirmity, and who expects and intends to be present at the trial, be compelled to give his deposition? Section 5266 provides, that either party may commence taking testimony by deposition at any time after service upon the defendant.

Section 5265 provides, when a deposition may be used.

1. When a witness does not reside in or is absent from the county, etc.

2. When the witness is dead, or from age, infirmity or imprisonment is unable to attend court.

3. When the testimony is required on a motion, etc.

The limitation of the statute is not upon taking of depositions, but upon the use. In 12 Kansas, 452, in a case similar to this, Brewer, J. says: "Giving the right to use a deposition under the contingencies named," which are substantially the same as under our statute "gives the right to prepare for those contingencies. It cannot have been contemplated that the contingency should exist before the deposition can be taken, for in one of the cases at least the happening of the contingency would destroy the power to obtain the testimony. If the deposition can be used in case of his death, the party must have the right to take that deposition beforehand; so of the other contingencies named in the statute. Now, the giving of testimony, whether on the trial or by deposition, is not a privilege of the witness, but a right of the party. He need not solicit, he can compel. It is said this power is liable to abuse, and that a witness might be compelled to give repeated depositions and still be present at the trial. Courts will see that this power is not abused, or the time of a witness unnecessarily taken. It is said that a large amount of costs will be accumulated. This will not injure the adverse party—for a party taking depositions which he does not use, must himself pay their cost."

It appears from the decision that under the civil code of Kansas, a deposition can be used when the witness is absent from the county, at the time of trial, or when from age, infirmity or imprisonment the witness is unable to attend court, or is dead.

In the matter of the application of Nushuler, 4 Ohio Dec. Re., 299. Barber, J., of the court of common pleas of Cuyahoga county, Ohio, decided that a witness was not excused from giving his deposition on the ground that he was a resident of the county in which the cause was pending, did not intend to depart therefrom, was in good health, and intended to be present at the trial. He bases his decisions upon the fact that there is no restriction upon the right to take depositions, the only limitation upon the time being that it cannot be prior to the service of summons upon defendant; the power of the notary to compel the attendance of witnesses, his power to compel them to give their depositions; absence of any power in the notary to decide as to the propriety or competency of questions put to the witness, and the fact that the law affords every possible facility to parties in obtaining and preserving their evidence.

The decision of the Superior Court of Cincinnati, in Shaw v. Edison, 9 Ohio Dec. Re., 809, per Taft, J., is to the same effect.

Counsel for relator cite *ex parte* Longford, Knox county, Ohio, court of common pleas, decided by McElroy, J., 9 Ohio Dec. Re., 597.

There the objections of the witness to giving his deposition, were almost identical with the objections made by relator. In that case the witness filed an affidavit with the notary at the time of his refusal to give his deposition, setting forth his reasons for such refusal, and the court on the trial assumed the facts therein stated as admitted and refused to consider affidavits filed in said matter after the commitment of the witness, whether or not in cases of this kind, courts should adhere to the rigid rule that no facts shall be considered except those shown by the papers attached to the return of the defendant, and the return itself, or should adopt the more liberal rule of considering all the facts in the interest of justice and all parties, may be a question of practice, upon which there may be a difference of opinion. But it seems to me that in

a case of this kind, the court should be in possession of all the facts connected with the matter, and that both relator and defendant ought to be permitted to introduce any competent testimony throwing light upon it. The court held that if the party had the right to take the deposition it made no difference whether he was in good faith or not in that behalf or the opposite party intended to call him as a witness, that he was subject to the process of the court for either party who desired his testimony. But based the decision on the ground that there did not appear any probability that the deposition could or would be used on the trial, that while the witness might die, so must all must, that a deposition can only be used in contingencies, that if the attendance of the witness can be procured such deposition ceases to be a deposition under the statute and can not be used, that the facts existing at the time the cause is heard determine whether it is testimony or not, and that a deposition to be taken must under the circumstances existing at the time of the taking be taken as testimony in the case, to be used as testimony, if within sec. 5265. The effect of this decision is to hold that while a party must be vigilant in preserving his own testimony and he not the court takes the risk of its loss, yet that the same court of justice in which the action is pending will not enable him to preserve and obtain the testimony of a witness within the county unless he make it appear that the witness will surely die before the trial, or that he will be absent from or a non-resident of the county at that time, or that from age, infirmity or imprisonment he will be unable to attend court. That the mere possibility of the happening of some of these contingencies will not suffice.

Section 5281 provides that when a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that for a cause specified in sec. 5265 the attendance of the witness cannot be procured.

This section, undoubtedly, contemplates the taking of depositions which may or may not be read in evidence, according to the circumstances existing on the day of trial, and notwithstanding the opinion of the court in the case last cited, that unless the circumstances bring it within one of the grounds for the use of a deposition, that it ceases to be a deposition, the section designates it as a deposition which may be offered, but only read under certain contingencies, existing at the time. Then and not before,—"when it is offered to be read in evidence" is the time for the application of sec. 5265, which provides for the use, not the taking of depositions.

Another limitation on the use, is found in sec. 5282. "Every deposition intended to be read in evidence on the trial must be filed at least one day before the trial."

The only limitation upon the taking is that it cannot be prior to the service of summons upon defendant.

Does a party stand in any better position than any other witness? Sec. 5248 provides that a party may be compelled by his adversary to testify orally or by deposition, as any other witness may be thus compelled.

The case in 12 Kansas, 451, above referred to, was a case where the witness compelled to give his deposition was the defendant, and on this point the court say, "that the witness whose testimony is sought is the adverse party does not affect the question; for by sec. 321 of the civil code either party can compel the adverse party at the trial, or by deposition, to testify as a witness in the same manner and subject to the same rules as other witnesses."

But it is said he may thus be compelled to disclose his whole case to his adversary, and yet the deposition not be used, by reason of the fact that at the time of trial it does not come within the provisions of the section providing when a deposition may be used. True, but so might this be the case with the deposition of any important witness for him, whose testimony his adversary is as much entitled to as he is. As suggested by Taft, J., in Shaw v. Edison Co., 9 Ohio Dec. Re. 809, "witnesses do not belong to one party more than to another. There is no reason why each party is not entitled to know the other's case. They are presumed to state it in their pleadings in the beginning."

But it is claimed the party is not undertaking to obtain the testimony in good faith. It certainly cannot be claimed that because he is undertaking to take the evidence of his adversary that that raises the presumption that it is not in good faith.

The general policy of the civil code of procedure is to afford every facility for obtaining testimony by either party.

By sec. 5248 a party may compel his adverse party to testify orally or by deposition as other witnesses.

Very frequently a party plaintiff compels the defendant to testify orally on the trial of suits to set aside fraudulent conveyances where certain facts are almost exclusively within the knowledge of such party.

Under sec. 5289, a party may be required to produce books and writings in his possession or control which contain evidence pertinent to the issue to be used as evidence by the opposite party, and in case of failure by a plaintiff to produce, the court may give judgment for defendant as in case of non-suit; and in case of failure by defendant the court may render judgment against him by default.

Under sec. 5290, a party may demand of his adversary an inspection, or copy, or permission to take a copy, of a book, paper, etc., in his possession or control containing evidence relating to the merits of the action or defense. And in case of failure to permit such inspection, etc., the court may exclude the book, paper, etc., from being given in evidence, or if wanted as evidence by the party applying may direct the jury to presume it to be such as the party applying in his affidavit alleges it to be. Under this section a party may be compelled to permit an inspection, etc., of books, etc., by the opposite party when the opposite party does not intend to use such book or paper in evidence, and in case of failure to permit such inspection he cannot use it himself.

Under sec. 5099, parties may attach interrogatories to their pleadings, pertinent to the issue, answers to which under oath, if not demurred to, may, under sec. 5101, be enforced by judgment by default, nonsuit or attachment, and which on the trial so far as competent on the issues made may be used by either party.

The policy of these sections seems to be to afford either party every facility in obtaining testimony on all matters pertinent to the issues made in the pleadings,—he is entitled to the evidence of the opposite party—to an inspection of papers, etc., although he himself does not intend to use the same in evidence—to papers in possession of the opposite party to be used against him, notwithstanding the fact that he may be thus compelled to disclose this cause of action or defense.

The case cited in 16 Pacific Rep., 790, (Sup. Ct., Kansas), was where there was a suit pending in the U. S. circuit for the district of Kansas, where plaintiff's deposition had been taken at Pittsburgh, Kansas, October 31, 1885. On November 4, 1885, plaintiff's attorney received notice

by telegram, at the attorney's place of residence, that defendant would take plaintiff's deposition at Wichita, and without further notice to the attorney, plaintiff was served with a subpœna, to appear before a notary at Wichita on November 7th. On that day the plaintiff was taken before the notary on attachment, and committed to jail for refusal to be sworn. About the same time, and while at Wichita, notice was served upon plaintiff, that on November 11th the deposition of himself and other witnesses would be taken at another place. The court say, "ordinarily the good faith of the proceedings will be presumed, but here the conduct and concessions of the parties disclose a purpose to annoy and injure the plaintiff." After referring to the fact that the deposition of plaintiff had already been taken, and the two additional notices to take at other and distant points, the court say, "Coupled with this conduct, is the admitted fact that the information which they obtained and were endeavoring to abstract from the witness, was not intended to be used in evidence at all."

The case cited in 18 Pacific Rep., 178, (Sup. Ct., Kansas), was where the deposition of a party was proposed to be taken, the party being a resident of the county, not sick or infirm, and expecting to be present and attend the trial. Unlike the preceding case; counsel proposing to take the deposition denied the want of good faith, claimed they desired to use the deposition at the trial, in case witness were absent, but qualified the statement by adding "if witness tell the truth," and further that they needed his deposition to be informed whether other depositions need be taken. In a very brief opinion the court holds that the real purpose was merely to fish out what the testimony would be, and that while the facts differed from the case reported in 16 Pacific Rep., 178, that sufficient was shown to bring it within the same principle.

While the facts in the two cases are very dissimilar, yet the court arrives at the same conclusion, without stating the grounds therefor.

Parties use neither the testimony, or deposition of a witness on the trial unless it is in some manner beneficial to their claims. He may be mistaken as to what a witness will testify. And it certainly can not be said that unless he positively asserts that he intends to use the deposition unconditionally, that he can not take it if the witness object. The same rule would apply with equal force to the taking the deposition of a witness without the county, or in other cases when clearly within the contingencies enumerated in sec. 5265.

Where it appears to be the intention of a party to harrass and oppress a party or witness, to compel him to answer questions which tend to criminate him, or clearly to abuse the process of the court, then of course a court should interfere.

The Kansas decisions are in conflict. 12 Kansas, 452, is not cited in the case in 18 Pacific Rep., 178. In the former case the court say, "It is also said that this permits one to go on a fishing expedition" to ascertain his adversary's testimony. This is an equal right of both parties, and justice will not be apt to suffer if each party knows beforehand his adversary's testimony.

Upon the facts and the law I am of the opinion that relator is not illegally deprived of her liberty. The writ will be refused and relator remanded to the custody of defendant.

James Winans and Snodgrass & Schuebley, for relator.

T. E. Scroggy and Little & Spencer, for defendant.

## DOWER. 254

[Logan Common Pleas, 1889.]

### CATHARINE SMITH v. EDWARD FLICKINGER ET AL.

**A wife cannot release her contingent right of dower to anyone except the owner of the fee or one who by the same conveyance takes the fee, hence, where S., without his wife joining, conveyed land by general warranty to K., from whom defendant claims, and afterwards an agreement of separation between S. and his wife was made, in pursuance of which he conveyed other land to one C. in trust for her, and she, in the same instrument, released her dower in the land, theretofore conveyed by S. to K., this is a mere release of dower by her to C., or S. is bound to K. by his warranty.**

PETITION for Dower.

PRICE, J.

Catharine Smith, widow of Solomon Smith, has filed her petition, asking to have dower set off and assigned to her in certain lands in the petition described. The defendants deny that she is entitled to dower in said lands, and aver that on the twenty-sixth day of January, 1864, she, by her deed in writing, duly executed under seal, in conjunction with Solomon Smith, released her dower interest in said lands, which had theretofore been conveyed to Daniel Kaylor and Henry Kaylor by said Solomon Smith; and that said Solomon Smith never thereafter held title to said lands. The plaintiff, by her reply, denies the alleged release, and alleges that said pretended release was, and is inoperative and void.

On the fifth day of December, 1863, Solomon Smith, the husband of the plaintiff, conveyed the lands described in the petition by general warranty deed to David Kaylor and Henry Kaylor; his wife, the plaintiff herein, not joining with him in such conveyance. The defendants now own the lands thus conveyed, holding title thereto through, and under said Kaylors.

On the twenty-sixth day of January, 1864, Solomon Smith and Catharine, his wife, joined in a deed of trust to Amos Cherry. The following is a copy of said trust deed:

"Whereas Solomon Smith and Catharine, his wife, in the settlement of sundry difficulties and contentions, have agreed to live separately and to make an equitable distribution and division of their property, and the said Solomon in pursuance of said agreement, has by deed bearing even date herewith, conveyed to Amos Cherry as trustee in trust for the said Catharine, the west half of the southwest quarter of sec. No. 30 of town 3, range 14, M. R. S. having the mansion house and outbuildings belonging to the said farm situated thereon; and whereas, the said Catharine is desirous to release to the said Solomon for his use her dower estate in the east half of the same quarter section, and also in the N. W. quarter of sec. No. 29 of town 3, range 14 M. R. S. heretofore sold and conveyed by the said Solomon to Daniel and Henry Kaylor.

Now therefore, know all men by these presents, that we, the said Sol. Smith and Catharine his wife, in consideration of the sum of one dollar to us in hand paid by Amos Cherry, of the county of Logan in the state of Ohio, do hereby grant, bargain and sell to the said Amos Cherry

and to his heirs and assigns forever the following premises situated in the county of Logan, in the state of Ohio, being the east half of the southwest quarter of sec. 30 in town 3, range 14, M. R. S., and the said Catharine hereby releases all her dower estate in the northwest quarter of sec. 29 of town 3, range 14, M. R. S. heretofore sold by the said Solomon Smith to Daniel Kaylor and Henry Kaylor.

To have and to hold all and singular the premises aforesaid to him the said Amos Cherry and to his heirs and assigns forever. In trust nevertheless, for the sole and exclusive use of him, the said Solomon Smith, his heirs and assigns forever, and the said Amos Cherry shall make such leases, transfers, conveyances and deeds as the said Solomon Smith may in writing direct, and to such person or persons as he may desire of all or any part of said premises.

In witness whereof, we have hereunto set our hands and seals this twenty-sixth day of January, A. D. 1864.

Signed, sealed and delivered in presence of us,

B. STANTON,
W. X. DAVIS,
PHILANDER JONES.
Two Dollar
U. S.
Excise Stamp
S. SMITH,
Jan. 26, 1864.

his
SOLOMON X SMITH,
mark (Seal.)
her
CATHARINE X SMITH,
mark (Seal.)

The State of Ohio, Logan county, ss.

Before me, a justice of the peace, within and for said county, personally came the above named Solomon Smith and Catharine Smith, his wife, and acknowledged the signing and sealing of the foregoing deed, to be their voluntary act and deed for the purposes therein mentioned, and the said Catharine, wife of the said Solomon having been examined by me separate and apart from the said Solomon, her husband and the contents of said deed, having been made known and explained to her by me, she declared to me on such separate examination that she executed the same voluntarily and of her own free will and accord, and that she is still satisfied therewith.

In testimony whereof I have hereunto set my hand and seal, this 26th day of January A. D. 1864.

PHILANDER JONES, J. P. [Seal]

Received and recorded January 26th, 1864.

JOHN SHUR, Recorder, L. C. O.

The north west quarter sec. 29, town 3, range 14, N. R. S. is the land sold and conveyed by Solomon Smith to David and Henry Kaylor on the fifth day of December, 1865, and in which the plaintiff is now claiming dower.

Is she barred or stopped from asserting dower in said premises, by reason of the trust deed of January 26, 1864?

At the time of the execution of the foregoing trust deed, Catharine Smith had an inchoate right of dower in the lands, which, though not technically an estate, was, nevertheless, an interest in the lands. But it was an interest that she could not convey by deed. The inchoate right of dower was not assignable. That is to say, her deed would not operate by way of grant of any title; but she could release her right of dower to a proper person, and such release would operate by the way of

estoppel, and thus be as effectual to bar her dower as if she could have granted title. The words of the recital in the trust deed are: "Whereas the said Catharine Smith is desirous to release to the said Solomon for his use her dower estate in the N. W. Quarter of sec. No. 29, of Town 3 of Range 14, M. R. S. heretofore sold and conveyed by the said Solomon to Daniel and Henry Kaylor. In the granting clause of the deed, the words are: "And the said Catharine hereby releases all her dower estate in the N. W. Quarter of sec. No. 29, of Town 3, Range 14, M. R. S. heretofore sold by the said Solomon Smith to Daniel Kaylor and Henry Kaylor." If these words are sufficient in form to constitute a release of her right of dower, to whom was the release? A. The most that can be claimed from them is that they constitute a release to Amos Cherry, in trust for Solomon Smith. There certainly is no attempt to make a release of her dower interest to Daniel Kaylor and Henry Kaylor, the owners of the fee; nor are there any words in the deed which can bear any such construction. They are not parties to the trust deed, and their names are used only as part of the description and by way of identifying the land.

If the language used in the deed is sufficient in form to constitute a release to Solomon Smith, or to Cherry in trust for Solomon, is plaintiff estopped by said deed from asserting her right of dower in said lands, as against the present tenants, who hold through and under Daniel Kaylor and Henry Kaylor?

Solomon Smith conveyed away all his interest in his lands in question on the fifth day of December, 1863, so that, at the time the trust deed was executed, January 26, 1864, his grantees, the two Kaylors, were the owners of the fee in the land.

In Scribner on Dower it is said: "It is well settled that it is no difference to an action of dower, that the widow has released her right to a stranger. In an early case in Massachusetts in which the defense was that the demandant had executed a release to a third person, the court said: "The deed relied on to bar the demandant shows no privity of estate or connection of any kind between her and the tenant. It can not avail the tenant in the action." 2 Vol. Scribner on Dower, p. 288, citing Pixley v. Bennett, 11 Mass., 298.

The trust deed relied upon by defendants in this case shows no privity of estate, or connection of any kind between her and the Kaylors, or between her and the present tenants. When the trust deed was executed Solomon Smith was in the position of a stranger, he no longer having any interest in the lands.

It may be said that the release being to Solomon Smith, who once owned the land, and had conveyed it away by a deed of general warranty, it will be held to inure to the benefit of his grantees.

On that subject Washburn on Real Property state the rule as follows: "But a release of dower to a stranger can not be set up as a bar to her claim against the tenant of the estate. Nor would it make any difference, in this respect, that the release was made to one through whom the tenant claims, in the release had before that ceased to have any interest in the estate. But though the interest of a wife as a doweress is not the subject of grant, so long as it is inchoate, it may be released to the owner of the fee." Washburn on Real Property, Vol. 11, 247, citing Pixley v. Bennett, *supra*, and Harriman v. Gray, 49 Mo., 538. See also McArthur v. Franklin, 15 Ohio St., 485, 509; and Kitzmiller v. Van Rensselaer, 10 Ohio St., 63.

From the authorities, it would seem that a wife can release her contingent right of dower only by joining with her husband in a conveyance to one who already hath, or by the same conveyance takes the fee.

It follows that the trust deed of 1864, does not bar or estop plaintiff from asserting her right to have dower assigned in the premises described in the petition. A decree will be entered in her favor accordingly.

West & West, for plaintiff.

C. J. Howenstine, for defendants.

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## 292 TAXATION.

[Hamilton Common Pleas, 1889.]

JETHRO MITCHELL v. HAMILTON COUNTY COMRS.

1. Where the assessor in the discharge of his duties under sec. 2753, Rev. Stat., in his determination of the new improvements upon a certain tract of land, committed an error in concluding that there were thirty-five new buildings, when, in fact, there were only twenty-six; and where he carried this error into the list returned by him to the auditor, the county commissioners have no authority by virtue of sec. 1028, Rev. Stat., to refund the taxes upon the non-existent nine buildings paid in previous years in consequence of said error.
2. The commissioners' power of refunder under sec. 1038, Rev. Stat., does not exist in case of fundamental error; and where the assessor, acting within the scope of his lawful authority under sec. 2723, Rev. Stat., committed an error in his determination as to the extent or number of new structures, it was a fundamental error.
3. The taxpayer's remedy was within the limitation of sec. 167, Rev. Stat., and secs 5848 *et seq.*

SHRODER, J.

This appeal is from the decision of the county commissioners in denying the appellant's claim, presented July, 1889, for taxes paid by him in 1887 and 1888. It appears from the records and files of the auditor's office that he was charged in the 1885 tax list and duplicate with a valuation of $17,010 upon 3 67-100 acres; that in May, 1886, the assessor returned as listed by him, eighteen new unfinished structures erected upon this land, with his valuation of them in the aggregate; that in May, 1887, he returned as listed by him, twenty-eight finished buildings, with his valuation of them in the aggregate, deducting therefrom the previous valuation made upon eighteen as unfinished; he also returned as listed thirty-five other new buildings with his valuation upon each of them, taken separately. The boards of equalization for 1886 and 1887 respectively, acted upon the respective returns, and the auditor in the tax list and duplicate of each year entered correctly the charges agreeably to the assessor's returns as modified by the board of equalization. The appellant paid these taxes as charged. He now claims that in listing the thirty-five new buildings in 1887 the assessor committed an error in that there were but twenty-six new buildings; and that the total of all the new buildings was fifty-four and not sixty-three, as returned by the assessor in 1887; that he paid the taxes charged in the 1887 tax list and duplicate under protest, and because of the auditor's promise that the error would be duly corrected and his taxes refunded.

The commissioners rejected the claim for want of jurisdiction. Upon the subject of refunding taxes their authority to act is derived from sec. 1038, Rev. Stat. As to name of person, description of property or amount of taxes charged, their jurisdiction is restricted to clerical errors only. Chatfield & Woods v. Commissioners, *ante* 511, and cases cited. In cases of this description upon appeal the inquiry in this court is subjected to the same limitation.

The assessor erred in the making and returning under sec. 2753, Rev. Stat., a list of new buildings, in which he found and reported as newly erected nine buildings which were non-existent. The charges in the auditor's tax list include these nine buildings. The auditor made no clerical error in the entries in the tax list, for these charges were accurately placed in accordance with the assessor's returns as passed on by the board of equalization. Nor could there be ascribed to him the errors found in the returns of the assessor's and in the action of the board of equalization. With respect to the assessor's return of new buildings or structures, the auditor had neither the right nor the duty of revision, review or correction.

But, assuming that sec. 1038, Rev. Stat., applies to clerical errors in assessor's returns, was there any clerical error in the assessor's return? The assessor was required by sec. 2753, Rev. Stat., to make and return a list of all new structures of over one hundred dollars in value not previously included in the valuation of the property, specifying the tract of the land on which the structure is erected, the kind of structure and the value which in his opinion the new structure added to the land. The duty thus cast upon him involves the functions of ascertaining and determining the existence and kind of new structures, and of reducing the results of his inquiry to writing. This error was either clerical, or fundamental, according to the classification decided by the Supreme Court in The State v. The Commissioners, 31 Ohio St., 271. The distinction would be elucidated by a reference to the following decisions:

In Insurance Co. v. Cappellar, 38 Ohio St., 574, the court in defining a clerical error, used this language: "No fact is to be inquired into. Every necessary fact appears on the face of the return."

In State of Ohio v. Brewster, 6 Dec. Re., 1210, the Hamilton county district court said: "Facts having been determined by the auditor, not appearing upon the face of the return, but ascertained * * * by investigation, we do not think the provisions of sec. 1038 apply."

Where under the act of January 16, 1873, (70 O. L., 10, 11), taxes were charged against exempt property, the error was not regarded as clerical. State v. Com'rs. 31 Ohio St., 271.

Where the non-taxable materials, which entered into the manufactured goods of a manufacturer were returned and charged in the tax list and duplicate, the error was held to be not clerical; the error being "that there was no property to be taxed." State, etc., v. Cappellar, 6 Ohio Dec. Re., 543; Com'rs v. Eckstein, Hill & Co., 6 Ohio Dec. Re., 843.

Where the error consisted in the failure to deduct the value of an old building which had been torn down and replaced by a new one, listed and returned by the assessors, the error was held as not clerical. Sandheger v. Com'rs, 8 Ohio Dec. Re., 569.

Where the property not taxable in Hamilton county was charged in the tax list and duplicate of that county, the error was decided not to be clerical. Butler v. Com'rs. 39 Ohio St., 168.

Where, after appropriation by the city of Cincinnati under the statutes of a portion of a tract of land, taxes upon it were charged against the former owner—the error was held not clerical. Ives v. Com'rs, 6 Ohio Dec. Re., 1078.

Where items of re-insurance set out in the returns as *bona fide* debts, were deducted from the credits specified in the same return, the Supreme Court, in deciding it to be a clerical error said: "Charge the proper rate of taxes upon the amount of credits returned without any deduction of the re-insurance item, the error in the amount of the plaintiff's taxes will be corrected—clerical work merely." Ins. Co. v. Cappeller, 38 Ohio St., 560, 574.

The principle deduced from these decisions as it is applicable to the present case, is that if the direct object of the inquiry be to determine the existence, kind and value of certain property, any error therein would be fundamental; if the direct and principal object be to ascertain whether there be a report or minute of the results of such inquiry, to serve the purpose of a copyist or accountant or the like, any error therein would be clerical.

If the assessor in discharging his duties under sec. 2752, Rev. Stat., committed errors in determining the character of the improvement and in the valuation thereof, it constituted erroneous decisions upon these subjects. The error was clearly not clerical. A return in writing of an erroneous decision would not impress that character upon the error. If in reducing his decision to a written form he committed an error in expressing his finding or intention it was done by him as author of the return, and not in any sense as copyist. The return as made by him was original in its character, and an error made in its production could no more be regarded as clerical than a misexpression in a brief or letter.

The decision in Harrison v. Com'rs, 8 Ohio Dec. Re., 256, appears to be in conflict with this application of the statute. The district assessor had described the lot as having a frontage of 34½ feet, when it was but 32½ feet. Because the description of the assessor's return was erroneous, the court considered it a clerical error. 6 Ohio Dec. Re., 1085. If the court had regarded the finding the frontage to be 34½ feet as the mistaken result of the assessor's investigation, or that in writing out his conclusions he misexpressed himself, or that the auditor would have had to enter into an inquiry *in pais* to ascertain whether an error existed and what its nature or extent was, then upon neither of these conditions could the error so caused have been regarded as clerical. It would then in neither event have been the error of a copyist or an accountant merely. It would have been a mistake occurring in an original and primary act, one in no respect clerical in its character. The character of the act could not have been affected by any subsequent admissions of the assessor, or in the pleadings of the cause.

But the decision in Com'rs v. Brashear, 6 Ohio Dec. Re., 1027, by the same court the same year, discloses the ground upon which the Harrison case rested. There the district assessor described the land in his return as containing 2.67-100 acres, when in fact it was 1.67-100 acres. The court held this to be a clerical error saying: "In this case, by the clerical error of the auditor, the assessor was led to assess real estate having in fact no existence whatever, giving to it a valuation which would not have occurred but for the error of the auditor." The report reads as follows: "The petition was in substance that in 1870, at the decennial appraisement, the auditor of the county in accordance with

his duties, had all the real estate of that ward transcribed to a separate book for the purpose of passing it over to the assessor of the ward, to enable him, under the law, to re-appraise this as well as other property in his district. Adeline Brashear was at that time owner of 1 67-100 acres, making a mistake of one acre." The cause was decided upon demurrer to the petition. The errors in both the Harrison and the Brashear cases arose in the transcribing of record facts, and were therefore pronounced to be clerical.

The promise of the auditor to correct the error after payment of the taxes had been made, cannot confer upon the commissioners a power not vested in them by law.

The statutes (sec. 5848 *et seq.* and 167, Rev. Stat.) afforded the appellant ample remedies and sufficient time to avail himself of them. His failure to do so gives no jurisdiction to the commissioners not conferred by the statute. In this case they had no authority to order a refunding of the taxes; therefore they properly disallowed the claim.

The error complained of, not being a clerical error, the court upon appeal must come to a similar conclusion.

The judgment is therefore for the defendant.

A. J. Cosgrove for appellant.

Davidson & Hertenstein, for defendant.

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## LIFE INSURANCE. 318

[Lucas Common Pleas, October Term, 1899.]

CORA LA RUE JONES v. NORTHWESTERN MUTUAL LIFE INS. CO.

A policy of insurance issued by a Mutual Life Insurance Company had lapsed by reason of non-payment of premiums. It was stipulated in the policy that at each distribution of the surplus, a due proportion of such surplus should be returned to the insured; and also that if, after two or more annual premiums are paid, default shall be made in the payment of any premium, the company will issue a paid-up policy for a certain sum, provided written application is made therefor and the original policy is surrendered within six months from the date of the default. In an action upon such policy, it is held:

1. The failure of the company to properly distribute its surplus, is not under the law or the provisions of the policy a sufficient ground for relief against the forfeiture of the policy.

2. No right to a paid-up policy exists unless the application was made and the original policy was surrendered within six months after the policy lapsed.

PUGSLEY, J.

This action is upon a policy of insurance issued by the defendant on July 16, 1873, whereby in consideration of the semi-annual premium of $17.78, to be paid on or before the sixteenth day of July and January in every year, the defendant insured the life of one Newton D. Jones in the sum of $2,000 for the term of his natural life, the said sum to be paid to the persons designated in the policy in sixty days after due notice and proof of death of the said insured. The policy contains the following stipulations, which I will designate as one and two:

1. "At each distribution of the surplus after two years from the date hereof, a due proportion of such surplus on each and every years'

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[318] See opinion in Jones v. Ins. Co., 40 O. S., 583.

business during the continuance of this policy will be returned to the assured."

2. "And the said company further promises and agrees that if after two or more annual premiums shall have been paid in cash, default shall be made in the payment of any premium or interest on the day it shall become due, it will issue a paid-up non-participating policy for an equitable sum at least equal to the full amount of the ordinary annual premiums so paid, provided this policy be then freed from all indebtedness to the company, and provided also that written application be made therefor, and this policy and all interest therein be surrended within six months from the date of said default."

It is also provided in policy that it is issued and accepted by the parties in interest on the following express conditions:

3. "If the said premiums shall not be paid on or before the days above mentioned for the payment thereof, then and in every such case this policy shall cease and determine, and no premium on this policy shall be considered paid unless a receipt shall be given therefor, signed by the president or secretary, and the payment and receipt of any premium less than a full annual shall not have the effect to continue this policy in force longer than three months in case of a quarterly payment, or six months in case of a semi-annual payment."

4. "In every case when this policy shall cease or become null and void, all payments thereon shall become forfeited to the company except as above provided, and except that in case the person whose life is assured die by his or her own hand and act, the company shall return the premium received."

The premiums on said policy were duly paid by the insured up to and including the premium due on January 16, 1884, but no further payment of premium was made. The premiums falling due on July 16th of each year from 1875 to 1883, both inclusive, were reduced by certain dividends apportioned by the company to said policy during those years, said dividends amounting in all to the sum of $95.35. The insured died on March 17, 1887. Thereafter notice and proofs of death were furnished to the defendant.

The petition contains two causes of action. It is alleged in the first cause of action that when the semi-annual premium fell due on July 16, 1884, the insured by reason of stress of circumstances was unable to pay it, and thereafter up to the time of his death failed to pay the premiums on said policy; that the defendant neglected to distribute the due proportion of the surplus to the insured as agreed in the stipulation No. 1 above mentioned, but on the contrary, it distributed only a small proportion thereof; that contrary to law it placed the same to the credit of a so-called surplus fund, and used the insured's portion of said surplus for the purpose of paying the officers and employees of the defendant enormous salaries, and otherwise wrongfully diverted the same; that the portion of surplus so wrongfully withheld from the insured was sufficient to have paid the premiums from the time of the default up to the time of his death; and thus by reason thereof the defendant is estopped from claiming a forfeiture of the policy by reason of non-payment of the premiums. The plaintiff in the first cause of action asks for judgment against the company for the sum of $2,000 and interest.

In the second cause of action it is alleged that on July 13, 1887, after the death of the insured, the plaintiff made a written application to the defendant for a paid-up non-participating policy, and offered to

surrender the original policy as provided in the stipulation No. 2 above mentioned, and to accept the paid-up policy in compromise of the original policy; that the sum of $391.16 was paid by the insured in annual premiums, and she claims to recover the said sum and interest in case she is not entitled to recover the full sum of $2,000 as claimed in the first cause of action.

The plaintiff attaches to her petition twenty interrogatories to be answered by the defendant under oath.

The answer of defendant contains two defenses, one to each cause of action of the petition. In the first defense all the allegations of the petition relating to the surplus are denied. In the second defense it is alleged that the amount paid by the insured in premiums was the sum of $391.16, less the sum of $95.35 dividends apportioned by the company to reduce the amount of premium payments.

The defendant answers the plaintiff's interrogatories No. 3, 4, 5, 6, 7, 19 and 20, and demurs to all the other interrogatories on the ground that they are immaterial and irrelevant, and not pertinent to the case. The interrogatories demurred to call for information as to the condition and transactions of the company, and its assets and liabilities, during the years when the policy was in force. The plaintiff has filed a general demurrer to the second defense of the answer, and the case has been submitted to the court on these two demurrers.

1st. *As to the demurrer to the interrogatories:* It is admitted that the insured failed to pay the semi-annual premium which fell due on July 16, 1884, and that if the contract between the parties is to be enforced, the policy then ceased and determined, and no action will lie thereon. But it is claimed that the company, while this policy was in existence, never made a proper distribution of its surplus, and that if it is now compelled to pay the dividends which should have been declared on the policy, these dividends will be sufficient to pay all the premiums from the date of the default up to the death of the insured; and for these reasons it is contended that it would be inequitable to enforce the forfeiture of the policy. The particular ground upon which alone the right to relief against the forfeiture of the policy must be based, is, that at the time when the unpaid premiums fell due the company had in its hands money which belonged to the insured, and was applicable to the payment of premiums.

After carefully considering the provisions of the policy and the law governing mutual life insurance companies, as well also as the admitted facts upon which the demurrer was submitted, I am of the opinion that the evidence sought to be introduced by the interrogatories has no tendency to establish this essential ground of relief. In other words, at the time of the default in the payment of the premium, there was no money in the hands of the company which the company or the insured had the right to apply to the payment of the premium.

It is one of the features of a mutual life insurance company that the policy holders are members of the company. They have a voice in the selection of its managing agents, and are entitled to participate in the profits accruing from its business; and it is a general rule applicable to all corporations, that the power of determining whether the corporation has earned a surplus which will warrant the payment of a dividend is vested in its board of directors, and that its stockholders have no legal claim to dividends until after they have been regularly declared. Morawitz on Corporations (2d ed.), secs. 446, 450.

There is no money in the treasury of a corporation belonging to a member which he can recover by suit, or which he can apply in payment of a debt due from him to the corporation, until the proportion of the surplus due to him has been ascertained and declared. Undoubtedly, the corporation may be compelled by appropriate proceedings to distribute profits which it wrongfully retains; but whether it voluntarily makes or is compelled to make a proper distribution of its surplus, in either case dividends are not payable until they are declared. Whether the holder of a policy issued by a mutual life insurance company may on allegations of fraud or mistake in the distribution of its surplus maintain a separate action to compel the company to redistribute its surplus, and pay him further dividends, is a question that was much discussed on the argument. It is claimed that such an action involves a general accounting, in which all the policy holders similarly situated are interested; that they should all be parties to the suit, and that the suit can only be brought in the courts of the state from which the company received its charter. On this question I do not consider it necessary to express an opinion. If it is conceded that such a separate action can be maintained, it does not follow that dividends which are declared and payable long after the default, are to be regarded as money of the insured in the treasury of the company at the time of the default.

The agreement in the policy is, that at each distribution of the surplus, that is, whenever the surplus shall be distributed, after two years from the date of the policy, the insured shall receive his due proportion of such surplus on each and every year's business during the continuance of the policy. There is no attempt in the policy to explain what is meant by the "surplus," nor to define the manner in which the amount of the surplus to be distributed, or the proportion thereof belonging to the policy holders, shall be ascertained. There is no agreement to pay a specific dividend. Under the law the company is required to set apart a certain sum as a "reserve fund," which shall be *not less than* the aggregate net value of all the outstanding policies. It must necessarily rest with the directors of the company to determine the amount of the surplus on each year's business to be distributed, as well as the due proportion thereof to which the policy holders are entitled.

There is therefore nothing in the provisions of the policy changing the general rule that the directors are charged with the duty of fixing the amount of the surplus to be distributed as dividends, and that the policy holder has no claim to a dividend until it has been ascertained and declared.

In this case, what purported to be a distribution of the surplus was made by the company each year during the existence of the policy after two years from the date of the policy, and a dividend was declared and paid to the insured during each of those years. It does not appear that prior to the commencement of this suit the correctness of these dividends was disputed, or that any effort was made by the insured or the plaintiff to obtain any further or larger dividends. To reinstate all the lapsed policies of a life insurance company on the ground that its surplus was not properly apportioned, would ignore the contract between the parties, and seriously embarrass the business of the company, if not entirely defeat the objects and purposes of its existence. If it is conceded that money which ought to have been distributed as surplus, has been wrongfully withheld or diverted by the company, and that this is a breach of its duty under the law, or even of the stipulations of the pol-

icy, it is a breach for which the policy holder has ample remedy, but it cannot relieve him from the positive obligation of his contract to promptly pay the premiums when due, nor from the stipulated effect of his failure to pay. These views are supported by the case of Ins. Co. v. Girard, 100 Pa. St., 172. It was there held that the profits of a mutual life insurance company earned, but not declared as dividends or otherwise, cannot be treated as funds in the hands of the company applicable to the payment of premiums. In that case the premium of $51 fell due on January 14, 1871, and was not paid. A dividend of $87.72 was declared on February 15, 1871, out of the earnings of the company prior to January 1, 1971. The claim was made that the company had in its possession the money of the insured to an amount covering the premium, and that for this reason it would be inequitable to permit the company to forfeit the policy.

The court say:

"It need no argument to show that neither stockholder nor policy holder has any right to the earnings of a corporation until a division or dividend has been declared by its board of managers. At the time the premium matured there were no funds in the hands of the company which the company or the insured had the right to apply to its payment. With the non-payment of the premium on the day appointed, the policy lapsed by virtue of the contract between the parties, unless there was something to take it out of the ordinary rule. We think it would be carrying the rule beyond any recognized principle to hold that the profits earned, but not declared as dividends or otherwise, could be treated as funds in the hands of the company, applicable to the payment of a premium. Non constat that such division ever will be made. That it was subsequently done in this case is not to the point. A change of times or heavy losses might have prevented it. Had the insured called at the office of the company on the fourteenth of January, and demanded the application of the profits to the payment of his premium, the company could then have refused it. No policy holder has the right thus to direct its affairs."

The principle of this decision is recognized in the following cases: Bogardus v. N. Y. Life Co., 101 N. Y., 328; Jackson v. Newark Co., 31 N. J., Law, 280; Uhlman v. N. Y., Life Ins. Co., 109 N. Y., 421; State v. R. R. Co., 6 Gill., 363.

In the case of Continental Life Ins. Co. v. Hamilton, 41 Ohio St., 274, which was an action against the company for refusal to issue a paid-up policy, the plaintiff claimed dividends for the first four years of the policy. The Supreme Court disallowed this claim on the ground, *first*, that there was no evidence that any dividends payable on this policy had been declared for those years, and *second*, that there was no averment in the petition that the company omitted to declare any dividend to which the policy was entitled. The question we are considering was not involved, namely, whether if dividends were not declared, but ought to have been declared, the company is to be regarded as having in its hands money of the insured applicable to the payment of the premiums. In the case at bar dividends on the policy were declared by the company in each of the last nine years during which the policy was in force, and were all paid to the insured. According to the practice of the company and the agreement contained in the policy, these dividends were on the business of the company during the first nine years of the policy, viz.: from 1873 to 1881, both inclusive. The dividends on the

business of the company during the last two years of the policy, namely, 1882 and 1883, were not declared until 1884 and 1885, after the policy had ceased to be in force. Whether an action can be maintained to recover the dividends for those two years it is not necessary to decide. The insured was notified by the company of the amount of the dividend declared in 1884 on the business of 1882, and that on payment of the premium due July 16, 1884, the dividend might be applied in reduction of the premium. By reason of the non-payment of the premium then due, the policy lapsed and was no longer a binding obligation on the company, and the failure of the company to declare and pay a dividend in 1885 on the business of 1883, even if the insured was entitled to such dividend, and the same exceeded the annual premium, would not revive the policy.

Whether in the case in 41 Ohio St., dividends could have been recovered, if it had been averred and proved that the company omitted to declare dividends to which the policy was entitled, was not decided; but assuming that such an action is maintainable, it is not decisive of the question here. This is not an action to recover dividends which were declared, or which ought to have been declared, but an action to recover the full amount of the insurance on a policy which in accordance with the agreement of the parties has lapsed by reason of non-payment of premium. The two cases are entirely different. The provisions of the policy as to payment of premiums and the effect of non-payment are absolute, and in no way dependent upon the agreement of the company to distribute the surplus. The principle of the rule that equity will relieve against a forfeiture if a dividend has been declared on the policy, and the same is in the treasury of the company and applicable to the payment of the premium at the time of its maturity, cannot apply to the facts of this case, and no authority is cited to support the plaintiff's contention.

Numerous decisions were cited in actions brought by the stockholders of an incorporated company to compel the company to declare and pay dividends. These decisions are conflicting, but for reasons already stated, I do not deem it profitable to review them. None of these cases involved the question presented here. Upon the agreed facts, I am of the opinion that the information called for will not be competent evidence on the trial of the case, and that the defendant ought not to be required to answer the interrogatories demurred to.

The demurrer is therefore sustained.

2d. As to the demurrer to the second defense of the answer; The question presented here is whether the plaintiff under the terms of the policy is entitled to recover from the company the amount of the annual premiums paid during the life time of the insured. The plaintiff's claim is based upon that provision of the policy which gives to the insured the right in a certain event to a paid-up policy for an equitable sum, at least equal to the full amount of the ordinary annual premiums paid. All the stipulations and conditions in the policy must be read and construed together. From these it appears that the insured was required to pay the premiums on the policy semi-annually in advance, and by the third and fourth conditions on which the policy was issued and accepted, it is provided that if the premiums shall not be paid when due the policy shall cease and determine, and in such case all payments thereon shall be forfeited to the company, except as above provided. And in a preceding part of the policy it is provided that if after two or

more annual premiums shall have been paid in cash, default shall be made in the payment of any premium, the company will issue a paid-up policy, provided written application be made therefor, and the original policy be surrendered, within six months from the date of such default.

Default was made in the payment of the semi-annual premium due on the policy July 16, 1884. No fact is stated to excuse such default; and without making or offering to make any further payments of premiums, and without seeking to obtain from the company a paid-up policy, the insured died on March 17, 1887, or nearly three years after the default. The application for a paid up policy was made on July 18, 1887.

By reason of the default, under the express conditions contained therein, the policy ceased and determined at the time of the default, and thereafter it was no longer a valid and subsisting obligation against the company. Union Mut. Life Ins. Co. v. McMillen, 24 Ohio St., 67.

In Holly v. Metropolitan Life Ins. Co., 105 N. Y., 437, the court say:

"Punctuality in the payment of the premiums in the case of a life insurance company is of the very essence of the contract, and if a payment is not made when due the company has the right to forfeit it, if such is the contract.

"The rule that a strict construction is to be given to a provision of forfeiture in a policy of insurance, and that it may not be extended for the purpose of working a forfeiture beyond the strict and literal meaning of the words used, applies only when the meaning is doubtful, and the words are capable of two constructions. When the language is plain and unequivocal, and the meaning not in doubt, in the absence of fraud or mistake, the contract must be enforced as it reads."

Notwithstanding such default the insured has, under the stipulations in the policy, a certain right of which he may avail himself. All premiums paid by him prior to the default are forfeited to the company, except that by making a written application and surrendering the policy within six months after the default, he may obtain a paid up policy for at least the amount of the premiums paid by him. Taking all the provisions of the policy together, there seems to be no room for construction. The parties have expressed their agreement in plain and unambiguous language, and no reason is shown why the court should not enforce the contract as the parties have made it. The provision that the policy shall be surrendered within six months after the default to entitle the insured to a paid-up policy must be construed to mean something, and it seems plain that the right to a paid-up policy can only be exercised in the manner and upon the condition to which the parties have agreed.

The great weight of authority is in favor of the contention that effect must be given to the condition requiring the policy to be surrendered within a certain time after the default, and that no right to a paid-up policy exists unless such condition is fulfilled. I cite some of the cases:

Attorney General v. Continental Life Ins. Co., 93 N. Y., 70; Universal Life Ins. Co. v. Whitehead, 58 Miss., 226; Coffey v. Universal Life Ins. Co., 7 Fed. Rep., 301; Knapp v. Homeopathic Mut. Life Ins. Co., 117 U. S., 411; Hudson v. Knickerbocker Life Ins. Co., 28 N. J. Eq., 167: Bliss on Life Insurance (2d ed.), sec. 188.

There are certain authorities in Kentucky and Maine, which seem to hold a contrary rule:

St. Louis Mut. Life Ins. Co. v. Grigsby, 10 Bush., 219; Montgomery v. Phoenix Mut. Life Ins. Co., 14 Bush., 51; Chase v. Phoenix Mut. Life Ins. Co., 67 Maine, 85.

These cases are not only in conflict with the decisions already cited, but they are criticised by numerous other courts, while discussing similar questions, as will appear in the following cases: Knickerbocker Life Ins. Co. v. Dietz, 52 Md., 16; Smith v. Ins. Co., 2 Tenn. Ch., 728; Smith v. National Life Ins. Co., 103 Pa. St., 177; Oberer v. Manhattan Life Insurance Co., 20 Fed. Rep., 886; Russum v. St. Louis Ins. Co., 1 Mo. App., 228; Knickerbocker Life Ins. Co. v. Harlan, 56 Miss., 512.

The decisions of the Supreme Court of this state support the view here taken. Bussing v. Ins. Co., 34 Ohio St., 222; Ins. Co. v. Robinson, 40 Ohio St., 270.

In 34 Ohio St. the policy contained a provision that after two or more of the annual premiums had been fully paid, the policy might be exchanged for a paid-up policy for a certain amount, and also a condition that if any premium should not be paid when due, the policy should be null and void, and all payments made thereon should be forfeited to the company. It was held that the right of the assured to exchange the policy for a paid-up policy was limited to the time during which the policy was in force. It is true in that case that the forfeiture provided for by the policy was absolute. In the case at bar the forfeiture is absolute unless the insured shall perform a certain condition. It is difficult to see any reason for enforcing the forfeiture according to its terms in the former case, which does not exist in the latter case.

In 40 Ohio St. the policy provided for payment of an annual premium, and contained a condition that in case of default the company will issue a paid-up policy, provided application therefor is made within one year after such default. In commenting on this condition the court say:

"It granted to an insured who was guilty of but one default as to one annual premium, the right to receive a paid-up policy, provided he made demand before a second default."

See also, Phoenix Ins. Co. v. Baker, 85 Ill., 410; People v. Widows Ins. Co., 15 Hun., 8; Ewald v. N. W. Mut. Life Ins. Co., 60 Wis., 431.

But it is claimed by counsel for plaintiff that the language of the policy in this case is peculiar, and takes the case out of the rule laid down by the authorities cited. The provision is, "if default shall be made in the payment of any premium, the company will issue a paid-up policy." The argument is, that the words "any premium" refer to any of the semi-annual installments of premium provided for by the policy during the life of the insured, and not alone to the first premium in the payment of which there is a default; that although there was a default in the payment of the premium due on the sixteenth of July, 1884, there was also a default in the payment of the premium due on January 16, 1887, and the application to the company for a paid-up policy having been made within six months after the latter date, that the application was made in time. It is said that to restrict the default to a single premium the language should be "if default shall be made in the payment of a premium." I cannot believe that the language referred to is susceptible of such a construction. By its terms the policy ceases and determines on the non-payment when due of the stipulated premiums. Upon the non-payment of any premium the policy ceases to have any binding force or effect except as to the stipulations therein which are made to depend

on such non-payment. There is no obligation on the part of the company to receive premiums thereafter, and no default can be said to occur in the payment of such premiums. When the policy lapses and becomes void, no rights of either party can be founded upon the supposition of its continued existence. The words "any premium" are appropriately used when restricted, as they must necessarily be, to a single premium. The company may waive a default in the payment of a premium, or the circumstances may be such that it would not be equitable on the part of the company to insist on the default, in which case the policy would not lapse, but be subject to forfeiture in case of a subsequent default. But there can be only one default which shall absolutely work a forfeiture of the policy, and that may be in the payment of any premium, whether the the first or last.

Examination of the authorities cited will show that the language referred to is not peculiar to this policy. In Ins. Co. v. Robinson, *supra*, the language is "if default shall be made in the payment of any subsequent premium when due." In 58 Miss., 226: "Upon default in the payment of any premium." In 7 Fed. Rep., 801: "In case of default in any payment of premium." In 99 N. Y., 70: "If assured shall fail to pay any further premium when due." In a large number of the other cases, including those cited by plaintiff, similar language is used, but in none of them did this claim occur to court or counsel.

This question is raised on a demurrer to the second defense of the answer. Under the rules of pleading a demurrer searches the record, and as the facts stated in the second cause of action in the petition to which the second defense is interposed, do not in my judgment constitute a cause of action, the demurrer is overruled.

O. S. Brumback, for plaintiff.

Sayler & Sayler, for defendant.

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## SUNDAY LAWS. 323

[Hamilton Common Pleas, 1889.]

GEORGE SPAITH v. STATE OF OHIO.

1. In a prosecution had under section 7033, Rev. Stat., known as the "Sunday Common Labor Law," it cannot be ruled as a matter of law, that shaving on Sunday is not a work of necessity.
2. An information framed under this section, which charges no specific act of shaving, is bad for uncertainty.

OUTCALT, J.

This a proceeding in error, prosecuted by the plaintiff in error to reverse the judgment of the police court, the prosecution being had upon that section of the statute which is commonly denominated and known as the Sunday Common Labor Law. The affidavit and information—which are practically the same—alleged that George Spaith, being a person over fourteen years of age, with force and arms, at the city of Cincinnati aforesaid, did unlawfully engage in common labor, to-wit: shaving—on Sunday, the twenty-eighth day of July, in the year 1888—said common labor not being a work of necessity or charity, contrary to the

formal statute in such case made and provided, and against the peace and dignity of the state of Ohio.

Trial was had upon a plea of "not guilty;" testimony was heard, and judgment of "guilty" was rendered. Subsequently a motion for new trial and arrest of judgment was filed, which by the consideration of the court below was overruled, and this is assigned for error.

Looking first, therefore to the information upon which the prosecution is founded to ascertain whether or not an offense is charged against the laws of the state of Ohio, I am clearly of opinion that the information itself does not set out in words or in terms an offense against any law of the state of Ohio in that no specific act of labor is charged. To allege that on a certain day, viz., on a Sunday, the defendant did engage in common labor, viz., shaving, is so indefinite and so uncertain as to render such an information bad for such uncertainty. It is simply in keeping with the well known principles of pleading in criminal law, and upon a very cursory reading of this information, it must be apparent that the information is bad for the reason stated. For this reason, necessarily, the judgment must be reversed, and I might stop here by remanding the case to the court below; but since it is desired that a decision in the form of an opinion from this court upon the real question in issue, viz, whether or not the act of shaving on Sunday is such common labor as to bring it within the terms and provisions of the statute, or whether or not it is one of the exceptions prescribed by that statute, is sought and desired by both sides, I have seen fit to express an opinion upon that issue.

The act under which this prosecution is had forbids common labor on Sunday, but excepts works of necessity and charity. Assuming therefore, that there is a proper legal charge made in this information, viz., that a specific act of common labor was charged in the information, let us inquire whether or not that act, if such had been alleged, would be a work of necessity or charity coming within the exception prescribed in this statute.

In the case of McGatrick v. Wason, in the 4 Ohio St., Reports, 563, at page 571, in the opinion rendered in that case by Judge Thurman, this language is used: "In answering this question" (viz., whether or not it is a work of necessity within the meaning of the act), "we must always keep in mind, that it is no part of the object of the act to enforce the observance of a religious duty. The act does not, to any extent, rest upon the ground that it is immoral or irreligious to labor on the Sabbath any more than upon any other day. It simply prescribes a day of rest from motives of public policy and as a civil regulation; and as the prohibition itself is founded on principles of policy, upon the same principles certain exceptions are made, among which are works of necessity and charity."

In other words, to my mind this act prescribes, as intimated in this opinion, a civil regulation, not seeking to enforce a religious duty, not seeking to enforce or deal with anything spiritual, but with things solely and entirely temporal; since the constitution prohibits any legislation looking to religious tests or preferences.

If such be the case, each act of labor, in determining whether or not that act was an act of necessity or charity, must depend upon the circumstances which surround the performance of that act.

It is contended upon the part of the plaintiff in error that because this work—viz., of shaving—is an incident to the operation of the Gib-

son House, in which the shop is located, that it is such work incident to the emergency or exigency of that trade or calling as to render it a work of necessity. I cannot agree with that proposition of counsel. The necessity does not spring from the motives which induce the plaintiff in error to prosecute his work, but from other causes, viz., originating in the necessity or non-necessity of the person who has the work performed. Trade, professions and business of almost every character have certainly undergone great changes in the time since the rendition of the opinions of courts, which have been cited to the court, holding that shaving was not a necessity, and I am clearly of the opinion that it would be difficult, if not erroneous, for the court to undertake to so draw the line as to say that shaving was not a necessity.

The most recent case, which I think explains the law, is that of Stone v. Graves, found in 145 Mass. Reports, at page 353; the decision rendered in November, 1887. The syllabus of that case is: "It cannot be ruled, as matter of law, that the work of shaving an aged and infirm person in his own house on the Lord's day is not a work of necessity."

This it seems was an action upon a contract for services rendered to the intestate for a period of time prior to his death, which work, it was admitted and proven—at least the majority of it—had been performed upon the first day of the week, viz., on Sunday; and that claim was resisted upon the ground that it was not a work of necessity, and that therefore no recovery could be had.

Judge Field, in rendering the opinion in the case, uses this language: "It appears that Graves, the defendant's intestate, was an old man, whose shoulder had been injured, and who could not well shave himself; and that the work of shaving him was done by the plaintiff, not in a public shop, but in the house of Graves. If Graves wished to be shaved on the Lord's day in his own house, we cannot say, as matter of law, that it was not morally fit and proper that the plaintiff should shave him."

And in the authorities cited from Indiana and from Tennessee and other states in which this question has arisen and been determined, that phrase has appeared in several cases, viz., "what may be morally fit and proper" "moral fitness and propriety of things." I do not think it is difficult to understand the exact meaning of that phrase, for as stated in Judge Thurman's opinion in the 4 Ohio St., we have constantly to keep in mind that this is a civil regulation, and not a religious regulation, and therefore it is not a question of morals nor of theological or religious theories, but is rather a regulation which seeks to provide and prescribe a day of rest from the ordinary avocations of men engaged in trade or professions. This is the rule of law, and it is the extent to which the law can go, by saying that it can not be laid down as a rule of law that shaving is or is not a necessity.

During the argument it was contended by counsel for the defendant in error that there were no exceptions, but upon illustration being suggested by the court it was readily seen that there were exceptions to it, and it is perfectly apparent that there must be. It is just as morally fit and proper that a man should appear either upon the streets, in his household or in the house of God, upon Sunday in a cleanly and fitting appearance, as it is that he should decently, quietly and soberly deport himself.

There are innumerable cases whereby a necessity will arise for a man to be shaved on Sunday. The question whether or not it is a

necessity for that man or the other to be shaved on Sunday, is not a thing for the court in advance to rule upon, but the necessity of each case must arise with the case itself as it presents itself to the barber who is called upon to perform that common labor.

It is, therefore, the judgment and opinion of the court upon this question that there can be no rule or order made by the executive authorities of the city, as was made in this case which brought about this prosecution, that will be in keeping with the spirit of this law, which will compel the closing up of barber-shops upon Sunday. There is no law which compels them to be open; there is no law which compels them to remain closed. The question of the work performed and to be performed on Sunday, the necessity for that work as each presents itself, is a question which must be at least left with the barber himself. If he performs labor which is not necessary upon Sunday, he renders himself, of course, amenable to the provisions of this law; but, as I have intimated, since there are exceptions which make it a necessity, there is every reason why the necessity should be provided for, viz., by the keeping open of the shops.

The case might well have closed upon the finding that there was error in the record which would cause a reversal of the judgment. I am not even permitted in this case to find whether or not there was a necessity, for the reason that the information itself does not charge any specific act, and from the information alone, or even from the testimony itself, there is nothing to indicate upon what act of the barber this prosecution was founded.

Judgment reversed, and plaintiff in error discharged.

Chas. W. Baker, for plaintiff in error.

M. B. Hagans & P. J. Corcoran, Pros. Att'y. for defendant in error.

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## 355 JURY—APPEAL—JUDGMENT.

[Belmont Circuit Court.]

ANONYMOUS v. B. & O. RY. CO.

**Under sec. 6547, Rev. Stat., a jury is not demandable by the plaintiff until after the defendant appears, and hence, in a case involving not over $20. A jury being had plaintiff's demand, in order to exclude appeal under sec. 6562, defendant not appearing, a judgment on the verdict is void.**

A nice question of practice was decided some time ago by the circuit court of Belmont county, to which our attention has just been called. Section 6562 Rev. Stat. provides that "If either the plaintiff or defendant in his bill of particulars claim more than $20, the case may be appealed to the court of common pleas, but if neither party claimed a greater sum than $20, and the case is tried by a jury, there shall be no appeal."

Now, the section which provides for jury trials before a justice of the peace, is sec. 6547, Rev. Stat. which reads:

"In all civil cases after the appearance of the defendant, and before the court shall proceed to inquire into the merits of the case, either party may demand a jury to try the action, which shall be composed, etc."

In a case before a J. P. in Belmont county, for less than $20, Judge Collins, Gen. Counsel of the B. & O. Railroad, as counsel for defendant, did not appear. Trial was had before a jury on the demand of plaintiff, and verdict and judgment was rendered for the plaintiff. Judge Collins took the case on error to the common pleas, claiming that under sec. 6547 a jury could only be demanded by the plaintiff after the appearance of the defendant, and defendant in this case having failed to appear, no jury could be demanded and the judgment was therefore void. The common pleas decided against him, but on error to the circuit court that court took the position of Judge Collins and reversed the judgment below.

Of course, if defendant makes an appearance, nothing will save his right to appeal in such cases, if the verdict should be against him, but the filing of a counter-claim for an amount of over $20.—[Editorial.

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## CHURCH PROPERTY. 367

[Perry Common Pleas, 1889.]

THOMAS L. GRIGGS ET AL. v. DAVID MIDDAUGH ET AL.

1. Property was held in trust for a certain sect (The United Brethren in Christ), and at a general conference, which constituted the highest authority in the sect and amended constitution and revised confession of faith were adopted.

A small part of the general conference seceded, and claim to be the true representatives of the church, and demand the benefit of the property. *Held:*

1. The civil courts have jurisdiction only in case of a perversion of trust; on matters of form and discipline the decision of the supreme authority of the church is binding on the courts.
2. It is only in cases of departure in essential matters of faith or organic law that the courts can look to see if the body has transcended its powers, and the departure must be obvious.
3. Where such changes do not conflict with any formal doctrinal matter, nor with the substance of the faith, and are adopted in the method provided for by the constitution of the church, the schismatics cannot obtain aid from the courts.

SLOUGH, J.

The question involved in this case is one of title to certain real estate described in the petition, which was purchased by the Church of the United Brethren in Christ in 1851, and the title conveyed in trust to certain persons named in the deed and their successors in office forever for the use of that church.

It is conceded that the title to the property in controversy is held by the church at large; that it does not belong to the local congregation at Junction City, this county; and that it is held by the trustees of that congregation for said church at large. Each of the contending parties claims to be lawful trustees, and to hold it for the parties respectively represented by them as the true Church of the United Brethren in Christ.

The controversy arose because of certain action of the general conferences held in the years 1885 and 1889, (the latter at York, Pa., May, 1880), respecting the proposal and submission by the former and the adoption by the latter of an amended constitution and a revised confession of faith for the church.

After participating several days in the proceedings of the last named conference, and discussing and voting upon the adoption of those instru-

ments, fifteen of the one hundred and thirty delegates composing that conference with Bishop Wright as one of their number at their head, because of the adoption of those instruments (by the votes of one hundred and ten delegates for, and the votes of only twenty delegates against them), withdrew from that conference, and constituted themselves into a separate "conference" at another hall in another part of the city of York. The general conference (of 1889) proceeded and completed its business, and the separate "conference" proceeded and completed the business that came before it. Each of these bodies, with their respective adherents, claims to be the true Church of the United Brethren in Christ, and as such entitled to the property of the church for the uses for which the church holds it.

In this case the plaintiffs represented the general conference of 1889 and its adherents, and the defendants represent those who seceded from that general conference and their followers; and the contest is as to which of these contending parties shall have the church property above referred to. The plaintiffs claim that the defendants, and those whom they represent, are no longer members of the Church of the United Brethren in Christ; that they have put themselves, or have been put, without the pale of that church; and that, therefore, they have no just or lawful claim to the title or use of the property of the church. On the other hand, the defendants claim that the church, as represented by the plaintiffs, because of its alleged perversion of the trust upon which the church property is held, has no rightful claim to the property, or its further use; and that the property and its use should be decreed to the church as represented by the defendants. Hence, the main question in this case is: Has there been by the church, as represented by the plaintiffs, a perversion of the trust upon which the Zion Church property at Junction City was granted to the Church of the United Brethren in Christ? It is claimed by the defendants that this alleged perversion of the trust results from the action taken by the above-mentioned general conferences of 1889, respecting the adoption of the amended constitution and the revised confession of faith for the church, which action the defendants allege was unconstitutional, illegal, and arbitrary. Now, does the action of these general conferences in the matters specified work a perversion of this trust? Civil courts can have jurisdiction of a case like this only upon the question of the perversion of a trust. In the inquiry whether there has been a perversion of a trust such as is involved in this case, civil courts may look into the question whether an ecclesiastical body, like the general conference of this church, has, in its action, transcended its powers or jurisdiction as a legislative, judicial, or executive body. Civil courts may, as this court apprehends the law, look into and determine the question whether there has been, by the action of such body, a substantial and evident departure in essential matters of faith: since such action would affect the title to the property held by the church for its uses. But such departure must be from essential faith, and must be obvious—not reasonably open to controversy. For illustration: Should a general conference of the church strike out of its confession of faith the second and third persons of the Holy Trinity, so as to make the faith Unitarian, here would be such a substantial and obvious departure as would work a perversion of the trust upon which the church property is held.

The civil court may examine and say whether the general conference of this church proceeded in an obviously illegal and arbitrary manner—

in a manner evidently in disregard of its plain organic law (its constitution)—to amend its constitution and change in essentials of doctrine its confession of faith. This court is of the opinion that amendments to the constitution and changes in the essentials of the faith should be made agreeably to the organic law. But the general rule is that the doctrinal decisions and judicial constructions (of church constitution and legislation under it) of the highest judicatory of a church are binding upon the civil courts, and the latter having no power to review or reverse them. Upon this point the following authorities are cited:

In the case of Watson v. Jones, decided by the Supreme Court of the United States, and reported in 13 Wallace, 679 to 733, the court on page 727 of the opinion says: "In this class of cases we think the rule of action which should 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 preponderating weight of judicial authority, is that whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunal must accept such decision as final and as binding on them in their application to the case before them."

Farther along in the opinion the court says: "The right to organize voluntary religious association to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed."

There is much more said in the opinion in that case that bears upon the determination of the questions in this case. The same rule is laid down by High on Injunctions (last edition). section 310, etc.; 45 American, 449; 41 Pennsylvania State, 9; 45 Missouri, 183; 89 Indiana, 136. Harrison v. Hoyle, 24 Ohio St., 254; Gaff v. Greet, 88 Ind., 122; Potter on Corporations, vol. 2, 709, etc., 718, 720; Walker v. Wainwright, 16 Barb., 486; Robertson v. Bullions, 9 Barb., 64; German Ch. v. Seibert, 3 Pa. St., 282; Shannon v. Frost, 3 B. Mon., 253; Gibson v. Armstrong, 7 B. Mon., 481; Hale v. Everett, 53 N. H., 2; Terraria v. Vasconce, 23 Ill., 403; Harmon v. Dreher, 1 Speer Equity, 87; German Ref. Ch. v. Seibert, 3 Barr., 282; McGinnis v. Watson, 41 Pa. St., 1; Chase v. Cheney, 58 Ill., 509.

"The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions and of all matters which concern the doctrines and discipline of the respective denominations to which they belong.

* * * * * * * * *

"Where a schism occurs in a ecclesiastical organization which leads to a separation into distinct and conflicting bodies, the respective claims of such bodies to the control of the property belonging to the organization must be determined by the ecclesiastical laws, usages, customs, principles, and practices which were accepted and adopted by the organi-

zation before the division took place." The White Lick Quaker case, 69 Indiana, 136.

"The principle may now be regarded as too well established to admit of controversy, that in case of a religious congregation or ecclesiastical body, which is in itself but a subordinate member of some general church organization, having a supreme ecclesiastical judicatory over the entire membership of the organization, the civil tribunals must accept the decisions of such judicatory as final and conclusive upon all questions of faith, discipline, and ecclesiastical rule." High on Injunctions, vol. 1, section 810, 374.

Judge Owens, in delivering the opinion of the Supreme Court of Ohio in the case of Mannix v. Purcell, 46 O. S., 102. "It has been held that where a religious body becomes divided, and the right to the property is in conflict, the civil courts will consider and determine which of the divisions submits to the church local and general. This division is entitled to the property. In determining which of the divisions has maintained the correct doctrine, the findings of the supreme ecclesiastical tribunal of the denomination in question are binding upon the civil courts." [See authorities cited by Judge Owens in that case.]

Now, the Church of the United Brethren in Christ is a perfectly organized society. It has its congregations, its places of worship and its burial grounds, etc., (its property), its pastors, its bishops, its quarterly conferences, its annual conferences, and its general conference of the church is its supreme legislative, executive, and judicial body. The church possesses the element or quality of unity and the power of perpetuity, and such a society can no more be affected by the withdrawal of a faction of its members than the universe can be destroyed by the disappearance or extinguishment of some of heaven's lesser luminaries. The general conference of the church is—to quote and adopt from the decision of Chief Justice Gibson in the great Presbyterian Church case —"a homogeneous body, uniting in itself, without separation of parts, the legislative, executive, and judicial functions of the church government, and its acts are referable to one or the other of them, according to the capacity in which it sat when they were performed." Commonwealth v. Green, 4 Wheat, 531.

All persons becoming members of the Church of the United Brethren in Christ not only accept its constitution and confession of faith as they are when they enter the church, but they either expressly or tacitly consent to such changes in either as this supreme authority of the church shall lawfully make.

Now, what of the general conferences of 1885 and 1889 of this church, and what of the action of each respecting the amended constitution and the revised confession of faith? It is admitted that these general conferences were lawfully constituted. No question is or has been made touching the validity of the election or credentials of the delegates respectively composing these general conferences. On the contrary, it is and has been conceded on all hands that the delegates to these conferences were regularly and lawfully chosen, certified and commissioned. It is also practically admitted that the delegates to the general conference of 1889 were elected with especial reference to the action taken by the general conference of 1885, and the action to be taken by the general conference of 1889 respecting the amended constitution and the revised confession of faith. The constitution of 1841 (in force up to 1889) expressly provided for its amendment; and it is granted in argument by

counsel for defendants that changes even in the essentials of the faith may be made after changing the constitution of the church so as to provide the mode or manner of altering the confession of faith. This court is of the opinion that the amendment of the constitution and the revision of the confession of faith (which were made) could lawfully be made at the same time. But it is contended that the constitution of 1841 provided that it might be amended only upon "the request of two thirds of the whole society," and that the amended constitution and the revised confession of faith were made and adopted without the required request of two-thirds of the whole society, indeed without any request of the society. Now it is true, either in law or in fact, that the constitution was amended and the confession of faith revised without the request of two-thirds of the whole society that the same be done? Is not the precise contrary true, that both were done regularly and lawfully upon the express request of two-thirds of the whole society? What was done by the general conference of 1885 toward the amendment of the constitution and the revision of the confession of faith? Why, the general conference of 1885 appointed a committee to formulate an amended constitution and a revised confession of faith, to be submitted to a vote of the entire membership of the church at an election to be held after full and due published notice thereof and of the nature of the proposed amendment and revision. Such proposed amended constitution and revised confession of faith, together with notice of such election, were fully and duly published, and such election was regularly and duly held. The clergy and the press of the church made diligent and urgent effort to secure a full vote of the entire membership of the church. All had opportunity to vote, and the election was in every way free and fair. The result of the election was: For the amended constitution and the revision of the confession of faith, 50,685 votes; against, 3,659, being 14 votes for to one vote against. Certainly the members who abstained from voting have no just cause to complain of this result.

What followed this election? Were the proposed amended constitution and revised confession of faith at once declared adopted? Why no. They, with the vote thereon, were fully and duly reported to the General Conference of 1889, and the same were, by that body, with full freedom, duly considered, discussed, voted upon, adopted, and declared as the amended constitution and the revised confession of faith of the church, and, as ordered by that body, the same were published and proclaimed by the bishops of the church as its amended constitution and revised confession of faith. Their adoption, etc., was by a vote of 110 delegates for to the vote of twenty delegates against.

Now, here was a positive, express request to the general conference of 1889. Certainly no valid objection can be made to this convenient and proper form of request. But defendants complain that of the 208,000 members of the church only about 54,000 voted at the election, whereas the constitution of 1841 required the request of two-thirds of the "whole society" to authorize amendment of the constitution, etc.; and that, since 54,000 votes are not two-thirds of 208,000 votes, therefore, the request required by that constitution was not made. The trouble with the position of the defendants upon this point is that it is not well taken. The practical and lawful construction of the provision in the constitution of 1841 for its amendment is that if the form of expressing such request is by a vote of the membership of the church at an election held for that purpose, "two-thirds of the whole society" means in law

two-thirds of all those voting at such election. To repeat: Largely more than two-thirds of all the members voting at the election voted intelligently and understandingly for the amended constitution and the revised confession of faith. This was in law the valid request of more than "two-thirds of the whole society." This is according to the legal and only practical rule in such cases. It is held by the courts that where an amendment to a state constitution is submitted to a vote of its electors for adoption, under a requirement that a majority of all the votes in the state must be for such amendment to affect its adoption, that such requirement is complied with if at such election a majority of all the electors voting, vote for such amendment. The same rule obtains respecting elections held in counties and in townships for the adoption of acts of the state legislature. See the following authorities: St. Joseph v. Rogers, 16 Wallace, 644 and 663–4, and authorities there cited; Wardens of Christ Ch. v. Pope, 8 Gray, 140–3; Richardson v. Society, 58 N. H., 188–9; State v. Swift, 69 Ind., 505; Green v. Weller, 32 Miss., 850; Prob. Anit. cases, 24 Kans., 700; Dayton v. St. Paul, 22 Minn., 400; Miller v. English, 21 N. J., 317; Mad. Av. Ch. v. Bap. Ch. 2 Abb. Pr. (N. S.), 234; 95 U. S., 369; 1 Sneed (Tenn.), 690–692; 20 Ill., 159–163; 20 Am Corp. cases, 93, 48 Ill., 262; 10 Minn., 87; 22 Minn., 53.

Said Judge McIlvaine in Harrison v. Hoyle, *supra*. "All members of the society are included, because, if not present, participating in the action of the meeting, their absence was voluntary, and hence there is no ground for complaint."

That the constitution was lawfully amended is, in view of the authorities, quite beyond controversy, and that the revised confession of faith was made and adopted in accordance with the organic law of the church seems to the court equally indisputable. In the judgment of the court the revision makes no changes in the essentials of the old confession of faith. The modifications made are not substantial or material, but are merely improvements in the form and style of expression. The substance of the faith remains the same. Certain articles were added to the old confession of faith, but these added articles only embody and express doctrinal matters, not set forth in the old confession of faith, of not only common but of universal belief in the church ever since its foundation. There is nothing whatever in any of these added articles that to any extent, clashes or conflicts with any doctrinal matter in the old confession of faith.

The records of the church, which are in evidence, show that up to the general conferences of 1885 and 1889, no constitution, or confession of faith, or rule of discipline, was ever submitted for adoption to a vote of the membership of the church. Prior to this general conference, all such matters were acted upon as within the absolute control of the general conference—all was formulated and adopted by that body alone. But the general conferences of 1885 and 1889, more clearly appreciating their high duties, and more regardful of the rights and consciences of all the members of the church, lawfully and very properly prepared the way and provided the means of taking the sense and voice of the whole membership of the church upon the questions of amending its constitution and revising its confession of faith; and having lawfully taken the sense and voice of the membership upon these questions, the general conference of 1889 proceeded accordingly, and in a constitutional manner, to adopt and declare the amended constitution and the revised confession of faith, and the bishops of the church, as lawfully authorized,

published and proclaimed the same as such. In taking this action, the clause in the constitution of 1841, providing for its amendment, was construed by the general conferences of 1885 and 1889, as they, and each of them, had the lawful right to do; and their decision on that point being clearly within their powers and manifestly correct, is final, and binding upon the civil courts.

In all the acts and proceedings of these general conferences, respecting the formulation, submission, and adoption of the amended constitution and the revised confession of faith, they each proceeded and acted within their constitutional and lawful powers; and they having determined all questions concerning them, it is not within the province or power of a civil court to review or reverse their decisions.

Indeed this court feels called upon to say, in view of all the evidence and the law of the case, that this church has done its work in these matters in not only a lawful but christian manner, and with a degree of care, wisdom, and correctness commendable to the churches of the world.

The defendants with Bishop Wright and his other followers having withdrawn from the church, and their names having since been stricken from the rolls of membership thereof, they, the defendants, have no rightful claim to the property involved in this litigation, but the plaintiffs are entitled to the same for the uses of the church, and the decree of this court to that effect is accordingly entered in favor of the plaintiffs.

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## FALSE PRETENSES. 371

[Highland Common Pleas, 1889.]

ANONYMOUS.

**Where two or more persons are engaged in a criminal design, and while so engaged one obtains from another money upon a false pretense, such false pretense relating to and being in pursuance of the criminal design in which such persons are together acting, such false pretense is not indictable under the law of Ohio making the obtaining of anything of value by means of any false pretense a crime.**

The grand jury, being in session in Highland county, came into court and asked instruction upon the following question:

"Where two or more persons are engaged in a criminal design, and while so engaged one obtains from another money upon a false pretense, such false pretense relating to and being in pursuance of the criminal design in which such persons are together acting, in such false pretense within the law of Ohio making the obtaining of anything of value by means of any false pretense a crime?"

In response to this question the following instruction was given by

HUGGINS, J.:

"*Gentlemen of the Grand Jury:*

"The criminal law of Ohio is not for the protection of law-breakers in and about the concoction and carrying out of schemes to break the law. When men band together to prey on society by violation of the laws made to protect society, and while so engaged, and in carrying on and in pursuance of a criminal scheme prey upon one another, the law

leaves them where it finds them. Suppose A should make this proposal to B: 'If you will give me one hundred dollars I will tell you where there is a thousand dollars concealed in the house of C, and I will also tell you how you can safely enter C's house and carry away this money without detection.' B accepts the offer and pays A the one hundred dollars, who then tells B where the money is concealed and gives the directions as he had promised. B then breaks into the house of C to steal the money, but finds none. A knew there was none, but had falsely pretended there was, to get one hundred dollars from B. Now here is a false pretense, made with intent to defraud, about what is claimed to be an existing fact, which false pretense is the sole inducing cause of the payment of the one hundred dollars. All the ingredients, as usually stated, of the crime of false pretense are present. Yet to say that a court of justice would sit to try such a cause, and that A can be indicted and tried and perhaps convicted, with B for a prosecuting witness, for a false pretense made in pursuance of such a criminal conspiracy would shock the natural sense of justice in rightly constituted minds. To so hold would to a certain extent throw around crime the protection of the law. For if in such a case one criminal can appeal to the law against another, it puts it in the power of one criminal to hold the law over the head of another in furtherance of a joint criminal design. I do not think such can be the law of Ohio."

The question responded to in the foregoing instruction seems to be new in this state, and the cases elsewhere seem to be conflicting. Some cases are collated in the American and English Encyclopedia of Law vol. 7.

In New York and Wisconsin the law seems to be as stated in the instruction. People v. Stetson, 4 Barbour, 151; State v. Crowley, 41 Wis., 271. In Massachusetts, Indiana, Michigan and Texas cases are cited as opposed. Perkins v. State, 67 Ind., 270; People v. Heussler, 48 Mich., 49; May v. State, 15 Texas Appeals, 45. The Massachusetts, Indiana and Texas cases when analyzed seem to be distinguishable from the Michigan case, which alone seems fully to oppose the New York and Wisconsin cases.

The matter under consideration by the Highland county grand jury which induced the question is understood to be as follows: G and B, two "sprinters," had agreed to run a footrace, and had bet a sum of money on the result, and put up one hundred dollars each forfeit money. G thus represented to one K, who was one of his backers in the race, that there was a private arrangement between himself and B, the other "sprinter," that he (G) was to run the race, and showed K letters from B to that effect. By this and other devices K was induced to believe that G would certainly win the race, and to bet largely on G. But instead of G winning the race B won it, and that had been the arrangement. G and B divided the money won. B was arrested and bound over to court for the false pretense of representing that G was to win the race, and thereby inducing K to bet and lose his money.

## DAMAGES FROM A SKY ROCKET. 384

[Superior Court of Cincinnati, General Term, November, 1889.]

ANNA CAMERON, ADM'X, v. JOHN HEISTER AND MICHAEL HEISTER.

1. Where suit is brought against a father and minor son, for damages sustained by the wrongful acts of the son, and the circumstances surrounding such wrongful act, tend to show that the father encouraged, approved and promoted the act, even though the evidence offered by plaintiff may not be sufficient in the mind of this court, to establish such complicity on the part of the father, yet it is evidence that ought to be submitted to the jury, and it is error to enter judgment of non-suit as to the father.
2. The discharge of fire rockets on the streets of a populous city is a nuisance *per se*, and all concerned in the commission of such nuisance are liable for any damage which may be occasioned thereby.
3. When the city council has by ordinance made the firing of rockets, weighing more than one pound, a misdemeanor punishable by fine or imprisonment, this is not to be regarded as a license to discharge a rocket of less weight than one pound, without rendering any party liable, as at common law, for the commission of a nuisance and the consequences thereof.

NOYES, J.

The plaintiff in this action sought to recover damages for the death of her husband, Robert Cameron, alleged to have resulted from injuries received on the night of July 3, 1889, while in his dwelling at Court and Linn streets, Cincinnati, Ohio, opposite the residence of defendants, through being struck by a rocket discharged on the pavement in front of the Heister residence by Michael Heister, a minor. It is also alleged that John Heister, the father of Michael, authorized, directed, encouraged, and permitted the discharge of said rocket, for the purpose of sport and without necessity, at the time and place named.

On the trial before the judge at special term and a jury, at the close of the testimony on behalf of plaintiff, the court granted a motion to non-suit and arrest the testimony as to defendant John Heister, and an order was entered dismissing him from the action, to all of which plaintiff at the time duly excepted. Thereupon a juror was withdrawn, and the cause continued as to defendant, Michael Heister.

It is here claimed that there is error in the record and proceedings in this case, in the action of the court below in arresting the testimony from the jury as to the defendant John Heister, and dismissing him from the action.

The evidence offered by the plaintiff is, in substance, as follows:

John Heister kept a saloon and residence at the southeast corner of Court and Linn streets. His family consisted of his daughter, aged fifteen, and the defendant, Michael, aged eighteen. The daughter was housekeeper for the family, her mother being dead, and William, who was employed away from home during the day, assisted his father in the saloon at night. On the night of July 3, 1888, both the father and son were present at the saloon and residence. Some time during the evening, the son took some money from the money drawer, went to a grocery, and bought some fireworks, including fire crackers and rockets, brought them to the saloon of his father and laid them down in a conspicuous place. The father was in and out the whole evening. About half past eleven o'clock, the father said to the son, you can go out now and enjoy yourself. The saloon was brilliantly lighted and decorated.

The daughter had remained up, as though expecting some kind of entertainment. About the hour named, the daughter took a chair to the pavement in front of the house, and it was placed in position by her or her brother, and, thereupon, the brother placed the rocket on the chair and discharged it, it entering the window at which Cameron was seated, striking him on the side of the head. John Heister had been sitting in front of the saloon just before the discharge of the rocket, which it is claimed killed the plaintiff's intestate.

Taking all these circumstances together, can it be said that there is not a scintilla of evidence tending to show that the discharge of the rocket by the son was with the knowledge, consent and encouragement of the father? While we do not say that the evidence offered by the plaintiff was sufficient to prove the co-operation of the father, we are of the opinion that there was enough to warrant its submission to the jury, and that the court erred in the judgment of non-suit as to defendant John Heister.

Another important question is raised in this case, namely, as to whether or not a discharge of fireworks on the public streets of a municipal corporation is a nuisance *per se*, so that all concerned in the commission of such nuisance are liable for any damages which may be occasioned thereby. We are of opinion that it is, and the fact that the city council has passed an ordinance making the discharge of rockets weighing more than one pound an offense punishable by fine or imprisonment, is not to be regarded as a license to fire a rocket of less weight, without rendering the party liable, as at common law, for the commission of a nuisance and the consequences thereof.

We think the petition of plaintiff states a cause of action, and that the evidence offered by the plaintiff is in conformity therewith, and supports the same.

Judgment of non-suit as to defendant John Heister is reversed, and cause remanded.

TAFT and MOORE, JJ., concur.

Wm. H. Pope, for plaintiff.

J. J. Glidden and A. C. Grube, for defendants.

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421 **LICENSE FEES.**

[Hamilton Common Pleas, December, 1889.]

CINCINNATI (CITY) v. F. BRUHAUSEN.

An act of the legislature (80 O. L., 129) provided for a license fee to be paid by the owners of vehicles using them on the streets, and that for non-payment of such license fee the delinquent might be arrested and fined or imprisoned, or both, but made no other provision as to the manner in which such license fee might be forcibly collected.

*Held*, that the city might maintain a civil suit, as for debt, for the collection of such license fees.

MAXWELL, J.

The plaintiff alleges, in his petition in the first case, that during the year 1886, the defendant was the owner of, and used on the streets of the city, one four-horse wagon, one three-horse wagon, and one two-horse

cart, and that, under what is known as the Russell License Law, 80 O. L., 129, 81 O. L., 78, there became due to the city from him as fees $45.00, with a penalty of two per cent. per month thereon. The same allegations are made in the second case, for the year 1887. The defendant filed a general denial in both cases, but when the cases came on to be tried, admitted the ownership and use of the wagons, but claimed, as matter of law, that the fees under the Russell Law could not be recovered in a civil suit, or, in other words, that these actions cannot be maintained, so that the cases were heard substantially as if upon demurrer, on the ground that the court had no jurisdiction.

The act under which the suit is sought to be maintained was passed April 16, 1883, and is entitled "An act to provide a license on trades, business and professions carried on in the cities of the first grade of the first class, and providing for the enforcement and collection of fines and penalties for carrying on business without license, and for other purposes." The act has forty-five sub-sections. Sub-section 2 provides that any person who shall violate any of the provisions of the act shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than $1,000.00, nor less than $50.00, or by imprisonment for not more than six months, or both. Sub-section 9 provides that all licenses which shall become due on January 1 or July 1, shall be considered delinquent if not paid within fifteen days thereafter, and for every month or fraction of a month thereafter a penalty of 2 per cent. shall be added, which shall be collected in the same manner as the license.

Sub-section 12 provides that the conviction and punishment of any person for transacting business without a license, shall not excuse or exempt such person from the payment of any license due or unpaid at the time of such conviction. Sub-sections 13 to 37 both inclusive provide for the licenses to be paid by various occupations, sub-section 29 providing, among other things, that a two-horse wagon shall pay $10.00, a three horse wagon $15.00 and a four-horse wagon $20.00. Sub-sections 38 to 45 both inclusive provide for the disposition of the money received from licenses, and for the manner in which the books shall be kept. Sub-section 38 provides that all moneys received for license from vehicles of all descriptions, shall be placed to the credit of the street repairing fund, and that all other moneys shall be placed to the credit of the general fund.

It may be noted here that the fines levied and collected in the police court, for non-compliance with the act, would be paid into the city treasury, not into any particular fund. R. S., 1807.

Sub-sections 19, 29 and 36 of the act were amended March 24 and 25, 1884. 81 O. L., 71 and 78, but not so as to affect the question under consideration.

No provision is made in the act for collection of these licenses by civil suit, and, that being the case, it is contended by counsel for the defendant that the only remedy provided for non-payment of the license is that afforded by sub-section 2, above, and that a civil suit to recover the license cannot be maintained. As it has been heretofore decided, by one of the judges of this court, that a person can not be arrested after the expiration of the year during which the license accrues, for non-payment of the license of that past year, if the contention of counsel for the defendant be correct, the city is without remedy respecting the license fees set out in the petitions in these cases.

The first cases, upon kindred subjects, in this state, are reported in 8 Ohio, 63, *sub nom.* State v. Hibbard and State v. Proudfit, where actions of debt were maintained, one against a lawyer for a tax assessed upon him as an attorney and counsellor at law, and the other against a physician. Judgment for the plaintiff in both cases. These cases were brought under the act of February 7, 1825, 2 Chase, 1471, which expressly provided that an action of debt might be maintained in the name of the state of Ohio, if the tax was not paid. This act was amended February 22, 1830, 3 Chase, 1565, and the amending act provided that such taxes should be collected as other taxes. A similar case appears in the 5 Ohio, 14, State v. Gazlay, in which the statement was made in the argument of counsel that it arose under the law of 1825. Judgment was again given for plaintiff.

In the City v. Buckingham, 10 Ohio, 257, the city council had passed an ordinance establishing a license fee of twenty-five cents per day for use of market space by a vehicle, and had further provided that refusal to pay the fee should make the delinquent liable to pay the sum of $5.00, with costs of suit, to be recovered before the mayor. This form of suit was upheld by the Supreme Court.

In the City v. Bryson, 15 Ohio, 625, the city had passed ordinances establishing a license fee for drays, of $3.00, and providing that upon refusal to pay the delinquent should be liable to a fine of not more than $10.00 and costs. Upon complaint, Bryson was fined $5.00 and cost. This was affirmed by the Supreme Court.

The case of Baker v. City, 11 Ohio St., 534, though growing out of a licensing ordinance, did not involve any questions analogous to those under consideration.

In the case of the Cincinnati Gas Light & Coke Co. v. State, 18 Ohio St., 237, the legislature had passed an act providing for the appointment of an inspector of meters, etc., and had provided that the gas companies should pay, each, a proportionate amount of his salary, and that, in case of default, the treasurer of state should institute an action against the delinquent for its proportion with six per cent. interest.

It thus appears that the question under consideration has not arisen in the Supreme Court of our state, nor has it, so far as I have been able to find, arisen in any of the lower courts. Authorities may be found in other states, however.

Two distinct classes of cases have come up for consideration in the courts of the various states:

I. Cases where the statute affords a remedy, or makes some provision, though it may be an inadequate one, for the collection of license fees or taxes.

II. Cases where the statute provides no remedy.

In the first class of cases, many authorities may be found that hold that where the statute provides a mode of recovery, that mode only can be resorted to, and that if the remedy be in the nature of a distress, or other summary process, an action of debt will not lie. This is suggested, though not advocated, in Dillon on Municipal Corporations, sec. 817. It is so held in the following cases: 6 Mass., 44, where it is said, "No action lies for the recovery of taxes, except where by law an action could be brought in the name of the collector." 26 Vt., 482, where it is said, "The assessment of taxes does not create a debt that can be enforced by suit." 26 N. J. L., 398, where it is said, "Payment of taxes can not be enforced by an action of debt: where the statute provides another method

of recovery, they can only be collected in the manner prescribed by statute;" and 20 Minn., 396, where it is said, "Where a method is provided, other methods are excluded." Many other cases to the same effect might be cited, but these I have cited serve to illustrate the principle laid down in all.

Other courts hold differently, as in Dugan v. Mayor, &c., of Baltimore, 1 Gill & J. 499, where it is said, "The imposition and assessment of a tax creates a legal obligation to pay such tax, on which the law raises an implied assumpsit." Mayor, etc., v. Howard, 6 Harris & J. 383, where it is said, "Remedy by distress is cumulative only, and does not take away action for debt." And 24 La. An., 27, where it is said, "A corporation which is invested with the power of assessing taxes and licenses, has the right to enforce their payment by judicial proceedings." To the same effect are 15 Ill., 9; 14 Ill., 88; 61 Ill., 397, and 2 Yerg., 167. To the same effect may be cited 41 Iowa, 134, where it is said, "Taxes are debts recoverable like any similar obligations and subject to the same conditions."

As to the second class of cases, there does not seem to be such apparent conflict. The uniform holding seems to be that, where the statute has provided no remedy, there the ordinary remedy may be resorted to. Dillon, Municipal Corporations, section 818, and 55 Mo., 378, where it is said, "where a statute creates a right and gives no remedy, the party may resort to the usual remedy applicable to such a case." 26 N. J. L., 398, where it is said, "If indeed a tax should be imposed and no method be provided by law for its recovery, a resort to legal proceedings would then be a matter of necessity. By the fundamental principle of the law, there must be a redress for every wrong, a method of recovery for every due." 1 Mason's C. C. R., 487, where it is said, by Judge Story, "Where the debt arises by statute, an action or information of debt is the appropriate remedy, unless a different remedy be provided by statute." To the same effect are 3 Mass., 307; 5 Id., 514; 7 Id., 202; 10 Id., 378, and 4 Pick., 130.

I have found the words "tax" and "license" used interchangeably in the foregoing decisions, and presume there is no distinction, where the question relates solely to the method of recovery.

I believe the apparent conflict in some of the foregoing cases may be removed by examining the facts involved in them, and by a consideration of the principles involved in cases of this character. For every right there must be a remedy, but two or more substantially similar remedies, or courses of procedure, will not be afforded for the same right. An application of that principle to the present case would result in holding that, wherever a municipality is given the power to establish a syetem of license fees, or wherever the legislature has done so for the municipality, there the right to collect such fees by resort to legal proceedings, if necessary, must be presumed, and the ordinary method may be resorted to, unless some adequate method is provided by statute.

In the Massachusetts, Vermont and New Jersey cases the remedy of collection by distress existed and was recognized by the courts. This was a fully adequate remedy. In the Minnesota case a remedy by information and fine, corresponding in amount to the tax, existed, and was held by the court to be the exclusive remedy. With deference to so able a court, this case does not seem to me to rest on sound reasoning. The cases in Maryland undoubtedly proceeded to some extent on the theory that the remedies were entirely unlike, though it must be

admitted that the Maryland cases cannot be reconciled with the Massachusetts and New Jersey cases.

On the whole, I am of the opinion that the great weight of authority is to the effect that taxes and license fees may be recovered in an action of debt, where the statute affords no other adequate remedy. In the cases at bar the statute provides no other method of recovery. It cannot be maintained that the provision for fine and imprisonment is a method of collecting the license fees, for, if there were no other objection, the act itself provides, sub-section 12, "The conviction and punishment of any person for transacting any business without a license, shall not excuse or exempt such person from the payment of any license, due or unpaid at the time of such conviction." But, aside from that section, the one is a criminal proceeding, the other is a civil action, with radically different aims and purposes, and the money accruing from one goes in one direction, that accruing from the other goes in an entirely different direction.

Judgment for the plaintiff.

Horstman, Hadden & Galvin, city solicitors for the city.

Baker & Goodhue for the defendants.

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427 ARRESTS.

[Superior Court of Cincinnati.]

LOUISE KRUSEMEIER v. EDWARD NEWMAN.

An officer has no right to invade private premises to make an arrest without a warrant in cases of a misdemeanor.

NOYES, J.

The action was for $2,500 damages. Plaintiff's husband had stopped a horse on the street that was being driven recklessly by a man. Officer Newton ordered him to release the animal, and he refused. He was then arrested. His wife got him away from the officer. Afterward Newman entered Krusemeier's house to arrest him. Mrs. Krusemeier resisted his entrance and prevented him from going upstairs. She was then arrested, and because of that she sued the officer for damages. Judge Noyes, in his charge to the jury, says that in case of a misdemeanor, an officer had no right to invade a man's private premises to make an arrest without having a warrant. He could only do so where the charges against the accused was felony.

The jury gave Mrs. Krusemeier a verdict for $150 damages.—[Editorial.

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## DAMAGES. 34

[Superior Court of Cincinnati, General Term, 1889.]

COVINGTON HARBOR CO. v. PHŒNIX BRIDGE CO.

Plaintiff's harbor for anchoring coal boats upon the Ohio river on the Kentucky side was injured by the change in the currents and flow of the stream caused by the V shaped breakwater placed some distance above the harbor in the stream to protect false work used in the construction of a railway bridge from Covington to Cincinnati. The bridge was authorized by act of congress, and was built as therein directed in accordance with plans approved by the secretary of war. The breakwater and the false work were necessary in completing the bridge. Held,

That the loss sustained by plaintiffs, was a remote or consequential damage arising from the exercise of the paramount right of congress to regulate navigation, and was therefore damnum absque injuria.

This petition alleges that it is a Kentucky corporation, owning an extensive landing on the south shore of the Ohio river in Covington, Kentucky; that it has for many years done a large business at said landing in the holding and storage of coal barges, the depth of water, contour of the shore and other advantages making it desirable and valuable as a coal harbor and enabling plaintiff to hold boats anchored there safely and economically, at all stages of the river and seasons of the year, on account of which plaintiff had a large list of regular and transient tenants, and received thereby large sums annually for rent, storage and other charges; that the defendant, a Pennsylvania corporation, is and has been engaged in erecting a bridge between Covington and Cincinnati over the Ohio river under a contract with the Covington and Cincinnati Elevated Railway Transfer and Bridge Company; that in such construction, defendant erected false work in sections from the Kentucky shore to the north pier of the main channel span whereon to build the spans of said bridge, and from August, 1888, to Jan. 1889, erected and maintained a V shaped breakwater to protect the false work; that thereby new currents and eddies were formed at and near plaintiff's landing, and the natural course and flow of the river were changed so as to be thrown towards and against said landing, whereby itself was greatly injured by the deposit of mud and drift, the holding of boats at said landing was made very difficult, dangerous and expensive, the storage capacity of the landing was greatly reduced, collisions of vessels navigating the river with the boats of said landing were thereby caused, and boats were sunk, all to the loss of the plaintiff in $3,500.00.

Defendant answers, and for its first defense says that on May 20, 1886, congress passed an act authorizing the Covington and Cincinnati Elevated Railway Transfer and Bridge Company to build a bridge across the Ohio river between Covington and Cincinnati; that this company had complied with all the requirements of said act and the acts of congress passed December 17, 1872, and February 14, 1883, regulating the construction of bridges over the Ohio river, and fully complied with the provisions of section four of the act of February 14, 1883, and that said bridge was constructed in conformity to the designs and drawings approved by the Secretary of War of the United States; that by acts of the Kentucky Legislature passed in April, 1884, and February 9, 1886, the said Covington and Cincinnati Elevated Railway Transfer and Bridge Com-

pany, was also authorized to construct said bridge, and that the erection and maintenance of said false work and of said V shaped breakwater were necessary and proper to the construction of the bridge.

To this defense the plaintiff demurred, and the demurrer was reserved to this court.

The act of congress of May 20, 1886, authorizes and empowers the company for whom defendant was working to erect a bridge over the Ohio river between Covington and Cincinnati subject to the limitations of the act of the same body passed December 17, 1872, and February 14, 1883. The important section in the acts referred to is sec. 4, which provides that any company authorized to construct a bridge shall give notice by publication in certain named large cities, and shall submit its plans for the bridge to the Secretary of War with a map of the river, contour of shore, direction of currents and other information required, which are to be referred to a board of engineers for examination and report who shall personally examine the site and hold a public session at some convenient point to hear all objections thereto, of which meeting due notice shall be given. If the report is unfavorable the Secretary of War is authorized, on recommendation of the board, to order changes for the security of navigation, and the proposed bridge shall only be a legal structure when built as approved by the Secretary of War.

TAFT, J.

The claim of the plaintiff, supported by an able and ingenious argument of its counsel, is that every riparian owner on the Ohio river in Kentucky has the fee simple title to the bed of the stream up to the middle of the channel opposite his dry land; that whether this be true or not, every riparian owner of a navigable stream has a right of access to the navigable part of the same; that this is private property of which he cannot be deprived except by due process of law, and without just compensation; that no authority, whether of congress, state legislature or municipal government, can justify any one in taking such private property without paying for it; that the acts of the defendant amount to depriving plaintiff of such private property in its former convenient access to the stream, and that, therefore, the defendant must pay for it. In England, whence our common law came, there were no navigable streams, except those in which the tide ebbed and flowed. As to such the rule was that the riparian proprietor owned only to tide water. When the law came to be applied to such inland streams as were navigable like the Ohio, a new question of ownership was presented to the courts as to where the fee simple title in such streams was. It is settled in this state by the case of Gavit v. Chambers, 3 Ohio, 496, and in Kentucky by the case of Berry v. Snyder, 3 Bush., 266, that riparian owners on nontidal navigable streams, hold title in the bed of the river to the middle of the channel subject to the paramount right of navigation in the public. But we think, and we understand counsel for plaintiff to concede, that with reference to the present discussion, the right of the riparian owner on the Ohio would be the same, even if he had no title to the bed of the river, because in either case, he has a right of access to the navigable part of the stream. This is authoritatively settled by the case of Yates v. Milwaukee, 10 Wallace, 497.

In that case the owner of a lot fronting on the Milwaukee river, from which a wharf had been partially built into the river, conveyed to the plaintiff the interest he had in a wharf and in the front of his lot to the middle of the Milwaukee river, with the right and privilege of docking,

dredging out and making a water front on the river. Between the margin of the water and the navigable channel there was a space covered with water more or less, but which was of no use for purposes of navigation. Yates built a wharf the width of his grantor's lot, extending one hundred and ninety feet to the navigable part of the river. The legislature of Wisconsin authorized the common council of Milwaukee to establish dock lines and wharf lines upon the banks of the Milwaukee river, to restrain and prevent encroachment upon said river and obstructions thereto, and also to cause the said Milwaukee river to be dredged. The city, thereupon, declared this wharf an obstruction to navigation, and ordered it to be abated. The plaintiffs refused, and when the city hired a man to abate it, filed a bill to enjoin the city from doing so. There was no evidence that the wharf was an actual obstruction to navigation, or was in any other sense a nuisance.

The Supreme Court held that an injunction should issue. Justice Miller, in delivering the judgment of the court, intimated that probably under the circumstances of the case, the title of the riparian owner only extended to the water's edge, and then continued: "But whether the title of the owner of such lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of the lot, the right to make a landing, wharf or pier, for his own use or for the use of the public, subject to such general rules and regulations, as the legislature may see proper to impose, for the protection of the rights of the public, whatever those may be. Citing Dutton v. Strong, 1 Black., 25, and R. R. Co. v. Schurmier, 7 Wallace, 372. * * * This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary, that it be taken for the public good, upon due compensation. This is the case upon which plaintiff's counsel relies chiefly in maintaining the sufficiency of his petition and the inadequacy of defendant's first defense. We have, therefore, quoted from it at some length. It is to be observed with respect to that case that what the city of Milwaukee proposed to do was to remove the pier owned by the plaintiff, and thus deny to him and the owner of the dry land any access to the navigable part of the stream. They proposed to do it by an act of direct appropriation. If the act complained of at bar were of like character, we should have no difficulty in reaching the conclusion here that was reached in that case. But, if in the case cited, the plaintiff's complaint had been that the city in impairing the navigation of the river, had so changed the force of the current against his pier that it required additional piling to support it, or that it was less useful to him because the navigable channel had been moved away from the end of his pier, requiring an addition to his pier to enable boats to reach it, a very different question would have been presented. In the case at bar, there never has been a time when access to the navigable part of the stream has been denied to the plaintiff. So far as appears, there was nothing to prevent his building a wharf or pier from his land to reach the navigable part of the river. What he complains of really is that the natural flow of the river has been changed by obstructions in the stream so that his arrangement for reaching the navigable part of the river are not as convenient as they were. He does

not complain that there has been any physical encroachment directly by the defendant upon that part of the stream between his land and the navigable part of the river, but that by an obstruction of the current an indirect and consequential damage has been done to his right of access, rendering it less easy. If this had been done by a private person in the current above plaintiff's landing, it would probably give him a right of action, because as against him he would be entitled to the natural flow of the river. But plaintiff's right to the flow of the river is subject to the controlling and paramount public right of navigation. In the present case, the exercise of that right is vested in congress by reason of its power to regulate commerce among the states. Pennsylvania v. Wheeling & Belmont Bridge Company, 18 How., 421. When congress authorizes and empowers a corporation to build a railway or other bridge across a navigable stream, it does it, or rather must be conclusively presumed to do it, because in its opinion such obstruction as may be caused thereby in the navigation of the stream is more than counterbalanced by the additional opportunities for public travel and commerce afforded by the bridge. Stockton v. Baltimore & N. Y. R. R. Co., 32 Fed. Rep., 9. It authorizes the bridge in exactly the same right as that in which it directs its engineers to improve the navigation of the river. The fact that from the bridge, emolument may come to the corporation, does not affect the character of the bridge as a public benefit. Hamilton v. Vicksburg, Shreveport & Pacific Railroad, 119 U. S., 280. In this sense, the persons acting strictly under and within such congressional authority to build a bridge are public agents, and are as fully to be protected against private actions as any officer of the government engaged in improving the navigation. The law of Ohio upon the subject of the liability of municipal corporations for damages to abutting lot owners, upon the public streets and highways arising from the exercise by such corporations of the sovereign power of improving the streets so as to best suit public convenience, is a departure from the rule of the common law, and is not sanctioned by courts of other states save where express sanction has been given to it by statute.

The Supreme Court of the United States rejects the Ohio doctrine, and follows the common law, in holding that an exercise of the sovereign power like that of improving or changing a highway for the public good, which is not a physical encroachment upon private property, and only causes consequential or indirect damages to it, is not a taking of private property for public use, and gives no right of action, either against the sovereign power or any agent acting by its authority, in making such improvement. Such damages are held to be *damnum absque injuria*. Transportation Company v. Chicago, 99 U. S., 635. In as much as we are discussing a right to recover damages for the exercise of an authority granted by the United States government, we are bound herein to follow the authority of the United States Supreme Court. The analogy between the public improvement or change of a highway and the public improvement or change of the navigation of a navigable river is perfect. They are both acts of the sovereign power for the improvement of highways.

Applying the principle above stated to a river, it follows that any change made in the navigable flow of water by the sovereign power for the public benefit, which is not a physical encroachment upon a riparian owner's property, resulting in consequential or indirect damages to such owner, gives no right of action against either the government, or the agents engaged in making such change. The loss so occasioned is

*damnum absque injuria*. In the case at bar, the allegations of the defense demurred to show that the bridge as constructed is strictly within the limitations of the grant of congress to defendant's principal, and that the false work and V shaped breakwater were necessary to the construction. From the petition we gather that the cause of the damage was the change in the natural flow and current of the river, and not from physical encroachment, either on plaintiff's dry land, or the land between him and the navigable part of the stream. The damages were therefore consequential and indirect, and the defendant being a public agent acting within his authority is protected from this action. This conclusion is borne out by the authorities in cases presenting much the same question.

In Lansing v. Smith, 8 Cowen, 146, the action was trespass on the case against commissioners appointed under a state law to construct a basin in the Hudson river, in which improvement it became necessary to erect a pier which, plaintiff claimed, so directed the natural flow of the water in front of his premises as to interfere with the use of his dock. One of the plaintiff's claims was that the act authorizing the improvement was unconstitutional, because it made no provision for compensation to him for his loss. Say the court, "If the act be unconstitutional, it must be on the ground that the plaintiff had either, at common law, as owner of the adjacent soil, or by virtue of the patent from the state to Quackenbush for the land under water opposite to the shore, a claim to the natural flow of the river with which the state had no right to interfere by any erections in the bed of the river, or in any other manner. This proposition appears to the court too extravagant to be seriously maintained. It denies to the state the power of improving the navigation of the river by dams, or any other erections, which must affect the natural flow of the stream without the consent of all the proprietors of the adjacent shore within the remotest limits which may be affected by the operation. Every new dock which is erected, partially diverts the natural course of the stream; and upon the principle contended for by the plaintiff, violates the rights of all the proprietors of the dock below it. The right of the plaintiff to navigate to and from his dock is not denied. All that is contended for on the part of the defendant is, that the mode in which that right is to be exercised, is subject to be controlled and regulated by the legislature, as, in their judgment, the interest and convenience of the public may require. In all such regulations, a due regard is undoubtedly to be paid to the interest of individuals. But every great public improvement must, almost of necessity more or less affect individual convenience and prosperity; and when the injury sustained is remote and consequential, it is *damnum absque injuria* and is to be borne as a part of the price to be paid for the advantages of the social conditions."

In Hollister v. The Union Company, 9 Conn., 436, the plaintiff's land adjoining the eastern bank of the Connecticut river was washed away by reason of obstructions to the natural current which the defendant company, under a charter from the state, were authorized to put in the river to improve its navigation. These were put in properly and without negligence. The court held that the state, holding the river for the purpose of navigation, might do everything for the full enjoyment of such right, not inconsistent with the constitutional principle that private property could not be taken for public use without compensation; that it was the duty of the individual proprietors of land adjoining the river, and not of the corporation, to protect the banks from encroach-

ment, and that remote or consequential damages to individuals like those for which the action was brought, resulting from the works of the defendant authorized by their charter, were not the taking of private property for public use within the constitutional prohibition, and were merely *damnum absque injuria*, and could not be made the basis for recovery from defendant.

In the case of Transportation Company v. Chicago, 99 U. S., 635, the plaintiff was shown to be the owner of a lot fronting on Lasalle street and the Chicago river; that upon the river it had extensive docking privileges. The city, in the construction of a tunnel under the river, temporarily blocked up Lasalle street in front of the plaintiff's warehouse, and by a coffer dam which was necessary in construing the tunnel, erected temporarily directly in front of plaintiff's dock, prevented access to the river from the dock. The action was trespass on the case against the city, and it was held that no damages would be recovered. In speaking of the coffer dam the court say, "It is insisted, however, that the plaintiffs may recover for the obstruction to the access of their lot, caused by the coffer dam in the river. It is admitted that the dam was necessary to enable the city to construct the tunnel under the river; and it is not complained that it was unskillfully built, or that it was kept in the stream longer than the necessities of the work required; but it is contended neither the state nor the city had any right to obstruct passage on the river at all. Yet the river is a highway, a state highway, as well as a national * * * In numerous instances states have authorized obstructions in navigable streams. They have authorized the erection of bridges, the piers of which have been more or less impediments to navigation. In this case the coffer dam was only a temporary obstruction. It was no physical encroachment upon the plaintiff's property and it was maintained only as long as it was needed for the public improvement. The tunnel could not have been constructed without it. We cannot doubt that it was lawfully placed where it was, and having thus been, that the city is not responsible in damages for having erected and maintained it while discharging the duty imposed by the legislature, the obstruction not having been permanent or unreasonably prolonged." See also Commrs' of Homochetto River v. Withers, 29 Miss., 21.

For the reasons given the demurrer to the first defense will be overruled.

MOORE & NOYES, JJ., concur.

John I. Conner, for plaintiff.

Healy & Brannan, for defendant.

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## 38 ATTACHMENT—ALIMONY.

[Lawrence Common Pleas, December 23, 1889.]

STEWART V. STEWART.

1. An attachment will lie against a husband defendant in a divorce suit, when he, having the means and being able to comply therewith, willfully and purposely refuse to comply with the order of the court, or a judge in vacation granting alimony to the wife for her sustenance and expenses during the suit.
2. The order granting temporary alimony in such case does not create a debt within the meaning of the constitution, and the defendant may be held to answer an attachment and be punished as for the willful refusal to comply with such order.

Action by the wife for divorce and alimony.

Upon a hearing on due notice, before a judge at chambers in vacation, an order was made granting alimony to the plaintiff for her sustenance and expense during the suit, and the same was ordered paid in installments at certain dates set out in the order.

The time allowed by the order for payment having elapsed, and the order not being complied with, an affidavit was filed by the plaintiff setting up the foregoing facts, and further declaring that while the defendant had no property subect to seizure and sale on execution, he had ample means and was fully able to comply with said order, and that the defendant purposely, willfully and contemptuously refused to comply therewith.

The prosecuting attorney thereupon filed a charge in writing, based upon said affidavit, embracing the facts therein contained, and asked that this defendant be attached and punished as for a contempt for such willful refusal to comply with said order.

An attachment was allowed and issued, and the defendant was brought into court to answer said charge, and on being arraigned, the defendant by his counsel presented and filed a general demurrer thereto.

Upon the demurrer to the written charges the case is submitted to the court.

John Hamilton for the defendant.

Thos. N. Ross, for the plaintiff.

Geo. W. Keye, prosecuting attorney.

DEVER, J.

Section 5701, Rev. Stat. provides that "the court, or a judge thereof in vacation, may on notice to the opposite party * * * grant alimony to the wife for her sustenance and expenses during the suit."

Alimony is the allowance which a husband by order of the court pays to his wife living apart from him, for her maintenance. Bouvier's Law Dic.

Alimony then is granted by order of the court or judge in vacation.

It will be observed that there is no provision in sec. 5701 for the rendition of judgment for the amount allowed as temporary alimony, but for the alimony allowed at the end of the suit in an action for alimony the court renders judgment. Section 5703, Rev. Stat.

Now, when the statute provides for the granting of temporary alimony, which is done by order, and makes no provision for judgment or execution, how is such order to be enforced upon the refusal of the defendant to comply therewith?

"A person guilty of any of the following acts may be punished as for a contempt:

1. Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment or command of a court, or an officer." * * * Section 5640, Rev. Stat.

In cases under the last section a charge in writing shall be filed with the clerk, etc. Section 5640, Rev. Stat.

The facts set out in the charge are admitted by the demurrer to be true, and clearly show a disobedience to a lawful order of a court or officer, and subject the defendant to be punished as for a contempt unless he is protected therefrom by sec. 15, art. I of the constitution, which is as follows: "No person shall be imprisoned for debt in any civil action on mesne or final process, unless in case of fraud."

The question then is, does an order to pay temporary alimony create a debt?

In *ex parte* Perkins, 18 Cal., 60, the court says: "A sum so ordered to be paid (support during suit) is not a debt within the meaning of the constitution, which prohibits imprisonment for debt, except for fraud. The husband is bound to support the wife, and this duty, though not technically a debt, is an imperfect obligation, which may be enforced by an order compelling him to pay her money.

"The husband does not owe the wife any specific amount of money, but he owes a duty to her, which the court may enforce by an order compelling him to pay her money."

In Haines v. Haines, 35 Mich., 138, the court says: "The process of contempt to enforce civil remedies is one of extreme resort, which cannot be justified if there is any other adequate remedy, yet it is allowable to compel obedience to an order requiring the payment of temporary alimony. The nature and purposes of allowances to carry on litigation will not permit of their being required to depend for enforcement on execution, and not being recoverable by execution, attachment will lie."

"For refusal to pay temporary alimony the husband may be committed for contempt, such sum not being a debt within the provisions of the constitution securing against imprisonment for debt, except in cases of fraud." Rapolji on Contempt, sec. 36. See also sec. 18.

"A husband who will not obey an order of the court to pay alimony, especially, but not exclusively, temporary and suit money, may be committed as for a contempt." 2 Bishop's Marriage and Divorce, sec. 498 (6th edition).

"The commitment of a defendant for contempt for refusing to pay alimony is not an imprisonment for debt from which he can claim exemption under the constitution providing against imprisonment for debt, except in cases of fraud." Wightman v. Wightman, 55 Ill., 167.

"The allowance in such case (temporary alimony) is not a debt within the meaning of the constitution, and the defendant may be held to answer a rule for contempt in default of payment." Paine v. Paine, 8 N. C., 322.

"The proper means to enforce the payment of temporary alimony is by proceedings in contempt." Doelly v. Doelly, 46 Me., 378.

On the contrary, in Coughlin v. Ehlert, 39 Mo., 285, the court say, "Imprisonment for debt being abolished, a party can not be imprisoned for contempt for refusing to obey an order or decree directing the mere payment of money. An order for the payment of alimony is merely an order for the payment of money."

An examination of the latter case, however, will show that the refusal in that case, was to pay permanent alimony, and not a refusal to comply with an order to pay temporary alimony.

A distinction is properly taken between temporary and permanent alimony.

Temporary alimony is allowed to the wife to sustain life during the suit, and to enable the court to be apprised of the merits of the litigation. The very nature of the allowance, and the purpose for which it is made, will not admit of the delay necessary to realize upon the same by the ordinary process of execution.

The court, in the exercise of its inherent right of self-protection and preservation, ought to have the power to prevent a defendant from wantonly refusing to comply with its order, by withholding sustenance

and the means necessary to conduct the litigation from his wife, to whom he owes such support, thereby purposely blocking the wheels of justice, and wantonly hindering and delaying the proceedings of the court.

While I am unable to refer to any Ohio case directly in point, I do find that a man may be imprisoned in this state for noncompliance with an order directing him to pay money. Musser v. Stewart, 21 Ohio St., 353.

In the latter case, which was a proceeding in bastardy to charge the defendant with the support of his illegitimate child, the court, on pages 356-7, say, "This is not a suit to recover a sum of money owing from the defendant to the complaining party * * * it is to enforce upon him the duty of making provision for the maintenance of his illegitimate offspring."

In like manner, the action of the wife against her husband in a divorce suit, is not an action to recover so much money, but it is to determine whether the husband has so grossly violated his duty as such as to release the wife from the marriage relation, and pending the determination of this question the husband is required, by the order granting temporary alimony, to perform the duty he owes to his wife of providing for her support and furnishing her the means necessary to have her case properly presented to the court. It would seem that the moral obligations of a case of this kind acquire an altitude, to say the least, equal to that of a suit in bastardy.

Without further comment, the decided weight of authority seems to be to the effect that an order to pay temporary alimony does not create a debt within the meaning of the constitution providing against imprisonment for debt, and that the court has the power to punish, as for a contempt, the willful disobedience of such an order.

The demurrer is overruled.

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## JURY—CONSPIRACY—EVIDENCE. 48

[Superior Court of Cincinnati, General Term.]

MOORES & CO. v. BRICKLAYERS' UNION ET AL.

1. Section 5177, Rev. Stat. of Ohio, provides that in impanelling a jury "each party may peremptorily challenge two jurors." Held, that in this section, party means "side," and that, however numerous the defendants in a civil case, they can only together exercise two peremptory challenges.
2. In an action for damages for loss occasioned by a conspiracy by defendants to injure plaintiffs' business by frightening away their customers. Held, that the declarations by customers of their reason for the withdrawal of their custom, made at the time of such withdrawals, are competent as part of the res gestae.
3. A combination by a trade union and others to coerce an employer to conduct his business with reference to apprentices and the employment of delinquent members of the union, according to the demand of the union, by injuring his business through notices sent to his customers and material men, stating that any dealings with him will be followed by similar measures against such customers and material men, is an unlawful conspiracy.
4. A material man against whom such threatened measures were taken because of his failure to heed the notices, and whose trade was injured by further notices sent to his customers and probable customers, threatening a refusal of union workmen to work material purchased from him, has a right of action against the union and all its agents engaged in such unlawful conspiracy for the loss thereby occasioned.

This was an action by the plaintiff firm against the Bricklayers' Union, W. H. Stevenson, P. H. McElroy and eight others, to recover damages for a loss occasioned to the plaintiffs' business by a wrongful and malicious conspiracy entered into by defendants to inflict such loss. The trial resulted in a verdict for $2,250 for plaintiffs. The motion for new trial was reserved to this court from the special term.

The facts were as follows: The Bricklayers' Union No. 1, of which all the other defendants were members, is an organization of journeyman bricklayers devoted to the protection of their interests by common action upon trade subjects. It contains four hundred members, being ninety-five per cent. of the trade in this city. The union requested Parker Bros., who were contracting bricklayers, first to pay a fine imposed upon one of their employees, who was a member of the union, and second to reinstate one apprentice who had left them, and discharge another. Parker Bros. refused. The union declared a boycott against them, and designated one of the defendants, P. H. Mc Elroy to enforce it. He continued in the work a number of months, reporting progress each week, and receiving $27.00 a week and his expenses for his time. The first step in the matter was the issuance of a circular to all material men, contractors, and owners stating that the firm of Parker Bros. was in various ways discriminating against the union, and calling upon all friends of organized labor and all dealers in material to withdraw their patronage from the obnoxious firm, and concluding with this announcement, "Any firm dealing in building materials, who ignores this request, is hereby notified that we will not work his material upon any building, nor for any contractors by whom we are employed." Signed, "By order Bricklayers' Union No. 1."

Plaintiffs, who were a firm selling large quantities of lime to the building trade in this city, received one of these circulars, upon which, in McElroy's writing, was the following postscript: "Please answer above. The Parker Bros. are getting your lime, and I want to know if you intend supplying them with lime. Answer as soon as possible. P. H. McElroy." This led to several interviews with McElroy, and the sending of another circular. Plaintiffs did stop selling lime to Parker Bros. by delivery, but the latter sent a teamster, who bought it for cash at the plaintiffs' cars. McElroy discovered this, and then, by authority of the union, sent to all of the plaintiff's customers and probable customers, the following circular: "Bricklayers' Union No. 1 of Ohio: That members of the Bricklayers' Union will not use material supplied by the following dealers until further notice. Moore Lime Co. (*i. e.* plaintiffs)," and then followed the names of four other dealers also under the ban. The effect of the circular was to interfere with Moore & Co.'s business, and to cause loss of customers who feared a similar fate.

TAFT, J.

The first error complained of by defendants is that the court refused to allow the half dozen defendants together to exercise more than two peremptory challenges. Section 5177 provides that "each party may peremptorily challenge two jurors." Defendants' counsel claims that this entitles each of the defendants to exercise two such challenges. We do not think so. It is true that in a certain sense, each defendant is a party to the suit, but, as used here, we think party means "side," and that all the plaintiffs are one party and all the defendants are the other. Jury trials are had in suits at law, and in such suits, the plaintiffs are all on one side of the issues, and the defendants are equally interested

on the other. This meaning thus given to "party" as used in sec. 5177 is borne out conclusively when we consider the secs. 5185 and 5186, providing the mode of selecting struck juries. These sections are in the same chapter, and of course are *in pari materia* with 5177. Section 5185 provides for four days' notice to be given to both parties of the striking of the jury, and 5186 provides that out of a list of forty names, each party shall strike twelve names, and the remaining sixteen shall constitute the panel. Both these sections show that in a jury case, within the meaning of the chapter on juries, there are only two parties, *i. e.* the plaintiff or plaintiffs, and the defendant or defendants. The case of the United States v. Alexander, 17 Pacific Reporter, 746, cited for defendants, turns out upon examination to be an express authority for the ruling of the court below. See also Thompson & Merriam on Juries, sec. 163 and note 1.

The second error claimed was that the court admitted evidence of declarations made to the plaintiffs by those of their customers who withdrew their custom, made at the time of such withdrawal.

We think the declarations were clearly admissible as part of the *res gestae*, to show the state of mind of the persons in doing the very act which these declarations accompanied. The withdrawal of custom from Moores & Co. was only material to the issue here involved as it was induced by fear of the defendants' threatened action. It was competent, therefore, to show that when customers withdrew their custom, they did it with intent to avoid injurious action by defendants. One of the usual ways of showing the intent with which an act is done, is by declarations of the actor at the time. Counsel for defendants say that it appeared from the evidence of some of these customers themselves that the defendants' action was not the cause of their ceasing to patronize the plaintiff. Even if this is the case, we are unable to see how such evidence can affect the relevancy of the statements the discussion of which is the subject of complaint. That evidence can be contradicted, is no reason for its exclusion.

The third and chief ground of error is that the court erred in refusing to give certain special charges, and in giving its general charge. The substance of that charge upon the main question in the case is contained in the following: "The defendant union, claims to be an organization composed of journeyman bricklayers, one of whose objects is the bettering of their condition by united action on the subject of wages, and the admission of apprentices into their craft. It becomes necessary to define what action they may legally take to carry out such purposes. They may, by mutual agreement, provide for and impose penalties for the failure of any of their members to comply with such regulations in respect of these purposes, as their association makes. They may unite in withdrawing from the employ of any persons whose terms of employment may not be satisfactory to them, or whose actions with regard to apprentices are not to their liking. Beyond this, they cannot go, to compel their employers to come to their terms. If, in addition to withdrawing from his employment, they combine together to coerce their employer, to come to their terms, and so interfere with his business by frightening persons from selling to him, or buying from him, or contracting with him by threats of a withdrawal of union workmen from the employment of such persons, *i. e.* by boycotting him, they become engaged in an unlawful conspiracy, and are liable to the employers for any injury arising therefrom. So, if one of the employer's material men con-

tinue to supply him with material, in spite of threats, and the union notifies the customers of the material man not to deal with him further under penalty of a refusal of union men to work for them, material purchased from him, and so intentionally drives away business from the material man, this would be an illegal conspiracy to injure the business of the material man, for which he might recover against the union and those of its members engaged therein."

There was really no attempt to dispute the facts as I have given them above, and the necessary result of such a charge was a verdict for the plaintiffs, the only issue really left to the jury being that of damages. The question to be determined, therefore, is whether on the facts stated, defendants were liable to plaintiffs. The argument for the defendant may be stated as follows: A company is a combination of two or more persons to do an unlawful act or a lawful act by unlawful means. It follows that there is no conspiracy unless either in its end or in its course, the combination is to do an unlawful act. Every man may dispose of his labor by such contract and to such persons as he pleases. He may refuse to contract with any man or class of men. If he chooses not to work for any person using materials of a certain dealer, that is his right. What he may lawfully do, he may lawfully announce his intention of doing. Therefore, he may notify his possible employers of his intention not to work for any man using material of such dealer. As these are acts all within his right and lawful, he may combine with others to do them, and such combination being only to do lawful acts is not a conspiracy, and is not actionable. The members of the Bricklayers' Union had the lawful right to decline to work for any one using Moore's lime. They, therefore, had the right to announce their intention of so doing. They had, therefore, the right to combine to do both. Any loss occurring to Moores & Co. through these lawful acts of the defendants is therefore only *damnum absque injuria*, and gives no cause of action.

If this argument is sound, the charge was erroneous, the evidence showed no cause of action, and the verdict must be set aside. It assumes two propositions; first, that no act generally lawful, can become unlawful or actionable by reason of the motive or intent with which it is done; and second, that nothing which is not actionable when done by one person, can be actionable or unlawful when done by a combination of persons. In our opinion both of these propositions are erroneous.

We are dealing in this case with common rights. Every man, be he capitalist, merchant, employer, laborer or professional man, is entitled to invest his capital, to carry on his business, to bestow his labor, or to exercise his calling, if within the law, according to his pleasure. Generally speaking, if, in the exercise of such a right by one, another suffers a loss, he has no ground of action. Thus, if two merchants are in the same business in the same place, and the business of the one is injured by the competition, the loss is caused by the other's pursuing his lawful right to carry on business as seems best to him. In this legitimate clash of common rights, the loss which is suffered, is *damnum absque injuria*. So it may reduce the employer's profits that his workman will not work at former prices, and that he is obliged to pay on a higher scale of wages. The loss which he sustains, if it can be called such, arises merely from the exercise of the workman's lawful right to work for such wages as he chooses, and to get as high a rate as he can. It is caused by the workman, but it gives no right of action. Again if a workman is called upon to work with the material of a certain dealer, and it is of

such a character as either to make his labor greater than that sold by another, or is hurtful to the person using it, or for any other reason is not satisfactory to the workman, he may lawfully notify his employers of his objection and refuse to work it. The loss of the material man in his sales caused by such action of the workman is not a legal injury, and not the subject of action. And so it may be said that in these respects, what one workman may do, many may do, and many may combine to do without giving the sufferer any right of action against those who cause his loss.

But on this common ground of common rights where every one is lawfully struggling for the mastery, and where losses suffered must be borne, there are losses willfully caused to one by another in the exercise of what otherwise would be a lawful right, from simple motives of malice.

In Keeble v. Heckeringill, reported in a note to Carrington v. Taylor, 11 East 573, the action was on the case by the owner of a wild fowl decoy against his neighbor who it was claimed, fired off his gun in the air with malicious intent to frighten away the wild fowl from the decoy. It was held that the plaintiff being so disturbed in his trade was entitled to recover because of the malice with which the act was done. Says Lord Holt: "Suppose the defendant had shot on his own ground: If he had occasion to shoot, it would have been one thing; but to shoot on purpose to damage the plaintiff is another thing, and a wrong. The principle is followed in Carrington v. Taylor, *supra*. In Gregory v. The Duke of Brunswick, 6 Man. & Gr., 953, the action was for conspiracy to hiss an actor off the stage. It was conceded that it was lawful for any person to express his disapproval of the performance by hissing, but when he hissed simply to injure the actor in his profession from malice, and that malice, was evidenced by the combination into which he had entered to make the injury effective, he and his coconspirators were liable for the injury.

In Bowen v. Hall, 6 Q. B. D., 333, and Lumley v. Lye, 2 Ellis & Bl., 216, the actions were on the case against defendant for having maliciously induced, in the one case an opera singer, in the other a bricklayer, to break contracts of employment with the plaintiff. It was conceded that unless such inducement or persuasion had been exercised with intent to injure plaintiffs and maliciously, no wrongful act would have been committed or legal injury inflicted. In the Mogul Steamship Co. v. McGregor, Gow & Co., tried before Lord Coleridge, 21 Q. B. D., 544, and in the Court of Appeals reported in 18 Law Journal Reports, N. S., 465, s. c. L. R., 23 Q. B. D., 598, the action was for damages for injuries which plaintiff claimed to have sustained from an unlawful conspiracy by defendants. The defendants were six steamship companies engaged in the China trade, which for the purpose of keeping up rates in tea freights, combined against outsiders by agreeing; first, to offer and give to all persons, whether principals or agents, shipping by their ships, a rebate of five per cent. to be paid at the end of the six months covered by the agreement, on condition that such principals and agents shipped by no other lines; second, whenever any outsider was known to be going to Hankow, the shipping point for tea, to send after him, several conference ships, to so "smash" freight rates as to make a loss for him and, third, to prohibit their agents from acting for any other line. Lord Coleridge held that in carrying out this agreement against plaintiffs, defendants were only engaged in severe competition and in pursuit of lawful gain, were not acting maliciously toward plaintiffs, and that there-

fore, plaintiffs' loss was not a legal injury giving rise to an action for damages. In the course of his judgment, the Lord Chief Justice said: "But it is said that the motive of these acts was to ruin the plaintiffs, and that such a motive, it has been held, will render the combination itself wrongful and malicious, and that if damage had resulted to the plaintiffs, an action will lie. I concede that if the premises are established, the conclusion follows. It is too late to dispute, if I desired it, as I do not, that a wrongful and malicious combination to ruin a man in his trade, may be ground for such an action as this."

In the court of appeal, Lord Esher M. R. dissented from Lord Coleridge's view of the case, and held that these acts of competition were not done for the purpose of competition, but with intent to injure plaintiffs in their trade, were not acts in the ordinary course of trade and were actionable if injury ensued.

Brown and Fry, L. JJ., however, sustained Lord Coleridge, and dismissed the appeal, holding that this agreement and the acts in accordance with it were simply competition carried to the bitter end, for the lawful purpose of gain, and that because such competition incidentally and necessarily involved driving plaintiffs out of the tea carrying trade, did not make the agreement or the acts in pursuance of it a malicious combination to ruin plaintiffs, and so it was not actionable.

It was conceded however that an action would have lain, if the acts were merely done with the intention of causing temporal harm without reference to defendants' own lawful gain or the lawful enjoyment of their own rights. It should be said that it is doubtful whether in this country a different result might not have been reached in the foregoing case, and Lord Esher's views followed. See People v. North River Sugar Refining Co., 7 N. Y. Supplement 406. However that may be, the effect of the presence of malice in an otherwise lawful act is fully admitted in all the judgments of the court of appeal.

In Walker v. Cronin, 107 Mass., 555, the action was for damages upon an allegation that the plaintiff was a manufacturer of shoes, and for the prosecution of his business, it was necessary for him to employ many shoemakers; that the defendant well knowing this, did unlawfully and without cause, molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers, who were in his employment, and others who were about to enter it, to abandon it without his consent and against his will, causing the plaintiff great loss. This was held to state a good cause of action, because the following four elements were present: (1) Intentional and willful acts, (2) calculated to cause damage to the plaintiffs in their lawful business, (3) done with the unlawful purpose to cause such damage and loss without right or justifiable cause on the part of the defendant (which constitutes malice) and (4) actual damage.

I have cited these authorities to show that in the exercise of common rights, like the pursuit of a business or a trade, which result in a mutual interference and loss, such loss is a legal injury, or not, according to the intent with which it has been caused, and the presence or absence of malice in the person causing it. The case of Frazier v. Brown, 12 Ohio St., 294, is cited by counsel for defendant, as opposed to this view. We do not think so. That was a case where one of two adjoining proprietors dug a hole in his own ground, and diverted underground waters filtering through the earth, and forming a spring on the other's ground, and so dried the spring knowing that such would be the result, and intending

it. The court held that in the absence of an allegation to the contrary, it would presume that this was done for some useful or ornamental purpose, and that the mixture of malice in the motive was not material. The case is not in point, because the court declined to express an opinion upon the question, which would have been presented, if there had been an allegation that the hole had been dug from motives of unmixed malice. Nor do we regard the case as one involving rights similar to those arising in the free pursuit of trade or business, and to be considered in deciding whether the circulation of such notices as defendants sent out, and the losses thereby occasioned, were wrongful. The right to one's land has been called a positive right. These are common rights. In Henty v. Capital & Counties Bank, 7 Appeal Cases, 741, though in a dissenting opinion, Lord Penzance very clearly distinguishes between the effect of malice in the exercise of a man's right over his land, and such a right as that we are here discussing. In Chasemore v. Richards, 7 H. L. C., 349, which was a case like Frazier v. Brown in all its facts except the malice, Lord Wensleydale (Baron Parke) expressed the opinion that malice was an immaterial element in such case, and yet in the cases cited, many of which were the law when Chasemore v. Richards was decided, we find how important malice is in determining whether a loss occasioned by the exercise of what is generally a legal right is actionable. And in Walker v. Cronin, *supra*, the distinction between the two classses of rights is fully supported and explained. In that case Frazier v. Brown is expressly considered.

We come then to the question whether the acts done by the defendants here were malicious. They were done expressly to inflict loss upon the plaintiffs, and such loss resulted. If they were malicious, they were actionable.

Test laid down by Lord Justice Bowen in the Mogul Steamship Co. case for deciding whether when intent to harm, and the actual harm has been proven, malice is present, is as follows: "In cases like these, where the element of intimidation, molestation or the other kinds of illegality, to which I have alluded are not present, the question must be decided by the application of the testI have indicated. Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, was it done with or without just cause or excuse? If it was *bona fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist, not the less because what was done might seem to others to be selfish and unreasonable. But such legal justification would not exist when the act was done merely with the intention of causing temporal harm, without reference to defendant's own lawful enjoyment of his own rights."

Malice, then, is really intent to injure another without cause or excuse. See also Walker v. Cronin, *supra*.

In Bowen v. Hall, 6 Q. B. D., 333, it was held that where one induced another to break his contract with a third, with intent either to benefit himself or to injure the third person, such act was without just cause or excuse, was malicious and actionable. It follows from this case and the *ratio decidendi* that generally where one induces another to do a legal injury to a third, with intent to benefit himself or injure such third person, the act of inducement is without just cause, and malicious. It must also be conceded from the authorities cited, that if the material men, from whomParker Bros. purchased the necessities of trade, for no

reason at all but simply to injure Parker Bros. combined and refused to sell them anything, and so drove them out of business. Parker Bros. would have had a cause of action against such material men. A loss similarly inflicted with as little reason upon plaintiffs by plaintiffs' customers would be a legal injury and would be actionable.

If then, defendants, with intent to injure plaintiffs, had persuaded plaintiffs' customers to withdraw custom from plaintiffs, and so inflict a loss, not for any benefit to such costomers for any reason connected with their trade, but simply to gratify defendants' intent to injure plaintiffs, the defendants, within the principle of Bowen v. Hall, *supra*, would be liable to plaintiffs for their loss.

In the case at bar, instead of defendants persuading plaintiff's customers, they coerced them to inflict the loss. While the difference may save plaintiffs' customers from liability to plaintiffs, because their acts were induced by fear of loss of their own trade, the conduct of the defendants in bringing coercion to bear, is a *fortiori* as unlawful and as much without excuse, as if the means used had been persuasion. There would be in such case an entire want of any reason or justification for the customers' acts, except such as the defendants with intent to injure plaintiffs themselves created.

The normal operation of competition in trade is the keeping away or getting away patronage from rivals by inducements offered to the trading public. The normal operation of the right to labor is the securing of better terms by refusing to contract to labor except on such terms. Thus in the Mogul Steamship Co. case, it was held to be merely lawful competition to offer great inducements to the public in one year, with intent to cause loss to rivals and drive them out of the trade, so as to get better prices the next year. If the workmen of an employer refuse to work for him except on better terms at a time when their withdrawal will cause great loss to him, and they intentionally inflict such loss to coerce him to come to their terms, they are *bona fide* exercising their lawful right to dispose of their labor for the purpose of lawful gain. But the dealings between Parker Bros. and their material men, or between such material men and their customers, had not the remotest natural connection, either with defendants' wages or their other terms of employment. There was no competition or possible contractual relation between plaintiffs and defendants, where their interests were naturally opposed. The right of the plaintiffs to sell their material was not one which, in its exercise, brought them into legitimate conflict with the right of defendants to dispose of their labor as they chose. The conflict was brought about by the effort of defendants to use plaintiffs' right of trade to injure Parker Bros. and upon failure of this, to use plaintiffs' customers, right of trade to injure plaintiffs. Such effort cannot be in the *bona fide* exercise of trade, is without just cause, and is, therefore, malicious. The immediate motive of defendants here was to show to the building world what punishment and disaster necessarily followed a defiance of their demands. The remote motive of wishing to better their condition by the power so acquired, will not, as we think we have shown, make any legal justification for defendants' acts.

The discussion up to this point has ignored the element of combination in the acts of the defendants. But such cases can rarely, if ever, arise because the power of a single individual to put into operation such a claim of causes as are necessary to inflict loss is hardly to be conceived. The combination of individuals to effect such a purpose is generally in-

dispensable to its success. In the Mogul Steamship Company v. McGregor, *supra*, Bowen, Lord Justice, says: "Of the general proposition that certain kinds of conduct, not criminal in any one individual, may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person would be otherwise; and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." In Gregory v. Duke of Brunswick, *supra*, Coltman, J., says: "It is to be borne in mind that the act of hissing in a public theater is *prima facie* a lawful act, and even if it should be conceded that such an act, though done without concert with others, if done from a malicious motive, might furnish a ground of action, yet it would be difficult to infer such a motive from the insulated acts of one person unconnected with others." It is thus apparent that in determining whether a concerted act or series of acts like those at bar, are actionable, the combination is material in two ways, first, in giving the act a different character from a similar act of an individual by reason of its greater, more dangerous and oppressive effect; and second, in being strong evidence of the malice with which the act is done.

We are of opinion that even if acts of the character and with the intent shown in this case, are not actionable when done by individuals, they become so when they are the result of combination, because it is clear that the terrorizing of a community by threats of exclusive dealing in order to deprive one obnoxious member of means of sustenance will become both dangerous and oppressive.

The conclusions we have reached as to the actionable character of the defendants' acts are supported by a great number of authorities in this country, and by the citation of those cases, we might have justified our decision without seeking to explain the principles upon which it depends. The reason why we have not done so is because in the discussion of illegal labor and trade conspiracies, there is not as uniform a statement of the principles upon which their illegality rests as could be wished. Many of the American cases, rest upon old English cases decided under ancient statutes, prohibiting combinations of labor, which are not now the law, either here or in England. Since 1825, statutes have been passed in England with the express intention of prohibiting combinations of laborers for certain purposes, and all the cases there decided are under such statutes. Whether these statutes were declarative of the common law, or made new crimes and rights of action, has been a subject of dispute among the judges of England since their passage, and the reports are full of dicta of judges with reference to the common law, which are entirely irreconcilable. Mr. Justice Stephen in his History of the Criminal Law, vol. 3, 217, and Mr. Wright, who has written the best work upon conspiracy under the English law, are of opinion that, except as provided by statute, the combination of workmen to raise wages at common law was not unlawful, and such seems to be the weight of judicial opinion. Mr. Wright says, on page 43 of his work, that the mistake arose in this way, that a combination to violate any statute was a crime, not under the statute, but a crime at common law, and the indictment ended not "*contra formam statuti;*" but concluded like ordinary indictments for common law crimes, so that any person reading the indictment would presume that the conspiracy was a crime at common

law, whereas, in fact the existence the conspiracy rested solely on the statute. We do not conceive that in this state or country a combination by working men to raise their wages or to obtain any mutual advantage is contrary to law, provided that they do not use such indirect means as obscure their original intent, and make their combination, one merely malicious to oppress and injure individuals. Such we understand to be the effect of Chief Justice Shaw's opinion in Commonwealth v. Hunt, 4 Metc., 125, where it was held that a society of working men, one of whose rules bound the members not to serve any master who employed non-society workmen, was not illegal of itself until it appeared that the purpose was unlawful. Accordingly in Carew v. Rutherford, in the 106 Mass., 1, where a contracting stone mason, contrary to the rules of his workmen's union, sent some of his material out of the state to be dressed, and his men refused to work for him any longer unless he paid a fine to the society, and upon his refusal left him and only returned upon his payment of the fine, it was held that this combination, being for the purpose of extortion and mischief was illegal. And the plaintiff was allowed to recover not only the fine paid, but damages for loss of business.

In State v. Donaldson, 32 N. J. L., 151, it was held that a combination of workmen to compel a master to discharge another workman, was illegal, because it was done for the purpose of oppressing the master and dictating to him how he should carry on his business.

In Commonwealth ex rel. Chew v. Carlisle, Brightly's Reports, 36, Chief Justice Gibson on an application for *habeas corpus* refused to discharge the relators, who were in custody on a charge of conspiracy in that they, as master ladies' shoemakers, had agreed with each other not to employ any journeymen who would not work at reduced wages. The principle upon which he acted, he expressed as follows: "I take it, then, a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or oppress individuals by subjecting them to the power of confederates, and giving effect to the purposes of the latter, whether of extortion or mischief."

The peculiar form of oppression resorted to in the case at bar is known as boycotting, the essential feature of which is the exclusion of the employer from all communication with former customers and material men by threats of similar exclusion to the latter if dealings are continued. The name is derived from Irish political history of the last ten years. The latest American case where this form of combination is considered, is Crump v. Commonwealth, 84 Va., 927, in which the combination is held to be unlawful, and the general principle is stated as follows: "A wanton, unprovoked interference by a combination of many with the business of another for the purpose of constraining that other to discharge faithful long-tried servants, or to employ whom he does not wish or will to employ (an interference intended to produce and likely to produce annoyance and loss to that business) will be restrained and punished by the criminal law as oppressive to the individual, injurious to the prosperity of the community, and subversive of the peace and good order of society." The case is peculiarly applicable at bar, because the special charges asked for defendants there refused were almost identical with those refused by the court below. As this last is the newest case, the oldest recorded case of boycotting is to be found in the first volume of the publication of the Selden Society, page 115, pleas of the crown, where, in 1221, the

Abbott of Lilleshall appeared before the justices on the circuit, and accused the bailiffs of Shrewsbury, of proclaiming that a fine of ten shillings would be imposed on any one selling him provisions, and the beadle through whom the proclamation was made, was held to answer. The case is indexed by the learned editor as one of boycotting. Other cases in which the same form of combination has been considered and condemned, are State v. Stewart, 59 Vermont, 273; State v. Glidden, 55 Conn., 76; Old Dominion Steamship Co. v. McKenna, 30 Fed. Reporter, 48; Mogul Steamship Co. v. McGregor, 15 Q. B. D., 476, and see a very interesting chapter on strikes and boycotts in Carson's American Law of Criminal Conspiracies, published in the same volume with Wright's work on the same subject above referred to.

From what has been said, it follows that the charge of the court was right, and that on the admitted facts, defendants were liable in damages to plaintiffs for an actionable tort. The fact that one of the defendants was a corporation and the others were its members, is immaterial. In the commission of an unlawful act, *i. e.* unlawful *ab initio*, as this was, all persons engaged, whether as principals or agents, are jointly liable. Meacham on Agency, sec. 573. A corporation may be a party to a conspiracy to injure and liable for the loss arising therefrom. Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y., 669.

A number of other exceptions were taken by defendants' counsel, but we do not find in them any ground for setting aside the verdict.

The motion for a new trial is overruled and judgment will be entered for plaintiffs on the verdict.

MOORE and NOYES. JJ., concur.

Bateman & Harper, for plaintiffs.

Baker & Goodhue, for defendants.

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## ENTAILS. 54

[Logan Common Pleas.]

JOHN D. YODER v. ELISHA FORD ET AL.

J. D. Y., in consideration of natural love and affection, conveyed a tract of land to his daughter, L. Y., "and to the heirs of her body and assigns;" and in the same conveyance reserved to the grantor "the right during his natural life to control the conveyance of said premises during the minority of any of the heirs of the body of the said L. Y." During the minority of all the children of L. Y., she, her husband, and the original grantor J. D. Y., joined in a conveyance of said land to J. C. Y. Afterward J. C. Y. conveyed said premises to E. F., said J. D. Y. again joining in such conveyance; and also executing a mortgage to E. F. on another tract of land to indemnify him against any claim to the land conveyed that might be made by the children of L. Y. Held;

1. That J. D. Y., as the source of the title in expectancy of the heirs of the body of L. Y., had the legal right to provide the means of barring the entail, or cutting off the expectancy, by the same instrument which created such expectancy.
2. That the joining of J. D. Y. in the deed to J. C. Y. was an execution of the power reserved by him in his deed to L. Y.; and did bar the entail, and cut off the expectancy of the bodily heirs of L.
3. That the title conveyed by J. C. Y. to E. F. is a fee simple absolute, divested of all interest or estate, present or expectant, of the bodily heirs of L. Y.
4. That said mortgage of J. D. Y. was and is without consideration.

PRICE J.

This cause has been submitted to the court on a general demurrer to the petition. The petition shows that on the third of May, 1879, the plaintiff, John D. Yoder, in consideration of natural love and affection, conveyed to his daughter, Lydia Yoder, wife of Eli Yoder, a tract of land described in the petition, containing fifty-nine acres. Said conveyance was to Lydia Yoder "and to the heirs of her body and assigns," and also reserved to the grantor "the right during his natural life to control the conveyance of said premises during the minority of any of the heirs of the body of the said Lydia Yoder." On the twentieth of January, 1882, during the minority of all the children of said Lydia Yoder, the said Lydia, her husband and the plaintiff joined in a deed conveying said land to Jonas C. Yoder, with covenants of warranty, the plaintiff receiving no consideration therefor, but uniting in said deed for the sole purpose of authorizing, directing and controlling the conveyance of said land. On the eighth of January, 1887, the said Jonas C. Yoder conveyed said premises to the defendant, Elisha Ford, the plaintiff uniting in the covenants of warranty in said deed, receiving no consideration therefor, and having no beneficial interest in said premises. On the last mentioned date, to indemnify the said Ford against any claim or possibility of claim that might or could be set up to said land by the heirs of the body of said Lydia, the plaintiff executed a mortgage to said Ford upon a tract of land containing forty-four and 95-100 acres. The condition written in said mortgage is as follows:

"Whereas, on the third day of May, 1879, said John D. Yoder and wife, by deed of that date conveyed to Lydia Yoder a certain tract of fifty-nine acres of land, part of sec. 31, T. 4, R., 14, in said Logan county, in which deed were certain limitations. Said deed is recorded in vol. 58, at page 112 to which reference is here had; afterwards to-wit: on the twentieth day of January, 1881, said Lydia Yoder desired to sell said lands and to perfect the title to said lands as was supposed said John D. Yoder, joined with the said Lydia Yoder in conveyance of said lands to Jonas C. Yoder, said deed is recorded in vol. 62, at page 629 of land records of said Logan county. Said Jonas C. Yoder has now sold said lands, and desires to convey the same to said Elisha Ford, and the parties have been advised that the title to said lands is still encumbered and clouded, and that said Jonas C. Yoder, cannot give a perfect title because of the limitations contained in said deed of May 3, 1879, and to perfect the said title and relieve it of said limitations, the said John D. Yoder for value received by him has joined in the warranty with said Jonas C. Yoder, and has agreed that all the heirs of the said Lydia Yoder, as they arrive at majority, shall execute and deliver to said Elisha Ford, his heirs and assigns, proper deeds of quit claim in fee simple for said lands, and has agreed that said Elisha Ford, his executor, heirs, and assigns forever, shall never be disturbed or in any manner damaged by reason of said limitations contained in said deed of May 3, 1879. Now, if said John C. Yoder, his executors and administrators shall protect said Elisha Ford, in his title to said lands, and shall cause the heirs of the body of said Lydia Yoder to execute to said Ford, his heirs and assigns, proper deeds of quit claim for said lands, and shall in every way save and indemnify him, Elisha Ford, his heirs and assigns, from all losses, damage and expense by reason of any claim of said Lydia Yoder or any child or heir in or to said lands by reason of said limitations contained

in said deed of May 8, 1879, then this mortgage to be void, otherwise to be and remain in full force and effect."

The plaintiff claims that said mortgage was without consideration; that there was nothing against which to indemnify the said Ford; that the title conveyed to Ford by Jonas C. Yoder was and is a fee simple absolute, divested of all estate existing, contingent or possible, in the heirs of the body of said Lydia Yoder, and asks that said mortgage be cancelled. The question to be determined is, was such mortgage without consideration? The mortgage pretends to indemnify Ford against any damage or expense by reason of any claim that might be made by Lydia Yoder. If that were all, the mortgage would certainly be without consideration, for Lydia Yoder conveyed to Jonas C. Yoder all her interest in the land by warranty deed. She is doubtless precluded from ever setting up or asserting any interest therein. So, in discussing the question of consideration, she may be left out of the question. As to whether there was any consideration for the mortgage, it must be ascertained by determining whether at the time of the execution of the mortgage the heirs of the body of Lydia had any interest in said lands, either present or in expectancy. If they had, that would be a sufficient consideration for the indemnity mortgage; if they had not, there would be no consideration for such mortgage, for there would have been nothing against which any indemnity could have been required. So that the whole case is to be determined by ascertaining whether at the time of the execution of said mortgage, the heirs of the body of Lydia had any interest in the lands, either present or in expectancy. The plaintiff, in his deed to Lydia, reserved "the right during his natural life to control the conveyance of said premises during the minority of any of the heirs of the body of said Lydia Yoder." When Lydia, her husband, and the plaintiff conveyed said real estate to Jonas C. Yoder, the children of said Lydia were all minors. In the case of Kary A. Pollock and others v. Elias Speidel, 17 Ohio St., page 439, the court decide:

I. "Where lands are conveyed by deed to A, the heirs of his body, and assigns, forever," the grantee takes an estate tail.

II. By force of the statute of this state limiting entailments, the issue of A takes the inheritance as an absolute estate in fee simple.

III. The first dower in tail cannot, in this state by a sale and conveyance in fee simple, with covenants of warranty, bar the entail, or deprive his issue of the right of succession to inheritance.

IV. Though the issue, in such case, take by descent, yet the tenant in tail is not the source of their title, they take *per formam doni*, from the person who first created the estate, are therefore not estopped by the deed of the tenant in tail."

Under this authority, it is clear that, but, for the power reserved by John D. in his deed to Lydia, she would have taken an estate for life only, and on her death her issue would have taken the inheritance as an absolute estate in fee simple, and she could not have barred the entail, or cut off the expectancy of her issue, by a conveyance in fee simple with covenants of warranty. But John D. did make the reservation already referred to, thus making a very different case from the one just cited. It must be remembered that Lydia would not, in any event, be the source of the title of her issue to the lands, but that John D. would be the source of whatever title they might or could take. Being the source of their title in expectancy, it was competent for him, in the same instrument which created their expectancy, to provide the means for

cutting it off, or barring the entail. His deed to Lydia was simply a gift to her, being without consideration other than natural love and affection. He had the right to place such limitations and restrictions upon the gift as seemed fit to him. He did reserve the power to control the conveyance of the land during his natural life, and during the minority of any of the heirs of the body of Lydia.

This is what is called a power in gross, that is, he reserved no interest or estate in the land itself, but simply the power to direct or control its conveyance during the time specified in the reservation. He had the right to reserve such power, and the exercise of the power thus reserved would cut off the expectancy of the heirs of the body of Lydia. The question remains, did he exercise such power when he joined Lydia and her husband in the conveyance to Jonas C. Yoder? The word "control" contained in the clause of reservation is not qualified by any other word, so that it imports as much as if he had used the words "absolute control" or "control without restraint." In the deed toJonas C., there is no express reference to the power that had been reserved to John D., but that he, John D., intended such conveyance as an execution of such power, in my judgment, admits of no rational doubt. The deed covers and describes the property which was the subject of the power that he might execute within the time specified; he had no interest or estate whatever in the property, nor did he hold the power in trust for the benefit of some stranger, but for his own exclusive benefit. So that his joining in the conveyance to Jonas C. would have been doing a most idle and vain thing, unless he had intended it to be an execution of the power reserved by him in his deed to Lydia.

I conclude, first, that John D. as the source of the title in expectancy of the heirs of the body of Lydia, had the legal right to provide the means of barring the entail, or cutting off the expectancy, by the same instrument which created such expectancy.

Second, that his joining in the deed to Jonas C., was an execution of the power reserved by him in his deed to Lydia, and did bar the entail, and cut off the expectancy of the bodily heirs of Lydia.

Third, that the title conveyed by Jonas C. to the defendant, Ford, was, and is a fee simple absolute, divested of all interest or estate, present or expectant, of the bodily heirs of Lydia.

Fourth, that in consequence of the above findings, plaintiff's mortgage was and is without consideration.

The demurrer to the petition will be overruled, and unless the defendants desire to further plead, a decree will be entered cancelling plaintiff's mortgage, also quieting the title of the defendant, Ford, as against the heirs of the body of Lydia, each party to pay his own costs.

West & West, for plaintiff.

E. J. Howenstine, for defendant.

## MUNICIPAL CORPORATIONS. 68

[Superior Court of Cincinnati, General Term.]

### †MT. ADAMS AND EDEN PARK INCLINED RY. CO. v. CINCINNATI.

**Plaintiffs assignors tendered a bond to the city of Cincinnati conditioned that he would pay the cost and expense of appropriating land for a street, the city to levy an assessment upon abutting lot owners, to pay for the appropriation and to certify the same to plaintiffs' assignors. The bond recited that he had an interest in the improvement. The bond was approved by the board of public works pending the passage of the ordinance, was read in council, but was not read in the board of aldermen. The ordinance to condemn passed all the boards, and was approved. Proceedings were had condemning the property, and in about one year after tendering the bond, plaintiffs' assignors paid the condemnation money into the city treasury and the city used it to open the street. No assessment was yet levied, in an action to recover the money. Held:**

1. That the common council had no authority to contract to levy an assessment and certify an assessment, and to certify the same to another, in cases of appropriation of land.
2. That the city has no power to borrow money in anticipation of assessment except by issuing bonds and advertising for bids for the same.
3. That as the bond was not approved by the board of council, and was not even read in the board of aldermen, there was no acceptance of it, and therefore no contract was entered into by the city to make and certify assessments.
4. That no promise either to verify assessments or to return the money is to be implied from the city's using the money, because it is to be presumed not that the city thereby intended to make a contract which was beyond its power, but rather that the plaintiffs' assignors, being interested in the improvement, and making payment after his bond had failed of acceptance, intended a voluntary payment within sec. 2251 Rev. Stat. and that the city accepted and used it as such.

This is an action by the plaintiff to recover from the city $8,750.00 which was paid by James Mooney into the city treasury for the purpose of enabling the city to appropriate and pay for land of Richard Mathers, and to open Grand street from Nassau street to Gilbert avenue. The allegation of the petition is that in consideration of the advance of this money, the city agreed to assess the cost of the appropriation upon the abutting and benefited lot owners and certify such assessment to Mooney, that the city used the money so advanced, took the land and is now using it as a street but although frequently requested, the city refuses to give to plaintiff who has become the owner of Mooney's rights, any assessment for said cost upon the abutting or benefited lot owners. The defendant denies the agreement to give an assessment and says that Mooney and plaintiff had such an interest in the condemnation that they agreed to and did advance this money without any stipulation that it should be repaid, a privilege accorded to any citizen who is interested in a public condemnation by sec. 2251, Rev. Stat.

The facts are as follows: On the twelfth of October, 1878, the board of public works recommended to the common council that it pass an ordinance to condemn a strip of land lying between Nassau street on the south and Gilbert avenue on the north which would be included between the extended lines of Grand street, authorizing and directing the city solicitor to institute the necessary proceedings in the court for an inquiry and assessment of compensation therefor, and providing that the amount so found, together with the costs of the action, should be assessed upon the property abutting on the improvement. In the board of council, the ordinance was read the first time on the eighteenth of October, 1878, and was referred to the committee on condemnation and vacation. On November first, 1878, it was reported back, read a second time and engrossed. Two days before this, James E. Mooney and Wm. M. Ramsey executed a bond to the city of Cincinnati by which they bound themselves to the city in a sum to be as-

†This judgment was affirmed by the superior court in general term; opinion 25 B. 91. The general term was affirmed by the Supreme Court, in Railway Co. v. Cincinnati, 52 O. S., 629.

certained; the condition being as follows:"Whereas said James E. Mooney is a person interested in the appropriation of private property, for the opening and extending of Grand street in said city from Nassau street to Gilbert avenue, which is now being considered by the boards of said city's government, now, therefore, if said city shall appropriate private property for such purpose, the expenses of the same to be assessed on property abutting thereon, and benefited thereby and the assessement to be certified to the obligors herein and cause an application to court to be made to assess the damages therefor, the said obligors bind themselves as aforesaid to pay all costs and expenses incurred by the city in such application and further to pay into court or otherwise as the law officer of the city or as the court shall direct all damages which may be assessed by the jury in such proceedings. Said payments to be made for costs and expenses immediately after the conclusion of the case, and for damages within the six months allowed by law." This bond was approved by the board of public works, November 1, 1878, and was read in the board of council the same day. Nothing further was done with it. It never was approved or accepted by the board of council and was never even read in the board of aldermen. In the board of council the condemnation ordinance was read a third time and passed November 15, 1878. On the twenty-second of November, 1878, in the board of aldermen the rules were suspended, the ordinance was read three times and passed. On November 25th, it was approved by the mayor and board of public works.

Condemnation proceedings were had, and on August 22, 1879, Mooney deposited $8,750.00, the amount of the condemnation money with the city treasurer, who gave him the following receipt:

"Received of Jas. E. Mooney for condemnation of ground for the purpose of extending Grand street from Nassau street to Gilbert avenue, eight thousand seven hundred and fifty dollars. Cr. General fund. $8,750.00.

Henry Stegner, Asst. City Treasurer."

This money was paid to the property owners. Grand street was opened by the city as a public street and continues to be used as such. Applications have been made to council to make the assessment upon abutting lots to pay for the improvement and certify the same to the obligors of the bond, and although ordinances have been introduced, they never have been passed.

TAFT, J.

The claim made by the plaintiff is based on the words of the condition of the bond as the contract under which the money was paid, and which by the acceptance of the money, it is said, became an express obligation of the city to make an assessment and certify the same to the obligors. Defendant contends that even if any such obligation was entered into, it was beyond the power of the city to make and void.

The agreement to pass an ordinance is an agreement to exercise legislative power conferred upon the city council. Unless express power is given to a municipal corporation to make such a contract, I think it cannot be inferred. For a long time it was believed, and the Supreme Court of Ohio actually held that it was beyond the power of one state legislature, even in the absence of constitutional inhibition to make a contract with a citizen by which other and succeeding legislatures should not tax such citizen, that it was inherently impossible for the legislature, though it was the depositary of all legislative authority, to contract itself out of the exercise of the sovereign power to tax.

A majority of the Supreme Court of the United States took a different view, and held the state to the obligation. We may infer, however, what would be the decision upon the right of a municipal legislature acting under limited and specified powers to effectually bind itself in advance to any particular course of legislation when no such right was expressly given to it. See Dillon on Municipal Corporations, sec. 97. Goszler v. Georgetown, 6 Wheaton, 593.

The only place in the statutes where a municipal corporation is given authority to agree to make and certify assessments to any one is in subdivision 7 of sec. 2303. This section describes the mode by which bids for public improvements shall be received and the contracts made. In subdivision 7 it is provided that "the contract shall be between the corporation and the bidder and the corporation shall pay the contract price in cash; provided, however, that the contract price may be paid in assessments, as the council in its discretion may have previously determined; and suits to recover or enforce such assessments may be brought in the name of the corporation." This section, of course, has no application to the expense of condemning property for improvements. Krumberg v.

City, 29 Ohio St., 69. It only permits council to contract to levy assessments and pay them for improvements by construction.

But it is said that this transaction was really only a mode of making a loan in anticipation of the assessment, and that power for it may be found in sec. 2704 of the Rev. Stat., which is as follows:

"The council of any municipal corporation, shall also have power to borrow money at a rate of interest not exceeding seven per cent, per annum, in anticipation of the collection of any special assessment and to issue the bonds of the corporation therefor, in the manner and form herein provided." It is very evident that the kind of loan herein authorized is one to be evidenced by the issuing of bonds. I do not think, however, that a departure from this particular form of the obligation to be issued would be a fatal defect in the exercise of the power, were it not for other provisions in the same chapter as to the mode of issuing and selling those bonds which are made obligatory. Secs. 2703 and 2709 apply to the bonds issued under 2704. They are as follows:

"Section 2703. All bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued and under what ordinance.

"Section 2709. In no case shall the bonds of the corporation be sold for less than their par value. All sales of bonds by any municipal corporation shall be to the highest and best bidder after thirty days notice in at least two newspapers of general circulation in the county where such municipal corporation is situated, setting forth the nature, amount, rate of interest and length of time the bonds have to run, with time and place of sale."

Now if this transaction at bar is to be regarded as a loan in anticipation of assessment, the city was given no opportunity as required by statute to secure that loan on the best terms by invitation for competitive bidding. Such a course is as much beyond the city's power as to let a contract for an improvement for an amount exceeding $500.00, without advertisement for bids. Whether, then, the contract upon which plaintiff relies be regarded as a contract to levy an assessment for the benefit of the plaintiff, or to repay a loan, in either case it was beyond the power of the city to make, and void.

Counsel for the plaintiffs contends that inasmuch as the plaintiffs' assignor paid the money on the faith of a promise by the city to reimburse him by giving him assessments, and the city has used the money, it is estopped to plead *ultra vires* in an action to recover the money paid. The cases of Louisiana v. Wood, 102 U. S., 294, and Chapman v. Douglas County, 107 U. S., 278, are cited to this point. I do not find it necessary to consider this argument, or the cases cited, to sustain it, because neither it nor they can have any application to the case at bar, if in fact the city never did promise to give Mooney an assessment. It seem to me that the evidence, taken with the legal presumptions, will not warrant the finding that the city ever made such a promise.

The writing said to contain the contract is a bond purporting to be given to the city. If this bond, like a voluntary deed, simply conferred a benefit, without giving rise to any obligation, binding the obligee, perhaps, delivery to an officer of the city, authorized to receive such an instrument, might raise a presumption of acceptance. But where an acceptance imposed on the city an obligation to make an assessment, and certify it to the obligors of the bond, I am quite convinced that the acceptance must have been clear and unequivocal to show that the city entered into such a contract as an acceptance of the bond would imply. In other words, an acceptance must be given with the same formalities, and by the same action of the co-ordinate branches of the city government, that are required to expressly make a contract of the character to be implied therefrom. Now the only city board which approved the bond, was the board of public works. It was once read in the board of council, but it was never approved or accepted, and so far as appears, it was never sent to the board of aldermen at all. It is apparent then that when the condemnation ordinance was passed, the city made no contract with Mooney to pay back in assessments, any money he might advance to make the condemnation ordinance effective.

Can the city be held to have made such contract by receiving his money one year later, and using it to buy the land? It seems to me not. If Mooney had had no personal interest in the condemnation, his advance of the money could not be explained, except that it was made under the unaccepted bond. But he had a deep interest, and when he advanced the money, in spite of the fact that the bond had not been accepted, I think that the city was entirely justified in receiving the money from Mooney, and using it as a voluntary advance, made because of the benefit accruing to him from the improvement. The statute, sec. 2251, makes provision for such voluntary advances by persons interested. and it is a much

stronger legal presumption that the city authorities, in receiving the money, and Mooney in paying it, were acting within the spirit of that section, than that they were thereby entering into a contract, the obligation of which, the city had no power to incur. For this reason, we must regard Mooney's deposit as a voluntary payment, which gives neither him, nor his assignee any right of recovery.

Judgment for defendant.

Ramsey, Maxwell & Ramsey, attorneys for plaintiff.

Hadden, Galvin & Van Horn, city solicitors.

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## 85 GRAND LARCENY.

[Clinton Common Pleas.]

STATE OF OHIO v. CHARLES SMITH AND CALVIN ROLSON.

Where several articles of property are stolen at the same time, the transaction being the same, the whole, although they having two different owners, may be embraced in one count of the indictment, and the taking thereof charged as one offense.

DOAN, J.

The defendants were indicted for stealing horse blankets, robes and harness, belonging to seven different owners, alleging the value of the property at $46.00. Plea: not guilty.

The proof at the trial showed the following facts: A, B, C, D, E, F, and G, all went on the evening of December 28, 1889, in their buggies, to attend a Lyceum, which was held in a township house, situated on a lot of two acres of ground, enclosed on three sides by a fence, but open in front. They hitched their horses at the hitching racks, part of them at a rack on the east side of the lot, and the remainder on the west side, the racks being 300 feet apart. They left their several articles which were afterwards stolen in their buggies. Some time between eight and ten o'clock these things were stolen, and afterwards, about one o'clock, found in the possession of the defendants. The defendants moved the court to compel the prosecution to elect upon which larceny the state would ask for a conviction. This motion the court overruled. The defendants offered testimony as to the value of goods, and rested.

The following special instructions were asked to be given to the jury by the defendants' counsel.

*First instruction*—The property alleged to have been taken in this case by the defendants is laid in the indictment as the property of some different owners. Before you can find the defendants guilty as charged in the indictment, you must find from the evidence, and that too, beyond a reasonable doubt, that the said property was taken at the same time from the same place; that the whole taking, was the same transaction, and was one and the same muscular action and volition.

*Second instruction*—If the property claimed to have been taken in this case from different owners, were taken from separate buggies, carriages, or other conveyance of different owners, situate at different places on any public ground, so placed by said different owners, each acting separately and independent of the others, then the several takings were not from the same place so as to make the different takings one larceny.

West & Walker, attorneys for defendant, cited in support of said instructions, State v. Hennessey, 23 Ohio St., 339; 1 Whar. Crim. Law,

secs. 27-9, 31-7; Crim. Law Mag., 714; Thatcher Crim. Cases, 84; 28 Am. Rep., 396; 20 same, 612; 35 same, 732; 24 same, 708; 180, 223, 36 Am. Rep., 106; 23 same, 602.

The court refused to give these instructions, but instructed as follows on that branch of the case:

"The indictment charges that the property was owned by several different persons, and describes the part of the property owned by each one. It is admitted that the property, when taken, was taken from different conveyances, where the owner had left it. Now, one of these questions to be ascertained in this case is, was there more than one larceny. It is true that the defendants may be indicted in one indictment with the crime of stealing property owned by different persons, of different and separate part of the property, and convicted when it is but one larceny. If more than one larceny, then there should be as many indictments as there are separate owners of the property stolen, that constituted a separate and distinct larceny. I charge you, gentlemen, that to find the defendants guilty, there must be but one larceny; therefore, to find that there is but one larceny, it is necessary that the evidence should satisfy you beyond a reasonable doubt, that there being separate owners of separate parts of the property taken, that the stealing of all the property was one transaction done at the same time and place, and that the taking of the several parts of property was, with the same intent to steal, and one continuous act, with no other intention nor delay in getting it from the place where found, than was indispensible to take the same. Gentlemen, I have charged that you must be satisfied that the goods were taken at the same time and place. I say further that if the goods were, at the time of taking, in conveyances on the same lot, without any separation or division of one part of the lot from the other, so that the goods were near together, and in different conveyances, if so taken by one act, with the same intent to steal the goods, as I have stated, that would be one larceny; but if the goods were part on another lot, or place, or if the taking was not one transaction, or one act, or if the taking was not the same intent to steal therefrom, your verdict would be not guilty, for the reason that that would make more than one larceny, and if more than one, there can be no conviction."

Verdict, guilty of grand larceny.

Sentence, one year each in penitentiary.

W. W. Savage, for State, Levi Mills, also for State.

West & Walker, for Defendants.

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## STREET ASSESSMENTS. 100

[Superior Court of Cincinnati, Special Term, 1890.]

† LONGWORTH v. CINCINNATI (CITY).

1. Where the common council of Cincinnati passed an ordinance condemning property to widen a street, and providing that the court costs and the condemnation money should be paid by an assessment upon the abutting lot owners, to be collected in one installment. *Held*, that it was beyond the power of the board of public affairs to provide in the assessing ordinance, that the assessment should be paid in ten installments, and to include in the amount assessed, interest upon bonds issued by the city in anticipation of such ten year installments, and expense of advertising.

†A contra holding by the superior court in general term is found in Anderson v. Cincinnati; opinion post 23 B. 430.

2. Section 2304, providing that before any improvement is ordered council shall pass a resolution declaring its necessity, has no application to the appropriation of private property for public improvements, and refers only to improvements by construction. The *ratio decidendi* of the case of Krumberg v. City, 29 Ohio St., 75, is applicable to sec. 2304, notwithstanding the difference in the language of sec. 563, of the municipal code of 1869, under consideration in that case, and section 2304, Rev. Stat.

3. It is not essential to the validity of an appropriating ordinance and the assessment founded thereon, that the board of public affairs should have recommended the same or transmitted a preliminary estimate of the expense of such appropriation.

4. In view of the fact that the assessment laws of the state have been repeatedly upheld as valid by our Supreme Court, an inferior state court should decline to consider the question whether they violate the 14th amendment of the U. S. Constitution in not giving sufficient notice, to the property owner assessed, until the question shall have been considered and passed upon by either our own Supreme Court or the Supreme Court of the U. S.

TAFT, J.

This is an action to enjoin the collection of an assessment made upon real estate of the plaintiffs, abutting on Ravine street in this city, to pay the expense of the condemnation of private property to widen the street.

Plaintiffs claim that the assessment is excessive, because it includes items not by law to be included therein. Again they say the assessment is void, first, because the board of public affairs did not recommend the improvement, second, because they did not have the engineer make, and forward to council a preliminary estimate of the cost of their improvement, and third, because council passed no preliminary resolution declaring the necessity of such improvement. Finally, it is urged on behalf of plaintiff that if such statutory steps are not required, then the law with reference to assessments for condemnation expenses is unconstitutional in that the abutting lot owner is not given his day in court to be heard upon the amount of the assessment, and so the assessment is taking his property without due process of law within the prohibition of the 14th amendment of the U. S. Constitution.

The condemning ordinance directed the city solicitor to institute proceedings to assess the value of the property to be taken, and provided that the amount so found, together with the costs of the action, should be assessed in one installment. The award by the jury was $1,600.01, and the costs of the suit were $56.63. The assessment was made by ordinance passed by the board of public affairs, under sec. 2314a. The entire amount assessed was $2,303.84. The excess was made up as follows:

| | |
|---|---|
| Advertising | $150 00 |
| Interest on bonds issued | 496 84 |
| | $646.84 |

No provision for the payment of advertisement was made in the original ordinance to condemn and assess. By sec. 2264 it is provided that such part of the expense of the improvement may be assessed upon such lands, and according to such one of three methods as council may in advance determine, and in the same section it is provided that council shall determine in advance, in how many installments the assessments shall be paid, and also whether bonds shall be issued in anticipation of payment. The power of the board of public affairs to assess after the work is done, is limited by sec. 2314a, 78 O. L., 259, to the mode and manner laid

down by council in the ordinances ordering the improvement. When, therefore, council had ordered this assessment to be paid in one installment, there was no power in the board of public affairs to order the same to be paid in ten installments, and to charge interest on the bonds in the assessments. Nor was it within the power of the board to include in the assessment that part of the expense of the improvement arising from the advertising, because counsel had not so ordered it in advance. Under secs. 2273 and 2275, the city, besides being obliged to pay assessments as a private owner for all intersections and other property, must also pay 2 per cent. of the whole cost. This 2 per cent. was not deducted from the total to be assessed upon private owners. By reason of these items, improperly included in the assessment, the excess in the whole amount assessed upon private owners was $680.33. The feet front of private owners amount to 11,785.31. The frontage of plaintiffs is 8,721.80 feet. This excess of the assessment upon their property is therefore $503.48, and as to so much at any rate, plaintiffs are entitled to relief by injunction.

We come now to the objection that the assessment is void for failure to comply with statutory requirements. Let us consider first the absence of a preliminary resolution, declaring the necessity for the improvement. The argument of counsel is that sec. 2264 is the only section under which authority to assess for appropriating property for streets, as well as for constructing streets is found. This is true. That section provides that the costs and expenses shall be assessed by council by the foot front, the benefit, or the valuation plan as council may determine, "and in the manner and subject to the restrictions herein contained." "Herein contained," refers to subdivision 1, of chapter 4, on assessments in general. Section 2304 is in this subdivision, and counsel contends that it is one of the restrictions thus referred to. The section provides that when it is deemed necessary by a city or village to make a public improvement, the council shall declare by resolution, the necessity of such improvement, and shall give twenty days' written notice of its passage to the owners of the property abutting upon the improvement, who may be residents of the county, and publish the same between two and four weeks. All plans and profiles relating to the improvement are to be recorded and kept on file for the inspection of interested parties. Council may appoint some one to serve the notice under the section. In cities like this, the board of public affairs may make the appointment. Is this a restriction upon the assessment by council under sec. 2264? I do not think so. For all improvements to which it applies, it is an essential step in the ordering of the improvement, and is, perhaps, in that sense, necessary to the validity of the assessment; but it is not peculiar to improvements to be paid for by assessments. Council has no power to order any improvement of the kind included in the section without such resolution, whether it is to be paid out of the general fund, or by local assessment. Nothing is said in the section with respect to assessments. The notices are sent to abutting owners, but they are not required to specify how the improvement is to be paid for. The real object of the section is revealed when it is read in connection with section 2315. That section provides that every abutting owner upon a proposed improvement within two weeks after receiving service of the notice provided in sec. 2304, or the completion of the publication, shall file a claim for damages, if any he has, likely to arise from such improvement, and failing to do this, he waives his right thereto. Now it

is perfectly obvious that damages can only arise from improvements by construction, such as lowering or raising grades, etc. No damages could possibly arise to an abutting owner by the simple appropriation of property to widen the street on which his lot stands. Counsel claims that sec. 2304 is for the purpose of giving notice to the probable assessment payers. But this cannot be true, because it is only the abutting owners who are to be notified, while it is clearly within the discretion of council and the equalizing board under sections 2277-2281 to assess according to benefits other lots than those abutting on the improvement. It would seem, therefore, that the chief purpose of the sec. 2304 is to give to council an idea of the damages to be claimed because of the proposed improvement, and to cut off delayed claims therefor. If so, it is difficult to see why it should be a restriction upon an assessment to pay for condemning property when the only damages which can arise therefrom are fixed in the proceeding to condemn. But it is said that the words "public improvement" are wide enough in their meaning to include improvements by appropriation as well as improvements by construction. This must be granted, but it will be found in running through subdivision 1, chapter 4, on "assessments in general," the word improvement has two different meanings. In some sections, it includes improvement by appropriation and by construction. In others it can only refer to improvement by construction. Thus in 2262, it is expressly made to include cost of real estate. In 2263, a distinction is made between appropriation, acquisition and improvement, and thus the latter means construction. In 2264, improvement is used in the wider sense, and includes appropriation and construction. In 2267, it is used in its wider sense, and so, also, in 2268, in 2269, 2270, 2271, 2272, 2273, 2274, which are all of them, properly speaking, restrictions upon assessments in general. In section 2289, improvement means improvement by construction, and so in 2293, in 2301, in 2303, in 2305 and in sec. 2311. The difference in the meaning of the word is determined by the association in which it is used. See the remark of Judge White in Krumberg case, 29 Ohio St., 75. "The word improvement is used in the act in various senses. Its meaning in any given instance will depend upon the subject to which it is applied, and the connection in which it is used." When, then, we consider what has already been stated and shown, that the chief purpose of sec. 2304 is to give notice to those who may be damaged by the improvement, and it is impossible for a simple appropriation of property to give rise to any damages save to the owner, who is compensated under chapter 3, it seems to follow that public improvement as used in sec. 2304, means improvement by construction. This conclusion is fortified by the decision of the Supreme Court in the case of Krumberg v. City, 29 Ohio St., 69. It was there held that the power to levy special assessments to pay for land taken to widen or extend a street is separate and independent of the power to levy such assessments to pay for grading and paving the streets, and the validity of assessments made for these purposes does not depend upon whether the powers were exercised at the same or at different times. It was further held that the resolution declaring the necessity of an improvement which the council was required to pass and publish, as provided in sec. 563, of the municipal code of 1869, did not apply to the appropriation of private property to public use, and that such proceedings were otherwise specially provided for. Section 2304, Rev. Stat., is an amended form of sec. 563 of the code of 1869, and, speaking generally, the rea-

soning of the Supreme Court in that case, excludes 2304, Rev. Stat., from application to proceeding to appropriate land just as it did 563 of the old code. Counsel for the plaintiff insists, however, that that sec. 2304 differs from old 563 in the very language upon which the Supreme Court relied upon for its distinction. Section 563 provided that "when it shall be deemed necessary by any city or incorporated village to make any public improvement not otherwise specially provided for, it shall be the duty of the council to declare by resolution the necessity of such improvement, etc." In referring to this section in the Krumberg case, the Supreme Court speaking by Judge White, says: "Another objection urged is that the council did not declare by resolution the necessity of widening the street, and publish such resolution as required by sec. 563 of the municipal code. That section, by its terms, only applies to "improvements not otherwise specially provided for." The appropriation of private property to public use is specially provided for in chapter 46. Sections 511 and 512 prescribe what the council is required to do when it is deemed necessary to make such appropriation, and when the property is required for the purposes of streets, alleys or public highways, the requirements of these sections seem to be modified by section 583 as amended, and to which reference has already been made." This section 583, in connection with amended section 589, gave council the power to assess for appropriation of lands according to certain sections of the general assessment law, which described the plan known as the benefit plan. What is the difference in the present law? By sections 2263 and 2264 the discretion of council to assess for appropriation, has been extended so that it may use not only the benefit plan, but also the foot front and the valuation plan. But the appropriation of private property continues to be specially provided for by chapter 3, division 7, title 12, which is substantially the same as chapter 47 under the old code. Sections 511 and 512, which Judge White refers to as prescribing what the council is required to do when it is deemed necessary to make an appropriation, are repeated in secs. 2234 and 2235, Rev. Stat. They are as follows: Section 2234, "No improvement requiring proceedings for the condemnation of private property shall be made without the concurrence in the by-laws, ordinances or resolution directing the same, of two-thirds of the whole number of the members elected to the council." Section 2235, "When it is deemed necessary by a municipal corporation to appropriate private property, as hereinbefore provided, the council shall, by resolution, declare such intent, defining therein the purpose of the appropriation, and setting forth a pertinent description of the property designed to be appropriated; and on the passage of such resolution, the yeas and nays shall be taken and entered on the record of the proceedings of the council." Then in secs. 2236 and 2237 follows a provision for application to the court and for service of notice upon the owners of the property to be taken. Now it seems to me that these sections serve exactly the same purpose for improvements by condemnation, that sec. 2304 does for improvement by construction. They are both declarations of intent to improve with notice thereof, to the persons who are to be directly injured by the proposed improvement. The error as I conceive with submission, that counsel has fallen into with respect to 2304, is to attribute to it the purpose of notifying assessment payers where its purpose is specially to notify injured property owners and, only in a general way, the public. It is a step in ordering the improvement and not in making the assessment, and although its

absence might affect the assessment, it is because a lawful assessment must be based on a lawful improvement, and not because a restriction upon the assessment itself has been violated. The very case upon which counsel relies, of Scott v. Toledo, 36 Fed. Rep., where Judge Jackson in a learned opinion considers the question of the provision for notice under the Ohio law of assessments, distinctly repudiates the idea that sec. 2304 provides for any notice to assessment payers as such for the very obvious reason that nothing is required to be set forth in the notices sent out of the mode by which the proposed improvement is to be paid for whether out of the general fund or out of local assessments. Returning now to the clause in the old 563, "improvments not otherwise specially provided," I do not think its presence was essential to the decision of the Krumberg case. It was expressed and so the court quoted it, but even if no such clause had been used, the court must have reached the same result, on the general principle of the construction of statutes, that where there is a general provision which might apply to a particular case, and there is a special provision for that particular case, the special provision must apply, to the exclusion of the general provision. For the court found that there was a special provision for improvements by approriation, and so would doubtless have read into sec. 563, the modifying clause, "not otherwise specially provided for," if it had not been expressed. When, therefore, in the revision of the code of 1868, 75 O. L., 322, in div. 7, chap. 4, sec. 47, was substituted for old sec. 563, the omission of the clause "not otherwise specially provided for" is not to be regarded as significant of change in the extent of its application; because the special provision for cases of appropriation continued exactly the same in the revision as before. The fact that assessments for appropriation and construction improvements are now provided for in the same section, 2264, does not effect the question under discussion in the least. As I have before said, and now repeat, neither sec. 2304, nor 2234-5, are provisions specifically directed to improvements to be paid for by assessments, but cover all improvements of their kind, paid for from whatever source. Counsel for the plaintiffs contends that assessments to pay for the appropriation of real estate were otherwise specially provided for in the Krumberg case, because under the benefit plan which was the only one then provided for such assessments, the assessment payers were given a notice and hearing before the equalizing board. If the feature of the notice thus provided under the plan was present in the minds of the court in the Krumberg case, no reference was made to it in the opinion, and in view of the fact that the preliminary resolution is not for the purpose of notifying assessment payers, but injured property owners, we may presume that the plan referred to was not of moment in the discussion. This view of the Krumberg case with reference to the question made upon the necessity for a preliminary resolution is sustained by a decision of Judge Maxwell, of the common pleas of this county Rademacher v. Cincinnati, *ante* 475.

We come now to the fact that there was no resolution of the board of public affairs, recommending the appropriation. Speaking of the necessity for such a resolution in the Krumberg case, Judge White says, "Looking to the powers and duties of the board of improvements, it may be questionable whether their recommendation is necessary before the council can acquire real estate by appropriation or otherwise for any public use," but added that they were not required to consider the question in that case. The duty of initiating improvements now entrusted

to the board of public affairs, is precisely similar to the duty then enjoined upon the board of improvements. The scope of the duties of the board of improvements was much the same as the board of public affairs. The duties were almost entirely confined to superintendence of improvements by construction. In view of the intimation of the Supreme Court, I have no hesitation in concluding that the recommendation of the board was not required for the appropriation of real estate to widen streets. Counsel relies on the provision in sec. 2264, that the section "shall be subject to the provisions of chapter two of this division," which is the chapter on the board of public affairs. But the provision of chapter two, requiring the recommendation of the board for improvements, we find does not apply to improvements by appropriating real estate, and therefore, the words used in sec. 2264, just quoted, can not give such provision any greater application. The same remark may be made with reference to the necessity for a preliminary estimate of the cost of the property to be appropriated. Section 2213 provides as follows: "When the board deems it advisable to make a contract for the execution of any work, or the purchase of material for matters under its charge, a careful estimate shall be made of the cost of such work or material." Section 2214 provides: "In any cases where assessments are to be made, or where the estimated cost of any work or material exceeds five hundred dollars, the board shall transmit to council, with its recommendation, a resolution or ordinance, as the case may be, authorizing the execution of such work, or the purchase of such material, at a cost not to exceed the amount of the estimate which shall be transmitted." It seems to me that the mere reading of these two sections shows that the estimate referred to must be of cost of work and material for improvements of construction, and can have no application to the appropriation of land. Such an estimate is to enable council to know the cost of the improvement to be ordered, and decide intelligently with reference to it. In cases of appropriation of land, the damages are assessed, and council has six months in which to determine whether it will enter upon the expenditure required. No preliminary estimate would, therefor, seem to be necessary. On the whole, therefore, I think that the assessment is not invalid because of a failure to pursue statutory steps.

The last objection urged is that the plaintiffs had no notice of the assessment, and that its collection is taking plaintiffs' property without due process of law. This is in fact an attack upon the whole assessment system of Ohio. Judge Jackson, in Scott v. Toledo, 36 Fed Rep., has practically decided that the Ohio assessment laws are in conflict with the 14th amendment of the Federal Constitution, because the assessment may be levied upon and collected by the county treasurer by distraint without giving the taxpayer a day in court. I think that the learned judge overlooked the statutory provision under which this suit is brought, which enables every taxpayer or assessment payer to bring an action for an injunction against the collection of any tax or assessment which he claims to be illegal or unjust, without any allegation of inadequacy of legal remedy required by the rules of equitable procedure to justify relief by injunction. In this way the taxpayer can have his day in court in exactly the same way as he would if suit had been brought to collect the assessment. However this may be, assessments under the laws of this state have been so often sustained by the

Supreme Court of Ohio, that until that tribunal or the Supreme Court of the United States has held them to be unconstitutional, I do not feel justified in entering into the discussion of the question of notice and hearing which counsel seeks to raise. For the reasons given, the injunction in this case will be made permanent as to the illegal excess above indicated, and will be dissolved as to the remainder. Decree accordingly.

W. M. Ampt and M. W. Conway, for the plaintiffs.

Hortsman, Hadden, Foraker & Galvin, City Solicitors.

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121 WASTE.

[Franklin Common Pleas, 1890.]

DAMARIS HALL v. HANNAH ROHR.

A devisee of land, part of which is valuable timber land, and which was bequeathed to her and the heirs of her body, cannot be enjoined by her daughter from cutting more timber than is needed to repair. The old doctrine of waste is not in force in Ohio, and the devisee as the first donee in tail can cut and sell.

PUGH, J.

Joseph Bonbey gave, by his will, to his daughter, Mrs. Hannah Rohr, and the heirs of her body, fifty acres of land, thirty-nine being cleared and eleven acres valuable timber land. Mrs. Rohr was about to cut the timber down and sell it, when her married daughter, Damaris Hall, an only child, brought an injunction suit to perpetually enjoin her from doing so, claiming that she had no right to cut any more than what was necessary to repair fences and buildings and to carry on farming operations. Mrs. Rohr claimed that she was not accountable for waste; that the right to commit waste belonged to her as first donee in tail at common law, and which had not been taken from her by statute or any decision of the Supreme Court. Judge Pugh reviewed the law at length, and held that the old doctrine of waste was not in force here, and that Mrs. Rohr was not limited to the cutting and selling of timber for the purposes of cultivating the rest of the land and repairing fences and buildings.—[Editorial.

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126 ADEMPTION OF LEGACIES.

[Superior Court of Cincinnati, Special Term.]

FRANCISKA STICHTENOTH v. OTTOMAR TOPH.

1. An ademption is the partial or entire fulfillment of the purpose of a legacy by the testator in his life time. It is not a variation of the terms of the will, but it is a premature compliance with them. It is obviously a contradiction in terms to speak of an act done before a will is made, as a compliance with its provisions.

2. No matter what the intention of a testator in making an advance to one of his children before executing his will, it can not justify a deduction of the advance from the child's share under the will, unless the will provides that such deduc-

tion be made. To allow evidence of such intention and advance, when not contained in the will, would be to vary its terms by extrinsic evidence of the testator's intention, a violation of the fundamental law of the construction of wills.

8. The doctrine of ademption can never apply to an advance before the will. No declarations made subsequent to the will of the testator with respect to advances made prior to it, can make such advances ademptions.

4. An attempt to avoid the effect of a will by an executory contract, such as in this case, is a violation of the statute of wills. Nor can suit on such contract be sustained on the doctrine of estoppel. No estoppel arises from the inducement to the testator not to change his will by a promise from the legatee that the same result will follow without such change.

5. When a testator states in his will, that ademptions of legacies will be made in a certain way, he is merely furnishing for the use of his executors convenient evidence, before the fact, of his future intent, not in making his will, but in paying money or conferring other bounty during his life time.

6. The sole question of importance in determining whether a benefit conferred by a testator in his life time satisfies or adeems a legacy in his will, is whether or not, he intended such satisfaction at the time. If that appears, no matter what the evidence, it is a satisfaction. An intention subsequently arrived at, could not be effectual to make the act an ademption.

7. A legacy is adeemed only when the bounty conferred was intended at the time of the gift as a satisfaction of the legacy. A subsequent intention can not have that effect.

This is an action under sec. 6202, Rev. Stat., by Franciska Stichtenoth, a legatee of Joseph Schaller, deceased, the executors having refused, after written request, to bring the suit, to obtain from the court, a decree directing the executors of Joseph Schaller how to proceed in the distribution of their testator's estate, particularly with reference to the question whether a certain legacy to said Franciska Stichtenoth was partially or wholly adeemed by the testator during his life time, a question dependent for its answer partly upon a construction of the will, and partly upon oral evidence adduced at the hearing of the cause. At the time the petition was filed, the estate had not been settled in the probate court, eighteen months not having elapsed after the death of the testator. The executors had, however, on their own responsibility begun the distribution of the estate. The executors denied the jurisdiction of this court to hear the cause before the estate had been settled in the probate court. The issue thus raised was heard alone, and the court decided that under sec. 6202, Rev. Stat., it might entertain the application on the allegations of the petition that the estate was so large and the debts were so small that the questions presented were certain to arise when the time for distribution under the order of the probate court should arrive, although it had no power to enter a conclusive finding that all the debts had been paid, which would protect the executors. The decree to be entered, it was held, must be conditioned on their being sufficient funds for distribution under the will after all debts were paid, to comply with the directions contained in the decree.

The will of Joseph Schaller was made in 1882, but was published in 1886, with a few changes, which are immaterial as far as this controversy is concerned. The will is as follows:

1. I desire that all my just debts be paid by my executors hereinafter named, as soon as the same can be done.

2. I have, during my life time, advanced to each of my six children, to-wit: Franciska, wife of William Stichtenoth, Michael Schaller, Philomena, wife of Thomas S. Royse, William Schaller, Josephine, wife of Adolph Pifton and Peter Schaller, the sum of twenty-five thousand dollars, as follows: to Michael Schaller, William Schaller and Peter Schal-

ler, the sum of $25,000 cash each, to establish them in business, and to enable them to carry on the brewery on Main street, purchased from the assignee of Mueller and Froelking; to Franciska and her husband, William Stichtenoth, the sum of $25,000 cash by crediting said amount on the indebtedness of said Stichtenoth to me; to Philomena, the house and lot on Dayton street, wherein she now resides, which I have conveyed to her, and for which I paid the sum of $10,500, and the remaining $14,500 I gave her in cash; and to Josephine the sum of $25,000 in cash. For all advancements I have already made to any of my said children in excess of said sum of $25,000 each, and for all advancements in excess of said sum which I shall hereafter make to any of them, I have taken and shall take promissory notes from him or her to whom I have already advanced or shall advance such sums in excess of said sum of $25,000, and these promissory notes so given to me by any of my said children, shall be assets of my estate in the hands of my executors, for the purpose of distribution, and the amounts due thereon at the time of my death shall be charged against the respective share or shares of the child or children giving the same by my said executors in making the distribution provided for in section three hereof, and none of my said children shall be charged with any other sum or sums whatever in said distribution, except my daughter Josephine, who shall in the distribution provided for in section three hereof, be charged with the sum of $2,800 in the event that she elect to retain the land adjoining my homestead farm, which I purchased and paid said sum for, causing the same, however, to be conveyed to her; should she elect not to retain the same, she and her husband shall convey said land to my executors at any time before my said executors make the distribution provided for in section three hereof, and thereupon said sum of $2,800 shall not in said distribution be charged against my said daughter Josephine, and said lands shall become and be considered as assets of my estate and subject to the succeeding sections of this will, and especially section five hereof.

3. I give, devise and bequeath unto each of my said six children, who are named in section two hereof, the sum of twenty-five thousand dollars cash, to be paid them and each of them, by my said executors as soon after my death as the said payment can be made, desiring my said executors to make said payments out of the cash money and the proceeds of sale of the least remunerative bonds and stocks on hand at the time of my death, which will probably be sufficient for the purpose. Should any one or more of my said children, have departed this life previous to my death without having issue of his or her body surviving at the time of my death, but leaving husband or wife of such deceased child or children surviving at the time of my death, then and in that event the said share or shares of said child or children under this section of my will shall be invested by my said executors in such manner as they shall deem best, and the income thereof paid to said husband or wife of my said child or children, so deceased as aforesaid, during the life time of said husband or wife of my said deceased child or children, said share or shares are to be distributed by my said executors among any then surviving of my said six children, share and share alike. In the event that any of my said children shall have departed this life previous to my death, leaving issue of his or her body surviving me, the said share of said child under this section of my will shall be paid to and distributed among his or her said issue and to the guardian of such as shall be under age at the time of my decease, share and share alike. In the distribution in this

section provided for, each of my said six children shall respectively be charged with the amount due at the time of my death upon any promissory note or notes given to me by him or her in excess of the $25,000 already given by me to each of them as recited in section two hereof, and this charge shall be made against the share of said child whether it, under this section, is invested for the benefit of the husband or wife, such child for life or is paid to the issue of such child surviving me.

4. (This section makes a small provision for a son, a seventh child not before mentioned in the will.)

5. Subject to the devises and bequests and trusts hereinbefore given and created and after said payments and investments shall have been made, I give, devise and bequeath the rest, residue and remainder of all property, real, personal and mixed of whatsoever character and wheresoever situated, of which I may die seized and possessed to my executors, their successors and assigns forever, to have and hold the same, however to, for and upon the following uses, purposes and trusts, that is to say: To manage and control the same and to convert the same, except my homestead farm, as to the disposition of which I have hereinbefore more specifically provided, as speedily as the interest of my estate may admit of into money, and in that behalf I hereby give my executors full power and authority to rent, lease, sell and convey by all proper instruments and deeds of conveyance, and without order of court, any or all of said real or personal property, and after payment of all costs, charges, fees and compensations to said executors for their services hereunder, to pay and distribute the proceeds and income thereof, from time to time, among six children, to-wit: Franciska, Michael, Philomena, William and Josephine and Peter, share and share alike, or in the case of the death of either of them, to their surviving children, the children of a deceased parent taking such parent's share."

(Then follows a provision for a valuation of the testator's real estate, with the privilege to any of the children to take any lot at such valuation, the same to be charged in the distribution.)

6. This item contains a somewhat similar provision to the last as to the homestead farm.

Ottomar Toph and John A. Kreis are appointed executors without bond

The testator made the distribution to his six children spoken of in Item 2 in 1882, about the time that he made this will. Wm. Stichtenoth then owed him $35,000, for which he had given him notes. The credit referred to in Item 2 was made by returning notes for $25,000. A note for $10,000, the remainder of the indebtedness, was kept by the testator. In the cash, said in the will to have been given to the daughters Josephine and Philomena, were included the notes of their respective husbands for small amounts, representing money borrowed by them from their father-in-law. The notes were returned to the husbands. At the time of this distribution, Wm. Stichtenoth was a malster, engaged in a large and prosperous business with extensive credit. In September, 1885, Stichtenoth paid his father-in-law's three year's interest on the $10,000 note. In the summer of 1887, Stichtenoth who had for several years been a one-half owner in the Weber Brewery, wishing to raise money to keep the brewery company from making an assignment, went out with his wife Franciska to see Jos. Schaller, the testator, in the western part of the city, to get him to endorse four notes for $3,000 each, and payable in two, three, four and five months, from July 28, 1887, respec-

tively. What occurred at that time is related by two witnesses, Mrs. Josephine Pitton and Mrs. Franciska Stichtenoth. Mrs. Pitton's account is as follows:

"Mr. Stichtenoth takes the note from his pocket, and says, I would like for you to endorse these notes." And he (*i. e.* the testator) says, "Why do you come to me, I am not engaged in business any more: why don't you go to other business men?" And Stichtenoth says, "I have been; they won't accept any name but yours, Mr. Joseph Schaller. And I have also been to one or two banks down town, and they would not accept any name but yours." And he (*i. e.* the testator) says, "Well, if I endorse this I very likely will have to pay it—most assuredly," and he says he thought it was strange he come to him, and Mr. Stichtenoth said they would not accept any other name than his, and Mr. Stichtenoth thought it was strange himself they would not accept any other name but Mr. Schaller's. Of course he thought over the matter, and finally Mrs. Stichtenoth says, "I know you don't like to do this, father. Do it once more, he is in a great trouble now; for I know you don't like to take any more trouble on you in your old age, but I would stand back of it, I would rather stand back of it sometime if you will do it once more." Well, then, he (*i. e.* the testator) says, "Josephine, get me the pen," and I got him the pen, and I says, "You will surely have to pay this if you sign it," and he says, "Yes, that is what I expect I will have to do," and then he signed the papers. Mrs. Stichtenoth's account is different in some respects to Mrs. Pitton's. She says, "Well, my husband went out with me, had a few words with my father, and showed him the note, that he would like to have it signed, that he had been in trouble just that day, and he would like to have it before two o'clock. And father kind of refused, and Mrs. Pitton come in and told father not to do so. Well, I begged father to do me a favor just to-day, to help us this other time. He (*i. e.* Stichtenoth) was in trouble, and I really didn't know what it was for until I come out there. Well, I spoke to father once more, I begged him twice, and he signed the paper. I never knew of father's ever having endorsed other paper of my husband. I do not know that my father had made a will. I was not present at all the conversation between my father and husband. I did not say that it should be charged to me, but I did say if there was any collects coming out of the brewery he should have the first one. I don't remember of my father's saying he would have to pay it, nor did I hear Josephine Pitton say so. She says, "father, you said you would never help one of them (*i. e.* one of the children) again; now you are going to do this over again."

Before these last endorsements, the testator had endorsed other notes for Stichtenoth, which had been discounted and paid when due. In September of 1887, the brewery company and Stichtenoth made assignments for the benefit of their creditors. The four notes for $12,000, endorsed by Jos. Schaller, which Stichtenoth had discounted for the brewery, went to protest, and were taken up by the testator. Stichtenoth, who was confined to his bed from September, 1887, died in April 1888. While he was ill, he was visited by Philomena Royse and her husband, and complained to them that the testator had not been to see him, attributing his absence to anger at having been induced to endorse the notes at a time so near Stichtenoth's insolvency. He said he intended to pay them when they were endorsed. He called upon his wife to see that they were paid, and she then agreed to do so. After his

death, the testator called on the plaintiff and procured her signature to the following document:

CINCINNATI, April 4, 1888.

I hereby consent that I be charged as for an advancement on my father's estate for the amount of a promissory note, dated September 12, 1882, executed by my husband, William Stichtenoth, to my father, for $10,000, with interest, on which note interest has been paid to September 12, 1885; also for the amount of four other notes for $3,000 each, dated July 28, 1887, payable respectively two, three, four and five months after date, bearing interest, and which notes my father endorsed for my husband's accomodation, and paid at maturity, so that the amount of my father's claim against my husband, and for which I consent to be charged as aforesaid, is as follows: $3,032.50, with interest from October 1, 1887; $3,047.59, with interest from October 31, 1887; $3,062.50, with interest from December 1, 1887; $3,077.50, with interest from December 31, 1887.

Any amounts that may hereafter be collected by my father on account of any of the above described notes should be deducted from the amount I herein consent to be charged with. In addition to the foregoing amounts I consent to be charged with the additional sum of $25-000, which amount my said father Joseph Schaller had loaned or advanced to my husband, and with which amount I long since consented verbally to be charged.

(Signed.) FRANCIS STICHTENOTH.

The only person present when this paper was signed, whose evidence can be considered, is Amelia K. Stichtenoth, a daughter of the plaintiff, twenty-four years of age. Her deposition was taken while she was fatally ill with consumption, and she was dead before the trial. She said that after her father's death her grandfather, the testator brought a paper to her mother to sign; that he laid it on the table and requested her to sign, that he said that in case she should have any trouble with the life insurance from her husband this paper would protect her; that upon her beginning to read it, he said it was not necessary for her to read it, it would take her too long, and he had not read it himself; that accordingly her mother did not read the paper and signed it as requested.

Joseph Schaller, the testator, died in June, 1888. His executors were able to distribute the legacies bequeathed under sec. 3 of the will a short time after his death. To the three sons Michael, William and Peter, the distribution was made by crediting $75,000 on a note given by the three to the testator for a larger amount. Cash was distributed to Josephine Pitton and Philomena Royse. To Mrs. Stichtenoth the executors proposed to return her husband's notes mentioned in the paper dated April 3, 1888, given above, and the small balance of about $400.00 necessary to make up her $25,000 was tendered her, and declined. In addition to this the executor distributed $15,000 a piece to the six children under the residuary item No. 5. The instruction which plaintiff seeks to have the court give to the executors, is that she is entitled to her full twenty-five thousand dollars under item No. 3, without any deduction on account of her husband's debts.

TAFT, J.

Different considerations arise in reaching a conclusion upon the question of the right of the executors to deduct the $10,000 note from plaintiff's legacy, and upon that of deducting the $12,000 notes. They must, therefore, be separately discussed.

It hardly needs mention that the $10,000 note can not be regarded as an ademption. The money was loaned and the note was taken before the will was made. An ademption or satisfaction of a general legacy is the partial or entire fulfillment of the purpose of the legacy by the testator in his life time. It is not a variation of the terms of the will, but it is a premature compliance with them. It is obviously a contradiction in terms to speak of an act done before a will is made, as a compliance with its provisions. It follows that no matter what the intention of a testator in making an advance to one of his children before executing his will, that it can not justify a deduction of the advance from the child's share under the will, unless the will provides that such deduction be made. To allow evidence of such intention and advance, when not contained in the will, would be to vary its terms by extrinsic evidence of the testator's intention, a violation of the fundamental law of the construction of wills.

The testator must be presumed to have had the advance in mind in making his will, and if he did not mention it, he must be conclusively presumed to have made his testamentary dispositions, free from any deduction on that account. Yundt's Appeal, 13 Pa. St., 575; Kreider v. Boyer, 10 Watts., 54; Zeiter v. Zeiter, 5 Watts., 212; Jones v. Richardson Exr. 5 Metc. (Mass.), 247; In re Lyon, 70 Iowa, 375; Taylor v. Cartwright, L. R., 14 Equity, 167.

Is then this $10,000 to be deducted from plaintiff's legacy under the terms of the will? By clause 2 of the will, the testator recites that he has advanced to each of his six children naming them $25,000 a piece, describing how this was done in each case, and in the plaintiff's case, as follows: "To Franciska and her husband William Stichtenoth the sum of $25,000 cash, by crediting said amount on the indebtedness of said Stichtenoth to me." Then he proceeds, "For all advancements, I have already made to any of my said children, in excess of said sum of $25,000 each, and for all advancements in excess of said sum which I shall hereafter make to any of them, I have taken and shall take promissory notes from him or her to whom I have already advanced or shall advance such sums in excess of said sum of $25,000." Then follows the provision that such advances shall be charged against the respective share or shares of the child or children giving the same, by his executors in making distribution under section 3, and "none of my said children shall be charged with any other sum or sums whatever in said distribution. In section "8" it is provided again that "each of my said six children shall respectively be charged with the amount due at the time of my death upon any promissory note or notes given to me by him or her respectively for advances made by me to him or her in excess of the $25,000 already given by me to each of them as recited in section 2.

It is claimed that the $10,000 notes signed not by the plaintiff, but by Wm. Stichtenoth, comes within this description of the notes for advances in the will. Wm. Stichtenoth was not a child of the testator. He was not named as one of the "said six children." His name does appear joined with that of his wife in the clause where the crediting of the $25,000 is spoken of, but inasmuch as the bounty there conferred on

his wife, was in fact, conferred on her by benefitting him, it was natural that his name should be so joined. The bounty conferred upon his wife through him, however, was not by advancing money to him, but by crediting the amount on his existing indebtedness to the testator. The balance not wiped out by the credit, remained of course a debt of Stichtenoth. This is the necessary result of the language of the will. Had the testator died immediately after making this will, and had suit been brought on the $10,000 note against Stichtenoth, how much weight would be given to a defense by him, that this was a mere advancement to his wife under the will and that he was entitled to use her legacy to set off enough of it to pay this note? If the $10,000 evidenced by a note of his, was an advancement to him for his wife, then the whole $35,000 was such an advancement before the distribution recited in clause 2, for the two amounts were of the same character. Why, then, did the testator speak of it as an indebtedness? Why did he not simply refer to it as he did to the money advanced to his sons to establish them in a brewery business? They had then received more than the $75,000 therein distributed to them, and had given a promissory note to their father as provided under section 2 for advances, aggregating more than $75,000. Why did he not speak of crediting $25,000 a piece on their indebtedness to him? The answer seems to me obvious. It was because every thing he gave to his sons and daughters, though to be evidenced by promissory notes, was an advancement, while what he gave to Stichtenoth was a loan, and did not become an advancement, until the debt was forgiven and charged to the daughter Franciska's account.

There is no confusion in the will between the children and their husbands or wives. In the event that a child dies without issue, leaving a surviving wife or husband, the latter takes not the share of the deceased child, but a life interest in the same. And the charge against the share of each child of the "said six children" is to be made whether it go to the child absolutely, to its husband or wife for life, or to its children. The fact that in the cash distributed under clause 2 to the other daughter were some small notes to their husbands, is to my mind no evidence that the testator regarded those notes when given as mere evidences of advancements to the daughters, but only that he did at the time of distribution make an advance to them by forgiving real debts of their husbands, just exactly as in the case of the Stichtenoths. There is no evidence whatsoever as to how the $10,000 debt was contracted Whatever evidence there is in the case shows, that before the will was made, Stichtenoth was amply able to pay the indebtedness, and in the absence of any proof of the circumstances of the loan, I am bound to presume that the note speaks the truth of the transaction, and that it was merely a loan in the ordinary course of business. Doubtless, the close connection by marriage of Stichtenoth with the testator led to the loan, but that fact does not change its legal character, or cast the burden of the loan upon the wife of Stichtenoth, in the absence of any evidence that the testator intended such a result at the times when the loan and the will were made.

This will was drawn by a lawyer to whom, doubtless, all the facts were either explained, or known. The $10,000 note signed by Stichtenoth, was clearly in the mind of the testator, because he mentions the indebtedness of which it was a part. Is it likely that if he had intended at that time to charge the note as an advancement to his daughter, his attorney would have used language which reasonably, literally and

grammatically construed did not have any such meaning? I can not think so. Counsel press upon me the testator's testamentary scheme of exact equality between the six children as a reason for this construction, and refer to many Ohio cases, where literal meanings of words have been violated to carry out the plan in the testator's mind, which a consideration of the whole will has shown clearly to have been the moving cause for its being made. The cases referred to are many of them strong instances of the principle, upon which counsel rely, but an examination of them shows that the departure from ordinary and usual meanings of words is caused by ambiguities and contradictions apparent from a reading of the will, and that these are explained or reconciled by arriving at the general intent of the testator and forcing an unusual meaning of a word or sentence to suit such intent. In the case at bar, however, the will is very clear in its language. There is no ambiguity or contradiction. The construction which, results in giving to the $10,000 note of Stichtenoth, the character of a debt and not an advancement, is entirely consistent with the testamentary scheme of equality among the children.

So far as surrounding circumstances are to be considered in construing wills it is the conditions existing at the time of making the will which are important. When the will was made, either in 1882, or republished in February 1886, there is nothing to show that the $10,000 note of Stichtenoth was not as good and safe a loan as the testator had, at least so far as he knew. As a matter of evidence upon this point, it should be noted that in September, 1885, Stichtenoth paid the testator three years' interest. This was only five months before the execution of the present will. If this was a good loan, then it was no injury to the other children for the testator to consider it and treat it as a loan, because such a debt was not likely to reduce their share of the estate. With deference to counsel, I am unable to find a single fact in the case, or a word in the will, which justifies the construction contended for. (I may cite in this connection the case of Rogers v. Daniell, 8 Allen, 342, to which my attention has been called. This is a much stronger case in support of the construction I must give to this will than the case at bar. Indeed, I can hardly reconcile myself to the justice of that decision.) Having concluded then, that the $10,000 note is neither an ademption of the legacy, nor an advance under the will, we come to the last ground upon which the claim to deduct it is based, that is the paper dated April 3d, and signed by Mrs. Stichtenoth. There is a strong presumption that having signed the paper, she knew what it contained. To rebut this presumption, the deposition of her daughter, now deceased, is introduced to show that she did not read the paper before signing it, and that her father told her it was unnecessary. The daughter gives further evidence that he misrepresented to her mother the contents of the paper, saying that it related to the proceeds of the life insurance policies upon her husband's life. I may say at once that I do not believe the testator was guilty of any such deceit.

To credit such evidence would be to find fraud without motive toward his own child in a man whose character stands unimpeached, and whose justice and kindness toward his six children are marked in every line of his will and all his acts of generosity preceding it. The much more reasonable explanation of the reference to the life insurance by the testator is that it was alluded to by him in a parental anxiety that his daughter should be protected in securing it. The memory of the plain-

tiff's daughter who was in the last stages of consumption, when testifying, was not unlikely to have made the mistake of confusing the purpose and connection of the testator's remarks. Nevertheless, I am disposed to credit her statement that her mother, the plaintiff, did not read the paper and that the testator told her it was not necessary. The plaintiff was then, it may be easily imagined, much depressed by the financial disaster which had wrecked her husband's fortune, and her sorrow at his death. Her mind, never very clear or strong must have been confused with all her misfortunes. Her father was the benefactor of her family. His wealth had not flown, like her husband's. At such a time, and under such circumstances, his authority over his daughter was unlimited. On the other hand, he was dealing with his own. He was doing what he felt to be an act of justice. He could not read English if he would, to explain the provisions of the paper to his daughter. He regarded it as entirely unnecessary that she should demur or question his right to do as he pleased with his property. The imperious abruptness of his request for her to sign, and her confused yielding to the demand, seem to me so natural, under all these circumstances, that when her daughter says the plaintiff did not read and could not know the contents of the paper which she signed, I believe it to be true, and that the presumption of her having read, and understandingly signed the paper is overcome. Such being my conclusion as to the fact, it, of course, follows that so far as the paper of April 3d, if signed with full knowledge of its contents might have any effect upon plaintiff's rights as a contract, such effect is destroyed because of the circumstances under which it was signed, and for the same reason it can have no effect by way of estoppel. If the plaintiff did not know what she was signing, she cannot be held to have misled the testator as to her future intentions so as to estop her from pursuing a different course from that described in the paper.

I have thought it necessary to indicate my conclusion of fact as to the signing of this paper, because it may be required hereafter, but it would not change my view of this part of the case, in the least, if the fact were that Mrs. Stichtenoth had signed the paper with full knowledge of its contents. As has been already shown, the $10,000 was loaned Stichtenoth before the will was made. The will did not direct it to be considered an advance to the daughter. Can the testator by a contract with his daughter change the meaning of his will in order that it shall be so regarded? Obviously not, because if so, then he can add a codicil to his will by an instrument not executed as a testamentary writing. Smith v. Condor, 9 Ch. D. 170.

The cases already cited upon the point that the doctrine of ademption can never apply to an advance before the will are clear to the effect that no declarations made subsequent to the will of the testator with respect to advances made prior to it can make such advances ademptions. Nor could this writing be supported as a contract between the testator and the plaintiff. There was not even an agreement by the testator to leave her anything. And even if there were, what obligation would the law impose upon him to observe such agreement? None. He was dealing with his own. He could thereafter give her all or none. Her agreement to consent to be charged was no consideration moving toward her father when in so doing, she only conceding what he had full power and right to enforce without her consent. It seems to me that the case of Needles v. Needles executors, 7 Ohio St., 432, is a stronger case upon the point we are now discussing than the case at bar.

In that case it was held that where a father, on making an advancement to one of his sons, took from the son a receipt for the amount advenced, acknowledging the same to be in full of all claims the son could have against his father's estate after his death, as one of his heirs, and stipulating not to set up any such claim, as heir, etc.,such agreement can impose no binding obligation, inasmuch as the estate of a deceased person must pass either by devise or descent, and the operation of the laws of the state in this respect, cannot be defeated by any kind of executory contract, made to control the distribution of a man's estate after his decease. And the judgment was put upon the further ground by Judge Bartley that the contract had neither mutuality of consideration, or obligation, and was unenforcible. Counsel seek to distinguish this case from the Needles case on the ground that there was no will, while here there is. But this distinction has no weight, for the attempt to avoid the effect of a will by an executory contract is exactly as much a violation of the statute of wills, as is the similar attempt to avoid the effect of the statute of descent and distribution, and the language and principle of the Needles case show them to be equally futile.

Counsel for defendants contend, however, that the contract in the present case can be sustained on the doctrine of estoppel. The estoppel is said to arise from the inducement held out to the testator not to change his will by a promise from the legatee that the same result will follow without such change. As I have said, this theory of estoppel to support such a contract is expressly repudiated by Judge Bartley in Needles v. Needles, *supra*. There it might have been argued just as forcibly that the testator was induced by the son's promise, not to make a will, as here it is argued that he was induced by plaintiff's promise, not to change it. The case of Low v. Low, 77 Maine, 37, relied on by counsel in support of the theory of estoppel, was a case where a father had made a will leaving his property equally to his four children. His son wished his share, in advance, and his father gave him more than his share, and took a receipt and a release of all further claim on the estate. This was as plain a case of ademption as could be conceived, but the court seek to put it not only on that ground, but also on the ground of estoppel, and cite the case of Quarles v. Quarles, 4 Mass., 680, and Kemey v. Tucker, 8 Mass., 148, to this point.

Quarles v. Quarles, is said by our Supreme Court in Needles v. Needles, to have been decided on a statute of Massachusetts, and not to sustain such a contract generally. There are some Pennsylvania cases to the same effect as Low v. Low, and doubtless the case of Upton v. Prince, Cases Tempore Talbot, 71, referred to as authority in Taylor v. Cartwright, L. R., 14 Equity, 167 in In re Peacock's Estate, L. R., 14 Eq. 236, and in Hopwood v. Hopwood, 7 H. L. C., 741, is to be similarly explained. But even if all these cases were authority in Ohio, they could not affect the case at bar. The agreement of the heir or legatee in each case was enforced, because by making such agreement he then and thereby received a valuable consideration which the ancestor or testator put it beyond his power to recall. As I have pointed out, the plaintiff here received nothing at all for her promise or consent, if such it is.

For the reasons given then, I find, first, that this $10,000 note was not an ademption; second, that it was not an advance within clause 2 and 3 of the will; third, that the paper of April 3rd is ineffectual to make it a valid charge, first, because the testator's intention to make it such could only be legally effective by a codicil; second, it was no contract

because plaintiff did not know the contents of the paper and did not knowingly consent thereto; third, even if she had, it was unenforceable, and would not estop her because no consideration moved to her. As to the $10,000 note of the husband of plaintiff, the instruction to the executors will be not to deduct the same from plaintiff's legacy under clause 3.

2. I come now to the question whether the $12,000.00 should be treated as an ademption, and here I find much more difficulty in reaching a satisfactory conclusion. It is claimed by counsel for the defendants that the act of testator in endorsing these notes at plaintiff's urgent request, thereby enabling her husband to get $12,000.00 for his own purposes and involving the subsequent expenditure of $12,000 by the testator in taking up the notes, constituted an ademption of the legacy left to plaintiff in clause 3, to the extent of the loss sustained by the testator. The endorsements were subsequent to the will, and the objection which was fatal to the $10,000 note, as an ademption, namely that it was made before the will, can not here be urged. It is contended on behalf of the plaintiff that the transaction we are discussing cannot be an ademption beeause the will provides that only such advances as are evidenced by promissory notes of the children shall be deducted, and no note of the wife was made to represent this advance even if it can be so considered.

This objection is based on the proposition that, when a testator in his will has said how he will evidence ademptions, he has limited his power to make them in any other way. The proposition can not be sustained. It is contrary to the only principle upon which ademptions can be reconciled with the statute of wills. An ademption is a payment of a legacy by the testator in his life time. It is not a testamentary act. If it were it would be ineffectual, because of the statute of wills. It has in a sense, a testamentary effect growing out of the just and logical result that one payment of a legacy will prevent a second payment. But an ademption is an act wholly independent of the intention of the testator in making the will. Given a legacy, the testator may pay it in advance if he chooses. To say that he can not make that payment except in a certain way prescribed by the will, is to say that a testator may by the provisions of his will limit his right to do as he pleases, with his property in his life time. Such is not the effect or office of a will. When a testator states in his will that ademptions of legacies will be made in a certain way, he is merely furnishing for the use of his executors convenient evidence, before the fact of his future intent, not in making his will but in paying money or conferring other bounty during his life time. The sole question of importance in determining whether a benefit conferred by a testator in his life time satisfies or adeems a legacy in his will, is whether or not he intended such satisfaction at the time. If that appears. no matter what the evidence, it is a satisfaction.

Counsel for plaintiff cite Loring v. Blake, 106 Mass., 592, as opposed to this view. That was a case where the testatrix by her will gave her own property and apportioned other property by virtue of a power in her deceased husband's will, equally among her children; directed that no child should be charged with any money advanced on its account, unless the same was charged in a memorandum filed with her will; and acquitted each of her children from all debts due her on her husband's estate, unless charged in such memorandum. After making the will, she gave a sum to one of her daughters, through an agent who had the daughter sign a receipt therefor, stating that the sum was to be deducted from the share out of the estate of her father. which wa-

coming to her. This receipt was deposited by the agent in a trunk containing the will of the testatrix, but it was not connected otherwise with the will. It was held that the money receipted for could not be deducted from the daughter's share, because the amount was not charged in a memorandum filed with the will, and there was no other evidence to show that the testatrix intended to make it a charge.

A reading of this case will show that it did not appear that the testatrix had any knowledge of the signing of the receipt by the daughter, or that she either approved or acquiesced in it, or that she had in any other way indicated her intention to charge the amount as an advance. The ground of the decision really is that the testatrix made no attempt to adeem either in the prescribed mode or otherwise. Nor does the case of Sayre v. Sayre, 32 N. J. Eq., 61, also cited upon this point by counsel for the plaintiff, support their contention. In that case, the testator declared, it was his intention to make an equal division of his estate among his children, and to that end directed that any obligations he might hold against either of them, and all advances he might have made to any of them, and charged against them in his accounts, should be deducted from their respective shares. The testator assigned as a gift to one of his daughters a bond and mortgage given by her husband (she joining in the latter) on his real estate. Whether the testator made any charge of this gift against her did not appear. It was held that as the gift was not shown to have been charged against the daughter on testator's books, it was not within the description of advances intended by him to be deducted. The only effect of this decision is that the provision of the will for evidencing advances overrides the ordinary equitable presumption that such a gift to a daughter is an ademption, but nothing is said or decided from which it can be inferred that the testator might not have effectually adeemed the share of his daughter without charging the same against her in his book, if his intention to do so was otherwise apparent. On the other hand, the contrary is expressly asserted in Langdon v. Astor's Executors, 16 N. Y., 1, which is the leading case on ademptions in this country. That was where the testator, with the idea that he might wish in some cases to anticipate his testamentary bounty, and in others to make gifts which should not be ademptions, provided in his will that whenever a gift was to be an ademption, he would charge it as such in his books of account. The main contest in the case was whether by such a provision he was not seeking to give to his book entries a testamentary character without executing and evidencing them as codicils to his will in violation of the statute of wills. In a learned and instructive examination of the principles upon which ademptions are permitted, Chief Justice Denio and Judge Bowen show that the objection to the book entries as attempted testamentary writings is not well founded. The ground of these opinions shortly stated is that these entries were merely part of the act of making the gift, showing the intention of the testator therein, and that the statement in the will that such entries would be made was a declaration of intention, not testamentary in its character, made merely as convenient evidence to enable the distinction to be made between the testator's intent to adeem, and his intent to give outright in his contemplated acts of bounty during life.

Says Denio, C. J.: "To provide against this difficulty, and to prevent, as far as possible, any uncertainty which might lead to controversy and litigation, he (*i. e.* the testator) proposed to put a mark upon such

subsequent donations as he did not intend to have considered cumulative. If they should be found charged upon his books against the legatee, they were to be taken, without further proof or intention, to be in satisfaction of the legacy bequeathed to the person to whom they were made, and against whom they were charged. If not so charged I do not say that it might not be shown by reference to the instrument of donation or other competent evidence, that they were given in satisfaction; but if no such proof could be given, I think they would be taken to be donations made in addition to the legacies." Again Bowen, J., on page 52, speaking of the same provision of the will, says:

"In fact, I think that, notwithstanding this provision of the will, it was competent for the testator to declare his intention that subsequent advances should satisfy legacies, otherwise than by charges in his books, for the reason above suggested, that the declaration of such intention is not testamentary in its character. It qualifies, and is in fact part of, or an ingredient in, the bestowment. A man cannot, by a will or by any other instrument, in whatever form, or with whatever solemnity executed, either limit or control his power of subsequently, in his life time, disposing of his own property, or prescribing the forms by which it must be done to be effectual."

It seems to me to result both from reason and authority, that the testator was perfectly free to adeem any legacy under his will without taking promissory notes. It is simply a matter of evidence to determine whether in the case of any particular bounty, he so intended. In the absence of other evidence of intention, his failure to take such notes as are prescribed by the will upon making a gift, would justify the inference that the gift was not an ademption of the donee's legacy, but such inference can be rebutted by any competent evidence of a different intention.

Another objection urged by counsel for plaintiff to an ademption here is that it is not possible for a testator to adeem by incurring a contingent liability like that arising from accommodation endorsements. Now it was held by Lord Hardwicke in Spinks v. Robins, 2 Atkyns 493, and Lord Chanceller Kings in Crompton v. Sale, 2 P. Wms. 553, that where the testamentary portion is certain, and the subsequent advancement depends upon a contingency, the presumption of intended satisfaction arising from the equitable leaning against double portions, would be repelled, because it was not to be supposed that the testator intended to substitute for a certain legacy, a gift which might never come into possession at all. But here, if there was any intention to adeem, it was an intention to adeem only so much of the legacy as would be equal to the ultimate payment required of the testator by reason of the endorsements, and the intention is to be proven by the circumstances and evidence, and not alone by presumption. In Lord Hardwicke's time, the law was that an ademption, no matter how small, satisfied the entire legacy.

Since the case of Pym. v. Lockyer, 5 Mylne & Craig, 29, however, ademptions are simply *pro tanto*, unless a contrary intention appear, Pollack v. Worral, 28 C. D., 552. Because of the distinctions stated, I think, that the cases above referred to are not authorities against the possibility of making ademptions *pro tanto* by the assumption of a contingent liability with an intention to adeem to the extent of the required payments. In Stieff et al. v. Collins et al., 65 Md., 69, 72, it was held that a contingent liability incurred by a testator on a bond for his son,

which accrued and became absolute after his death, was in fact an ademption, and came within the provision of the will that all future advances to his children should be deducted from their shares. This case would seem to refute the claim of counsel, and I am inclined to think, though not without doubt, that this objection is not well taken. Ademption is conferring bounty. It seems to me that the testator may say to one who seeks his credit and guarranty, I will do this for you out of regard to you, but whatever I am called to pay on this account is in fact a gift to you, and must satisfy *pro tanto* the legacy I have left you in my will. It is not apparent to me, after some thought upon the subject, why an act with such intent, followed by actual payment, may not adeem a legacy, as well as a payment on another's account not preceded by a contingent obligation to pay. In so far as the contingent liability becomes an ademption by payment, the legacy and the advance are "*ejusdem generis*." We now come to consider the evidence in this case of the intention of the testator, if he had any, with reference to plaintiff's legacy, and the intended effect upon that legacy of these notes, when he endorsed them. It is essential, it seems to me, that any intention to adeem thereby, should have been contemporaneous with the endorsements. An intention subsequently arrived at, could not be effectual to make the act an ademption. The case is not different in this respect from a simple gift of money. If the donor does not intend an ademption when he gives the money, the gift is completed, and has passed beyond his control, and he cannot change its character by intentions subsequently formed and declared. If he wishes the gift deducted from the legacy, his only means of reaching that end, is to make a codicil.

What occurred at the testator's house when he endorsed these notes is not altogether certain, because the only two witnesses, the plaintiff and the defendant, Mrs. Pitton, do not agree. But some facts are not in dispute. William Stichtenoth was in financial distress when he made the visit, and he took his wife with him, in order that by her intercession, he might get the needed aid from her father. The latter must have known that his son-in-law was hard pressed, because Stichtenoth told him that the money would be forthcoming only on his endorsement. The plaintiff, too, says she told him her husband was in trouble, that is, financial trouble. And there was other evidence, which shows that he had suffered losses which must have been known to the testator. The testator refused to sign at first. It is apparent from the conversation and other circumstances of the visit, taken with the testator's evident reluctance to sign, that he was impressed with the fact that he would probably have to follow his endorsements with a payment of the notes. Mrs. Pitton was much opposed to his complying with the request. The remark which she says she made, that her father would have to pay the notes, and his reply that he knew it, seem to me to accord with the circumstances and the probabilities. It is admitted that the testator refused to sign at Stichtenoth's request, and that not until his daughter, the plaintiff, begged him repeatedly to help them once more, did he yield. At this point, Mrs. Pitton complained, as plaintiff says, that the testator had said he would not help any of his children again, and yet here he is doing it. It is very clear to me, that when the testator endorsed these notes, he was, in effect, enabling his son-in-law to get $12,000, some part of which he knew, it was quite probable that he would ultimately have to pay, and that he was doing this on his daughter's account, and at her request, and that he thought he was thereby helping her, *i. e.* con-

ferring a bounty upon her. The fact that the testator had some time before endorsed notes for Stichtenoth's accommodation in the ordinary course of business, does not show that these notes are to be so regarded. On the contrary, the fact that the plaintiff had nothing to do with those former endorsements, taken with her presence on this occasion, and the failure of Stichtenoth to secure the testator's aid except by her prayers, seems to me rather to emphasize the feature of the visit to the testator, which stands out most prominently, namely that what was there done, was done for the plaintiff, at her request, and on her account.

Mrs. Pitton says that the plaintiff told her father that she would "stand back for" these notes of her husband. Mrs. Stichtenoth denies this, but her manner is hesitating and her memory somewhat confused, so that if the question of the fact of this remark lay only between these two witnesses, I should be inclined, considering how natural such a remark would be under the circumstances, to accept Mrs. Pitton's statement. But it seems to me that the language of the paper dated April 3d, signed by the plaintiff at the testator's request, can leave little doubt that the testator heard no such remark. For in that paper, he is careful to have it said that the plaintiff had theretofore verbally consented to be charged with the $25,000 of her husband's debts mentioned in clause 2 of the will, and this statement is so contracted with the present assumption of the $10,000 and $12,000, as to leave no doubt that so far as the testator recollected, there had not been up to that time, any verbal assumption of the notes. The paper was written at a time when he would not have been likely to forget such a remark of the plaintiff as that remembered by Mrs. Pitton. The importance of the remark arises only from its having been heard and acted on by the testator, and as he does not seem to remember it, I conclude that Mrs. Pitton is mistaken. It should be here said, that the fact that the language of the paper of April 3d, as to the assumption by plaintiff of the $12,000 notes is *in praesenti*, has no evidential effect whatever to show that the intention to charge was not in the mind of the testator in July, 1887, when he endorsed the notes, however strong the inference, to which it gives rise that there had been no previous consent to the charge by the plaintiff.

Notwithstanding my conclusion that Mrs. Stichtenoth did not make the remark attributed to her, I infer from the facts already found that the testator, when he endorsed those notes, intended to charge any loss arising therefrom to the plaintiff. I base this inference upon the fact as I have found it, that he regarded this act of his as a bounty to his daughter, and one not conferred until after she had made begging appeals for it, and upon the marked desire expressed in his will for an equal division of his property among his children, a desire extending even to the forgiving of debts to his sons-in-law by charging the same as advances to his daughters. To this desire for equality, found in his will, should be added the weight of the equitable leaning against double portions, giving rise to the presumption of ademption from a gift or bounty conferred by a father upon a child.

I am cited in this connection by counsel for plaintiff to the case of Ravenscroft v. Jones, 32 Beavan, 669, where a bequest of £700 to a daughter in a will, made before her marriage, was held not to have been adeemed by a simple gift of £400 handed to the husband of the daughter just after marriage by the wife of the testator. Romilly M. R. says he knows of no case where a gift of money to a husband *simpliciter* after

the marriage, and not in consequence of a marriage settlement, has been held to be an ademption of a legacy to the daughter. This is claimed to show that a gift to a son-in-law does not give rise to a presumption of satisfaction. It should be said with reference to this case, that it was affirmed by the lords justices on appeal, 4 De Gex, Jones & Smith, 227, because one of the two thought it ought to be, and the other doubted. But the affirming lord justice, Knight Bruce, did not affirm the ground upon which the master of the rolls decided the case below. He says, "I prefer to express no opinion as to the ground upon which, to a great extent at least, the master of the rolls appears to have proceeded; namely, that the daughter herself was the legatee, while the payment was made to the husband of the daughter." He then proceeded to find from the circumstances that no ademption was in fact intended. However, in Cooper v. McDonald L. R. 14 Eq., 258, Lord Selborne seems to follow the master of the rolls in the case just cited, althongh he does not refer to it. Cooper v. McDonald was where a testator had made a will leaving a legacy to his daughter for life with remainder to her issue, and afterwards, upon her marriage, made a settlement under which he paid £1,000 to the husband absolutely, and put £4,000 with trustees for his daughter for life and her issue. Lord Selborne, sitting at the rolls, held that the legacy which was of residuary part of the estate, was adeemed to the extent of £4,000, but that the £1,000 paid absolutely to the husband, was not ademption. He says, "The court has been in the habit of disregarding differences in the manner of settling gifts on a child or a child's family by different instruments which raise a question of ademption or satisfaction when such differences appear to be in their nature consistent with the presumption that the one gift is meant to be substituted for the other.

But I am not aware that the presumption has ever been held to arise (in the absence of express direction) when the persons taking under the several instruments are themselves altogether different." These two cases apply forcibly where there are no circumstances to show that the gift to the son-in-law was made by way of conferring bounty on the daughter, and so are authorities supporting the view I took of the $10,000 note given for a debt of the son-in-law contracted under circumstances not proven. But if the circumstances show, as they do with respect to the $12,000 notes, that when the testator conferred the bounty on the son-in-law, he was doing it for the daughter and on her account and to help her, then the presumption of satisfaction will arise.

In Ferris v. Goodburn, 27 L. J. Ch., 574, Lord Hatherly (then V. C. Wood) held that a legacy to a daughter to be paid on her wedding day, was adeemed *pro tanto* by advances within six months after marriage to her husband made at his request to help him in business because the testator had amply provided for his daughter in other parts of the will, and this legacy seemed made to her to benefit the future husband whoever he might be. This case illustrates the converse of the proposition I have stated, for here the court in effect found from the will that the bounty conferred in the will upon the daughter was to help the husband, and would be satisfied by subsequent help to the husband in testator's lifetime.

In McClure v. Evans, 29 Beavan, 422, the question was whether $1,000 given by the testator to his son-in-law, was the ademption of a a legacy for that amount to his daughter. The will provided that in any case my daughter should have received from the testator any sum

"advanced by way of marriage portion or advancement," it should be deducted from the legacy. Romilly Master of the Rolls, said: "This (*i. e.* the question in the case) depends on the intention of the testator." Nothing turns on the fact that it was given to the husband rather than to the wife; if in truth the money was paid by way of marriage portion or by way of advancement, it falls within the provision whoever received it, "and then proceeded to find from the circumstances that it was not intended as an advancement to the daughter." See also Kirk v. Eddowes, 8 Hare, 509. The effect of the cases so apparently contradicting from the decisions on the facts seems to be that from a simple gift to son-in-law, no presumption of satisfaction of a daughter's legacy arises unless the circumstances show that a bounty to the daughter was intended. And that, as I have said, seems to be shown here.

But it is said that all the circumstances showing an intention to adeem and the equitable presumption of ademption are rebutted by the failure of the testator to take the note of the plaintiff as provided in the will when these notes were endorsed, and by the further fact that he never forgave the debt to Stichtenoth on these notes. I think that the reason why he did not take the note of the plaintiff at the time of the visit is obvious, and that it in no way conflicts with the presence in his mind at the time of an intention to charge to her the loss, it any, arising from the act which she induced. Until the endorsed notes should fall due, and he should have to pay them, there would be nothing definite to charge to her, and he preferred to wait until what he regarded as probable should become certain.

When the loss had become certain, he had prepared a written paper for her to sign, and thereby assume these $12,000 notes of her husband, to the extent that they were not collectible. Because, as I have found, he intended to charge her with the consequences of his act of endorsement from its date, it seems proper to hold that the preparation of the paper of April 3d, in so far as it related to these endorsements, was a part of the transaction in this, that it was the final act of the testator in the matter in preparing the evidence of its real character to assist his executors, and was an attempt to bring it within the description of the advancements in the will. If he had had no intention to charge her with these endorsements when he made them, this paper would be ineffectual to do it. For this reason I refused to consider the $10,000 note as an advancement. But I am convinced by the circumstances, and the conversation at the time of the endorsement as well as by the declarations of the will, that the intention to charge plaintiff was in testator's mind then, and that it merely found expression in the paper of April 3, 1888, because then the testator thought the time had arrived when, the anticipated loss having occurred, he ought to put that intention into a a form which should be evidence, and should accord with his will. I do not think the difference between an agreement to pay a promissory note and a simple note is sufficiently great to prevent this paper of April 3, 1888, from fulfilling the requirement of the will as to the $12,000 notes, and even if it is, the terms of the paper are such as to leave no doubt of the testator's intention, and that appearing, the departure from the will as I have said, is not material. The objection that the debt of Stichtenoth to the testator is not forgiven is fully explained by the paper of April 3d. What the testator intended to charge to his daughter, the plaintiff, was only the amount he would be compelled to pay of his estate by reason of the act he had done for her at her request. There are cases

where what was claimed to be an ademption remained in fact a debt, and it was held that because the debt was not forgiven, no ademption could be intended. But, in such cases, the debtor and the legatee are the same person. Here there is nothing inconsistent in the testator's holding Stichtenoth on the notes, and his charging the plaintiff with the loss arising from Stichtenoth's being given the opportunity to obtain the money and incur the debt.

It may be said that in arriving at what was the intention of the testator in July, 1887, when he endorsed these notes, I have been influenced by the paper of April, 1888, and its contents, and so have used subsequent declaration of the testator of his intention to prove his intention at the time. I am not prepared to deny that the paper may have had an unconscious influence, in leading me to the conclusion as to what was testator's purpose when he endorsed those notes with respect to the loss likely to arise. But if it had, I think the paper competent evidence for that purpose as a part of the transaction with respect to these notes. It was not on its face, a subsequent declaration of intention by the testator of what he intended in the past, because there is nothing of the kind in the paper. It was merely the final act in the transaction by which he was getting evidence of its character for his executors, and an attempt to conform to the will. There are cases in which quite as much latitude has been sanctioned in admitting evidence as part of the transaction, as here. Thus in Pollock v. Worrall, 28 Ch. D. 552, the question was whether a testatrix had adeemed a legacy of £500, which was recited in the will to have been given according to the wish of her late husband, by the gift of £300. Evidence was given of conversations of the testatrix with her two brothers, in which she related a correspondence with the legatee, with reference to the legacy and its ademption, for the purpose of showing her intention at that time, more than a year before the payment. These the Earl of Selborne said, were so connected with the matter, as to make them admissible, though not contemporaneous with the gift. I presume it is unnecessary for me to say that the fact that the signature of the plaintiff was obtained from her, without her understanding the purport of the paper, is immaterial in this discussion, because the paper is only useful or relevant here to show from his acts the intent of the testator, and because as a contract, it has no effect whatever. The testator knew the contents of the paper, and his act with respect to it, including the obtaining of the signature, are what is material.

I am of the opinion therefore, that when the testator endorsed these notes, he did it as a bounty for his daughter, at her request; that he intended to charge any loss arising therefrom to her share of his estate under section 3, of the will; that he procured her signature to the paper of April 3d, in accordance with that original intention, in order to evidence the transaction for his executors and to conform to the formalities prescribed in the will for advances, and that thereby he adeemed her legacy under clause 8 to the amount of these notes for $12,000, less whatever has been recovered from Stichtenoth's estate, or the Weber Brewing Company, which was also liable thereon. The decree will be for instructions to the executors in accordance herewith.

## ELECTRIC LIGHT COMPANIES. 137

[Superior Court of Cincinnati, Special Term.]

HAUSS ELECTRIC LIGHTING POWER CO. v. JONES BROS. ELECTRIC CO.

**Where an electric light company, by decree of the probate court (secs. 3461, 3471*a*, Rev. Stat.), obtained a right to put poles on certain city streets, subject to the rights of other companies to use its poles for their wires on paying a fair proportion or rental, another company cannot insist on using such poles, where its only right to do so is under a city ordinance providing that any company having by ordinance a right to erect poles should submit to the use of the poles by other companies, for the owner of the poles did not get its right by ordinance but by decree of the probate court; hence, the ordinance does not apply. The fact that the former company also had a permit from the board of public affairs, with a similar reservation, does not affect the case, for that board had no power to impose such condition.**

TAFT, J.

This is a motion to dissolve an injunction issued on the filing of the plaintiff's petition. The plaintiff company, which is authorized to occupy the streets of Cincinnati by a decree of the probate court, has, with the permission of board of public affairs, erected poles for its use on the north side of Seventh, between Main and Walnut streets, and on the south side of the same streets, between Walnut and Vine. The defendant company wishing to use the same street, and being prevented by ordinance and its own decree in probate court from erecting poles on the other side of the street from that occupied by the plaintiff, proposes to string its wires on the plaintiff's poles, and to pay a just proportion of the original cost of the poles, and a fair monthly rental. This the plaintiff denies the defendant's right to do and has obtained herein a preliminary injunction to prevent it from doing. The decree of the probate court under which plaintiff's company acts, contains the following: "It is hereby further ordered that this decree shall not be so construed as to prevent the defendant city, or the court, from granting upon the same terms and conditions herein stated, to any other person, company or corporation proposing in good faith to engage in the business of supplying electric light or power within the same territory, the right to use the unoccupied portion of the poles, masts, towers, brackets, or supports erected by said plaintiff company, upon the payment to the said plaintiff company of a fair proportion of the original cost of erection, and a monthly rental equivalent to a fair proportion of the cost of maintenance of the same, provided said unoccupied portion of such poles, masts, towers, brackets or supports is not required for the present as well as fair prospective business of said company, and provided further, that such use does in nowise interfere either with the safe or successful use of the same by said plaintiff company.

"The exact location and the erection of all poles, masts, towers or supports proposed to be erected by said plaintiff company, shall be subject to the approval of the board of public affairs of the said defendant city, which shall, for good cause, have the right to order and enforce a change of location of any poles, masts, towers or supports; and the occupation by said plaintiff of any new street hereafter opened, shall be upon a plan to be submitted by plaintiff company and approved by the board of public affairs of said city." It is also provided "that all poles, masts, towers, brackets or supports, shall be 30 feet in height, unless otherwise specially ordered by the board of public affairs of said city."

This decree was entered March 8, 1889.

On the twenty-seventh of July, the board of public affairs adopted a series of rules for the construction of the outside plant for electric light and power. Section 33 of those rules provides that "in granting permits to erect poles for purpose of electric light or power, this board reserves the right, if the interests of the city so demand, to authorize other companies or persons to use the same poles for the same purposes upon the payment to the owner thereof of a proper compensation, to be determined by agreement between the parties concerned, or by the board in default of such agreement. All permits will be subject to this condition, and in accepting a permit the applicant binds himself accordingly thereto."

On the eighteenth of October, 1889, the common council of Cincinnati passed an ordinance, providing that whenever permission is by ordinance granted to any person, company or corporation to engage in the business of electrical illumination, it shall be under the following expressed terms and conditions. Among such terms and conditions is the following provision, "That the person, company or corporation erecting any such lines of poles, masts, towers or supports shall, upon payment to them of a fair proportion of the original cost of erection of the portion to be so occupied and possessed, and a monthly rental equivalent to a fair proportion of the cost of erection and maintenance of the portion to be so occupied and possessed, permit any other person, company or corporation to occupy and possess equal rights and privileges thereon, if said poles have not already a full complement of wires—same to be determined by the city electrician.

And, whenever two or more persons, companies or corporations are supplying, or propose to supply, electricity for any purpose whatsoever within the same territory, they shall be required to jointly use and occupy the same poles, masts, towers or supports upon the conditions hereinbefore recited; and no wires or electrical conductors of any character or kind shall be maintained in any other manner than that herein provided."

Then follows a provision by which the board of public affairs is to have the right to change the location of any posts, etc., and making the erection of all posts subject to the approval of the board.

Plaintiff erected the poles in question before the rules of the board of public affairs were adopted. They have applied for and obtained permits to string wires upon these poles since the enactment of those rules. The electrician of the city files his affidavit stating that in his opinion, the poles of the plaintiff are amply able to accomodate the lines of the defendant company, without interfering with the lines, or the present or fair prospective business of said plaintiff company. This statement is denied by several officers of the plaintiff company and another interested person, the president of the Brush Company. The claim is also made in like affidavit for plaintiff that the defendant may proceed through this district by alleys. Section 2461, under which together with sec. 3471*a* (84 O. L., 7), the probate court acts in granting authority to occupy the streets to electric companies, provides that the mode of use of the street shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they cannot agree, * * * the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same."

Since the legislature has invested the probate court with what is practically a franchise-granting power, a power to be exercised in all

events, and to be of concurrent effect with similar grants from the municipal authorities, it is exceedingly difficult to reconcile and adjust rights growing out of franchises from the different sources, and to say how far general ordinances of the city affect grants of the probate court. This much is clear, however, that no ordinance of the common council, which, in its terms, is not wide enough to include what may be called probate court companies, is to be applied to them. The general ordinance from which I have quoted above, only applies by its terms to cases where permission is by special ordinance granted to any person, company or corporation, and provides the mode of use of the streets by such person, company or corporation. This general ordinance seems to have been intended to subserve the same purpose with respect to such companies, that the probate court decree fulfills with respect to companies deriving its power from its statutory authority, *i. e.* they each prescribe the mode of use of the streets. Much has been said as to the police power and its exercise. Regulation of the use of the streets by such companies is certainly an exercise of legislative police power, but the fallacy of the argument for the defendant, as it seems to me, is in failing to perceive that under sec. 3461, the probate court is itself exercising such power, it being taken for the purpose from the common council. It might be argued, therefore, that where the probate court has exercised such power, it is not for the common council to qualify, amend, or interfere with its action. In the plaintiffs' decree, however, the city is given power to make provision for the joint occupancy of poles, and if the city has done that, its action is as binding upon plaintiff as the terms of the decree. The general ordinance above quoted has no such effect, because of its limited application referred to. Are the rules of the board of public affairs such action? I think not. The city in such matters acts by common council. That body is given control of the streets. The board of public affairs simply enforces the ordinances of council. Under plaintiff's decree, the board is to fix location of poles and change them, but it seems to me to be an act beyond its power so far as the probate companies are concerned, to impose a condition upon its fixing such location and granting permits, that the company shall agree to some rule as to joint occupancy of its poles with another company. It is thereby seeking to qualify and amend the mode of use prescribed by the probate court though not being authorized by the decree of that court to do so. However advantageous it may be to have electric wires governed by a common plan, the law gives two tribunals the power to make such plans, and if they do not agree, then the law does not work well. I come therefore to the conclusion that the only provision by which plaintiff is governed with respect to joint occupancy of its poles, is that contained in the decree. That occupancy cannot be had by another company except upon a grant from the city to such other company. I think I have shown that there is no such grant by the city to defendant, and there has been none by the court under the reservation of power to grant such right contained in the decree. It follows that defendant's only remedy is to apply to the city authorities or to the court for such grant, and then to act upon it. This conclusion makes it unnecessary for me to consider the issues of fact made by the affidavit of the city engineer and the officers of defendant.

Motion to dissolve injunction overruled.

A. L. Herlinger, Drausin Wulsin and Champion & Williams, for plaintiff.



Pottenger & Pogue and Paxton & Warrington, for defendants.

151 INSOLVENT ESTATES.

[Superior Court of Cincinnati, General Term, 1890.]

† WILLIAM E. JONES, EX'R., v. HEROLD BYLAND, TRUSTEE.

**Where an assignee for the benefit of creditors had converted assets so assigned to his own use, and afterward placed choses in action belonging to himself in an envelope indorsed with the name of the assignor and a statement to the effect that the property enclosed should take the place of that which he had misappropriated, such action constituted a declaration of trust in favor of the estate assigned, which could not be revoked by the executor of such assignee.**

PECK, J.

Alfred A. Clerke, as assignee for the benefit of creditors of the Lard Refining Co., received some $7,000 of the assets of the company, which he converted to his own use. Afterwards when pressed for a settlement of the affairs of that company, he stated to the attorney for the creditor who was pressing him that he had in his possession certain notes of other parties named, which represented the assets of the Lard Refining Company, and that when those notes were paid the money would represent in his hands the money of the company. Soon afterwards Clerke died insolvent, and the plaintiff in error is his executor. After his death the executor found in Clerke's safe among his private and other papers, an envelope marked, "Cincinnati Lard Refining Co.; these notes will cover all in my hands, deducting fee," containing the notes of which Clerke had spoken to the attorney, without indorsement. The notes had been made to Clerke in an individual transaction between himself and the makers thereof, and have since been paid, and the money is now in the hands of a receiver awaiting the orders of the court.

The question is, whether it shall go to the creditors of the Lard Refining Co. by reason of the facts stated, or whether it remains a part of Clerke's estate to be distributed to his creditors. That depends upon whether the statements and action of Clerke were such as to constitute a declaration of a trust in the property in question, in favor of the Lard Refining Co. Having appropriated the property of that company to his owo use, he was bound to replace it. If he set aside a part of his own property to take the place of that which he had misappropriated, and evidenced his action in that behalf in an unmistakable manner, so as both to show and effect his intention of reimbursing the trust fund, equity would treat the property as part of the trust fund. If another person had been assignee of the Lard Refining Company, and Clerke had been under the same obligation, and he had delivered the notes to such assignee, with the statement that they were to be applied to the reimbursement of the trust fund in his hands, there can be no doubt that the title to the property would have vested in such assignee for the benefit of creditors, and beyond the power of Clerke to recall it. As it stood, there was no other to whom the property could be delivered. He was himself the assignee, and if he took such steps as to fairly show that he transferred the property to the trust fund in his own hands, it is difficult to perceive why the transaction should have any different legal significance from what it would have had if he had delivered the property to another.

† A motion for leave to file petition in error was overruled by the Supreme Court, in effect affirming this judgment; unreported.

What he did was to separate the notes from other property of his own, place them in an envelope indorsed as aforesaid and to state to the attorney for creditors of the Lard Refining Co., that he held them as assets of that company. It is difficult to perceive what more he could have done under the circumstances. The fact that the notes were not indorsed is not significant when we remember that he was the payee and expected that the money would come into his own hands—to be by him held and distributed as the assignee of the Lard Refining Co. The indorsement was not necessary for the collection of the notes, and no indorsement is necessary to pass the equitable title to a promissory note, when the transfer is otherwise satisfactorily shown. Lancaster National Bank v. Taylor, 100 Mass., 18.

The fact that after he had declared this property to be held in trust, it was still in his power, because of his possession to divert it to other uses, is of no significance. He had the same control over the restored trust fund as he had over the original trust fund—with the physical power to misapply in either case, but no more lawful right to do so in the one case than in the other.

The case is closely analogous to several others which have been adjudicated, and the trust is here quite as plainly made out as it was in either of them.

*In re* Bankhead's Trust, 2 Kay & J., 560; Uran v. Coates, 109 Mass., 581; Hewitt v. Provident Life Co., 53.

The judgment of the court below is affirmed.

TAFT and MOORE, JJ. concur.

Rankin D. Jones, for plaintiff.

W. M. Ramsey and H. W. Cist, for defendant.

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## INCLINED PLANE RAILWAY CO—STREETS—NUISANCE. 165

[Superior Court of Cincinnati, Special Term, 1890.]

### †CITY AND SUBURBAN TELEGRAPH ASS'N v. CINCINNATI INCLINED PLANE RY. CO.

1. The plaintiff, a telephone company which has established a telephone system in a city at vast expense, using the earth as a return circuit for an electric current, is entitled to an injunction against the continuance of an electric railway constructed ten years later under a single trolley system, also using the earth as a return circuit, and thus by induction destroying the use of the telephone to plaintiff's customers along the same street. It appearing that the cost of a return wire by plaintiff would be enormous, and that the cost of a return wire by the electric railway substituting a double trolley system would be of greatly less expense. It also appearing that plaintiff had not acquiesced in, but had duly protested to the railway company before its construction, and had received assurances that their system would not create trouble. Dumping electricity into the ground to the injury of other property is cognizable as a nuisance, just as dumping filthy water or creating noisome gases would be. Six months' time will be given before the injunction takes effect.
2. It can not be said that the right of a street railway to occupy a street for travel is a superior right to that of using it for telephone poles. A telephone company's grant of the right to use a street is as well founded as that of a street railway. The public cannot complain if the legislature enlarges the use of a street, though the abutter may be entitled to compensation for the new burdens.

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†This judgment was affirmed by the superior court in general term, post 24 B 471, but the judgment was reversed by the Supreme Court; opinion 48 O. S., 390.

3 An incline plane railway purchasing an existing street railway connected with the incline plane, may, under a proper construction of the act of March 30, 1877, (74 O. L., 66), substitute electricity or other motive power for horses whenever the board of public works permits, without being required to obtain the consent of the city council.

4. Section 3445, Rev. Stat., does not compel the incline plain railway company to cross streets on bridges or tunnels, except on the inclined plane and not on surface connecting roads purchased or leased by it.

5. The act of 1877 gives such companies the right to purchase or lease connecting surface roads.

TAFT, J.

This is an action to enjoin the defendant from using a system of electric railway propulsion known as the single trolley system, in running its cars upon the streets of this city and the roads of the county, because, as plaintiff claims, it does a great injury to the conduct of the public business in which it is engaged, i. e., the maintenance for profit of telephone communication between a large number of subscribers in the city and county. Plaintiff alleges that it has been conducting its business under lawful grants of the legislature of the state and the municipal authorities, and by virtue thereof has lawfully erected many lines of telephone wires on the streets upon which the street railway of defendant is constructed and operated. That the defendant has no lawful authority to use electricity as a propulsive power for its cars; that the single trolley system in use by defendant conducts upon and induces upon the wires of the plaintiff erected on the same streets currents of electricity, which make it impossible to use those wires for the purpose of telephone communication; that the result is, that many of the subscribers of plaintiff have made complaint and threatened to discontinue the use of the telephone, and some have refused to continue payment for the same, all to the great injury of the plaintiff; that the damage is irreparable and continuous, and that plaintiff notified defendant before the erection of the single trolley system that it would result in a serious injury to plaintiff, and of the objection to the system.

The defendant answers, denying plaintiff's lawful right to operate telephone lines; avers its own lawful right to conduct a system of electrical railway propulsion; avers that the single trolley system is the only practicable one in use, and secures advantages to the defendant not afforded by any other; that plaintiff's difficulties arise from the defects of its own telephone system, in that, for economy, it uses the earth as a return conductor, and so invites onto its lines many disturbing currents, both natural and artificial, although the mechanism of the telephone is so delicate that any proper system would make the return circuit metalic; that plaintiff's claim amounts to a claim to the exclusive use of the earth as a conductor, which is without warrant of law; that the use by the defendant of the earth as a return circuit is a material assistance in propelling cars up heavy grades; that it could not alter its system so as to avoid the use of the earth as a return circuit except at great outlay and loss of efficiency. The answer denies that the operation of its road produces interference with the telephone lines of plaintiff, and says that, if any injury has been produced for which defendant is liable, the damages are capable of exact ascertainment, because they can all be remedied by an additional expenditure by the plaintiff, and that therefore there is no ground for equitable relief.

Plaintiff, by its reply, denies the allegations of the answer.

First. The plaintiff company was organized in 1873, as a magnetic telegraph company, to conduct a telegraph business on lines within the city, and between here and Hamilton, under laws which have since been incorporated in chapter 4, Title 2, concerning magnetic telegraph companies. Sec. 3454 provides that "a magnetic telegraph company heretofore or hereafter created may construct telegraph lines from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wire; but the same shall not incommode the public in the use of such road." Sec. 3461 provides that, "when any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as

to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness."

In 1878, the telephone, as a practical commercial instrument, came into use, and the plaintiff became the licensee of the American Bell Telephone Company, with exclusive rights to use all its patents in this city and county. Before this time, in 1873, the common council had passed resolutions fixing the terms under which the plaintiff might occupy the streets with its poles. From 1878 until the present time the business of the plaintiff has grown to such an extent that it now has over 3,000 subscribers in the city and vicinity. The pole lines of the plaintiff along the streets occupied by the defendant's railway were erected in 1881 and 1882. In 1880, the following section was added to the telegraph law, 3471: "The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions, as are herein prescribed for magnectic telegraph companies."

The pole lines of the plaintiff are so erected under the ordinances of the city as to leave a bar at the top of each pole, on which to string the wires of the fire department telephone lines. The fire department and police department are each given a separate exchange, operated by city employees. The city strings its own wires upon telephone poles, but pays nothing to the plaintiff for the use of the instruments, or for the general exchange work of the fire and police department. The poles have been erected at such places as directed by the engineer of the board of public affairs, and under his supervision. The plaintiff has always used the earth as the return circuit. This has been the case with all the telephone systems in this country down to present day, with the exception of certain long-distance lines from New York city, and the connecting subscribers who frequently use those lines in that city. The telegraph companies have used, and still use the earth as the return for the circuit. The most complicated part of the telephone business is the mechanism by which temporary connection is made between any two subscribers' lines. It is called a switchboard, and each of the exchanges, of which there are five in this city, is furnished with one. It is a very expensive instrument, and could not be adapted to use for a system of metalic circuits.

It will thus be seen that every step taken by the plaintiff was authorized by law, and that all that has been done by it has been with the consent of the proper authorities. From this statement, there can be no doubt that the plaintiff has a lawful right to occupy the streets upon which defendant's track is laid, with the poles and wires erected for the conduct of its business, and that the use of the earth as a return is not a violation of its franchise. It was organized and still is called a telegraph company. It began its telephone business before section 3471 was passed and perhaps some of its poles and lines along the streets occupied by defendant were erected for such use. But this circumstance is immaterial, for it has been held, both in England and in this country, that the telephone system, which is communication over long and short distances through the agency of currents of electricity on metal wires, is really a magnetic telegraph system, and that an exclusive right to operate the telegraph includes the exclusive right to operate telephone line. Attorney-General v. Edison Telephone Co., 6. Q. B. D., 244; Wisconsin Tel. Co. v. Oshkosh, 62 Wis., 32.

Nor does the passage of sec. 3471, which expressly makes the chapter on magnetic telegraph companies applicable to telephone companies, affect this conclusion. It was passed simply to remove the basis for an argument, and not because the chapter was not already sufficient to include telephone companies without it. Chesapeake, etc., Tel. Co. v. B. & O. Tel. Co., 66 Md., 399.

But, even if it were true that, when the plaintiff company, in 1878, began to use the telephone system, it was beyond its charter, it seems to me that the subsequent legislation of 1880 would have validated what before was ultra vires. See Spring Grove Ave. Ry. Co. v. Cumminsville, 14 Ohio St., 523.

I have not discussed, in this connection, the question how much the abutting property owners' rights were affected by the erection of the poles and wires of the plaintiff, because their rights are not in issue, and it is to be presumed, from the fact of plaintiff's occupation for so many years, in the absence of other evidence, that if any of the rights of the property owners were taken, they were ceded or sold to the plaintiff.

Having determined, then, that plaintiff's use of the streets, on which defendant operates its road, is lawful, the next question which arises is, whether defendant has the right to use electricity for the propulsion of its cars. If it has not, and it thereby interferes with plaintiff's franchise, it is very clear that such inter-

ference gives plaintiff a right of action. Defendant's counsel seems to contend that the question of ultra vires can not be raised against the defendant in this case; but that such an issue could only be made in an action by the state, or its delegated representatives, to oust the defendant from the exercise of such unwarranted privilege. This contention can not be sustained, for while it is true that if defendant is violating the limitations of its charter, plaintiff might request the attorney-general to institute quo warranto proceedings, nevertheless, it may rely on the fact of defendant's violation of its charter in a private litigation to show that the acts causing loss are unlawful. City of Zanesville v. Zanesville Gaslight Co., Supreme Court of Ohio, 47 O. S. 1, 35.

The larger portion of the line now occupied by the defendant, was once operated by the Mt. Auburn Street Railroad Company, under a number of grants from the common council, the first of which was made September 2, 1864, and the last November 14, 1873. All these grants were subject to the provisions of the general street railroad ordinance of 1859, that no motive power except horses and mules should be used on any road without the consent of common council. The franchise and property of the Mt. Auburn Railroad Co. was purchased by three persons: George A. Smith, J. M. Doherty, and Jos. S. Hill. On April 21, 1871, the Cincinnati Inclined Plane Railway Company was incorporated under the general corporation act passed May 1, 1851, for the purpose of constructing a railroad whose termini should be in Cincinnati and the village of Avondale, and then constructed the inclined plane, still in use, connecting Locust street, Mt. Auburn, with the head of Main street. By ordinance, December, 1871, common council gave the company the power to lay tracks on certain streets which connected it with the Mt. Auburn Street Railroad tracks, with the express proviso that no motive power except horses and mules should be used on said tracks. A similar proviso was contained in an ordinance passed October 27, 1875, granting it the right to extend the tracks of the Mt. Auburn Street Railroad tracks to the north corporation line, at the Zoological Garden. In 1876, an act was passed (73 Ohio L., 229), providing for the organization of inclined plane companies, and authorizing them to construct, operate, and maintain an inclined plane railroad for the conveyance of passengers and freight, or either, with such offices, depots, and other buildings as they may deem necessary; also, to establish and maintain a park or pleasure grounds, and for such purposes to hold real estate. Sec. 10 of this act, provided that whenever the part of the roadway of such railroad operated by steam power shall cross a public highway, such part of the railroad's railway shall pass either over or under such street or highway, and shall be constructed in such a manner and at such a distance above or below such street or highway as not to obstruct the ordinary uses of such street or highway.

March 30, 1877, the legislature passed a law providing that any inclined plane railway company organized under the General Corporation Act of May, 1852, should have "the power to hold, lease, or purchase and maintain and operate such portion of any street railroad leading to or connected with the inclined plane as may be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it holds, maintains, and operates its inclined plane; provided, that no other motive power than animals shall be used on the public highways occupied by such street railway company without the consent of the board of public works in any city having such a board, and the common council, or the public authority or company having charge, or owning any other highway in which such street railway may be laid; and, provided, that no inclined plane railway or railroad company shall construct any track or tracks in any street or highway without first obtaining the written consent of a majority of the abutting property holders.

June 19, 1877, George A. Smith, Jas. M. Doherty and Jos. S. Hill leased the Mt. Auburn Railroad perpetually to the Cincinnati Inclined Railway Company. On September 24, 1885, the board of public works passed a resolution consenting to the use by the defendant either of electricity, cable, or compressed air as a motive power "upon the highways in which the street railroads connected with its inclined plane, and held and operated by it are laid," on condition that defendant gave bond in $25,000 to hold the city harmless from any damages to persons or property arising out of the use of such motive power. On October 24, 1888, the board of public affairs gave the defendant permission to erect along the entire length of its road the poles, wires and appliances necessary to operate and maintain its entire line from Fifth and Walnut streets to the Zoological Garden as an electric road, in accordance with plans and specifications submitted to the board. The poles and wires were erected under the supervision of the engineer of the board. On February 23rd, the stockholders of defendant extended its terminus

to Glendale, Hamilton county, Ohio, and certified the same to the secretary of state under sec. 3306 of the general railroad chapter. And under such extension are now constructing a line of road along the Carthage pike under the consent of the county commissioners, given March 23, 1889, to use and occupy said pike with double tracks and with necessary appendages and appurtenances of an overhead electric railroad system. This consent contains the provision that the county commissioners are to cause the removal of any or all telegraph or telephone poles which may interfere with the operation of said electric road. The grant thus given was modified in September, 1889, but only with respect to the part of the streets to be occupied.

Plaintiff's counsel maintain that on this record of the title of defendant, the present operation of this road is unlawful for several reasons.

First. That the act of 1876 providing for the incorporation of inclined plane railways requires that in passing over streets it should be conducted on bridges or in tunnels, and the act of May, 1877, provides that the operation of the railways to be leased shall be subject to the conditions upon which its inclined plane is operated.

Second. That the road connected with the inclined plane to be leased and operated by it under the act of 1877, was to be a "portion" of some other road, and that here the defendant is operating the entire road, nor is it shown that the road as used is necessary to the convenient dispatch of the business of the inclined plane.

Third. That a proper construction of the first proviso of the act of 1877 requires that the consent necessary to permit the use of animal power shall be given by the board of public works and the common council of the city.

As to the first reason, it should be said that it is doubtful whether the section referred to in the act of 1876 applies to defendant, for it does not appear that defendant ever accepted the provisions of that act as therein provided. Conceding, however, that the provision is of such a general character as to apply to any company running an inclined plane under whatever law organized, the restriction obviously applies only to places where the inclined plane itself crosses the streets, and not at all to what may be called surface street railroads which the Inclined Plane Company is given power to lease and operate as street railroads are usually operated. The conditions upon which the inclined plane is operated, and to which the operation of street railways by the Inclined Plane Company is to be subject, must, of course, be such conditions as are applicable to street railroads, of which the condition insisted on is obviously not one. Nor has the second reason, in my opinion, any weight. The original Mt. Auburn Railroad Company ran up Liberty, Price, Josephine, and Saunders streets. This portion of the road is not used now, but, being taken away, it leaves the part of Liberty to Fifth a portion, and from Mason to the north corporation line a portion. As to the objection that such roads are not necessary to the dispatch of the business of the inclined plane, I think it may be presumed that they are. It is common knowledge that the great difficulty to be overcome in reaching the plateaus about the city was in climbing the hills, and that the instrumentality by which that was accomplished became the principal feature of any such plan. The approach to the bottom and the departure from the top were incidental, and were certainly necessary to get passengers to the place of ascent or descent.

In so far as the third reason depends on the restriction in the grants to the Mt. Auburn railway to the use of horse and mule power, it is quite clear that subsequent legislative action enlarging the right of the lessee in this respect has been had, and no reason is apparent why it is not valid.

The chief argument is based on a construction of the proviso, "provided that no other motive power than animals shall be used on the public highways occupied by such street railway company without the consent of the board of public works in any city having such a board, and the common council, or the public authority or company having charge, or owning any other highway in which such street railroad may be laid." Counsel for plaintiff argues that the body usually invested with the power of granting franchises for a municipal corporation, is the common council, and that it is not to be presumed that, in this case, the legislature intended to confer final power of that kind on the board of public works, which is a body for the initiation of measures, not for their final legal sanction. Therefore, it is said, the word "and" before "common council" unites these two words with board of public works, and the disjunctive "or" is the dividing word of the clauses, so that by a proper transposition it might be made to read "without the consent of the common council and of the board of public works in any city having such a board, or of the public authority or company having charge,

or owing, etc." This construction might be supported but for the use of the word "other" in the second clause. The clause is rather obscurely drawn, but the expression "any other highway in which such street railroad may be laid" means any highway additional to those already mentioned in which the same street railroad has been laid. The law is defining the consents required for one railroad passing through several jurisdictions. Therefore, we have the conjunctive and before common council to indicate that where a railroad has its beginning in the highways of a city having a board of public works, and extends onto another highway beyond the city's jurisdiction, it must have the consent of the common council or the public authority or company having charge, or owning such other highway in which such street railroad may be laid. The bill was evidently passed by the legislature with this city in their minds, for this is the only city in the state where an inclined plane would be necessary, and for this reason the peculiar phraseology is used. It would apply by virtue of the last clause after "and" to any other city, but as bearing on the effect of and, the probable and possible application of the law may be considered.

While it is true that to the common council is usually given the right to grant franchises, it is certainly within the legislative power to give it to the board of public works or affairs, and of late years there have been many instances where other powers, like those of passing ordinances to assess, and to make certain improvements, have been transferred from council to the board of public works. Moreover if, by this law, the legislature intended to make the consent of the board of public works, and council necessary, it was wholly superfluous to have mentioned the board at all, because, under sec. 2227 Rev. Stat., the common council could not grant such consent except upon the approval of the board. Some point is made of the presence of a comma after the words "common council" in the certified copy of the bill obtained from the secretary of state's office, which does not appear in the printed law. I can not see that this materially affects the construction given above, for the certified copy shows the comma between board and the following and just as the printed law does, and that is the point where the question of a separation is important in construing the proviso.

On the whole, then, I am of opinion that the legislature conferred the right upon defendant to use any other motive power than animals, whenever the board of public works should consent. Now, the board did consent, on October 24, 1885, that defendant should use either a cable, compressed air, or electricity. It has chosen electricity, and has procured the necessary authority to erect its poles and string its wires.

Such being the condition of the franchises which the plaintiff and defendant are lawfully entitled to enjoy, considered each without reference to the other, it becomes necessary to inquire first whether any loss has been inflicted upon plaintiff by defendant, and if so, how it has occurred; second, whether such loss, if any, is justified by defendant's franchise, so as to be damnum absque injuria, which involves the preliminary question the legislature, after having given the plaintiff the right to construct its telephone system, on the faith of which right it has expended large amounts, can confer a franchise on another, the exercise of which will seriously impair the plaintiff's franchise as heretofore enjoyed.

First, a current of electricity can not be produced without a circuit; that is, unless the negative and positive poles of the generating battery or instrument are connected by a continuous substance, capable of conducting the current. Such a substance may be a metal wire, or if both poles of the battery be connected with the earth by metal wires, the current will find a circuit through the wires and the earth. The earth, by reason of its immense mass, makes an excellent conductor. By what paths the current discharged into it over the wire from one pole finds its way throughout to the wire from the other pole, is not capable of determination.

The telephone is a mechanism by which the sound of human speech is reproduced over long distances. Without attempting to describe the exact mode in which this result is brought about, I may say that the sound waves of the human voice produce vibrations in a thin ferrotype plate, which, by means of a magnet and an induction coil, are converted into corresponding variations in an electric current on the connecting wire, and these variations are, in turn, by means of the inducing coil and magnet at the other end converted into exactly corresponding vibrations on a plate there, reproducing the sound waves of the voice of the speaker in such a manner as to enable the receiver to understand. The current on the connecting wire is a slight one, and the circuit is completed, not by a return wire, but by a ground wire brought into contact with the earth. This contact is usually made by attaching the wire from the negative pole of a single cell

battery in each telephone, to a gas pipe or water pipe running down into the earth.

In the Sprague system of electric railways, which is the kind used by the defendant, the electricity used to operate the motors under the cars is conveyed to them by a single overhead wire suspended over the middle of the track, along the underside of which runs a trolley wheel on a single mast attached to the car, making electric connection between the overhead wire and the motor of the car, and allowing the current to pass down through the motor, and onto the track, whence some of it returns directly to the dynamo generator at the power house. A large part of the electricity leaves the track, however, and, by other and various paths, also finds its way through the earth back to the dynamo. In addition to the overhead trolley wire, which is supported by guide wires from iron posts erected on the curb at regular intervals, there is what is called a feed wire strung along on these posts for the purpose of keeping up the required quantity of electricity on the trolley wires. On the streets where are telephone wires, and electric railway wires, their general course must be parallel. The evidence in the case establishes beyond a doubt that since the defendant began the operation of its line by electricity, in June, 1889, down to the time of trial, the usefulness of all the telephones along the line of the railway have been more or less impaired; that, in many cases, the buzzing noise, which seems to be the chief form of the disturbance, has been so loud and continuous that communication over the lines has been impossible. Nor has the disturbance been confined to telephones on the line of the railway. Telephones several miles from the city, whose connecting wires ran parallel for any distance with the railway, were similarly affected, and the buzzing noise, in many of these, seems to have been quite as deafening as in the telephones along the line. Altogether, more than two hundred lines have been affected in this way, to a greater or less degree. The cause of the trouble is undoubtedly the operation of the electric railways, and the way by which it is brought about is two-fold. First, the escape of the electric fluid from the rails, which is called earth distribution or leakage, near where the wire from the telephone is connected with the earth, brings upon this earth connecting wire of the telephone varying currents of electricity of much greater quantity than that necessary for the telephone current, and produces upon the magnet and inducing coil an effect which results in vibrations of a very different character from those produced by the human voice, and makes a noise like the buzzing of a saw. Second, a similar noise is made by induction. It is a physical fact of much importance in electric mechanism that, where two wires of two circuits are parallel to each other, and there is a current of varying intensity on one of them, this will produce in the other, in the opposite direction, a current of electricity of similar variation. The insulation of the wires has no effect to reduce the current produced in this way. The amount of induction depends upon variation in the current, the distance of the wires from each other, and the length of the parallelism of the wires. The current upon the trolley wire, and the feed wire of the railway, is quite variable in quantity and intensity, owing to the drain upon the store of electricity by the moving and stopping of the car. Nor is the electricity, as generated, exactly uniform in its flow from the dynamo. The result is, that wherever the telephone wire is parallel with the trolley wire and the feed wire, there is induced upon the telephone wire a current whose variations correspond with the variations of the electrical current on the electric railway wires, and this acting upon the inducing coil and magnet, producing vibrations of the tin plate, which makes the buzzing sound. It is not possible, in listening to the sounds produced by the electric railway, to say whether it is the result of induction or earth leakage. Some of plaintiff's subscribers, notably Proctor & Gamble, have loud buzzing sounds upon their telephones, the ground wires of which are at such a distance from the railway track as to make it quite unlikely that the disturbance could have been caused by earth leakage, while, on the other hand, their wires are for some distance parallel with the trolley and feed wire of the railway company. Other telephones are disturbed on the line of the road, though their wires are not parallel with the trolley wire. Expert evidence attributed the disturbance about one-half to induction, and one-half to conduction or earth leakage. This, of course, is only a rough estimate, and the fact may vary much in particular instances. The injury to plaintiff's service is produced then, speaking in a general way, one-half by the defendant's pouring electricity into the earth, which finds its way into the property of plaintiff's subscribers, and thence into the wire of the telephone, and one-half by a creation of a current on plaintiff's wires in the street by the parallelism of defendant's wire and the varying character of the current. The result has been a very substantial interference with

the plaintiff's business, and, if the present condition continues, it will end in a serious loss.

Is it a loss for which defendant is liable? The contention on behalf of the defendant is, that because it has full power to operate by electricity under the law, the loss resulting to the plaintiff is damnum absque injuria, and if the plaintiff wishes to avoid the loss, it must adopt safe-guards in the shape of a metalic circuit to avoid the difficulty. To this plaintiff replies, that, by virtue of its grant, it acquired, before the defendant had a right to use electricity as a motive power, a vested interest in the telephone system as it now operates it, with a grounded circuit, and that not even the legislature of the state could take away from it or injure this franchise, on the faith of which it has expended so much capital and labor.

I am inclined to think that, under the constitutional provision that all laws for the forming of corporations may be altered or repealed (sec. 2, art. XII), it would be in the power of the legislature to grant a right to other corporations for a public use, to so use the street as to require the plaintiff company, if it wished to continue in the telephone business, to change its system, and that without any right of action against such corporations. The case of Ry. Co. v. Ry. Co., 30 O. S., 604, shows that, where one railway company condemned a right-of-way across the track of another, that other cannot recover for an injury to its franchise as a railroad, or for the increased expense entailed upon it in obeying laws of the state with reference to railroad crossings. However this may be, I am very clear that no intention on the part of the legislature to abridge the granted rights of one corporation by a new grant to another will be recognized by the courts, unless such intention plainly appears in the law. In England, the power of parliament is unlimited, and it may even confiscate private property, and a fortiori may abridge and destroy chartered rights and franchises. Nevertheless, we find in that country, that where one corporation is granted a right which may be so exercised as to injure or interfere with a right previously granted to another, the presumption of law is that parliament intended only such uses as was consistent with the rights of the first corporation. In Gas Light and Coke Co. v. Vestry, 15 Q. B. D., 1, plaintiff was a gas company which had laid its gas pipes by virtue of a public grant under a street which the defendant, a public corporation, was charged with keeping in repair, and upon which it used such heavy rollers as to injure the pipes of the plaintiff. The rolls used were economical and well fitted for the purpose, but it was held that, unless the defendants were expressly authorized by statute to use rollers of the size and weight of those which did the injury, the defendant could not justify under a duty to keep in repair which might be discharged by rollers of less weight, and without breaking the pipes. Says Findley, L. J.: "The authorities * * * show that an action lies for injury to property unless such injury is expressly authorized by statute, or is, physically speaking, the necessary consequence of what is authorized. If in this case, the defendants were expressly authorized by statute to use steam rollers of such a weight as necessarily to injure the plaintiff's pipes, the plaintiffs would have no ground of complaint. The case would then be one of damnum absque injuria. The same consequence would follow if defendants were expressly authorized by statute to repair in some way which necessarily required the use of heavy steam rollers, or other machinery, which could not be worked without injuring the plaintiff's pipes. There again, although such rollers or machinery were not expressly mentioned, their use would be authorized by necessary implication, and the plaintiffs would be without redress. But, unless some statutory enactment can be shown to authorize the defendants to injure the plaintiffs' pipes, the plaintiffs are intitled to redress." This case is peculiarly applicable to the case at bar, because here was a case of a public grant to the gas company enjoyed in a certain way, followed by a grant to the defendants to exercise another right, which if exercised in one way, would injure plaintiffs' enjoyment of its right, and which if exercised in another, would not. The same principle is here applied that courts recognize wherever private property is injured by the exercise of authority granted by the parliament. See Hammersmith, etc., Ry. Co. v. Brand, L. R., 4 H. L., 171; Queen v. Bradford Navagation Co., 6 B. & S., 631; Geddis v. Proprietors of Bann Reservoir, 3 App. Cases, 430. Att'y Gen'l v. Colney Hatch Lunatic Asylum, L. R., 4 Ch. App., 416; Att'y Gen'l v. Gas Light and Coke Co., 7 Ch. D., 217; Managers Metrop. Asylum District v. Hill, 6 App. Cases, 193.

Even then, if franchises to occupy the public streets conferred by the legislature may be subject to modifications of their use and enjoyment by other public grants of the legislature, it is certain that unless the legislative intent to make such modification clearly appears, either by express words or by necessary impli-

cation arising from the impossibility of enjoying the second grant without such modification, it will not be inferred.

But it is said that this principle can have no place here, because the right to occupy the street for the purpose of travel is a superior right to that of using it for the telephone poles. Defendant's counsel, to establish this, rely on The Spring Grove Ave. v. Cumminsville, 14 Ohio St.; Smith v. Tel. Co., 2 C. R. 259; Mt. Adams & E. P. R. Co. v. Winslow, 3 C. C. R., 425; R. R. Co. v. Williams, 35 Ohio St., 171; Pike's Ex'rs v. Western U. Tel. Co., decided by this court.

The cases have no bearing upon this case at all, as it seems to me. They involved a discussion of whether the erection of certain structures in the street could be considered a new burden and use, not included in the easement, which the abutting property holder had originally granted to the public, and whether therefore he was entitled to compensation. It is unquestionably within the power of the legislature, so far as the public is concerned, to enlarge the benefit to be derived from the streets, so as to include other public purposes than those of mere travel. Ry Co. v. Lawrence, 38 Ohio St., 45. If this takes more from the abutting property holder than he originally gave, then he may have compensation, but the public can not complain, for their representative, the legislature, has spoken and granted the use. When the telephone company is granted the right to use the streets, its right is as well founded as that of a street railway company, and in the absence of express legislative direction to the contrary, there is to be no yielding to any other. The provision that the telephone and telegraph lines shall not incommode the public in the use of the street, in sec. 3461, does not help the defendant. The inconvenience must be determined when the enjoyment of the franchise is entered upon. After rights have been acquired by the outlay of capital and user, there must be express legislative sanction, at least, to warrant a court in finding a use of the street to be an interference with public travel, which was not so when it began. It should be noted in this connection, too, that the plaintiff performs a very important quasi public duty, and is in fact a common carrier of messages. It is given the power of condemnation on that ground alone. Pierce v. Drew, 136 Mass., 75; Hockett v. State, 105 Ind., 250.

Coming now to apply the principle just under discussion to the case at bar, what do we find? For ten years the plaintiff has exercised the franchise of occupying the streets along defendant's lines with its poles and wires conducting a telephone business with a single wire circuit and an earth return. This mode of return was universally employed when it began, and is today in general use. It has constructed a valuable plant, many parts of which will have to be changed at great expense if it is to adopt the only system which will obviate the difficulty it now encounters from the operation of defendant's railway. I refer to the metalic circuit. It is admitted by every one that if the telephone company were to make every one of its lines a complete metalic circuit, with the return wire parallel with the outgoing wire, the disturbance both from induction and earth leakage would be completely removed. It is obvious that if the circuit never came into contact with the earth, the electricity dumped into the ground by defendant could not reach the telephone wire, and so no disturbance could arise there. And it is also a well ascertained fact that if two wires of the circuit, the outgoing and the return, are parallel and the same length, no effect will be perceptible from induction by a third parallel wire of another circuit, however variable may be the current on that wire. This is because the induction, which actually takes place upon each of the wires of the circuit, results in currents of equal intensity and variability in opposite directions, which, being on the same circuit exactly neutralize each other. To construct such a circuit for every subscriber, would entail an expense upon plaintiffs, perhaps, even greater than the original outlay. Nor does it seem practicable to have metallic circuits in disturbed districts and allow the other lines to remain grounded because of the difficulty in arranging the switch boards at the exchange by which subscribers are connected with each other and for the further reason that in order to connect a metallic circuit with a grounded circuit, the return wire of the metallic circuit must be grounded at the exchanges. The result is that the circuit then made between the two subscribers is a grounded circuit with a long leg and a short leg of wire parallel in the disturbed district. The difference in the length of the two wires prevents the neutralizing effect of the induced current in one wire upon the opposite induced current in the other, because, by reason of the different lengths, that part of the induced currents said to be produced by static induction is unequal. Moreover, to put up metallic circuits through the disturbed districts, and to make the necessary alterations in the switch board, would entail an expense, not nearly so heavy, of course, as a complete conversion

into a metallic circuit, but which would be quite substantial. There remains to consider what is called the McCluer device, which consists in a large wire carried into the disturbed district with which are connected all the return wires of the telephones. This main wire is grounded at a point away from danger of earth leakage. It is likely that such a device would get rid of earth leakage, but it would have no practical preventative effect upon the disturbances by induction, which, as I have said, make up about half of the troubles. The expense of such a device would not be large, still it would be something. It follows, from what has been said, that if the defendant is permitted to use its present single trolley system, it will require the plaintiff either to lose the business of many subscribers, or it will have to go to an enormous expense to obviate all difficulty, or to a less expense to get partial relief.

The plaintiff invested large capital on the faith of its present mode of enjoyment of its franchise. It has continued in such enjoyment for some ten years. To change involves loss and expense. Clearly, then, it can not be deprived of what so nearly approximates a vested right without clear legislative intent. The defendant can not be the instrument by which such loss is occasioned unless it clearly appears, and upon it is the burden to show that, in no other way, can it enjoy the right to use electricity for its cars. Atty. Gen'l v. Gas Co., 7 Ch. D., 217. It is true that the resolution of the board of public affairs approved its plan of structure, but as the legislature in allowing the defendant to use electrical propulsion upon consent by such board is not presumed to have intended a use which would injure plaintiff unless no other use is practicable, so it cannot be presumed to have given the board power to consent to such use. Moreover, the consent upon which defendant relies was the resolution of the board of public works in 1885, which defined no system of electricity.

Is it impossible, then, for the defendant to run an electric railway along its streets without making these disturbances? It is practically conceded, although there was some slight evidence to the contrary, that if instead of a single trolley wire, and an earth return, two trolley wires were used, one for the positive and the other the negative current, the difficulties would be just as completely obviated as if the telephone company used a metallic circuit. There is such a system in use in a number of cities of the country. There are two in operation in this city, and two or three more are projected here. In such a system the electricity is carried from one wire down through one trolley wheel and mast to the motor of the moving car, and returns from the motor to the wire by means of a second trolley wheel and mast. It is said it is wholly impracticable.

The single trolley system is in use on nine-tenths of the electric railway systems in the United States. This arises doubtless from two facts: First, that it is perhaps one-fourth cheaper in its outside construction; and, second, because in single track railways, of which there are many more than double track, where it is necessary to have many switches and turn outs, the complications of wires overhead increase much more rapidly with a double trolley than a single trolley. But in the case at bar we have a double track from one end of the road to the other, so that no switches are required. Mr. Short, who is a skilled mechanician engaged in a company which bears his name, and which erects both the single and the double trolley systems, says that he recommends the single trolley for single tracks and the double trolley for double tracks. He seems the only witness on either side that is free from suspicion of bias.

It is admitted by many of defendant's witnesses, that electrically the double trolley system is exactly as good as the single trolley, and this must be so, because a return by wire makes quite as good a current as by the earth. The claim that electricity in the wheels passing to the track gives additional traction is conjectural, and is not apparent in a practical comparison of the grades ascended by the cars on the two systems. The objection to the double trolley system is the mechanical difficulty in making proper switches and in supporting the superstructure. In the double-track road like the defendant's, the first difficulty does not arise, and the second difficulty has in fact been overcome in every double trolley system which has been erected. On the whole, then, it seems to me that there is no serious obstacle to defendant's using the double trolley. A change will no doubt involve the defendant in substantial expenditures in the overhead structure, which will have to be made heavier. But nearly all of the material can be used again, and no material changes need be made either in the dynamos, engines or motors.

The defendant can not rely on an estoppel. It was notified by the plaintiff as early as March 12, 1889, some three months or more before its electrical plant was put into position, that the use of the single trolley system would interfere

with and injure the use of the plaintiff's telephone lines. Defendant promised plaintiff that the system was an improved one which would give rise to no trouble. In so doing, it relied on the assurance of its vendor, the Sprague Company, and the peril of the fulfillment of such assurances must lie with it.

But it is said that the injuries here occasioned are not cognizable in the courts, even if the telephone company is to be regarded as a private property owner in the enjoyment of the telephone franchise, and the case of Frazier v. Siebern, 16 Ohio St., 614, is relied on in this connection. That was a case between adjoining proprietors, where the defendant dug a well on his premises and knowingly diverted percolating waters which made a spring on the plaintiff's premises, and dried the spring. This was held to be damnum absque injuria. There is no parallel between that case and the one before us. There the spring owner had no ownership in the percolating waters until they appeared on his property, and the injury he suffered arose simply from his neighbor making his own that to which, while it was on his premises, he was lawfully entitled. In the case at bar, the disturbances, in their two-fold origin, present slightly different circumstances, but call for the application of the same principle. The earth leakage arises from the defendant's pouring electricity into the earth, which, following a course as natural for it as the seeking of a lower level is for water, comes upon the premises of plaintiff's subscribers, and by getting upon the wires of the telephone, does harm. The plaintiff, by contract with its subscribers, has a right to have its wire where it is, and, for the purpose of this discussion, has exactly the same right to object to the presence of electricity on his premises caused by defendant and resulting in damage, as would the subscriber himself. It is impossible to distinguish such an injury in principle from the case of one discharging filthy waters into the ground so that it shall percolate into another's premises and there do damage, or of one's causing smoke and cinders to be constantly thrown into one's windows and injuring one's enjoyment of one's property. These are all examples of nuisances which have been held to give a right of redress. Ballard v. Tomlinson, 29 Ch. D., 115; Ry. Co. v. Gardner, 45 Ohio St., 309.

In Reinhardt v. Mentasti, 42 Ch. D., 685, it was held to be a nuisance for the defendant, a pastry cook, to put in a room in his house, which adjoined a room of the plaintiff long used as a wine cellar, a stove so large that, when it was being used, it heated the wine cellar, and made it useless for that purpose.

In Attorney-General v. Gas Co., 7 Ch. D., 217, the creation of noisome gases was held a nuisance. How can injury from electricity be distinguished from an injury by water, gas, smoke, or heat. The term nuisance signified anything that causes hurt, inconvenience, annoyance, or damages. Columbus Gas Co. v. Freeland, 12 Ohio St. 392.

As was said in Reinhardt v. Mentasti, 42 Ch. D., 685, "the principle governing the jurisdiction of the court in cases of nuisance does not depend on the question whether the defendant is using his own, reasonably or otherwise. The question is, does he injure his neighbors?"

The disturbance by induction is of similar character, except that the force is applied from one wire to the other through the air instead of the earth. If, as we have found, defendant is not entitled to interfere with plaintiff's enjoyment of the telephone franchise, here is a direct act of interference. I presume that, if one man arranges a set of mirrors, with reference to the sun, so as to concentrate its rays upon his neighbor's property, and so burns and damages that property, no question would be made of his liability. What difference can there be between such a case and the inducing of a damaging current on plaintiff's wires. The way in which the force acts may not be as well understood in the case of the mirrors and the rays as in that of electric induction, but the fact of the cause and the result is quite as clear. The contention by the defendant that the plaintiff, in resisting injury which reaches it through the medium of the earth and the air, where the defendant is the known moving cause of such injury, is making a claim to the exclusive use of the earth, is misleading, until it is examined, when it becomes apparent that the same claim might be made as to percolating waters, as to heat, as to smoke, and as to odors. The fact is, nuisances are generally injuries arising from a cause which is not in contact with the property injured and which must have come through the medium of the earth or the air, or the waters under the earth.

Then it is said no claim can arise for disturbances by the defendant, because there are similar disturbances from other causes, for which the defendant is not responsible, and Wood v. Sutcliff, 2 Simons N. S., 163, is cited upon this point. That was a case where the injury sought to be enjoined was the pollutions of a stream from which plaintiff had, in time past, drawn water for his business. One

of the reasons given by the vice-chancellor for refusing the injunction was that others than the defendant were polluting the stream. The real basis of the decision was the laches of the defendant in asserting its right, for he had provided a new supply of water and had used the river for some time. This case presented no difficulty in considering the case at bar, first, because there are no substantial disturbances shown, other than those caused by defendant, and, second, because the case itself is not sound authority. See Crump v. Lambert, 3 Eq. Cas., 414; Crosky v. Lightowler, 2 Ch., 478; Walter v. Selfe, 4 DeGex & S., 315.

In the last case, the court said that, because one man was maintaining a nuisance against the plaintiff, was no reason why defendant should set up an additional nuisance.

We find, then, that defendant is inflicting a legal injury upon the plaintiff in the nature of a nuisance from which has already arisen loss, and which must inevitably cause loss in the future, constantly recurring. It is said that the damage is not irreparable, because the plaintiff can expend money and avoid it; and, in the same way, can arrive at its exact loss, and that, therefore, its remedy is not by injunction, but at law. Neither of these claims can be sustained. The most frequent exercise by a court of equity of the power of injunction, is to prevent the continual recurrence of injuries from nuisance. The ground is that the plaintiff should not be put to a multiplicity of suits and endless litigation. To say that in order to entitle a man to obtain an injunction against such an injury, that he should not be able, by the expenditure of even vast amounts, to avoid the injury, is to say that no injunctions can ever issue for such a cause. The point is that he is not obliged to expend money to protect himself when a neighbor injures him, but he may appeal to the courts; and when upon the law side, he finds that the remedy there afforded is inadequate because of the necessity for bringing a separate suit for each injury, he may fairly say that by appeals to legal tribunals, he cannot repair his damage, and, therefore, his loss will be irreparable. As to the ascertainment of damages, it is by no means true that in each suit the entire cost of introducing a metallic circuit or a McCluer device would be the measure of damages for this sort of interference, and the very reason for going into a court of equity, is to get into a forum where all the injuries can be considered together.

The authorities are overwhelming that for such injuries as those arising at the bar the proper remedy is by injunction. Imperial Gas Co. v. Broadbent, 7 H. L. C., 601; Crump v. Lambert, L. R., 3 Eq., Cases, 409; Crawford v. Rambo, 44 Ohio St., 279; Attorney-General v. Cambridge Consumer's Gas Co., 4 Ch. App., 71; Gas Co. v. Vestry, 15 Q. B. D., 1; Cook v. Forbes, L. R. 5 Eq. Cas., 166.

The order of the court will therefore be that the defendant be enjoined perpetually from the use of the system of electric railway propulsion as now operated by them, or any other which will occasion similar disturbances to those now caused by defendant's single trolley system. The order of injunction will not take effect until six months from this day, with leave to the defendant to apply to the court hereafter for further time, if necessary, in a bona fide effort to make the necessary changes. The costs of the action must be paid by the defendant.

Aaron F. Terry, Hiram D. Peck and G. H. Wald, for plaintiff.

R. A. Ferguson, J. S. Wise and Edward Dienst, for defendant.

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## 205 RIPARIAN RIGHTS.

[Hamilton Common Pleas, 1890.]

### WARE & WILSON v. JOSEPH HOUK.

In an action by the owner of land fronting on the Ohio river, for the value of sand taken by the defendant from a sand bar in the river, plaintiff claiming to own to low water mark, and defendant that the bar was below low water mark, it is a question for the jury to decide, where the low water line at that point is.

It cannot be said, as a matter of law, that the low water line is the average line to which the water has receded in past years, as shown by the waterworks records; but the jury can consider these records in deciding.

OUTCALT, J.

The plaintiffs are lessees of ground bordering on the Ohio river, opposite Four Mile Bar, near Cincinnati, on the Ohio side. The defendant got his supply of sand from the bar, and a number of suits have been brought for recovery of the value of the sand. The case tried was intended as a test. It is well established that the southern boundary line of the state of Ohio is at low water mark on the north side of the Ohio river. But where is low water mark? and what is it? Is it the lowest point to which the river has ever been known to recede? This the court refused to charge, and there was also a refusal to charge, as a matter of law, that it is the average point to which the river has receded each year for the last thirty years, as shown by the waterworks records; but the jury were told that they were at liberty to take these records into consideration in determining what line may reasonably be considered low-water line at the point of the river in controversy. If, when the river is at the line so located, water passes between the bar and the solid Ohio shore, then the bar is an island, and plaintiffs can not claim title therein.

The jury found for the plaintiffs—that is, so located the low water line as to make the bar continuous with the Ohio shore. Lincoln, Stephens & Lincoln; W. B. Burnet. [Editorial.]

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## CONTRACTS. 217

[Superior Court of Cincinnati, Special Term.]

ROSS ROAD MACHINE CO. v. M. S. FORBUS ET AL.

The breach of a contract by which defendant agreed to employ and pay plaintiff for certain work is not excused by the fact that a third person prevented defendant from doing the work, as where F. employed plaintiff to roll the paving of certain streets, the contract to make which the city had awarded to F., and the city by refusing to permit F. to proceed with one of the streets disabled him from letting plaintiff roll it.

This is an action for damages for the breach of the following contract:

"This agreement made this fourth day of February, 1886, by and between the Ross Road Machine Company, a corporation, of the first part, and M. S. Forbus, of the second part, witnesseth: That the party of the first part, for the consideration hereinafter stated, agrees to do all the rolling required on such portions of Fourth street, Fifth street, Court street and Vine street, in the city of Cincinnati, for which contracts have heretofore been awarded by the board of public works of said city to said M. S. Forbus for the improvement thereof with granite blocks.

"Said rolling is to be done wholly at the expense of the party of the first part, and in strict accordance with the specifications and the contract entered into between said Forbus and said city, and to the entire satisfaction of the board of public works of said city or other duly authorized officer or officers thereof.

"In consideration of the faithful execution and performance of said work as aforesaid, the said M. S. Forbus agrees to pay the party of the first part the sum of ten thousand ($10,000) dollars, as follows, viz.: Such proportions thereof as each or any of the streets bear to the entire

amount of work to be performed under this contract shall be paid upon the completion and acceptance by the city of such street.

"And the said party of the second part agrees to the extent of the power and control of said streets which may be vested in him for the proper execution and performance of his contract, that he will keep such streets blocked, so as to prevent the public travel over the same from interfering with the due execution of this contract by the party of the first part. No charge shall be made by said party of the first part against the party of the second part for any detentions or delays occasioned by the acts of the city or its officers.

"(Signed) CHARLES M. STEELE,
"President Ross Road Machine Co.
"M. S. Forbus."

The Ross Road Machine Company, plaintiff, says that it has done work under this contract on Fourth street, Fifth street and Court street, and has received $6,360.00 for the same, but that while it has been ready and willing to do the rolling on Vine street under this contract, the defendants have refused to permit it to do so, to the damage of the plaintiff in the sum of $3,640.00.

The answer avers "That without fault on the part of the defendants, but solely through the fault of the city of Cincinnati, they have been unable to perform his said separate contract for the improvement of Vine street, and that no rolling has been required or done by plaintiff or defendants on said street.

To the answer a demurrer has been filed, and the case argued as if the contract were fully set out in the pleadings. The question in the case is whether the answer sets out an excuse for the failure by the defendants to permit plaintiff to roll Vine street, so that there has been no actionable breach of contract.

Counsel for plaintiff contends that it is no defense that by the act of a third person performance has become impossible. This was an absolute agreement, it is said, to employ plaintiff to roll Vine street under a contract with the city, and such agreement includes in it the agreement that the city shall allow such contract to be performed. If the city does not do so, it is merely a breach of defendant's agreement that it shall. The general principle relied on is stated in Wald's Pollock, 2d edition, 356, "Therefore a man is not excused who chooses to make himself answerable for the acts or conduct of third persons, though beyond his control." A number of cases are there cited to sustain the principle as stated. In Shephard's Touchstone, 392, it is said, "If the condition be that the obligor shall ride with I. S. to Dover such a day, and I. S. does not go thither that day; in this case it seems the condition is broken, and that he must promise I. S. to go thither and ride with him at his peril."

In Lamb's case, 5 Co. Rep., 23b, the condition of the bond was to give such a release as by the court should be thought meet, and it was held to be the obligor's duty to procure the judges to device and direct it. In Lloyd's Crispe, 5 Faunt, 249, the lessee agreed absolutely to assign his lease, the lease containing a covenant not to assign without license, and it was held that the contract was binding, and that he must procure the lessor's consent.

In Railroad Co. v. Reichert, 58 Md. 261, the defendant railroad company agreed unconditionally to make a connection for the plaintiff with

another railroad company, and it was held no excuse for non-performance that the latter company declined to permit the connection to be made. I can not distinguish these cases from the one at bar, and it seems to me that plaintiff's counsel is entitled to invoke the principle therein established to defeat the defense here set up.

It is urged on behalf of the defendants, that it was according to the intent of the parties that the agreement should be conditional on the performance continuing possible in fact, and the following language is quoted from Wald's Pollock, page 352: "An agreement is not void merely by reason of the performance being impossible in fact, nor does it become void by the performance becoming impossible in fact, without the default of either party, unless according to the true intention of the parties, the agreement was conditional on the performance of it being or continuing possible in fact. Such an intention is presumed where the performance of the contract depends on the existence of a specific thing, or on the life or health of a party who undertakes personal service by the contract." The argument is, that in the contract at bar, performance was dependent on the existence of a contract with the city, and that it must be presumed that the parties intended that performance should be required only on condition that the city contract continues in existence. The leading case cited to illustrate this principle relied on is Taylor v. Caldwell, 3 B. & S. 826, where it was applied to excuse the owner of a music hall which had been burned, from fulfilling a contract to let the use of it. The rule is stated there as follows:

"In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance." It is said that the "excuse is by law implied because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel." Now, can it be said that the city contract has been destroyed, or has ceased to exist, as the music hall did in Taylor v. Caldwell? It seems to me that it cannot.

A contract is in existence after it is broken. Both parties are bound by its obligations, and are liable for this breach. If the city contract was not fulfilled because of the fault of the city, as alleged in the answer; that can only mean that the city broke its contract. The measure of damages recoverable for that breach by defendants against the city might by allegation of special damage be made to include the amount required to be paid to plaintiff by defendants as damages for a breach of the contract at bar.

While therefore performance becomes impossible by the fault of the city there is substituted a cause of action on the contract against the city in which the defendants may recover as part of their damages, the damages which the plaintiffs are entitled to recover from them. In the eye of the law damages are compensation for failure to perform. It is not to be presumed that the plaintiff's intended to excuse performance by defendant, and to waive all claim for compensation for a failure to perform under circumstances which would enable defendants to recover compensation not only for their own losses, but for plaintiffs' as well. The only case in which the contract could cease to exist as a binding obligation affording a cause of action, would be when it was rescinded. This could not happen except by the act of the defendants, and where

the impossibility of performance is brought about by act of one party, it is no defense in an action for the breach by the other party.

For the reasons given the answer, taken with the contract, does not state a good defense, and the demurrer to it must be sustained.

Wilby & Wald, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, for defendants.

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## 224 FIRE INSURANCE.

[Superior Court of Cincinnati, General Term.]

†WESTERN INS. CO. v. ENOCH T. CARSON ET AL.

1. Where a lessor procures the insurance on his building and a lessee of one room procures insurance on his own fixtures without the lessor's knowledge, all the policies containing clauses limiting recovery to the proportion of loss the amount of each bore to the total insurance, the lessee's policy subject to such clause, although payable to a different person than the lessor's policy.
2. Where a lessee of part of a building, without his lessor's knowledge, procures insurance upon his fixtures in the name of the lessor, loss, if any, payable to the lessee, this does not violate clauses in the lessor's policies, forbidding other insurance.

ERROR to special term.

PECK, J.

The action was upon a policy issued by the Insurance Co. to defendants, trustees of the Masonic Society, known as the Gibulum Lodge of Perfection, insuring the Nova Caesarea Harmony Lodge against loss upon certain fixtures placed by the Gibulum Lodge in the Masonic Temple, owned by the Harmony Lodge, loss, if any, payable to the trustees of the Gibulum Lodge. The latter was the lessee of the former, and added the fixtures to the building for its own purposes. A fire occurred, the fixtures were destroyed, and the company declining to pay them, action was commenced. The case was tried at special term to a jury, and resulted in a verdict against the company for the amount of the policy and interest, and a judgment was entered upon the verdict. We are now asked to reverse the judgment because of sundry errors alleged to appear in the record.

It appeared in evidence that the Harmony Lodge had the building insured for $125,000 in other companies, and that the policy on which the action was based, contained a clause whereby it was stipulated that "the company should, in no case, be liable for a greater proportion of the entire loss than the amount it was thereby insured bore to the whole amount insured on the property." That there were other similar policies, amounting with the one in question to $9,500, which, added to the $125,000, made the total insurance on the building $134,000, and that was much more than the amount of the loss. It is claimed that upon this state of facts the court should have instructed the jury that the recovery, if any, should be limited to an amount, proportion to the entire loss as the amount of this policy was to the total insurance, which instruction the court declined to give, but did instruct the jury to the effect that the $9,500 of insurance, effected by the trustees of Gibulum Lodge, if it were to be regarded as insurance upon the Masonic Temple, would render void the other policies for $125,000, because each of the latter con-

†See also ante 9 Dec. Re., 843, for previous decision. The case was dismissed, in the Supreme Court, by plaintiff in error, March 2, 1892.

tained a clause avoiding the policy if the insurance upon the Temple exceeded $125,000, and that in such case the companies issuing them could not be called upon to contribute to the payment of the loss.

The charge, so given, entirely disposed of the claim as to contribution adversely to the company, for the jury was elsewhere told, in substance, that the action could only be maintained in the interest of the Harmony Lodge, the owner of the building, and that it was the interest of that body which was insured, and for the loss of which compensation was to be made, as held in the previous decision of this court herein. 9 Dec. Re., 848. The effect of this proposition is that the insurance, being upon the interest of the Harmony Lodge, it was necessarily insurance upon the Masonic Temple, for it was only as owner of the Temple that the Harmony Lodge had any interest and that it had an insurable interest in the fixtures placed in the building by the tenant was heretofore decided.

We are of the opinion that the charge as to contribution was erroneous, for the reason that it appears from the record that the officers of the Harmony Lodge were not aware of the fact that the trustees of the Gibulum Lodge had taken out the additional insurance. Generally speaking, it would seem plain that the rights of one or two contracting parties could hardly be affected by the unauthorized action of a third. And it has been held in a number of cases, that a provision against over insurance is not violated by the taking out of an amount in excess of that stipulated as the maximum of allowable insurance, if it be done by a person other than the owner and without his knowledge, although covering his interest. Nichols v. Fayette Insurance Co., I Allen, 63; Turner v. Meridian Insurance Co., 16 F. R., 454. *n*; 40 N. Y., 557; Woodbury Bank v. Insurance Co., 31 Conn., 518.

It follows therefore, that as the policies previously issued were not avoided by the issue of the one in question, and they were all upon the interest of the same party in the same property, it was a case for contribution unless the fact that the loss was made payable to the Gibulum Lodge, brings the case within a different rule.

We have carefully examined all the cases cited by counsel for defendant in error upon this point, and we think some of them sustain the proposition. Home Ins. Co. v. Balt. Warehouse Co., 93 U. S., 527; 36 Md., 431; 88 N. Y., 591.

The object of the provision as to contribution is plainly to protect the company against the payment of more than its proportionate share of the loss happening to the interest insured. If the insurance be upon the same interest in the same property, we fail to perceive how the fact that it is agreed that the loss shall be payable to some party other than the insured makes any difference. It is the amount of the loss as compared with the amount of the insurance which the parties have agreed, shall determine the liability of the respective insurers. If the fact that a party having insurable interest in the property, is to receive the money, renders the company liable for the whole amount of the policy without regard to the amount of the loss, then an owner may take out any number of policies payable to others, and all may be collected if a loss occurs, no matter how much the amount of the policies exceed the amount of the loss. If this be the law the rule against wager policies would seem to be a vain thing.

The judgment is reversed, and the case will be remanded for a new trial.

## 225 CONTEST OF ELECTION.

[Adams Common Pleas.]

### W. P. NEWMAN v. G. N. MCMANIS.

**The contestant having shown that certain votes cast for contestee were by persons not electors, the contestee has the right to show that the contestant also received votes of persons not eligible to vote, although the contestee has not served notice of intention to contest or question contestant's votes. The statute, R. S., sec. 3,000, only provides for pleading by the contestant.**

**If the justices take depositions in an election contest have any right to open the ballot box, which is doubtful under Rev. Stat., sec. 2999 (and which sec. 2957 now forbids), it does not empower them to appoint a witness to open and examine the ballots, and attach those claimed to be marked or illegal to their depositions, and such tickets having been since handled by many persons will not be considered as evidence by the court, and such depositions will fall with the ballots and will be excluded.**

DAVIS, J.

At the November election 1889, W. P. Newman and G. N. McManis were candidates for the office of sheriff of Adams county, Ohio. The official abstract of votes was made, as required by law, by the clerk of court [common pleas] and two justices of the peace, who declared that G. N. McManis had received 2957 votes and W. P. Newman had received 2944, showing a majority of thirteen votes for G. N. McManis, who was thereupon declared to be duly elected sheriff of Adams county.

W. P. Newman, within the period fixed by law, filed in the office of the clerk of common pleas notice in writing of his intention to appeal from the findings and declaration of the clerk and justices, claiming that he had a majority of the legal votes cast at the election for sheriff; he also gave notice as required by law that he would take depositions on the points sent out in the notice. It is admitted that all the steps necessary to be taken, as to notice and service of notice of taking depositions, have been taken as required by law, and no question is raised as to the preliminary steps. It is claimed by contestant

First—That illegal votes, in number fourteen, were cast for contestee, by non-residents, minors, idiots, imbeciles, and insane persons.

Second—That marked ballots were voted for contestee in the township of Tiffin and in Cedar Mills precinct of Jefferson township.

On the first of these points contestant introduced testimony, and from this testimony it is clear that a majority of these votes, so challenged, were illegal and the ballots should not be counted, but as there is not a sufficient number of these votes, even if all on which there is dispute, were declared illegal, to change the declared result, it is not necessary to examine them in detail. The contestee also introduced testimony tending to prove that a number of persons voted for contestant, who were not qualified voters, by reason of imbecility, insanity, minority and non-residence, and as to these votes, it is sufficient to say, that perhaps a majority of votes so challenged were illegally cast, and the number of such votes cast for contestant, is about equal to the number cast for the contestee. It is therefore not necessary to examine as to the qualifications of the persons whose right to vote is now questioned by either the contestant or the contestee.

There is one question raised by contestant, on the trial, which in order to save, it is necessary to pass upon. The contestant objected to

the introduction of any evidence by contestee, tending to prove that illegal votes were cast for contestant, for the reason that McManis had not served notice of his intention to contest or question any votes cast for contestant, and the only issue was the one raised by the contestant in his notice. The statute does not in terms provide for any notice or pleadings on the part of the contestee, in a contested election case. Sec. 3,000 does provide, however, that either party may introduce oral testimony or depositions on the trial, and an examination of the case of Sinks v. Rees, 19 Ohio St., 306, 312, shows that no such notice was given by contestee; yet the court say, the court of common pleas erred in refusing to reject illegal votes cast for contestant, Rees, and in Ingerson v. Berry, 14 Ohio St., 315, 325, the court speaking of the power of common pleas courts, on the trial of contested election cases, says "It is clothed with full power to judge of the validity of the returns as shown by the poll-books, and to go behind them and inquire into the legality of every vote which they exhibit," and so far as the report of that case discloses, no notice of contest or of the point relied on as a defense was given by contestee. The statute provides a summary way of determining the question, "Who has received the highest number of legal votes for the office?" It is an inquiry of a public nature and the filing of notice of appeal, service of notice of points relied upon, etc., by contestant, is the only pleading required by the statute.

AS TO THE MARKED BALLOTS.

Section 2948 provides, among other things "that all ballots shall be without any mark or devise by which one ticket may be distinguished from another."

Webster defines a devise to be a stratagem, and also an emblematic picture. Possibly the intention of the legislature in using this word may have been as counsel for contestee so strongly urged, to put an end to the using of red, white and blue tickets, or tickets having printed thereon, eagles, roosters, flags and other devices, but by the use of the word mark, which according to Webster, means a visible sign, made or left upon anything, a line, point, stamp, so as to draw attention and convey some information, or intimation, it is clearly the intention of the statute, and its purpose, to prevent anything being placed as a mark on the ballott, which might, or could be the means of conveying to some one or more persons, information or knowledge as to how, or for whom an elector voted. It is intended to preserve the secrecy of the ballot; it is a regulation in which the state has an interest; and if a devise or mark placed on a ticket, is of such a character as might be easily seen and noticed by the voter, such a ballot is an unlawful ballot and should not be counted. It is said by the Supreme Court of California, in the case of Kerck v. Rhoads, 46 Cal., 398, "that as to the exact size of the ticket, kind of paper and style of type, used in printing the ballots, the statute may be considered to be directory, and the ballot should not be rejected for such lack of compliance with these provisions. But if the elector, willfully neglects to comply with requirements over which he has no control, such as seeing that the ballot, when delivered to the election officers, is not so marked that it may be identified, the ballot shall be rejected." This case is cited by McCrary in his work on elections, with approval and is, I think the sound rule of construction to be given our statute.

It is pressed, in argument, that this rule would permit of great frauds in the election; that tickets might be so marked, by a dot, a dash, or almost invisible mark of some kind, and such tickets, by making a contract with some ticket holder, might be voted, by honest electors, and then on ballots being counted, the mark being pointed out, the ballots would be rejected and so the will of honest voters defeated and greater frauds, than ever thought possible, thus perpetrated. That such a thing might be done, is possible, but the remedy, if attempted, is with the legislature, and is not an argument to be considered by the court. It is hardly probable, however, that courts would construe the statute so as to say, that a microscopic dot, a dash, a pin hole, or any slight mark, which might be easily and honestly made, without any wrong or design to do an unlawful act, is to invalidate the ballot; but if tickets are marked "b. b." "H. S." or any such marks, they plainly show they are fraudulent, if the marks are plainly visible and can be readily and easily seen by the voter, if he looks at his ticket.

It is also urged that as the statute declares it to be unlawful to furnish any elector with a marked ballot, or for an elector to vote any such ballot, and there is no express provision in the statute declaring such ballot fraudulent, that therefore such ballot must be counted. I can not agree to this. The law does not declare that a ballot secured to be voted by bribing the elector shall be thrown out, and there is a statute making it a criminal act to bribe an elector to cast his ballot. Yet it is well settled, and no one will deny, that if it is shown to the court that an elector was induced to cast his vote for a candidate by bribery, the offer of money or any valuable thing, and did so cast his ballot, that such a ballot will not be counted. Long before Hawkins wrote his pleas of the Crown, in which he clearly lays this down as the law, it was recognized to be law, and numerous cases in our own country have settled this beyond all cavil, and the fact that the candidate himself is innocent, that he did not personally or by agent offer the bribe, nor did he know of it being given, or promised, will not change the rule. It is a matter of public concern. Fraud and bribery are discountenanced, and the object which the briber hoped to gain is to be utterly defeated, by refusing to allow him in any way to profit by his wrong, and by taking away all hope of gain by bribery the purity of the ballot will be insured. To admit that an act is criminal and unlawful, and yet to say that such an act is as efficacious as if it was legal, and shall accomplish its end as effectually as if it was right and lawful, is illogical. If it be unlawful to vote a marked ticket, then the ballot itself is an unlawful one, and should not be counted; it is tainted and destroyed because it is criminal.

The evidence in this case shows that bribery was resorted to, and that tickets were marked for the purpose of ascertaining who voted these tickets; that when so known, money might be paid to those voting such tickets. The testimony of Wm. Greenlee and Wm. Bayless, is uncontradicted. If not true, the man was in the court house during the whole of the trial, who is charged with having marked the tickets, and he did not deny it, so it may be considered as an admitted fact that certain tickets were marked for the express purpose of ascertaining how certain electors would vote, and the evidence points to the conclusion that a watch was kept on the ballot box, as the tickets were being counted out, and a tally made of each marked ticket. As to the character of the marks it is not necessary to refer. Some names written on the ballots were fictitious, others were names of candidates on the prohibition ticket.

As to these last the presumption of law is that the ballot is legal. It is only necessary to say further on this point, that if the marked ballots had been properly preserved and could not be identified, they would not now be counted

It appears, however, that after the contestant had given notice of his intention to contest, and had commenced taking depositions, he caused subpœnas *duces tecum* to be issued commanding the clerk and judges of election of Cedar Mills precinct, Jefferson township, to appear and bring with them the ballot box used at the November election, and upon the ballot box being produced in obedience to the subpœna, the justices took charge of, but did not open it, and they exercised watchful care over it while in their possession, at night. except, perhaps, on one occasion, and during adjournment they placed this box in the vault of the county treasury of Adams county and the testimony of the treasurer, Brown, satisfied me that no one had access to the box; and the evidence of the justices is sufficient to show that the box was not tampered with while it remained exclusively under their control, and the same may be said of that Tiffin township box. The evidence does show that the ballot box of Cedar Mills precinct was taken to Columbus, Ohio, to be used in the contested election case of Peterson v. Blair; that it was taken there by Justice Eylar, and he delivered it into the hands of the Sergeant-at-Arms of the House of Representatives; that the ballot box was opened by the committee of the house, the ballots examined, that there were a number of persons present at the examination, that the ballots were handled by the committee and by others, and one or more ballots fell off the desk on the floor and one ballot was picked from the floor after the other ballots had been returned to the box, and there was a question at the time, whether this ballot belonged in the box or came out of the pocket of a by-stander. It also appears that the committee kept out of the box, seventy-two or more ballots, which they retained to be used by them in the contest case of Peterson v. Blair. The remainder of the ballots were returned to the box, which was then delivered into the custody of Esquire Eylar, who brought it with him home, and retained it in his possession until he produced it in court on the trial of this case.

The trustees of Cedar Mills precinct testify that they carefully examined each ticket as it came out of the ballot box, as the ballots were counted at the close of the polls; that they saw no marked tickets, and feel confident that had there been any such they would have noticed them. There is no evidence of any one present, who witnessed the count seeing any marked ballots come out of this ballot box, and I may remark here, in passing, that if the tickets were marked for the purpose as claimed of ascertaining how certain electors voted, the end was not accomplished, because contestant claims that the marks were so concealed that it was only by close inspection they could be discovered, and therefore unless parties opened ballot boxes after the count was finished which is not claimed, there could have been no discovery of the marks, by any one, consequently no one would know from the marks alone that night how any elector voted; but the court is now asked to receive as evidence in this case certain ballots, on which there are marks of various kinds, letters, W. P. K. O. S., S. S., and other letters, and marks, which ballots it is now claimed are the same as taken out of the Cedar Mills precinct ballot box and retained, as above set out, by the committee at Columbus. The evidence offered and which it is claimed, authorizes

the court to receive, inspect and reject these ballots, is that the Sergeant-at-Arms of the House of Representatives agreed to take good care of them, and after the committee was through using the ballots, to return the tickets to the clerk of the court of Adams county. There is no evidence offered to show what was done with the ballots while in the possession of the committee, nor is there any sufficient proof to show these to be the identical ballots. There is no deposition of the Sergeant-at-Arms, or any one else, except that a witness on the stand, who was at Columbus when the ballot box was opened, claims and believes them to be the same ballots, because they look like them and have similar marks. But these ballots were retained at Columbus some time, and it was only after writing letters and telegraphing that their return was finally secured, and these ballots, with part of the depositions, were forwarded by the express to the attorney for the contestant, who took them to the clerk of the court and there opened the package, and when opened it was found that part of the evidence, the depositions of Andrews, was not returned. These tickets are not sufficiently identified, and there is not sufficient proof to show that they had been properly guarded while in the custody of the Sergeant-at-Arms, so that they might not have been tampered with. The court is asked to say that these are the identical tickets taken out of the Cedar Mills ballot box, on this evidence, and against the testimony, direct, positive, of the judges of election of that precinct, that they had carefully examined the ballots, and are positive that no marked tickets were taken out of the box. and it must be apparent that if the tickets were marked, to be identified when counted out, that the marks would certainly be visible when the tickets were examined by the judges, otherwise it would be futile and useless to place marks upon them. In the case of Hudson v. Solomon, cited by McCrary on Elections, page 295, Brewer, Judge, says: "In order to construe the ballots as controlling evidence, it must appear that they have been preserved in the manner and by the officers prescribed in the statute, and that while in such custody they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with; if there has been an opportunity for tampering with ballots, they lose their character as primary evidence." Adopting this rule, which has the sanction of reason and good sense the motion to refuse to receive and inspect these tickets claimed to be the Cedar Mills precinct ballots is sustained.

TIFFIN TOWNSHIP TICKETS.

As to the fifteen tickets claimed to have been taken out of the Tiffin township ballot box.

The evidence of Mr. Crawford, clerk of the election, is that he kept a memorandum of tickets having on them names not found on either the Republican, Democratic or Prohibition tickets. Nine of these tickets are mentioned by him, and he says there were a number more; he thinks enough to make the total number of fifteen or more; he only made a memorandum of nine. These tickets are claimed to be marked either by having fictitious names written on them as candidates for state officers or by other marks, and tickets which contestant claims to be the identical ones taken by the judges out of the Tiffin township ballot-box are produced and now offered in evidence. To the introduction and receiving of these tickets as evidence the contestee objects. The testimony

of J. H. Connor, and Wm. Bayless is also introduced to show that tickets bearing names, Z. Young, A. V. Coan, etc., such as were testified to by Mr. Crawford, were called out by the judges of the election, on the night the ballots were counted out, and these witnesses heard the names and saw Clifton Smith keeping tally, as they believed, of such tickets.

The evidence shows that the justices of the peace taking the depositions in this case caused the ballot-box of Tiffin and other townships to be opened, the ballots to be counted and examined by two men appointed by the justices for that purpose and acting under the personal supervision of the justices. These men retained in their possession, fifteen tickets found in Tiffin township ballot-box, and returned the remainder of the tickets to the box and locked it up. The justices then took the depositions of these two men, as to the results of their investigation of the ballot box, and had the witnesses attach to their deposition the fifteen ballots so kept. On motion made for that purpose during the trial, these depositions were ruled out. It is now claimed that the ballots can be introduced. The case of Sinks v. Rees, 19 Ohio St., 306, 312, was cited as an authority authorizing ballots to be attached to depositions, but since that case was decided the statute as to the care of ballots has been materially changed, and the ballots themselves being primary evidence, the testimony of witnesses who have seen and examined the ballots is not competent, unless it is shown that ballots are lost, or that they have been so carelessly and negligently kept as to lose their character, and make it unsafe to rely on them. Justices taking depositions in a contested election case are not authorized to appoint any two, or any person to open the ballot-boxes, count the ballots and report their findings. If the statute, sec. 2999, which authorizes the justices to issue subpœnas *duces tecum*, and require the production of books, papers, ballots and other things, does authorize the justices themselves to open the ballot-box, which is doubtful, it does not empower them to take the ballots out and have any part or all of them attached to a deposition of one or more previously or at any time appointed by the justices to inspect and count the ballots. The duty of the justices, it appears to me, if they do open the ballot-boxes, is to see that none of the tickets are in any way tampered with while the box is open, and to return all tickets to the ballot-box, lock it, and at the request of either party attach or make the box and ballots a part of the deposition and send the box and ballots with the deposition to the court.

Section 2957 has been passed since sec. 2999, authorizing justices to subpœna *duces tecum*, and by the express terms of sec. 2957 all ballots are to be deposited within the ballot-box as soon as the court is completed by the judges, and the box then locked and the box and contents delivered to the officer authorized to receive and keep the same, and to remain so locked, and if a contest is had then the box shall be delivered into the custody of the court in which the case is pending, and in view of this positive language of the statute it is doubtful whether justices had authority to open the ballot-box. We now come to consider whether the tickets so taken out of the ballot-box are to be admitted in evidence, in view of the testimony of Crawford, Connor, and Bayless as to the tickets in this ballot-box of Tiffin township at the time the judges made the count, and in the outset it is clear that unless the testimony of these witnesses shows the character of the tickets, that is whether Republican or Democratic, and further that McManis' name was upon these tickets,

then if the tickets now offered as evidence be rejected, the case of contestant fails.

It was claimed in argument that there is no person appointed by the statute into whose custody the ballot-box is to be delivered. An examination of sec. 2928 however shows that the township clerk is "the officer authorized to receive and keep the ballot-box." Section 2957 provides as has been stated as to the method to be adopted; when the polls are closed, the poll book is to be first signed, then the ballots are to be taken out, one by one and read, then strung, and after ballots equal in number to the names on the poll book are taken out of the ballot-box, read and strung, then all ballots remaining, together with those strung are to be placed in the ballot-box, the ballot-box locked, the key taken charge of by the minority judge, the box delivered to the township clerk, and in case of contest, it is not be opened until it is opened in court on trial of the case. The claim that the custody of the justices is the custody of the court, is not tenable. If this claim is true then a notary public, who under the same section, which authorizes justices to issue subpœna *duces tecum*, is also authorized in like manner to issue subpœna *duces tecum*, and have ballots and other things brought before him, would be authorized to keep ballots in his possession, or appoint a committee to examine them. Section 3,000 requires justices and notaries to certify to the depositions, including a copy of the notice to the court in which the contest is pending, with all the evidence, which certainly includes the ballot boxes and ballots in the case, must be certified and sent to the clerk and when the certificate is made and depositions filed in court, the justices have no further duties to perform, and no longer have a right to the ballot boxes. The justices then having no authority to take and keep ballots out of the box, and these ballots having been handled during the taking of depositions at Columbus, and there detached from the depositions and handled by many persons, they have lost their character as primary evidence and the testimony of Mr. Crawford and others that tickets taken out of Tiffin township box bearing names which they believe to be fictitious, is not sufficient alone to show that such tickets were Republican tickets, and especially that they were voted for McManis. Nor does this testimony, unaided by the tickets themselves, show that the tickets were marked contrary to law, and such as should be excluded from the count. The unauthorized opening of the ballot box the taking out and keeping out the ballots originally deposited therein, has taken away from the court the power to examine the original ballots cast in Tiffin township and from such examination determining the claim of contest that there were marked ballots in the ballot box, cast for contestant, which now should have been eliminated from the count, and the contestant having assented, and by his motion caused the ballot box to be opened and tickets taken out and attached to depositions, and so destroyed the primary evidence, can not now introduce secondary evidence of the contest of that which he might have preserved. The motion therefore to exclude from the evidence the nine or fifteen ballots claimed to have been taken from the Tiffin township box is sustained, and there being no sufficient proof to sustain the case of contestant, the appeal will be dismissed, at cost of contestant.

## STREET ASSESSMENTS. 229

[Hamilton Common Pleas, March, 1890.]

AUGUST BEPLER V. THE CITY.

A payment under protest of a street assessment to the city comptroller, in a response to his notice that unless paid it would be certified to the county auditor and placed on the tax duplicate, which payment was made nearly nine months before it became due, is not under immediate and urgent necessity, and can not be recovered back.

BUCHWALTER, J.

The plaintiff claimed that he made an involuntary payment, under protest, to the City Comptroller, as expressed in his receipt of an assessment claim of $693.73 for street improvements on Auburn avenue, which is alleged to have been illegal and void, and he asks recovery. To his cause of action as set out the city filed a general demurrer.

It appears that the first of the ten annual installments would become due on next June 20, 1890. He paid it prior to the filing of his petition, October 3, 1889. The Comptroller sent him notice in accordance with provisions of the law as to payment. That if not paid in cash he would certify to the county auditor to be put on tax duplicate and collected in said ten installments, as other taxes. This is the threat which, it is claimed, put him in duress and caused him to make payment under protest.

To entitle one to relief as for an involuntary payment of an illegal tax upon property, it must appear that he not only expressly made protest, but also that he did so under an immediate and urgent necessity to preserve his property. Mays v. Cincinnati, 1 Ohio St.. 268; Baker v. Cincinnati, 11 Ohio St., 534; Stephan v. Daniels, 27 Ohio St., 527; Fullam v. Down. 6 Esp., 26; Valpy v. Manly, 1 C. B., 594; Railroad v. Commissioners, 98 U. S., 541; Lamborn v. County Commissioners, etc., 97 U. S., 181.

It is not sufficient duress, the court held, that one may become liable for interest, or the five per cent. penalty, if he do not pay. Lee v. People, 15 Gray, (79 Mass.), 476.

Nor that it creates a lien and cloud to that extent on his title if the procedure to collect is not summary, but with full opportunity to test its validity by an action in court; or if it can be collected only by a proceeding against him in court. Marietta v. Slocomb, 6 Ohio St., 471.

In the cause on hearing it is true the tax, if not paid when due and permitted to become delinquent, can be, by a summary process, collected by tax sale, as like other tax delinquencies, but no urgency or immediate necessity arises until after default of payment or until the officer threatens and is proceeding to disturb one's possession or title. Hanks v. Tax Collector, 53 Col. 378; Wilson v. Pelton, 40 Ohio St., 306.

Here is a payment made almost a year in advance of the time when any default could occur, or any step taken to assert the lien and sell any interest in the title of the property. The owner had ample time to proceed by a proper action in court to test the validity of the assessment lien, and was entitled to an injunction to restrain the auditor and treasurer from proceeding further in asserting a claim until the cause should be tried and determined.

*Held*, that the payment was voluntary.

Joseph Cox, Jr. for plaintiff.

City Solicitor, for city.

## 246 LIMITATIONS OF ACTIONS.

[Gallia Common Pleas, September Term, 1889.]

RICHARD J. MORRISON, ADM'R, v. MARY J. MARTIN ET AL.

I. In Ohio, prior to the enactment of the code of civil procedure, the statute of limitations did not operate *proprio vigore* to bar a suit in equity for the foreclosure of a mortgage on land. In such cases the statute was applied with a view to justice, by way of analogy to legal actions of similar nature or subject-matter. On this principle, the bar to an ejectment was made the limitation in foreclosure, rather than that of an action for the debt which the mortgage secured.

II. By the code of civil procedure, a suit in equity, like an action at law, is made a civil action. The code also enacts that civil actions other than for the recovery of real property, can be brought only within specified periods after the cause of action accrues, the longest of which is fifteen years, upon a specialty or an agreement, contract, or promise in writing.

III. A civil action under the code, to foreclose a mortgage on land, is not an action for the recovery of real property, but is an action on a specialty, which is also a contract in writing. Therefore, where, in a foreclosure of a mortgage of land, the defendant in answer set up that the action was not brought within fifteen years next after the cause of action accrued, and the petition showed this to be true, on a general demurrer to the answer, *Held:*

1. That in bar of the action, this plea of the statute is good.

2. That the demurrer thereto is therefore not well taken, and must be overruled.

3. Leave to reply, or to amend the petition not being asked, that judgment for the defendant should be entered, on the demurrer.

### CASE STATED.

This is an action to foreclose a mortgage on land. The mortgage was made and delivered March 2, 1868, to secure a note of that date for $1,000 at one year. The mortgagor died in 1875. While in life, he conveyed his equity of redemption to Mary J. Martin, defendant, who went into the possession of the premises, which she still holds. The note is barred. The action is on the mortgage for an account, and sale of the mortgaged premises. The answer sets up that this is not an action for the recovery of real property, but is an action on an agreement or contract in writing; and also, that it was not brought within fifteen years after the cause of action accrued, which the petition shows to be true. To this answer there is a general demurrer, on which the case was submitted.

A. L. Roadarmour, for plaintiff.

A. J. Green and D. B. Hebard, for defendant.

### OPINION.

SIBLEY, J.

The sole question presented by this case is, what is the present limitation in Ohio, of an action for the foreclosure of a mortgage on land? The plaintiff contends for the rule of twenty-one years; the defendants, for that of fifteen.

THE OLD LAW.

I. Before the enactment of the Code of Civil Procedure, in Ohio, as in England, and generally in this country, in cases like this, of exclusive equitable cognizance, the bar of the statute of limitations did not of its own force operate in courts of equity, but was applied by them only by way of analogy to actions at law, similar in nature or subject-matter, according to the justice of the case, and as a branch of the doctrine that in equity stale claims are not favored. Tuttle v. Wilson, 10 Ohio, 26; Clark v. Potter, 32 Ohio St., 49; 1 Story's Eq. Jur. sec. 529; 2 Jones on Mort. sec. 1192; Buswell on Limitations, sec. 18; Frame v. Kenny, 2 A. K. Marsh, 145; 12 Am. Dec., 367.

II. Acting upon these principles, and finding that as respects mortgages and the debts they secured, there were at law different limitations, depending upon whether the mortgagee proceeded in ejectment for the possession of the mortgaged premises, or by action to recover the debt, equity adopted the legal bar of the mortgage rather than that of the debt, as the limitation in foreclosure. As a sequence of this doctrine it also held that the bar of the debt secured by a mortgage, "does not necessarily, or as a general rule extinguish the mortgage security, or prevent the maintaining of an action to enforce it." 2 Jones on Mort., sec. 1204. The period of twenty-one years, the time by which ejectment was generally limited, therefore became the limitation upon a suit in foreclosure, regardless of the bar which applied to the debt. Belnap v. Gleason, *supra*; Gary v. May, 16 Ohio, 66. To this, however, there was the exception, that if the "mortgage contained no covenant to pay the money, the right of foreclosure will be barred when the note is barred." Buswell on Limitations, sec. 140; Harris v. Mills, 28 Ill., 44.

III. But while the law formerly was what we have stated, as to the limitation in foreclosure, it gives no aid here, for the reason (1) that on the general proposition of how the statute of limitations operates, in equity, it has been entirely changed by the Civil Code, and (2) the point that a bar of the debt will not necessarily cut off remedy on the mortgage to secure it, is wholly immaterial to the case. This will appear as we proceed.

THE LAW OF THE CODE.

I. The Code of Civil Procedure provides that "there shall be but one form of action, to be known as a civil action." Rev. Stat., sec. 4971. And this is held to be a "substitute for all such judicial proceedings as were previously known, either as actions at law or suits in equity." Chinn v. Trustees, 32 Ohio St., 236; Barger v. Cochran, 15 Ohio St., 460. The Code further enacts that "civil actions can only be commenced within the period" named therein, with exceptions which it is unnecessary to notice, as they in no way touch this case. Rev. Stat., sec. 4976. Hence its limitations apply to all suits in equity, equally with actions at law. Chinn v. Trustees, *supra*. The specific provisions also are made, that "civil actions other than for the recovery of real property, can only be brought within" certain periods "after the cause of action accrues," the longest of which is fifteen years, upon a specialty, or an agreement, contract, or promise in writing." Rev. Stat., secs. 4979, 4980.

II. Under early practice in chancery, a mortgagee of land could have a "strict foreclosure;" that is a decree cutting off the equity of

redemption if the debt were not paid, in case the sum found due on the mortgage, exceeded the appraised value of the mortgaged premises. Anon., 1 Ohio 235; Higgins v. West, 5 Ohio, 554. The operation of the decree in such cases is plain. When there was a failure to redeem, it perfected and confirmed the title of the mortgagee, under the mortgage. 2 Jones on Mort., sec. 1540. Consequently a foreclosure according to this old practice might, perhaps, be regarded as a proceeding to recover the title, if not the possession of land. But if that be so, the code changed it all by enacting that "in the foreclosure of a mortgage, a sale of the mortgaged property shall in all cases be ordered." 3 Curwen, 1996. The doctrine has also come to be firmly established, that in equity a mortgage on land is regarded as a "mere security" for the payment,, and "incident" therefore, of "the debt." Swartz v. Leist, 13 O. S., 419. A mortgage "in equity," say the Supreme Court of the United States, "at the present day, has almost ceased to be regarded as a conveyance of an estate, and is considered rather as merely a lien upon the estate of the mortgagor, the tendency of the modern law being to look upon it simply as a security for the payment of a debt or duty." Neslin v. Wells, 104 U. S., 440; Ferrell v. Alison, 21 Wal., 293. And where, as here, the mortgagor continues in possession pending foreclosure, without effort to dispossess him, this view of the effect of the mortgage in equity is emphasized, for under such circumstances, in Ohio, regardless of his default, the mortgagor, and not the mortgagee holds the legal title. Martin v. Alter, 42 O. S., 94. The result then is that this case is one for the simple enforcement of the lien of a mortgage. Now it is elementary that a lien is "neither *jus in re*, nor a *jus ad rem*; that is, it is not a right of the property in the thing itself or a right of action to the thing itself." Whartson's Law Dict. And, as is said in a case where the subject was fully considered, "in courts of equity, the term lien is synonomous with a charge or incumbrance upon a thing, where there is neither *jus in re*, nor *ad rem*, nor possession of the thing." Peck v. Jenness, 7 How., (U. S.) 620. From this it is obvious that an action in the nature of a creditor's bill, on a judgment, where there are liens to be marshalled, and which seeks to sell lands upon which the judgment has attached as a lien, is exactly analogous to our code proceeding in foreclosure. Both alike look to a judicial sale of the property bound by the lien, and a recovery of title or possession is a form of relief no more contemplated or possible in the one case, than in the other. The comments of Mr. Pomeroy, therefore, on foreclosure by judicial sale, in contrast with strict foreclosure, apply here with great force. "The relief no longer consists in the extinguishment of the right, by which the absolute title is left in the mortgagee. Its primary object is the enforcement of the lien by a sale of the mortgaged premises and an application of the proceeds upon the debt. The mortgagor's estate is of course destroyed, or to speak more accurately, is transferred to the purchaser at the judicial sale. The term 'foreclosure' is still applied to the process, but it is evidently a misnomer when used to describe the effect produced on the mortgagor's interest; no equity of redemption is foreclosed or cut off, but a legal estate is taken from the mortgagor and transferred to the purchaser. The mortgagee is permitted to buy in the land at the sale, and may thus acquire the title; but he acquires it not as mortgagee, but as purchaser." 3 Equity Jur. sec. 1190. This so clearly states the effect of the code system of foreclosure, in connection with the equitable view of the character and operation of the mortgage, as to render further

remark superfluous. From the nature of the case, however, it is too clear for dispute, that foreclosure under the code can not be regarded as in any sense an action to recover real property, in respect either of its title or possession. Into what category, then, as regards the statute of limitations, does it fall? The answer we think is obvious.

III. "A contract under seal is called a specialty or deed." 1 Bouvier's Inst. pl., 874. "In the strict sense, the word deed is substantially the equivalent of specialty." Bishop on Cont. sec. 105. We need hardly say that a mortgage of lands in this state, made in 1868, was a contract under seal, and deed, as well as an agreement in writing. Manifestly then, Rev. Stat., sec. 4980, which limits actions upon a specialty, agreement or contract in writing, in the most precise and apt terms, covers an action under the code to foreclose a mortgage. This then we hold applies, and its limitation, as already stated, is fifteen years. The result thus reached was long ago stated in what for many years was justly a leading work on practice in this state, by a very able lawyer, which, with reference to a case referred to, says: "The court has decided that the note and mortgage are separate securities for the same debt; the one legal, and the other equitable; the one to be enforced by an action at law, the other by a suit in equity. Fisher v. Mossman, 11 Ohio St., 42. And hence that the note may be barred by the statute of limitations while the remedy in equity under the old statute would run for twenty-one years. The present statute bars an action on both note and mortgage in fifteen years." 1 Nash. Pl. & Pr., 724-4th ed. And as in point on some features of the discussion, in support of the conclusion reached: See Newman v. DeLorimer, 19 Iowa, 244; Lord v. Morris, 18 Cal., 482; Day v. Baldwin, 34 Iowa, 380.

OUR OWN CASES.

I. Longworth v. Taylor, 2 C. S. C., 39, is supposed to be against us. But while it so declares, it does not so decide. The case is very meagerly reported, and save on the point that a bar of the debt will not cut off relief on the mortgage, one can not say that anything was ruled. The limitation seems to have been set up to the debt only, for the opinion says if it does apply to that, "it does not affect the security;" which would of course be true if the statute were not plead to the mortgage as well as to the debt. The old equity rule is then quoted from an English book, and Fisher v. Mossman, *supra*, cited as covering the case. But that decides only the proposition that the bar of the debt will not operate to bar remedy on a mortage to secure it—the law then and now. That, however, in no wise touches the controversy here, which is, whether under the Code, the limitation of fifteen years, properly set up, applies to bar an action to foreclose a mortgage on land. This is a question wholly distinct from what was ruled in Fisher v. Mossman, or as we think, in Longworth v. Taylor. The vitally important effect of the Civil Code upon a suit to foreclose a mortgage of land (1) in making an order of sale requisite in all cases, thus denying any possible recovery either of title or possession in the action; and (2) in bringing the foreclosure as a civil action within the express terms of the statute of limitations, rather than leaving it in the discretion of the court to apply the bar of the debt or deed, was not mooted in either of these cases, nor decided by them. On their facts indeed, it is impossible to say that fifteen years had elapsed after the cause of action accrued, before suit was brought. So far as the

cases referred to relate to it, therefore, the question remains open for decision, as upon the first impression.

II. The doctrine of Martin v. Alter, 42 Ohio St., 94, though not necessary to sustain the conclusion arrived at, gives it support on the facts, and confirms the *dictum* of Ranney, J., that while by way of pledge a mortgage is regarded as conveying the estate, yet both at law and in equity, it is "now treated as a mere security for the debt." Harkrader v. Leiby, 4 Ohio St., 602, 612. That is, it operates as conclusive evidence of title to the possession, when remedy is sought in that form, at law, and of the lien, which in foreclosure gives a right to relief by a sale of the mortgaged premises. But until entry, judgment of recovery, or sale by foreclosure, the mortgagor is not divested of the legal estate. Hence, while he is in possession by the acquiescence of the mortgagee, the land may be seized in execution, and judgments against the mortgagor become a lien upon it, after condition broken, as before. The doctrine stated is made clear by an early case which, in this respect, points out the difference between mortgages and a certain class of deeds of trust. The question was whether the grantee in a trust deed, with power of sale to pay debts, after payment, could maintain ejectment against his grantor. Holding that he might, the court, by Read, J., says: "There is nothing in this deed to distinguish it from an ordinary deed of trust, where a conveyance to the *cestui que trust* is necessary to reinvest him with the legal title. It is not at all the case of a mortgage, because a mortgage is a mere incident to a debt which it is given to secure, and never divests the legal title of the mortgagor, as to the rest of the world, nor even as to the mortgagee, except to allow him to obtain possession, and apply the rents and profits to satisfy his debt. A mortgage lives and dies with the debt; satisfaction destroys it." Moore v. Burnet, 11 Ohio, 341; Morris v. Way, 16 Ohio, 469; Baird v. Kirtland, 8 Ohio, 21; Hill v. West, ibid 222.

At one time it was a question, whether, after a breach of condition, a mortgage was sufficient evidence of title to enable the mortgagee to maintain ejectment. Holding it to be, the old Supreme Court said: "We have always considered the title to mortgaged premises to remain in the mortgagor, as against all the world except the mortgagee, and also as against him, until the deed becomes absolute at law, by the nonperformance of the condition, and the mortgagee takes legal steps to reduce the premises to possession. On this principle we have decided, that the mortgaged premises may be sold on execution against the mortgagor, and that a mortgage, executed by the defendant, before the judgment, could not be set up as evidence of an outstanding title in an action of ejectment, brought by a purchaser under the sheriff, against the person in possession under the mortgagor, on the ground, that as the mortgage did not divest him of the legal title, the judgment was a lien on the premises subject to the mortgage." Ely v. McGuire, 2 Ohio, 223; Tousley v. Tousley, 5 Ohio St., 78. Again, the same court declared the law to be that "until foreclosure or possession by the mortgagee, the mortgagor's interest is liable to levy and sale upon a judgment against him." Miami Ex. Co. v. Bank, Wright, 249; Bank v. Bank, 10 Ohio, 71. The later case of Perkins v. Dibble, was decided in 1841, by the Supreme Court in bank. One point was, whether, under the rule that a defendant in ejectment may protect himself by showing title in a third person, a mortgage of the plaintiff would be a defense. Holding that it would not, the court, by Hitchcock, J., state the law thus: "Before

foreclosure or entry under a mortgage, the mortgagor must be considered as the owner of the land. And it has been repeatedly decided in this court that the interest of the mortgagor may be sold on execution, the purchaser taking the land subject to the mortgage. * * * If we look at the true nature of the contract, and view the mortgage as it really is, a mere security for a debt; if the debt is the principal, and the mortgage the incident, there certainly, as it appears to me, can be no good reason why a discharge of the debt should not be a discharge of the mortgage, and put an end to the mortgagee's interest in the land. Such was said by this court to be the case in Hill v. West, 8 Ohio, 222, and we are disposed to adhere to the opinion therein expressed." Perkins v. Dibble, 10 Ohio, 438–440.

Now an execution in this state can be levied only on a legal interest, not on a mere equity; and it is equally settled that, "in order that a judgment may operate as a lien, the defendant or judgment debtor must have a legal title." Baird v. Kirtland, 8 Ohio, 21, 23; Scott v. Douglas, 7 Ohio P. 1, 227; Douglass v. Huston, 6 Ohio, 156; Roads v. Symmes, 1 Ohio, 281. But the proposition is also well established, as already shown in the course of this discussion, that while the mortgagor, without effort to dispossess him, remains in possession of the mortgaged premises, a judgment against him becomes a lien thereon, as well after the breach of condition as before. Martin v. Alter, 42 Ohio St., 94; Ely v. McGuire, 2 Ohio, 223; Tousley v. Tousley, *supra*. Hence, from every point of view it appears that until foreclosure, entry, or at least judgment therefor, under the mortgage, even on condition broken, the mortgagor must be regarded as invested with the legal title, and so, as the holder of the estate in lands mortgaged, against the mortgagee, equal with the "rest of the world." An obvious consequence of this doctrine is, that if the mortgagor be allowed to hold the possession until foreclosure, an action for that relief stands on the mortgage as creating a lien merely, and not upon its operation as a conveyance. For the purposes of the ruling here, this is not really essential, in view of the code provisions respecting foreclosure, the statute of limitations, and the doctrine that in equity a mortgage is regarded as a mere security by the lien it creates, and not as a conveyance of the estate; which manifestly give the same result, so far as the proceeding to foreclose is concerned, with the ruling in Martin v. Alter, *supra*.

III. Rands v. Kendall, 15 Ohio, 671, appears to be in conflict with Martin v. Alter, on the point of the vesting of the legal title, as between mortgagor and mortgagee. But read as it seems to have been in Welch v. Buckins, 9 Ohio St., 332, where it is cited for the proposition that if a "husband purchases lands, takes conveyance, and mortgages the same back to secure the purchase money, the claim under the mortgage is superior to the claim of the widow for dower;" the two cases harmonize in all they decide. Whether the mortgage in Rands v. Kendall, was for purchase money or not, the report fails to show. The point it ruled is, if one mortgages lands, after breach of condition marries, in coverture releases his equity of redemption, and dies, that his widow is not entitled to dower in the mortgaged premises, on the ground, stated in the opinion, that as to them, the husband during marriage was not seized of an estate of inheritance, for the reason that on condition broken, as between him and the mortgagee, the legal estate *ipso facto* vested in the latter. The matter of the mortgagor's possession, made so material in earlier

cases, as in Martin v. Alter, was dropped out of the statement in respect to the passing of title. Read, J., in a very able opinion dissented. We do not dwell upon the case for the reason that, if it may be assumed to have been on a mortgage for purchase money, only by its *dicta* does it present any conflict with our other adjudications; and the great weight of authority is against it, otherwise interpreted. On the point who has the inheritance in lands mortgaged, after breach of condition, for purposes of dower, Rands v. Kendall seems to be overruled by McArthur v. Franklin, 16 Ohio St., 193. The great question in this case was as to the widow's right to claim dower against purchasers in possession, under a sale of lands in foreclosure against her husband of a mortgage in which, she had joined—she not having been made a party to the suit. The point was made that in any event the dower would be only in the surplus arising from the sale, after paying off the mortgage. This, on the facts, raised the question of where the inheritance was after breach of condition; on which the court, by White, J., declared the law as follows: "After condition broken, the inheritance must be either in the mortgagor or mortgagee; and, under the statute, the right of dower attaches in favor of the wife of whichever is seized of the inheritance. Such a seisin and coverture are the only facts upon the concurrence of which dower inchoate is made to depend. Where they have concurred, the statute expressly declares that the widow shall have dower. But the interest of the mortgagee goes, not to his heirs, but to his personal representatives. His widow cannot have dower, because he was not seized of the inheritance; and if he was not, the seisin must continue in the mortgagor. The equity of redemption—the estate of the mortgagor—is the real and beneficial estate, descendible by inheritance, and only alienable by deed." McArthur v. Franklin, *supra*, 206. Now, if this be law, the opinion of the majority in Rands v. Kendall, is not.

IV. After the decision in the latter case, it became common with some of the judges to follow its verbiage, and say that, as between the parties to a mortgage, on breach of condition, the title vested in the mortgagee—dropping out of view any question in regard to possession. This was done in Heighway v. Pendleton, 15 Ohio, 735; Frische v. Kramer, 16 Ohio, 125; and even so late as Allen v. Everly, 24 Ohio St. 97; although no such proposition was decided in either of those cases. But it was reserved for the Supreme Court in Martin v. Alter, *supra*, by decision on the point, to overthrow the *dicta* referred to, thus restoring the law to its more accurate form of statement in the early cases; and if Rands v. Kendall is not to be read as in Welch v. Buckins, with McArthur v. Franklin, to correct its aberration from sound doctrine by substantially overruling it. By the suggested reading of that case, the whole body of our adjudications on mortgages is brought into system, and made entirely consistent with the the decisions respecting deeds of trust, judgment liens, and the interests in land upon which execution may be levied. Otherwise, the cases fall into conflict and confusion, and stand upon the special facts of the different classes, without the light of a principle which will run through and harmonize them. But in any event, there is nothing in our reported decisions which militates against the rule we apply to this case. Were the law as stated in the opinion in Rands v. Kendall, instead of as it is decided in Martin v. Alter, the code provisions referred to would still be operative, in conjunction with the equitable doctrine respecting the character and effect

of a mortgage, to conduct to the conclusion reached. The holding then is, as already stated, that the bar set up, of fifteen years, is good. Hence the demurrer to the answer is not well taken, and must be overruled; and no relief to reply or to amend petition being asked, judgment should be entered for the defendant on the demurrer.

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## COVENANTS. 250

[Hamilton Common Pleas, March, 1890.]

CINCINNATI (CITY) v. SPRINGER ET AL.

Where a person sold a lot fronting on a strip which would be needed to widen a street, covenanting not to use the strip so as to cut off the grantee's access to the street, and covenanting that the grantee should have the benefit of the grantor's interest on condemnation, such covenant runs with the land, and the city having appropriated the strip to widen the street, the grantee's heirs who inherited the lot are entitled to the entire condemnation money.

BUCHWALTER, J.

The city condemned a strip of ground 30 feet wide by 104 feet long for street purposes, to wit, to widen McMillan street west of Wheeler street. The jury found the value to be $1.500. Springer, in his lifetime, conveyed to Mrs. Chesley two lots in his sub-division, being 104 feet on the south side of this strip of land, on the south line of McMillan street, as proposed, by 52 feet on west side of Wheeler street. The grantor covenanted that he would not use the thirty-foot strip of land in any way that cut off the grantee from its use, as for street purposes, for access to McMillan street, and that the lots conveyed should be corner lots to Wheeler and McMillan streets when the thirty-foot strip was condemned for street purposes. It was also covenanted in the deed that the grantee should have the benefit of the grantor's interest in the property on condemnation.

The court held that this covenant was one running with the land, and that Mrs. Chesley's interest passed, on her death, as intestate property, to her heir. The words of the covenant were not used with a doubtful sense or meaning. The only legal benefit accruing to the owner of land, when condemned, was the condemnation money fixed as the value thereof, which must be paid when the land is appropriated or taken. The benefit which the covenant and agreement in the deed passes to the grantee is the condemnation money recovered. Not a part of that money; not the surplus left after reimbursing the grantee as to expenses in widening and improving McMillan street in front of the lots conveyed; but the whole of the condemnation money.

While this may have been an improvident bargain on Springer's part yet the court found it is clearly his agreement and covenant.

I. J. Miller and Ex-Judge Horton, for Springer's heirs.

Thos. F. Shay, for the Chesley heirs.

## 251 GUARDIAN—EMBEZZLEMENT.

[Hamilton Common Pleas, January Term, 1890.]

†STATE OF OHIO v. WILLIAM H. MEYER.

1. The use by a guardian of his ward's money in his own business and its loss thereby, to constitute embezzlement, must be with a fraudulent purpose although the statute is silent as to intent.
2. An expectation to repay, or an attempt at reparation, does not avoid the criminality.
3. The test of criminality is whether the primary object of such use of the money was to benefit himself irrespective of the ward's interests, and such intent is a question for the jury to be determined from conduct and circumstances.

The defendant was tried for embezzlement of funds held by him as the guardian of minor wards, and was found guilty.

The defendant had for many years conducted a retail boot and shoe business, in partnership with his uncle, the firm being Meyer & Pruess; the defendant having charge of the books and financiering of the firm, and his partner attending chiefly to the repairing and mechanical part of the business; the firm being worth in 1884 about $10,000.00. At that time the defendant became guardian of the minor heirs of one Mary A. Siebern, and received as such guardian some twelve to fifteen thousand dollars. From that time on he used the wards' money by paying bills of his firm or putting it into the business in sums of from one to five hundred dollars at a time, at intervals of every month or two until by the first part of 1888 over eleven thousand dollars had thus gone into the firm. But during all this time he did not inform his partner that any of the wards' money was going into their business, nor did he ever balance the firm's books or keep any accounts other than upon scraps and pieces of paper, and upon the firm's bank deposit book and a small book of his own. Neither did he execute to the wards' estate any notes or other evidences of debt representing the moneys thus taken from time to time.

In January, 1888, the co-partner learning the condition of affairs insisted on a dissolution, and sold out his interest for $1,500.00 to the defendant, who assumed all the debts which were some $3,000.00 outside of that owing the wards' estate. Three months afterwards the defendant made an assignment for the benefit of creditors after first mortgaging the stock to secure the debt due the wards, and to secure his sureties on the guardian's bond. The sale of the stock did not realize $7,000.00, and the assignee feared to distribute this, owing to doubts as to the legality of the mortgages arising from the recent decisions in Commercial Bank v. Cincinnati Bank, 2 Circ. Dec., 295; Turner v. Reed, 3 Circ. Dec., 384, and Rouse v. Merchants Bank, 46 Ohio St., 493.

There was evidence tending to prove that the defendant when applied to on behalf of the wards stated, that the funds were safely invested in securities which were locked up in the Safe Deposit Co. The defendant testified that he put the money into the business as an investment; that he thought that was a safe investment; that he believed he had a right to do so. and had expected to repay it with six per cent. as the wards one by one came of age, and did not intend that they should lose anything. The defendant may testify to his own intent. See Wharton's Cr. Ev. sec., 431; also, State v. Wright, 40 La. Ann., 589; Coal Co. v. Davenport, 37 Ohio St., 194; Snow v. Paine, 114 Mass., 510; State v. King, 86 N. Ca., 603. A large number of the defendant's acquaintances and neighbors and members of the shoe trade testified that the defendant had an excellent character, as honest, steady and industrious. His counsel urged that defendant had a right to invest in his own business as well as to invest by lending to any one else, and that if he believed he had that right and intended it as an investment, he could not be convicted, because there was no criminal intent.

It was demanded that the charge of the court be in writing. And as the statute is silent upon the subject of intent, Rev. Stat. sec. 6842, "An officer * * * guardian * * * who embezzles or converts to his own use or fraudulently takes * * * with intent to embezzle or convert," etc., we extract the following part of the charge as of interest on this subject.

†This judgment was reversed by the circuit court; opinion 2 Circ. Dec., 712.

BATES, J.

After charging, first, as to reasonable doubt as defined in Clark v. State, 12 Ohio, 483, and Miles v. United States, 103 U. S., 304, 312; next as to character, stated that a bad man might be innocent, and a good man might be guilty of a crime, yet a man always had the right to show his good character as reflecting on the probability of innocence, and if a reasonable doubt of guilt was thereby injected into the evidence, was entitled to an acquittal. The court then proceeded as follows:

Intent.—Some acts may be innocent or criminal, according to the intent with which they are committed. And although the statute is silent as to intent, I think the case you are trying relates to acts of that kind. Hence a criminal or fraudulent intent is necessary to justify a conviction in this case. People v. Hurst, 62 Mich., 276; State v. Fritchler, 54 Mo., 424; Williams v. State, 25 Tex. App., 733; Beaty v. State, 82 Ind., 228. It is only in case of public officers that mere non-payment is embezzlement without proof of intent.

I therefore leave to you the question of the existence of this intent, and its proof beyond a reasonable doubt. Intent can but rarely be proved by direct evidence of the condition of a prisoner's mind; Padgett v. State, 103 Ind., 550; Bonker v. People, 37 Mich., 4; Mullins v. State, 37 Tex., 337; State v. Maxwell, 42 Iowa, 208; hence its presence or absence must be gathered by considering all the facts and circumstances, and all that was said and done, or omitted to be done in determining whether the acts were accompanied by a criminal or fraudulent purpose; and subsequent conduct, State v. Lewis, 45 Iowa, 20; Long v. State, 1 Swan. (Tenn.), 287; Lamb v. State, 66 Md., 285, 287, may be considered as well as prior or contemporaneous.

In endeavoring to describe what constitutes a criminal or fraudulent intent, I shall do no more than say two things.

First.—There is no such doctrine in the law as that a guardian has the same right to invest his ward's money in his own business, or lend it to himself, that he has to lend it to third persons. Such an idea is utterly preposterous, and not for an instant to be entertained. Putting the money into his own business is not investing it at all, Clark v. Garfield, 8 Allen, 427; and even the courts have no power to give a permission to do so, Michael v. Locke, 80 Mo., 548, and if the accused so disposed of it he would be liable to a civil action, not merely for the money and six per cent. interest upon it, but for the entire profits over that amount which the money earned. Chanslor v. Chanslor, 11 Bush., 663; Seguin's Appeal, 103 Pa. St., 139; Vyse v. Foster, L. R. 7 H. L., 318; Kyle v. Barnett, 17 Ala., 306; Long v. Majestre, 1 Johns Ch., 305, and would probably be refused all compensation as guardian for such management. Gilbert v. Sutliff, 3 Ohio St.,129; Burke v. Turner, 85 N. Ca., 500; Seguin's Appeal, 103 Pa. St., 139.

Whether he would also be liable criminally depends on the nature of the acts, and their accompanying intent to be examined into, in view of the principles laid down in the other parts of the charges you receive.

Second.—If a man wrongfully appropriates to himself another's money, the fact that he intended and always has intended to replace it, or that he attempts to make reparation, does not prevent the act being punishable criminally if the elements of a crime exist. In other words, the fact that the prisoner may never have intended that the funds of his trust should be wholly lost or impaired, and may have expected to reimburse the estate, does not prevent his acts being criminal. State v. Pratt, 98 Mo., 482; State v. Leicham, 41 Wis., 565, (2 Am. Cr. Rep., 117); Com. v. Tuckerman, 10 Gray, 173, 201; Com. v. Tenney, 97 Mass., 50. That is to say, the state does not have to show that he intended to keep this money forever to himself and repay none of it; nor to show that he knew he could not produce it when due.

The question then is not what he intended to do, but what he actually did, and with what purpose.

To return, therefore, to the question of intent, in the sense of present purpose and motive. If a person converts to his own use money or property in his hands as guardian, and does this with the object not of managing the wards' estate, but with the primary design and conscious purpose of benefiting his own estate, or that of his firm, and applying it in furtherance of his own interests, regardless and irrespective of the consequences to his wards, such purpose, if conscious, and not the product of honest mistake, is a fraudulent and criminal purpose, and if you find that the defendant converted to his own use any money of his wards with such purpose existing in his mind, then he is guilty, and otherwise not.

In determining this you may consider the fact of defendant's solvency or insolvency; Leonard v. State, 7 Tex. App., 417, 447-8; whether he concealed or did

not conceal; whether he did or not give false representations of where the money was to those entitled to enquire; Tompkins v. State, 17 Ga., 356; Jackson v. State, 76 Ga., 551; State v. Baldwin, 70 Iowa, 180; whether he kept proper accounts or not; whether he informed his partner or not, or entered the alleged loans on the books of his firm or not; whether he did or did not make notes, or other evidences of debt, to protect the wards' estate; whether the condition of the business was such as to justify an expectation that a loss was or was not probable; the method in which the payments into the firm were made, in that they were for small sums at a time, at frequent intervals. Anything that is out of any usual or natural order or manner of doing may be taken into consideration by you and given such weight, whether more or less, as you in your best judgment shall determine, in ascertaining whether the defendant converted the money to his own use with the fraudulent intent aforesaid of applying it to his own purposes, regardless of the consequences to his wards. People v. Welsh, 63 Cal., 167; Bonker v. People, 37 Mich., 4; People v. Marion, 29 Mich., 31; Leonard v. State, 7 Tex. App., 417, 447-8; Mullins v. State, 7 Tex., 337, and article by W. F. Elliott in 22 Centr. Law J., 271.

William Littleford, for the state.

Alfred Yaple, for the defendant.

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## 260 TAXATION.

[Superior Court of Cincinnati, Special Term, 1890.]

†FRANK RATTERMAN, TREAS., v. MELVILLE E. INGALLS.

1. Taxes assessed for back years, under Rev. Stat., sec. 2781, as amended (83 O. L., 82), should all be placed upon the tax list of the year in which the correction is made.

   Whether such taxes can be collected when not placed upon the current tax list, but upon the respective lists of the years in which the false returns were made, quaere?

2. Considering art. 2, sec. 28, of the constitution of Ohio, said sec. 2781, as amended, only grants power to correct false statements made after its passage. And as original sec. 2781 was repealed without saving clause, false statements made prior to the repeal (April 14, 1886), can not now be corrected.

3. The word "false" in original and amended sec. 2881 of the Revised Statutes means not merely erroneous, but willfully so. Hence, when property is omitted from a tax statement because of a mistake honestly and reasonably made, in thinking the law did not require such property to be returned by the holder, and where the auditors of the county where the statement is made and the state auditors have for many years acted upon the same misinterpretation of the law, and refused to correct statements which to their knowledge omitted similar property, such statement is not false within those sections.

4. But where the auditor discovers his mistake of law after the statement is made and prior to the expiration of that tax year notifies the tax payers thereof, and the latter fails to correct his statement voluntarily, the auditor may do so under said sec. 2781 as amended.

This is a suit brought by Frank Ratterman, treasurer of Hamilton county, Ohio, against M. E. Ingalls, to recover taxes claimed to be due from said defendant to the said county for the years 1881 to 1886, both inclusive, upon certain shares of stock of the C., I., St. L. & C. R. R. Co., owned and held by said defendant during the years specified as aforesaid, and not returned by him for taxation, with penalty.

The pleadings in the case show, that on December 7, 1886, the then auditor of Hamilton county, in pursuance of the provisions of secs. 2781 and 2782 R. S. O., and in the manner provided therein, after due notice to said defendant, placed upon the tax lists and duplicates of said county for the several years set forth in the petition as the true amount of personal property, moneys, credits and investments that said defendant ought to have returned. in addition to the returns made by the said defendant for said several years, as follows, towit:

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*This judgment was affirmed by the superior court in general term; post, 24 B., 433 and the general term affirmed by the Supreme Court; opinion 48 O. S., 468.

| Year. | Amt. Added. | Penalty. | Total. | Tax. |
|---|---|---|---|---|
| 1881 | $600,000 | $300,000 | $900,000 | $19,800 00 |
| 1882 | 600,000 | 300,000 | 900,000 | 21,538 00 |
| 1883 | 540,000 | 270,000 | 810,000 | 16,605 00 |
| 1884 | 360,000 | 180,000 | 540,000 | 13,802 40 |
| 1885 | 420,000 | 210,000 | 630,000 | 16,921 80 |
| 1886 | 462,000 | 231,000 | 693,000 | 17,629 92 |

Being for 6,000 shares of stock of the C., I., St. L. & C. R. R. Co., of the par value of $100 per share, for each of said years, with 50 per cent. penalty, and taxes thereon; and said auditor duly certified the same to the treasurer of Hamilton county, for collection; that afterward, on or about February 7, 1887, said defendant having heretofore filed his application and petition with said county auditor for such purposes, was heard upon his own testimony and that of other witnesses produced by him, and argument of his counsel, upon the question among others of the taxability of said stock, and said auditor reported the evidence, with his recommendation thereon, to the state board of revision of taxes, consisting of the governor, auditor of state and attorney-general of Ohio, at the request of said defendant; before which board said defendant also appeared by counsel, and said matters were there again argued and submitted; and thereupon, on said hearing, said board refused said defendant's application to strike off said taxes from the tax lists and duplicates for non-taxability of said stock; but granted his application to reduce the number of shares and value, and to remit the 50 per cent. penalty, except for the year 1886; and directed the said county auditor, for the purpose of making such changes, to strike the amount as assessed from the tax lists and duplicates, but immediately to replace thereon the true number and value of said shares with the proper tax thereon, including the 50 per cent. penalty, thereon for the year 1886 only; which was done by said county auditor, and his said action approved and confirmed by said state board of revision, leaving the amount standing upon the tax lists and duplicates, as alleged in the petition. Said charges upon said tax list and duplicates are for shares of stock of the C., I., St. L. & C. R. R. Co., for each of said years, as follows, viz.:

For the year 1881, 4,000 shares at 70 cents.
For the year 1882, 5,000 shares at 67.9 cents.
For the year 1883, 5,000 shares at 63 cents.
For the year 1884, 4,000 shares at 43 cents.
For the year 1885, 4,877 shares at 49 cents.
For the year 1886, 4,889 shares at 53.9 cents.

A full statement of the facts and evidence in all of which proceedings was duly filed by the said county auditor of Hamilton county, in his office.

NOYES, J.

It is contended by the learned counsel for plaintiff that all the important legal questions involved in the case at bar have been disposed of by tribunals whose authority is binding upon this court. If that is so, my task is easy and simple; but after an examination of all the authorities cited by the able and distinguished counsel upon either side, in arguments which occupied eight solid days, I have been unable to reach the conclusion contended for by plaintiff's attorneys in that regard.

It is convenient to consider briefly what has been decided by the Supreme Court of the United States, the Supreme Court of Ohio, and the general term of the superior court of Cincinnati.

In the case of Sturgis v. Carter, (114 U. S., 511), the Supreme Court of the United States held:

Syllabus—"The act of the legislature of Ohio, of May 11, 1878, authorizing auditors to extend inquiries into returns of property for taxation over a period of four years next before that in which the inquiry is made, is no violence of that provision of the constitution of that state which declares that the general assembly shall have no power to pass retroactive laws.

The Supreme Court then adopts the definition of a retroactive law as laid down by Mr. Justice Story in the case of The Society for Propogating the Gospel v. Wheeler, as follows:

"Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

It will be observed that the Supreme Court had before it for interpretation the law of May 11, 1878, which permitted the auditor, in case of false returns to go back for four years, to correct the returns, and assess for taxation without penalty for back taxes omitted, but with fifty per cent. penalty added for the current year only. This was regarded by the court as purely remedial, since it impaired no vested right, created no new obligation, imposed no new duty, and attached no new disability with regard to transactions and considerations already past. If the law of April 14, 1886, (sec. 2781, Rev. Stat.), had been before that court would it have reached the same conclusion? That we shall have occasion to consider further on. In the cases of Lee, Treasurer, v. Sturges, and Western Ins. Co. of Cincinnati v. Ratterman, 46 O. S., 153, such stocks as the C., I., St. L. & C., and the P., Ft. Wayne & C., are held to be taxable in the hands of the citizens of Ohio. So the taxability of these stocks is one of the questions settled. The court further declared:

"A construction, by officers having the enforcement of the tax laws of Ohio, since the enactment thereof, to the effect that, under such laws, shares held by residents of Ohio, of stock of foreign railroad corporations, having property in this state on which they pay taxes, and of consolidated railroad companies, are not taxable in Ohio does not bind the successors of such officers, nor the state, in the proper assessment and collection of taxes upon such shares."

In Western Ins. Co. v. Ratterman, supra, where return of holdings was made, not for taxation, but under the head of securities not subject to taxation, held: That the penalty could not be exacted.

It is therefore held by controlling authority that the decision of taxing officers, even the highest, does not bind the successors of such officers or the state; but may it not be binding, and estop the state, until reversed by such successors, or until the state asserts her right? And may such decisions of taxing officers not be important when considering whether or not the return of the tax payer is false, while he was relying upon and in his actions guided by them? This will be considered later in this opinion.

In the case of Probasco v. Raine, ante 409 it was held, Judge Taft delivering the opinion of the general term of the superior court of Cincinnati:

Syllabus 5—"Good faith in a tax return, which does not state truly the taxable personal property held by the tax payer, because of a mistake of law honestly entertained, does not prevent it from being a false return with sec. 2781 as amended, 83 O. L., p. 92, when only inaction on the part of the taxing officials is shown."

In the body of the opinion it is said: "It is to be observed that the duty of making the return is on the tax payer. Sec. 2736, Rev. Stat. If he assumes to decide that property is not taxable without offering to return the same, and he makes a mistake in law, his return is false, however free he may be, as he undoubtedly was in this case, from moral blame in making such statement. The maxim that ignorance of the law excuses no one must apply here. There are no acts done or opinions rendered, by state or county officials, which could in any way estop the state from assessing as upon a false return."

The case of Delaware Division Canal Co. v. Commonwealth (50 Penn. St., 339), is then referred to by the court as throwing light upon the final sentences of the opinion, and as indicating what the decision would have been under other circumstances.

I quote from 50 Penn. St., 399, in order to show just how far the general term intended to go in Probasco v. Raine.

Syllabus 3—"When in answer to inquiries made by the officers of the company in 1859, the auditor general had decided that the company was not taxable under the act of 1844, the penalty imposed by the act of the twenty-first of April, 1858, for a neglect or refusal to make the necessary returns, was held not to be incurred."

In the text of the opinion, the learned court say: "There is no evidence of a refusal here, for there was no demand for a return. Was there any negligence in the case? The undisputed facts are that the company were seeking for information from the department, in order to make out their returns in 1858, when, on the seventh of December of that year, they were informed by the auditor general that their company was not taxable under the act of 1844. * * * It is difficult to deduce neglect from such circumstances, indeed, impossible. Had the company sent their returns, accompanied by the cash to pay their taxes, the auditor general, as a conscientious man would not have received it, holding the opinion he did. * * * The argument that the mistakes of the officers of the state shall not prejudice her rights, is misapplied in this case. * * * I entirely agree

with the learned judge below that it is repugnant to our sense of justice, even if there were some technical default on the part of the company in not repeating their offers of reports, under the circumstances, to insist on the penalty. Until they were notified by the auditor-general that they had been misled, in relation to the required reports, by himself, they might rely on his decision, without the imputation of having refused or neglected their duty in the matter."

It may safely be inferred, therefore, that in referring to the decision quoted, the general term, in the Probasco case, intended to be understood as limiting its decision to the circumstances of that particular case, where no inquiry was made of attorneys learned in the law, or of taxing officers, state or county, and where it does not appear that the county or state auditor knew of Probasco's holdings. Here carelessness and neglect to seek information made the return false, and there was only inaction on the part of the auditor from lack of knowledge of the facts.

The three cases above referred to, constitute the basis upon which plaintiff's counsel chiefly rely as concluding the decision in the case at bar.

I am of opinion that there are several important questions involved in the case now under consideration which have not been determined by the higher courts:

First—It has not been settled that the taxes herein claimed are so charged upon the auditor's duplicate as to constitute a proper legal and valid warrant to the county treasurer to collect or receive them.

Second—It has not been decided whether or not said sec. 2781, as amended, in whole or in part, is valid, under the provisions of art. 2, sec. 28, of the constitution of Ohio.

Third—It has not been decided that the returns made by the defendant, of his personal property for the years, 1881 to 1886, both inclusive, are "false" under the circumstances of this case, and within the meaning of sec. 2781 Rev. Stat., as amended April 14, 1886.

These questions are left open for decision here, and we will consider them in their order.

(1.) As to the auditor's charges on the duplicate—The treasurer sues under sec. 2859, Rev. Stat., and avers that the taxes claimed stand charged on the duplicate, which that section makes prima facie evidence only.

It is claimed by counsel for defendant that, unless the taxes are properly charged, the treasurer has no authority to receive taxes, much less to enforce their collection. Wooley v. Staley, 39 Ohio St., 354; DeWald v. Staley, 8 Dec. Re., 376.

In fact, that there are no taxes until they are actually entered on the auditor's tax list: Jones v. Davis, 35 Ohio St., 474, 479; Jayne v. School District, 3 Cush., 571.

That when the levy is complete by the entry on the auditor's list, the treasurer has no authority to receive or collect them until process is issued to him therefor; that process being the duplicate properly made out, certified and delivered to him, which process rises no higher than its source,—the auditor's list. Loomis v. Spencer, 1 Ohio St., 154, 159. It is likened to an execution issued to a sheriff. Thompson v. Kelly, 2 Ohio St., 647; Hoglen v. Cohan, 30 Ohio St., 443.

That it is like all process, to be returned, and then become functus officio, and is filed as a mere record of past acts, and that it can thereafter be no authority for further acts, (Cham. Co. Bank v. Smith, 7 Ohio St., 51), which speaks of the time while duplicate is still in the treasurer's hands in process of collection.

That it is so returned and ended at the annual settlement, Rev. Stat., 1043. Unpaid real taxes on that duplicate are preserved on one list. Rev. Stat., 1046. Unpaid personal taxes on another. Rev. Stat., 2855.

That on neither of these lists can new charges be made; they are to be made up from the treasurer's sworn return of his duplicate; their only purpose is to preserve unpaid charges so taken from the treasurer's return.

That they are not the grand list or duplicate on which charges subsequently made under Rev. Stat., 2781 are expressly required to be made by Rev. Stat., 2753.

That the fact that delinquent real taxes so taken from the treasurer's return are required to be carried forward to the new or current duplicate, while the delinquent's personal taxes are not, does not affect the question of new charges under sec., 2781. They are not delinquent taxes. Taxes are delinquent only when the treasurer has attempted their collection and reported a failure, under oath, with his reasons for non-collections. Rev. Stat., 1043.

That the sending to the treasurer of a duplicate of the delinquent personal list, Rev. Stat., 2855, does not make that list anything but a mere record of past charges so returned delinquent.

That it can not be the source of a new charge, but is so limited, is shown by the fact that the auditor is to charge ten per cent. penalty on every entry. Rev. Stat., 2855. The fact that such delinquent list of personal taxes was first provided for in 1877, only emphasizes the argument. It shows that the old duplicate was dead; had served its purpose. and was put away for reference, as a record of past events.

It is further claimed by defendant's counsel that the uniform practice, prior to 1886, was to put subsequent additions on the current duplicate. Ins. Co. v. Cappellar, 38 Ohio St., 560, 562; Shotwell v. Moore, 45 Ohio St., 632-3.

In Sturges v. Carter, 114 U. S., 513-14, they were on a supplemental duplicate, although for several years; evidently, the one provided for in Rev. Stat., 1039.

This reasoning seems to me to be very strong and convincing. It is difficult to conceive what right or warrant in law the auditor has to take down from the shelves the records of his predecessors in office, who alone were responsible for them as a record of their official acts, and to make therein new charges, not contemplated or thought of by those who kept the books, and who have passed from official life. The auditors and treasurers, and the books they kept and used, are all dead together, to use the expressive word of one of the counsel.

Plaintiff's attorney, however, contends that the change of the word "lists" in original sec. 2781, into "lists," in the act of April 14, 1886, indicates a legislative intention that these charges should be made on the respective duplicates of the several years, extending back five years prior to the current year. Such intention does not plainly appear; the change of "list" to "lists" may have been a clerical error, or it may have been meant to apply to the duplicates for each year, one of which remains in the hands of the auditor, and the other of which is by him sent to the treasurer.

Counsel argue forcibly that the direction to multiply the valuation by the rates for the respective years, conclusively shows that the taxes for all the years were to be placed on a single duplicate, which could only be the current one. If they were to be put on the various duplicates, the expression "placed on the respective duplicates" would have been used. Then there could be only a single rate on each. And this would be true, whether the entries were on the regular duplicates for each year. or the delinquent personal lists for each year.

Is it not true, as claimed, that the only effective record of present action by the auditor is clearly made the current duplicate, and that only?

The charges for back years, in the case at bar, were not made on the current duplicate, and of necessity, they could not have been in all cases upon the former duplicates, either original or delinquent. Those for the years 1881, 1882, 1883, were destroyed in the court house fire in 1884, and no law was ever enacted for their restoration, except as to the year 1883, where restoration was authorized by the legislature, and attempted to be made from the tax bills in the hands of the tax payers.

It is not easy to see whether the auditor finds authority to add to, or take from the records of past years; and if he has no such authority, and if the taxes for the five back years are charged on the wrong duplicates, has the treasurer any lawful warrant for collecting or receiving the same?

The authority of the state to tax the citizens is only limited by the necessities of government. It exercises a high prerogative which no one can question. In the exercise of such extraordinary power as that contemplated by sec. 2781, Rev. Stat., involving penalty or punishment as for a wrongful act, it must pursue lawful methods, and be bound by a strict construction of the statute under which it acts.

It is contended, however, by plaintiff's counsel, that the charges are upon the right duplicates; and if not, that this is only a matter of "form and details," and not of substance, and hence that it does not affect the plaintiff's right to recover; that it is not fatal to his claim. This question it is not necessary for me, in the view I take of the case, to decide, and I do not decide it. I leave that for the determination of a higher court, if it should be deemed important.

(2.) As to the constitutionality of sec. 2781, as amended April 14, 1886.—It seems to be logical next to consider the proper interpretation and effect to be given to section 2781, of the Rev. Stat., as amended April 14, 1886.

The law of 1878, of which this section is an amendment, provided in case of false returns that the auditor might go back to correct such returns as far as the false statements could be traced, not exceeding four years prior to the year in

which the inquiry was made; and might assess simple taxes without penalty for the back years, and taxes with fifty per cent. penalty added for the current year. This law of 1878 has been held not to be retroactive within the inhibition of the constitution, for the reason that it was purely remedial. In other words, because it "did not take away or impair any vested rights, acquired under existing laws, nor create a new obligation, nor impose a new duty, nor attach a new disability, in respect to transactions or considerations already past." Sturges v. Carter, 114 U. S., 511.

The present sec. 2781. however, absolutely repeals the law of 1878, without any saving clause as to existing liabilities. So the plaintiff in these cases must stand, if at all, on the section as amended April 14, 1886. Had the legislature power to make this act retrospective? If the law is made in its entirety to apply to back taxes, and past years, it results that it revives one year's obligation which was already barred when the act took effect, for it goes back five years instead of four; it undertakes to inflict a severe penalty for wrongs done before the act went into effect, and when there was no law for the punishment of such wrongs. It comes precisely within the definition of a retroactive law given by Mr. Justice Story, and adopted by the Supreme Court of the United States in Sturges v. Carter, and within the inhibition of art. 2, sec. 28, of the constitution of the state.

I shall not stop long to consider whether what sec. 2781, as amended, calls a penalty, is really a penalty or not. The intention of the legislature to provide for the infliction of a severe punishment upon the tax payers who should make false returns, or evade making the required returns, is so evident from the language of the law, that no reasoning can make it plainer. While counsel for plaintiff mildly claim that the law as a whole, with tax on value and penalty both included, may be given a retrospective effect without violating the constitution, it is practically conceded that as to penalty for back years, if the act be retrospective, it is unconstitutional. Auditor Brewster, when the stocks, the taxation of which is involved in the cases at bar, were decided to be subject to taxation, entered them upon the county duplicate in 1886, and he included both the value of the stocks and the fifty per cent. penalty, and assessed taxes for both, and for all the years. Subsequently, upon recommendation of Auditor Raine, the state board of revision struck off the penalty, except for the current year, and under the advice of learned counsel, these suits are brought only to recover simple taxes for back years, or tax on the value of property omitted, without penalty.

But the able counsel for plaintiff zealously contend that if the provision in the law for penalty be unconstitutional, and therefore void, yet the law is separable; that the provision for simple taxes can stand and be effective, while that for penalty fails. This is a question of some difficulty, and the authorities regarding it, cited by counsel, are not altogether uniform. It is, however, possible, I think, from them all, taken as a whole, to gather the principle which should govern in considering the cases at bar.

In Cooley's Constitutional Limitations (178), the rule is laid down as follows: "If, where the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects and is void as to one, it may still be in every respect complete and valid as to the other. But, if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependant on each other as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not have passed the residue independently; then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

In Bowles v. State, 37 Ohio St., 35, held: Syllabus 2—"A statute containing clauses in conflict with the constitution, which, independently of such clauses, may have a constitutional operation, according to the intent and purpose of the legislature, is not wholly void by reason of such provision."

In State v. Sinks, 42 Ohio St., 345, held: Syllabus 2—"In as much as it is plainly unreasonable and improbable that the general assembly would have passed the Scott law with the provision giving a lien for the tax on premises occupied by tenant eliminated therefrom, the whole act, so far as it provides for an assessment or tax, is unconstitutional and void."

In State v. Pugh, 43 Ohio St., 94, 124, in the opinion of the court, announced by Chief Justice Owen, held: "It is a familiar principle that when one part of a legislative enactment is found to be unconstitutional, and another part which, standing alone, would be free from constitutional infirmity, and so connected in the general plan and object of the act, that it is highly improbable that the legislature would have enacted the one without the other, the one is so affected by the infirmity of the other, that both must fall."

The court then referring to the law in question in the case under consideration, say: "Looking to the entire act, it is highly improbable that the legislature would have enacted the provisions for re-districting the city, without those for reorganization. State v. Commissioners, 5 Ohio St., 507; State v. Sinks, supra.

"The conclusion is inevitable," say the court, "that so much of the act as provides for re-districting the city is also invalid." Hoke v. Commonwealth, 79 Ky., 581, is relied upon by plaintiff's counsel. That case differs from the cases at bar in that the penalty was one added to the tax, and not to the basis of taxation, and hence was held to be separable. But it is doubtful if even that case would have been so decided by the Supreme Court of Ohio.

Running through all the cases are the questions: What was the intent of the legislature? What was the main object sought? Was the purpose to accomplish one or more things? What is the meaning of the law, gathered from the terms of the act itself, and the history of its passage?

And now, what was the legislature seeking to do in the enactment of sec. 2781, as amended? It certainly was not to collect simple back taxes for four years, and simple taxes for the current year, with fifty per cent. added by way of penalty, for all that was provided for in original sec. 2781 as enacted in 1878. The conclusion is irresistible that the sole object was to add one year of retrospection and fifty per cent. penalty for all the years. But these being added burdens, which were not imposed under the law of 1878, if the act be given retrospective effect, are unconstitutional and void.

Can the unconstitutional part be separated from that part which is valid, and the latter part be upheld and enforced? Sec. 2781, as amended in April, 1886, provides that in case of false returns the auditor shall ascertain the true value in money of the property omitted from the returns of the tax-payers, and shall then arbitrarily add fifty per cent. to the value so found; and these two sums added together shall constitute the basis of taxation. The value of the property and the penalty become thus amalgamated, a unit, one sum, in law and in fact; and the basis of taxation so found and fixed is multiplied by the rate of taxation for the year to which it relates, and thus is found the amount of the tax for which the tax payer becomes liable. Upon the recommendation of Auditor Raine, the penalties for back years, assessed by Auditor Brewster, were remitted by the state board of revision. But it is difficult to understand what greater authority the state board of revision had to strike off and remit the tax on the penalty, than it had to remit the tax on the valuation and retain that on the penalty. The valuation and the penalty had become consolidated, one sum; and the auditor was just as much bound to enter on the tax duplicates, and assess for taxes, the one part as the other of "the basis of taxation" ascertained in accordance with sec. 2781. This is a much stronger case against the separability of tax on value from tax on penalty than the cases of State v. Sinks, and State v. Pugh, already referred to, would seem to make necessary in order to render the whole act unconstitutional and void.

The court holds that the act of April 14, 1886, sec. 2781, must be considered as a whole; that if it fails as to penalty for back years, so it must fail for simple back taxes also.

But must sec. 2781 be given retrospective operation, and thus become unconstituional and void? If the language of the section alone were considered, it would seem that the general assembly intended to give it retroactive force. But can it be presumed that a legislature whose membership was composed largely of lawyers from all parts of the state, deliberately passed an act which must have been known to be in violation of the state constitution? May it not have been that the general assembly, having found the law of 1878 inadequate to secure honest and faithful returns from tax payers, concluded to give up the old law as to simple back taxes for four years, in order, that by a more stringent law and severer penalties, it might provide against false returns for all the future?

In Bernier v. Becker, 37 Ohio St., 72-74, Judge White says: "A statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively."

And in Allen v. Russell, 39 Ohio St., 336, this decision is referred to and adopted. In Burt v. Rattle, 31 Ohio St., 116, held: Syllabus 1—"A statute should not receive a construction which makes it conflict with the constitution, if a different interpretation is practicable."

In Jahne v. New York, 128 U. S. Rep., held: "A general law for the punishment of offenses which endeavors, by retroactive operation, to reach acts before committed, and also provides a like punishment for the same acts in future, is void so far as it is retroactive, and valid as to future cases within the legislative control."

State, Dickson Prosecutor v. Mayor of Jersey City, 37 N. J. Law, 39: Syllabus 2—"Penalties may be prescribed for future delinquencies in the payment of taxes as part of the machinery, by which government is enabled to collect them. * * * The imposition of penalties for past omissions, would be confiscation, not taxation."

People v. Johnston, 98 Ill., 172: Syllabus 5—"Penal statutes are to be strictly construed, and are never to be extended by mere implication to either persons or things not expressly brought within their terms.

Syllabus 6—"Courts will not so construe a statute as to render it unconstitutional, if any other reasonable construction can be placed upon it, which will render it effectual and legal."

Newlan v. Marsh, 19 Ill., 384, held: "Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution, and give to it the force of law, such construction will be adopted by the courts. Therefore, acts of the legislature, in terms retrospective, and which literally interpreted would invalidate and destroy vested rights, are upheld by giving them prospective operation only."

Applying the principle laid down in these decisions, the court holds that sec. 2781, as amended, is not to be given retrospective operation, which would render the law unconstitutional and void, but that it was intended to have and has prospective operation only, and is constitutional and valid.

(3.) As to false returns.—In order to give the auditor authority to place these stocks upon any duplicate, and to assess taxes thereon, jurisdiction must be obtained under sec. 2781, Rev. Stat., as amended. It may be well, therefore, to trace the history of this section of the statute. Sec. 2781 was first passed in 1861 (1 Sayler, 54; S. & S., 759). This was amended in the revision of 1878, to the form in which it originally appeared as sec. 2781, in the Rev. Stat., (75 O. L., 456, sec. 48). This was last amended by the act of April 14, 1886, (83 O. L., 82). The original act of 1861 imposed a penalty upon the current year, but gave no authority to go behind that year; the act of 1878 required the auditor also to add simple taxes for the four years preceding the current year; while the act of 1886, required the auditor to assess taxes on both value and penalty for the current year and for the five years preceding.

It is claimed by defendant's counsel that whatever the word "false" meant in the act of 1861, it meant in all the subsequent acts; citing Allen v. Russell, 39 Ohio St., 337.

The primary meaning of the word "false" is, an untruth told with intent to deceive. 1 Abbott's Law Dictionary, 478; Anderson's Law Dictionary, 447: 1 Bouvier's Law Dictionary, 643; 7 American & English Encyclopedia of law, 661.

But a simple reading of sec. 2781, as it now stands, would seem to be sufficient to indicate and make certain that the legislature intended a penalty therein provided for, as a punishment for some act or omission dictated by an evil mind, or with fraudulent intent; for the section reads: "If any person whose duty it is to list property or make return thereof for taxation, either to the assessor or the county auditor, shall in any year or years make a false return or statement, or shall evade making a return or statement, the county auditor shall, etc."

As is well said, "evade" is a sinister word, and associated as it is, with the word "false" in a penal statute, which affixes a severe punishment for something done or omitted, a wrong intent on the part of the tax payer must necessarily be implied. The legislature does not punish mere accidental or unwitting mistakes, as though they constituted an intentional crime.

The rule that all penal statutes are to be strictly construed and limited to the primary meaning of the words used, is supported by abundant authority. Derbow v. State, 18 Ohio, 11; Hall v. State, 20 Ohio, 7; Turner v. State, 1 Ohio St., 422; White v. Woodward, 44 Ohio St., 347.

And where doing something falsely involves a penalty, a punishment, a forfeiture, the falsity must be willful and conscious. Puttman v. Osgood, 51 N. H., 192; Maher v. Hibernia Ins. Co., 67 N. Y., 282; Franklin Ins. Co., v. Culver, 6

Ind., 137; Moore v. Protection Ins. Co., 16 Me., 97; Franklin Ins. Co., v. Updegraff, 43 Pa. St., 350.

The rule that "Ignorantia legis neminem excusat" is not applicable here in its full sense; for, as claimed by defendant's counsel, "While ignorance or mistake of the law punishing the violation of duty is no defense, ignorance or mistake of the law defining or creating the duty, honestly and reasonably entertained, is." Delaware Division Canal Co. v. Commonwealth, 50 Pa. St., 399; Commonwealth v. Bradford, 9 Metcalf, 272; Crabtree v. State, 30 Ohio St., 382, 388; Folwell v. State, 49 N. J. L., 31; 1 Bishop on Criminal Law, secs. 297-9.

It is urged that the fifty per cent. penalty imposed for the non-return of taxable property by the tax-payers was not meant by the legislature solely for punishment, but was intended to deter others from committing similar offenses in the future. The same reasoning would apply with equal force in case of any other crime; we hang men for murder, not alone to punish the criminals, but largely to prevent other murders in the future.

In view of sec. 2781 of the Rev. Stat., may there not exist facts and circumstances which would excuse a tax-payer from making a return of property lawfully taxable, without imputing to him falsety or evasion under the section as amended?

The evidence in the case at bar discloses the following state of facts: Upon application of one of the Cincinnati insurance companies, Auditor of State Williams, on the seventeenth day of October, 1872, sent an official letter to the auditor of Hamilton county, advising him that Pittsburg, Ft. Wayne & Chicago stock, and other similar stocks, owned and held by citizens of Ohio, were not taxable under the laws of the state. The contents of this letter and this official decision were made known to the succeeding Hamilton county auditors, and remained unrevoked, unmodified, and unquestioned from 1872 until 1886; and acting upon this instruction, no county auditor prior to 1886 ever placed such stocks upon the tax duplicates, or demanded a return thereof, though well knowing of many citizens who were holders and owners of the same. Mr. Reuben R. Springer, a prominent and wealthy citizen of Cincinnati, was, on four or five different occasions, before successive county auditors; he frankly acknowledged his ownership of the stocks in question, and claimed that they were not taxable. He consulted and obtained opinions from six or eight leading lawyers of the country, including several of those most eminent in Ohio, all concurring in holding that these stocks were not taxable under the law. These opinions he presented to the several county auditors for inspection, and then called attention over and over again to the official letter of Auditor of State Williams. After a full hearing in every instance, the county auditors decided not to place these stocks upon the tax duplicates, and demanded no return of the same. This was not non-action. It was as much positive action as though the several county auditors had arrived at the opposite conclusion and placed the stocks on the duplicates and levied taxes thereon. Every year the Cincinnati insurance companies made return of their holdings, not for taxation, but under the head of "property not taxable under the laws of Ohio," and these companies were never cited before the county auditors as for making a false return. All this was well known to the entire community, and especially to M. E. Ingalls, the defendant herein, and the defendants in the other cases, the determination of which will be governed by the decision in this. Mr. R .R. Springer took great pains to make known to the defendants in these cases at bar, the result of his inquiries and his experiences with county and state auditors with regard to his own stock, of the character in question.

The defendant herein, M. E. Ingalls, also consulted the County Auditor Cappellar, disclosed his holdings of stock, argued the case as to their non-taxability, and received the decision that they would not be placed on the duplicate.

As a result of all this, the opinion was universal in Cincinnati and Hamilton county that such stocks were not taxable. Shall it be said that the tax-payers relying upon the opinion and decision of the highest taxing officers of the state and county, upon the opinions of counsel learned in the law, upon the unbroken practice of taxing officers, and upon the uniform understanding of the business community in omitting to place these stocks on the tax lists, were guilty of making "false" returns, or of evading the payment of taxes?

In the case of Insurance Company v. Cappellar, 38 Ohio St., 560, where an insurance company returned its property for taxation, deducting amount held for "re-insurance" and paid taxes for the balance, it was held that the amount for re-insurance was improperly deducted; but it was also held: Syllabus 3—"The return of the company was not "false" within the meaning of secs. 2781 and 2782 of

the Rev. Stat. Syllabus 4—"The county auditor, under sec. 1038 of the Rev. Stat., may correct an error in the amount of taxes upon the current duplicate, resulting from such erroneous deduction."

It is conceded that when insurance companies made returns of stocks such as we are considering, not for taxation, but under the head of non-taxable property, their returns were not false under sec. 2781.

And in Delaware Division Canal Company v. Commonwealth, 50 Pa. St., 399, the Supreme Court, in a very able opinion, holds, in language which has been quoted heretofore in this opinion, that when the company inquired as to the taxability of its stock of the auditor-general alone, and upon receiving from him an answer that it was not taxable, relied upon it, asking no one else, and did not inquire of the auditor-general again for years, that the company was not guilty of refusal or neglect to make returns, but had a right to rely upon the opinion of the auditor-general until his decision was reversed or modified by himself.

In 46 Mich., 209, (relied upon by plaintiff's counsel), the court use this language: "It is sufficient for the protection of all to hold the state bound where an officer ascertains the facts and passes judgment thereon."

I can not but hold that a return by a tax payer, in order to be "false" or evasive within the meaning of these words in a penal statute, such as sec. 2781 is, must be willfully wrong and made with evil intent. Under the circumstances of this case the return was not false, and there was no evasion, but the defendant had good reason to excuse him from listing the stocks in controversy.

If this be so, the auditor had no jurisdiction to place the stock, with penalty, on any duplicate, current or otherwise.

While it can not be claimed that the mistakes of state or county officials can bind the successors of such officers or the state, yet, until such successors act and reverse the decisions of their predecessors, or until the state asserts her rights, the tax payer who relies upon the opinions given and the decisions rendered by state and county taxing officers, and acts accordingly, can not be held liable and punished for falsehood or evasion.

If the taxing authorities knew that defendant held and owned the stocks in question, and with full knowledge decided not to place them upon the tax duplicate or tax them, and did not so enter or assess, it would not seem to be vital, whether the knowledge of such holdings was communicated in writing on a tax return, or orally and face to face. The gist of the whole matter is this: had the auditor full knowledge of the holdings of these stocks? And with such knowledge, did he decide that the stocks were not taxable, and refuse to enter them on duplicates for taxation. If he did know, and did so refuse, and the tax payers were informed of such refusal, this constituted a sufficient excuse for not returning such stock for taxation, and the returns were not "false" on this account.

It follows, therefore, that as the returns for taxation made by the defendant Ingalls were not false or evasive, under sec. 2781, as amended April 14, 1886, and as said sec. 2781 is to be interpreted as having a prospective operation only, and as the suit at bar was brought under sec. 2781, and not sec. 2782 of the Rev. Stat., that plaintiff's action must fail entirely as to taxes for the five back years for which the suit was instituted.

Claim is made by defendant's counsel, that in no event is defendant chargeable with taxes upon the Cincinnati, Indianapolis, St. Louis & Chicago stock, pledged by him in bank as collateral security for loans, and not in defendant's immediate possession.

I am of opinion that the authorities clearly establish, that notwithstanding such pledge, the pledger's ownership was such as to render him liable for taxation on such stock. The pledgee could not be taxed, and the hardship in this case is no greater than in the case of mortgaged real estate. Tucker v. Aiken, 7 N. H., 113; Waltham Bank v. Waltham, 51 Mass., 334. Referred to in Cook on the Law of Stocks and Stockholders, sec., 564, note.

I have been in considerable doubt as to where the logic of the decision so far rendered leaves me as to the taxes for the year 1886. I have held that the tax on penalty can not be separated from the tax on value, as the tax is one thing and levied on a single sum as the basis of taxation. I have also held that sec. 2781, as amended in 1886, is prospective in its operation; and that returns of M. E. Ingalls, the defendant herein, were not false or evasive. Must then the taxes for 1886 fail? It seems to me that the taxes for 1886 stand on a different footing from those of former years. For the five previous years the defendant had a right to rely on the judgment and decision of the taxing officers to relieve him from making returns of the stock in question. In 1886, however, the new law was enacted, under which this suit is brought. In that year, and in ample time for the correc-

tion of returns for 1886, the taxing officer, that is, the county auditor, decided to place these stocks on the tax duplicate, and to levy taxes thereon, and he did so. From that time on, there was not a uniform construction in favor of the non-taxability of the stocks; the tax-payer was put upon his guard, and admonished that taxes would be assessed and collected, if possible; so the defendant could not claim to be protected, as under former rulings and practices. As to the year 1886, I announce my opinion with much hesitation, but on the whole I am reasonably satisfied with the conclusion at which I have arrived.

Judgment is rendered in favor of plaintiff for the taxes of the year 1886, as assessed and entered upon the duplicate by the county auditor, and as prayed for in plaintiff's petition.

In the case of Ratterman v. Wilshire, 42, 628, no deduction is made on account of certain shares of stock transferred by defendant to his son, for the reason that the evidence does not satisfy me that the defendant had so parted with his ownership of said stock as to relieve him from liability for taxation.

In the two cases of Ratterman, Treas., v. Lincoln et al., executors of etc., Reuben R. Springer, deceased, and Same v. Same, Nos. 42,642 and 42,643, respectively, involving the same kind of stock and also P., Ft. Wayne & C. R. R. stock, which were tried separately from the other cases, no claim is made for taxes for the year 1886, the year in which sec. 2781, as amended, became a law.

When these suits were brought against the executors of the last will and testament of Reuben R. Springer, on account of alleged false returns made by said Springer in his life-time, and by his executors afterward he was not present to answer or defend—he was dead and gone.

The law, while based upon the eternal principles of right and justice, deals but little with sentiment; and I venture to say there are but few judges of large experience upon the bench who have not felt called upon, under authority which they could not ignore or disregard, to pronounce judgments which made the heart ache. It is a satisfaction, however, to be able, without consciously violating any principle of law or justice, to render a decision which appeals to the higher nature and the better feelings of all right minded citizens.

Reuben R. Springer, for many years before his death, was a prominent figure in Cincinnati. His name was a household word; his presence and person were familiar to all; he fed the hungry, clothed the naked, administered to the wants of the sick and poor. He founded and endowed great public institutions, where rich and poor alike could receive education in the higher departments of taste and learning, to fit them for lives of usefulness and honor. To say of such a man, after all the pains he took to know and perform his duty as a tax payer, that he was guilty of making "false" returns of his property for taxation, or that he evaded the payment of his taxes, within the meaning of a severe penal statute, grates harshly upon the sensibilities of bench and bar and people alike. His returns were not false, either morally or legally; either on account of evil intent or technically.

If a judicial decision can vindicate the memory of one who never did a dishonest act—of a generous, kind-hearted christian gentleman, who spent his life and lavished his wealth by the million, for the welfare of his fellow-men, I gladly lay that tribute upon his honored grave.

Judgment in both these cases is rendered for defendants.

Wm. L. Avery, J. C. Hale and L. W. Goss, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly, William Worthington, Paxton & Warrington, Lincoln, Stephens & Lincoln, J. H. Bates, Thomas McDougall, contra.

## TRUSTS. 269

[Hamilton Common Pleas, 1890.]

### CLARA RITTENHOUSE v. W. A. HICKS, TRUSTEE, ET AL.

1. A parent whose daughter had a dissipated husband, devised property in trust for the daughter for life, remainder to her children, with a proviso that if she became a widow the trust should end and the property turned over to her absolutely. *Held*,
2. To become a widow will be construed to mean husbandless in view of the testator's probable intent and the daughter having procured a divorce is entitled to have the trust ended.

BUCHWALTER, J.

This was an action to declare a trust terminated, which had been created by the will of plaintiff's mother. By that will one-third of the testatrix's property was given to Hicks in trust for plaintiff, she to receive the income during her natural life, and after her death the trust to end, and the property to belong to plaintiff's children. At the time the will was executed plaintiff had a husband whose habits were dissipated. The will further provided that if plaintiff "should become a widow" the trust should thereupon likewise end, and the property to be turned over to her as her own absolutely. After the death of the testatrix, plaintiff procured a divorce from her husband because of his habitual drunkeness. She claimed that being divorced from him she was a widow within the sense in which the testatrix intended the word to be understood, namely, "husbandless."

The court said that, while technically the word widow means a woman whose husband has died while she was still married to him, yet, as in construing wills, the courts will always disregard the technical meaning of a word in the face of a plain intention on the part of a testator to use the word in a different and more liberal sense. The question here presented is whether this testatrix meant the word widow to be understood in its technical sense or not. From a careful consideration of the whole context of the will, as well as the evidence furnished by the circumstances which surrounded the testatrix at the time of its execution, it is certain that the only object of the creation of the trust was to keep this property from the control of this particular husband, and that the testatrix used the word widow simply as a term designating a husbandless condition; wherefore the divorce having had the effect of severing the daughter's married relation with this husband and of putting her property as completely beyond his control as his death would have done, the conclusion, the court thought, was inevitable that the event named for terminating the trust occurred by the granting of the divorce. Authority for this conclusion is found in numerous cases where the word "unmarried," which technically means "never having been married," has been decided to mean "wifeless" as coming within the testator's intention.

Judgment declaring the trust terminated.

Granger & Hunt, for Mrs. Rittenhouse.

W. A. Hicks, for the defendants.

## 283 CONTRACTS.

[Franklin Common Pleas, 1890.]

ALBERT GLOCK v. AUGUST HARTDEGAN.

**Where two persons had drawn a large prize in a lottery, and by agreement it was paid to one, the division of the money to be made when they reached home, the illegality of the source of the fund, or the illegality of the original partnership between them, is no defense to the subsequent to divide.**

DUNCAN, J.

Albert Glock and August Hartdegan, young men of Columbus, drew $15,000 in the Louisiana lottery about a year ago. They went to New Orleans and had a check made out for the amount, payable to Hartdegan it being understood that they were to divide when they got back to Columbus. After they got back, Hartdegan refused to divide. Glock brought suit. Hartdegan demurred to Glock's petition, setting up that the Louisiana lottery was not recognized by the laws of this state, and the partnership was not for legal business. Judge Duncan held that no matter what the original contract was, the two men had made a lawful contract in New Orleans when they agreed to divide and overruled the demurrer.—[Editorial.

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## 289 MUNICIPAL CORPORATIONS.

[Franklin Common Pleas, April 21, 1890.]

C. T. CLARK v. COLUMBUS (CITY) ET AL.

**The provisions of the Burns law, sec. 2702 of the Revised Statutes, do not apply to a contract made by the City Council with The Columbus Electric Light and Power Company to light the streets of the city.**

PUGH, J.

The question presented in this cause is, whether the city council, in making contracts for the electric lighting of the city, must be governed by sec. 2702 of the Rev. Stat.—the Burns law.

1. There is no ambiguity in the language used in this section; and if the letter of the statute is to be adhered to, the conclusion is inevitable that the law does apply to a contract made by the city with the Electric Light Company.

In construing a statute, however, the duty rests upon the court to give effect to the obvious purpose, the intention, of the legislature. The purpose of the enactment of the Burns law has already been ascertained by the Supreme Court. See State v. Hoffman, Auditor, 25 Ohio St. 328. It is dictum, perhaps, yet it is a common sense view.

It was to prohibit cities and towns from incurring debts to subserve their ordinary purposes. Municipal indebtedness to carry out the extraordinary purposes of cities and towns is not within the prohibition of the statute.

In the opinion in 25 Ohio St., pages 331 and 332, it was declared that it was not the purpose of the statute to practically put an end to

municipal government, and that it is the duty of the court to so construe it as to avert public calamities which were depicted by counsel in the argument, and which would befall a city if the law was literally construed.

Experience, history, has demonstrated that it is impossible for city authorities to provide monies at the beginning of a year for all of the expenses that have to be paid during the year. Human foresight is incompetent to do it. It can only be done by guessing, and by providing for a large surplus which stimulates extravagance and causes needless taxation.

If the Burns law embraces all contracts or agreements, ordinances, resolutions and orders, which may involve the expenditure of public money, one man can put an embargo as it were on any city of the state by simply invoking the enforcement of the law as thus interpreted.

In construing a statute its policy, its scope, the mischief which caused its enactment, and the sort of remedy provided for must be considered. Burgett v. Burgett, 1 Ohio, 469, 480 and 481; Wright, 233.

The spirit, the reason, the principle, of a law overshadows the letter of the law. Bishops Written Laws, sec. 92*d. et seq.*

The statute of frauds has been the subject of fierce litigation, of ingenious arguments and elaborate discussions; every syllable of it, said a great judge, is worth a subsidy; but if it had been construed and enforced according to its strict letter, it would have promoted more frauds than it prevented.

"In construing statutes we should look at the real object and intention of the law makers, as gathered from an examination and comparison of the context of the whole act—its spirit and import." People v. Canal Commissions, 3 Scam., 153.

In 7 Wallace, 482, Judge Field said: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The nature of the law in such cases should prevail over its letter."

He borrowed a couple of apposite illustrations.

A Bolognian law enacted that "whoever drew blood in the streets should be punished with the utmost severity." But it did not apply to a surgeon who opened the vein of a person that fell down in the street in a fit.

A statute of Edward II, enacted that a prisoner who breaks prison should be guilty of felony; but it did not extend to a prisoner who broke out when the prison was on fire; the court observing: "For he is not to be hanged because he would not stay to be burnt." See also 2 Disney, 279.

The Burns law is couched in exceedingly general terms, and if literally enforced it would cause injustice and bring about absurd consequences.

The conclusion upon these authorities seems to be reasonable that a contract between the city and the Electric Light and Power Co. is not within the meaning, the spirit, the reason, of the law.

Decisions of the Circuit Court of Hamilton county, in two cases, cast doubt upon this conclusion—a fact which it is fair to mention. Bond v. Madisonville, 1 Circ. Dec., 581; Drott v. Riverside, 2 Circ. Dec. 565. But another Circuit Court has adopted an entirely different con-

struction of the law. "See, Lima Gas Co." v. Lima, 2 Circ., Dec., 396. "See, also, Lowery v. Lowery, 7 Dec. Re., 81.

By sec. 2491 of the Rev. Stat., as amended March 1, 1889, it is provided that a "municipal corporation may contract with gas or electric lighting companies for supplying both electric light, natural or artificial gas for the purpose of lighting the streets, squares or other public places and buildings in the corporation." It is not very accurate phraseology, but I quote it as it is. Then it is expressly declared by a proviso that "this section shall be subject to restrictions in the last clause of sec. 3551. The only restriction named there is that no gas or water company shall go into operation in any city or village, when such a corporation has been already formed, until after the question of authorizing such operation has been submitted to the qualified voters of such city or village." This is the only restriction on the power of a city to contract under sec. 2491.

The provision of sec. 2702, the Burns law, that a city shall not make a contract involving the expenditure or money unless the money is certified to be in the treasury unappropriated is a restriction. Under the sanction of a well known rule of legal hermeneutics, the expression of only one restriction on the power of a city to contract with a highway company in sec. 2491, excludes all other restrictions.

Section 2491 as amended was passed after the Burns law was enacted, and if there is any repugnance between them, as there seems to be, the former, to the extent of the repugnance, repeals, by implication, the latter.

But there is still another consideration. The present state of the law, as embodied in these statutes, makes it doubtful at least as to what is the power of the city to make contracts for lighting it.

The rule is well established by authority that great public interests will not be necessarily subjected to hazard by the interpretation of a law. So private hardships will, when they may, be avoided by interpretation.

Bishops Written laws, sec. 82. "If it appears," says the Supreme Court of Ill., in 3 Scam. *supra*, "that by a particular construction of a statute, in a doubtful case, great public interests would be endangered or sacrificed, it ought not to be presumed that such a construction was intended by the legislature.

When it is doubtful what is meant by a statute, consideration of evil and hardship may exert a controlling influence in its construction. If the court should construe this Burns law as having application to a contract between the city and the Electric Lighting Company, it is manifest that an irreparable evil would follow, in case the enforcement of the law should be invoked. The darkness of Erebus might enshroud the city for several months, and there would be no way to avoid it.

The motion of plaintiff for a renewal of that part of the injunction which was dissolved at the hearing, is overruled, and the residue of the injunction is dissolved.

C. T. Clark, for plaintiff.

Jones & Smith, city solicitor, for the city of Columbus.

Geo. B. Okey, for the Columbus Electric Light and Power Co.

## STREET ASSESSMENTS. 291

[Hamilton Common Pleas, 1890.]

WESTWOOD (VILLAGE) v. GILBERT DATER, WM. MEIER ET AL.

1. A municipal corporation in widening a street need not wait until the street is graded and improved and assess for the entire cost, but may assess separately for the cost of appropriating the ground before the street is finished. This follows from the fact that the same method of assessment need not be followed for both.
2. It is not unconstitutional to assess back on an abutter's remaining land the cost of appropriating part of it.
3. The assessment statutes of Ohio are not contrary to U. S. Const., art. 14, because sec. 2304, Rev. Stat., provides for notice to the property holder, and sec. 2316 provides for a hearing.

BUCHWALTER, J.

The plaintiff is a municipal corporation of this county. Its council did on September 26, 1887, pass an ordinance by a yeas and nays two-thirds vote to condemn a strip of ground ten feet wide on both sides of Furgeson road, between Forrest avenue and the Short line Lick Run road, for public use for street purposes. The ordinance also provided that the expense of the improvement should be assessed per front foot on the abutting property to the depth of 150 feet deep.

Publication was made, and the steps taken in the formal matters as provided by law.

Condemnation proceedings assessing compensation to the owners were had in the probate court. The amount assessed was $1,086.75. Expenses and costs duly itemized in the sum of $302.68 were incurred. The village allows a credit for proceeds of sale of certain improvements on said strip of land of $70.80.

Afterwards the village council duly passed an ordinance by a two-thirds yea and nay vote, December 17, 1888, assessing a special tax of a certain fraction over 36 cents on each front foot abutting on said street between said points where thus widened, to pay the costs and expense of the proceeding to appropriate said property for street purposes.

Said assessment was ordered paid to the village in twenty days from the date of the ordinance, or be subject to interest and penalty.

The defendant, Wm. Meier, owned at the time of the passage of the several ordinances over 1,302 feet, on which the assessment claim is made for $469.77, with interest from (twenty days after) December 17, 1888, and five per cent. penalty, also on 1,036 feet a claim of $373.79, interest and penalty as aforesaid.

Due notice was given by publication of these several ordinances.

The village prayed that the court decree the several sums to be a lien on said abutting lands, for an order of sale, and other relief.

The proof of these various steps, the amount of condemnation, costs and expenses, had been regularly made.

The argument of counsel raises various questions, and especially these: That the claim being a part of the condemnation or compensation money awarded by the jury for defendants' lands taken for the public use, and the costs, etc., of that procedure, that it is in violation of sec. 19, art. 1, of the state constitution to assess and make the same a lien on defendants' abutting lands, viz.: that for lands so taken for pub-

lic use there "shall be assessed by a jury without deduction for benefits to any property of the owner.

2. That if constitutional, the action is premature, until after the streetis graded and improved.

3. That the costs and expenses of the appropriation cannot be a charge.

The constitutional question has been urged on the authority of Judge Jackson in 36 Fed. Rep., 385.

In so far as the question is raised upon the claim of the statute being in violation of our state constitution it is no longer a debatable one for this court. Cleveland v. Mack, 18 Ohio St., 403.

"An assessment upon lands fronting on a street to reimburse the amount of compensation paid the owner for his other land taken for the use of the street * * * is not in violation of the constitutional provision, which guarantees to owners of land so taken a full compensation "without deduction for benefits." * * *

Judge Welsh fully discusses this proposition (which is the unanimous opinion of the court). The facts of the case singularly present this distinct issue as made in the ca se at bar.

Whatever may have been the view of the learned judge in Scott v. City of Toledo, 36 Fed. Rep., 385, as to the construction of the provision of our assessing statute, as found now in secs. 2264, 2283, etc., it is certain that our Supreme Court has distinctly placed such statutory provisions as permissive under our constitution, and that it is the duty of this court to follow that construction, (and which it is true, is the conceded rule of decision also for the United States Court when a state statute has been construed by the State Supreme Court.)

One other constitutional question remains. The same learned judge has held that sec. 1, art. 14, of the United States constitution, which provides "Nor shall any state deprive any person of life, liberty or property, without due process of law, prohibits so much of such state legislation, as permits appropriation of land, as in this case, the compensation for which may hereafter be assessed upon abutting land of the same owner.

While it is the sworn duty of the judges of the court to support the constitution of the United States, as well as our state constitution, yet no construction of this section so far as I am advised has been made by our U. S. Supreme Court, and I am unable to draw any distinction in meaning (as applicable to the issue before us in this case) between the phrases in sec. 19, art. 1, state constitution: "Where private property shall be taken for public use, a compensation therefor shall first be made in money, and such compensation shall be assessed by a jury without deduction for benefits to any property of the owner," and sec. 1, art. 14, of U. S. constitution, "nor shall any state deprive any person of his property without due process of law."

In fact, our state constitution is thus more specific in the protection of the property of the citizen in this regard.

If it were an open question, as to the construction of these, and like statutory provisions under our constitution, then this reasoning of Judge Jackson would present formidable grounds for the construction favorable to the abutting land owners.

The second proposition of counsel for defendant, that the action is premature to recover the appropriating moneys, costs and expenses before the improvement is made, is worthy of consideration at least in a practical view in this, that it may require two causes of action instead of

one. Yet it may be said, that while defense should reasonably be made to one action or claim, that no action on the other may be required. It is quite manifest the council is not bound to adopt the same method for assessment of cost of appropriation, that it does for the improvement.

One may be put on the abutting property, and the other on the general duplicate.

See Judge White's opinion in 29 Ohio St., Krumberg v. City of Cincinnati, on bottom of page 75.

As to costs and expenses charged herein see sec. 2284.

It occurs to me this is a specific provision as to the court cost bill, preliminary surveys, etc.

See also Butler v. Toledo, 5 Ohio St., 225, under Toledo Charter (as to attorney's fees and costs collectible).

But contractor cannot recover same. Corry v. Gaynor, 22 Ohio St., 584, 597.

Longworth v. Cin., 34 Ohio St., 101, did include right to recover superintendent's fees, etc., but not pay of salaries, officers, etc.

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## GUARDIAN AND WARD. 328

[Hamilton Common Pleas, April 17, 1890.]

### †In re Estate of Catherine E. Dunn v. Louisa J. Dunn, Claimant.

1. Care, support, and nursing furnished to an insane ward, without any request by or agreement with the guardian therefor, are *necessaries*, and the guardian of such ward is liable for their payment out of his ward's estate.
2. The fact that such *necessaries* were furnished by a sister of such ward, does not overcome the promise which the law implies on the part of the guardian to pay for such services.
3. The guardianship having been terminated by the death of the ward, and settlement having been made by the guardian with the court, without having paid for such services, the estate of the ward in the hands of an administrator is liable therefor.

Kumler, J.

Louisa J. Dunn, the claimant, is administratrix of the estate of Catherine E. Dunn, deceased, and makes a claim of $525.00 for services rendered in nursing and caring for the decedent during her last sickness.

Under our statute the claim was presented, for allowance, to the probate court, which held against Louisa J. Dunn, and the matter comes here on appeal.

The evidence shows that Catherine E. Dunn was an insane person, having been confined in Longview Asylum from the year 1882, till eight months before death in 1889.

It appears that she was very violent, and at different times made attempts against the lives of relatives.

Having become ill, her mother said to the superintendent of the asylum that when her daughter became so weak that she could be controlled, she wanted to take her home, as she did not want her daughter

†This reverses the judgment of the probate, Goebel 297

to die in the asylum. In due time the mother and guardian of Miss Dunn were notified that Catherine could not at furthest live beyond three weeks, and thereupon the guardian went to the mother, and they together brought the daughter to the home of Mrs. Dunn, the guardian saying that he left Catherine with the mother, feeling that she could live but a short time, and that she would be taken care of till death.

Louisa, the claimant, made her home with the mother.

Catherine was of mature years, and left an estate worth about $6,000.00

The evidence shows that after she was taken home she grew better, and having a violent hatred towards her mother, the latter was unable to care for her and could not even enter the room in which she remained.

Accordingly Louisa, who it seems was the only one whom the sister would tolerate, took charge of her, and for thirty-five weeks cared for Catherine day and night, great vigilence being necessary to prevent her escape. The claim is made that inasmuch as Louisa was a sister and lived with her mother, as did Catherine before entering the asylum, no recovery for services can be had in the absence of an express contract. The position, it seems to me, is not tenable.

The services rendered were extraordinary, and are to be classed with necessaries, and were in no sense voluntary, inasmuch as the surrounding circumstances really compelled Louisa to render them.

This kind of service is not to be classed with that, where a child remains with the family beyond majority, works about the farm, or otherwise, receives food and clothing, and continues in the same relation that existed during minority.

And while relationship may raise a presumption that a service is gratuitous, yet the cases are numerous where parents are allowed compensation for maintaining and educating their own children when the latter have an estate, even though the former also have means of their own.

Moreover, the presumption that such services are to be compensated, is greater than the one arising from relationship that they are to be gratuitous.

And the well settled rule now is that each case must be considered in the light of its surrounding circumstances.

Here the guardian of the estate of an insane person having charge of her estate, takes his ward to her mother's house to be kept by the mother, presumably two or three weeks.

The ward lives thirty-five weeks; the mother is unable to render the service which she intended, and another daughter, also of mature years, gives her entire time and attention to her sister.

It was the duty of the guardian to compensate her, and he having failed to do so, the estate is liable.

Any other rule would be manifestly harsh and unjust, and the tendency of such a holding would be to deny persons situated like Catherine Dunn the attention they ought to have.

The claim is accordingly allowed.

Phillip Roettinger, for claimant.

Wm. Cornell, *contra*.

## ELECTRIC LIGHTING. 329

[Hamilton Common Pleas.]

### †BRUSH ELECTRIC LIGHT CO. v. JONES BROTHERS ELECTRIC CO.

### SAME v. QUEEN CITY ELECTRIC CO.

1. A corporation "formed for the purpose of manufacturing, operating, selling or renting dynamos, motors and other electrical appliances for furnishing light and power, and for other purposes," has no power to carry on the business of electrical illumination. And a decree of our probate court or a permit from city authorities, allowing it to light streets and alleys, will not give it the corporate power, and a competing company may on this ground enjoin its use of their poles.
2. An ordinance of a city council authorized electric light companies to erect poles in the streets for lighting, on condition that other light companies might use the poles on paying a proper part of the cost or a rental. The probate court granted a decree, authorizing an electric company to use the streets and erect poles for lighting, subject to the control of the board of public affairs, and said board granted a permit to the company under said ordinance. Held, such company must still obtain a grant or franchise under secs. 2491, 3550 and 3551, Rev. Stat., before it can use the streets.

KUMLER, J.

The Brush Electric Light Company, plaintiff in the above actions, brings and prosecutes its actions in injunction against The Jones Brothers Electric Company and The Queen City Electric Company. The petitions of the plaintiff are substantially alike in both cases. The Brush Company alleges that it is a corporation duly organized under the laws of Ohio, and doing business within this state, and that the defendant companies are likewise doing business in the state of Ohio. Plaintiff also alleges that the city of Cincinnati passed a certain ordinance on the third day of March, 1882, by which it granted to it the right to erect poles and appurtenances necessary to carry on its electric business, and that it has the right by virtue of the terms and conditions of said ordinance to enjoy its rights thereunder free from all use and claims of said defendant companies; that under said ordinance it has erected a large number of poles in this city; that said poles and appurtenances are owned exclusively by the plaintiff, which is well known to defendants; that said defendants threaten to occupy and possess the same by erecting cross-arms, and stringing wires thereon, without the consent of the plaintiffs or other rightful authority; that the capacity of the poles so erected is no greater than its business interests require; that the defendants' use and enjoyment of said poles in the manner threatened by it, will work great and irreparable damage to the plaintiffs.

Wherefore plaintiff asks that an order may be granted restraining said defendants, their officers and agents from using its poles in this city, and from interfering with the said business.

The defendant companies file separate answers, which are substantially the same. The defendants admit that plaintiff is an incorporated company, but deny each and every other allegation contained in its petition; they deny that the plaintiff is entitled to erect poles and to use and enjoy the rights conferred under said ordinance to the exclusion of said companies; they deny that said plaintiff is the owner of said poles, and that it alone is entitled to their use, and that defendants have no property or rights therein; they deny that the capacity of the poles erected by the plaintiff is no greater than will be required by the business interest of the plaintiff. Defendants further answer, saying, that the plaintiff obtained permission to erect and maintain the necessary number of poles and wires with which to furnish the city and its inhabitants with light by electric currents under said ordinance, subject to certain rules and regulations therein prescribed, which are set forth in the answers; that said Brush Company operated under its ordi-

†This judgment was reversed by the circuit court; opinion 3 Circ. Dec., 168. The judgment of the circuit court was affirmed by the Supreme Court, January 17, 1893; unreported.

nance until 1889, but did but little if any work, and strung but few wires, until the year 1889; that in the years 1888 and 1889, various electric companies commenced business in this city, and obtained decrees through the probate court of Hamilton county, granting them the right to go upon the streets of the city, and to use and occupy the same for the purposes of their business, erect poles, etc., and string wires suitable to said business, but that all of said decrees subjected said companies to the supervision and control of the board of public affairs of said city; that the board of public affairs in July, 1889, adopted certain rules and regulations set forth in the answer, which stipulate that the board reserves the right if the interests of the city require it, to authorize other companies or persons to use plaintiff's poles for the same purposes upon payment to the owner of a proper compensation; that all permits thereafter granted will be subject to that condition; that the plaintiff subsequent to the adoption of said rules, applied to the board for permission to erect poles and string its wires, filing with it plans showing the location of all poles, and afterwards obtained permits and erected poles and strung wires thereon, under the supervision of the board and its chief engineer; that the common council passed a general ordinance on the eighteenth day of October, 1889, prescribing certain terms under which electric companies may do business in the city limits; that by the terms of said ordinance the person, company or corporation erecting such poles shall upon payment to them of a fair proportion of the original cost of erection permit any other person or company to occupy and possess equal rights and privileges thereon, if said poles have not a full complement of wires; that whenever two or more persons, companies or corporations are supplying electricity for any purpose within the same territory, they shall be required to jointly use the same poles upon the conditions therein recited; that said plaintiff since the date of said ordinance has done business subject to the requirements of said ordinance; that said board on January 30, 1890, adopted a resolution fixing the basis upon which the different electric light companies shall use the lines of poles in the city, which is fully set forth in said answer; that the Jones Brothers Electric Company obtained a decree from the probate court of Hamilton county, Ohio, on the fifth day of October, 1889, by which it was granted the right to occupy the streets of the city of Cincinnati, erect its poles for light and power purposes; that it filed its bond and submitted its plans for the erection of poles as required by said decree, ordinance of October 18, 1889, and the regulations of said board, and secured permits to erect its poles, string wires and do other work in accordance therewith, which it did, and is now doing; that both of said companies obtained decrees from the probate court of this county to occupy the streets of this city for lighting purposes, and in all respects complied with said decrees, the general ordinance of October 18, 1889, aforesaid in regard to lighting, including the rules and regulations of said board; that said defendant companies desiring to occupy the plaintiff's poles, expressed their willingness and ability to pay the required price of five ($5.00) dollars per pole, and to pay a reasonable monthly rental equivalent to a fair proportion of the original cost of the poles to be occupied; that said plaintiff arbitrarily refused to come to an agreement, refused to recognize the authority of the board, and to comply with the general ordinance aforesaid in regard to lighting, and declined all offers and tenders of payment on the part of the defendant companies. That said defendant companies and the plaintiff are supplying electricity in the same territory; that plaintiff's and defendants' poles are contiguous at many points, and are sufficient for the needs and requirements of all these companies. That the use and occupation of said poles jointly will not interfere with the safe use of the same by plaintiff in its present or prospective business. The Jones Brothers Electric Company ask that the restraining order be vacated. The Queen City Electric Company asks the dissolution of the injunction, and also prays affirmative relief against the plaintiff upon its answer and cross-petition.

To these answers the plaintiff files a reply denying each and every allegation contained in the answers excepting the admission made therein of matters set forth in the petition.

The plaintiff offered in evidence its articles of incorporation; the ordinance of March 3, 1882, under which it operates; and rested its case.

The defendant companies to maintain the issues upon their part, among other things offered in evidence the articles of incorporation, to which plaintiff objected, on the ground that the articles of incorporation do not empower them to supply electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places within the corporate limits of the city.

The defendant companies also asked their witness when the companies went into operation, to which question plaintiff objected. The court allowed the witness to answer against the objection of the plaintiff.

The witness then answered, "On January 1, 1889." Plaintiff then objected to the answer, and moved the court to strike out the answer. Are the acts of incorporation admissible in evidence for the purpose of showing that the defendant companies have the right and power to engage in the business of supplying electric light for the purpose of lighting the streets, squares and other public places and buildings in the corporation limits?

The articles of incorporation of the Jones Brothers Electric Company read as follows: "Said corporation is formed for the purpose of manufacturing, buying and selling and dealing in telegraph and electrical supplies, appliances and apparatus, and all things incident thereto; also the making of models and experimental work, and general light manufacturing, and all things incident thereto."

The articles of incorporation of The Queen City Electric Company read as follows: "Said corporation is formed for the purpose of manufacturing, operating, selling or renting dynamos, motors and other electrical appliances for furnishing lights and power, and for other purposes."

## RULE OF CONSTRUCTION.

As a general rule, corporations have such powers, and such only, as the act creating them confers, and are confined to the exercise of those expressly granted, and such incidental powers as are necessary for the purpose of carrying into effect powers specifically conferred. Acts of incorporation should be fairly and reasonably construed; the leading purposes and objects to be accomplished, and for which the corporation is created, should be ascertained if possible. Straus v. Eagle Ins. Co., 5 Ohio St., 59.

After carefully reading the acts of incorporation, and paying close attention to the arguments of counsel, we have no difficulty in construing the articles of the Jones Brothers Electric Company. The claim is made that this act of incorporation clothes this company with the power of supplying with electric light the streets, squares and public places inside the city limits. The evidence already offered shows that the Jones Brothers Electric Company are now engaged in this enterprise. The words "electricity," "electric light and power," do not appear in this charter at all; indeed, the word "light" appears only once, and it is used as an adjective, and not as a noun. But we are told that the power is lodged in sec. 3471, the decree of the probate court, the ordinance of council of October 18, 1888, and in the resolutions of the board of public affairs. These are plainly not the sources of power. The articles are absolutely silent on the subject and object of supplying electricity publicly or privately, in the streets or elsewhere. The right to furnish electricity is neither expressed nor implied. The charter must be our guide. The language employed is plain and easily understood. The articles of incorporation quoted above lead us plainly to the conclusion that the Jones Brothers, under their charter, could only engage in manufacturing, buying, selling, and dealing in telegraph and electrical supplies, and cannot engage in electrical illumination.

The same objection is made to the articles of incorporation of the Queen City Electric Light Company. These articles herein before quoted have been the subject of much controversy. If formed for the purpose claimed, they ought to be protected, and not destroyed. The articles read, "formed for the purpose of manufacturing;" "manufacturing" means "making goods and wares from raw materials," Webster. Manufacturing what? Dynamos, motors and other electrical appliances. What for? For furnishing lights and power, and for other purposes. "Appliances" means "the act of applying or the thing applied." Clearly "manufacturing dynamos, motors and other electrical appliances" will not confer the right to supply electricity. The same may be said of "selling or renting dynamos, motors and other electrical appliances for furnishing lights and power, and for other purposes." Then, if formed for "operating dynamos, motors and other electrical appliances for furnishing lights and power and for other purposes," does this confer the right to supply electricity. "Operating" means "acting, exerting, agency or power." Whether we read these articles in the manner we have read them or in the natural and ordinary way, we are still confronted with the phrase: "and other electrical appliances," which plainly relates to the main objects mentioned in the charter. In our judgment the corporation was formed, as the lan-

guage plainly indicates, for the purpose of manufacturing, operating, selling or renting dynamos, motors and other electrical appliances. After a careful examination of the language of the Queen City charter, we have come to the conclusion that it has no right to carry on the business of electrical illumination.

This brings us to the motion to strike out the answer of the defendant, witness, who was asked the question "When did the defendant companies go into operation?" answered as follows: "They went into operation on the first of January, 1889."

Plaintiff's counsel claim that under the evidence already offered, the witness could not answer the question, the same being incompetent. The defendant companies claim that they did go into operation, and commenced business under their respective charters in January, 1889. The plaintiff's claim is, that as a matter of fact and law, the defendant companies did not go into operation at all. In order to appreciate and understand the force of the answer and the objection thereto, we must keep in mind the evidence offered by the defendants respecting the dates of their respective articles of incorporation and the dates of their respective decrees in the probate court in connection with secs. 3550, 3551 and 2491 as amended March 1, 1889. The Queen City Electric Company filed its articles of incorporation December 31, 1887, and obtained its decree in the probate court April 29, 1889. The Jones Brothers Electric Company filed its articles of incorporation December 5, 1888, and obtained its decree in the probate court, October 5, 1889.

The nature of the contracts involving the use of the streets within the municipality, whether they relate to railroads, gas, water, or electricity, are contracts if entered into on behalf of the city. Cincinnati St. R. R. Co. v. Smith, 29 Ohio St., 291. Council alone can make contracts involving the use of the streets, lands and public places in the corporation. It is conceded that the defendant companies never obtained any direct grant from the council to use its property for supplying electric light and power. Whenever it is desirable to use and enjoy the streets above or below the surface, the consent of the municipal authorities must first be obtained. This consent is usually obtained in the form of an ordinance; and in all cases where gas, water and electric light and power are to be supplied through the streets and lands of the corporation, there must be an ordinance passed by the council, and that ordinance will not go into operation until the same has been submitted to the qualified voters of the city making the contract.

Two things are necessary in all contracts where the streets of the corporation are sought to be used for any of the purposes named in secs. 3550, 3551 and 3471a. There must be an ordinance and a vote of the citizens of the municipality upon it. Whether such vote shall be taken before or after the passage of the ordinance is a question to be determined whenever it arises. In the case of Lewis D. Campbell v. The City of Hamilton the court held that the vote of the people should follow after the passage of the ordinance.

Section 2550 reads as follows:

"A company organized for the purpose of supplying gas for lighting the streets and public and private buildings of a city, village, town or township, may manufacture, sell and furnish the gas required therein for such or other purposes; and a company organized for the purpose of supplying the inhabitants of a city, village, town or township with water may sell and furnish any quantity of water required therein for such or other purposes; and such companies may lay conductors for conducting gas or water through the streets, lands, alleys and squares of such city, village, town or township with the consent of the municipal authority of the city, village or town, or with the consent of the trustees of the township, and under such reasonable regulations as they may prescribe."

Section 3551 reads as follows:

"The municipal authority of any city or village, or the trustees of any township in which any gas or water company is organized, may contract with any such company for lighting or supplying with water the streets, lands, lanes, squares and public places in such city, village, town or township; but no such company shall go into operation in any city or village where such a corporation has been already formed or is hereafter formed, until after the question of authorizing such operation has been submitted to the qualified voters of such city or village, and authorized by an ordinance."

On the first day of March, A. D. 1889, Vol. 86, p. 63, the following amendment was passed amending sec. 2491:

"A municipal corporation may contract with such company for supplying with electric light, natural or artificial gas, for the purpose of lighting (or heating) the streets, squares and other public places and buildings in the corpora-

tion limits. But this section shall be subject to the restriction in the last clause of sec. 8551."

The language of sec. 3551 is very definite, and says:

"But no such company shall go into operation in any city or village where such a corporation has been already formed, or is hereafter formed, until after the question of authorizing such operation has been submitted to the qualified voters of such city or village and authorized by ordinance." It will be observed that the law of March 1, 1889, makes contracts for electric lighting subject to the restrictions in the last clause of sec. 3551, towit: an ordinance and a vote of the people. "But no such company shall go into operation," means that all contracts provided for in section 3550, 3551 and 2491 shall not go into effect until there is an ordinance and an affirmative vote upon it.

The defendant companies do not claim to have complied with the provisions of these statutes. The decrees of the probate court were obtained subsequent to the passage of the law of March 1, 1889. The defndants obtained their rights to occupy the streets from the probate court, and not from the city.

The defendant companies did undoubtedly go into operation soon after they received their charters, in the sense of doing business. They might very properly supply themselves and their neighbors with electric light and power. But when they undertook to use the lands of the corporation, whether above or below the surface of such lands, for the purposes of electric lighting, could they be said to "go into operation" in the absence of a grant from the city? Going into operation means going into operation by virtue of a legal grant from the city for the purpose of supplying the streets and lands of the city with electric light and power.

It is also claimed that the right is reserved in the ordinance of March 3, 1882, to allow other companies to go upon the poles of the Brush Company and the Cincinnati Electric Light Company, and that this right to other companies is conferred by the general ordinance of October 18, 1889, subsequently passed, which was offered in evidence. I have examined these ordinances, and I can not adopt that view of the case.

It follows therefore that the objection to the articles of incorporation will be sustained, and the motion to strike out the answer granted.

The Court—Gentlemen, if there is anything else, we will now hear what counsel have to say in the matter.

Mr. Wulsin—I think, your Honor, we are entitled to a decree making the injunction perpetual.

Mr. Pogue—I think, your Honor, this is in effect deciding that the Jones Brothers Company has no right to go upon these pole lines; the introduction of any further testimony, would be therefore totally immaterial, the effect of the ruling is, the court would grant the decree anyhow.

Mr. Wulsin—You rest, in other words, and we rest.

The Court—In that view of the case, gentlemen, an order will be made overruling the motion to dissolve the injunction; the injunction will be made perpetual, and the answer and cross-petition of the defendant, the Queen City Company, in which it asks affirmative relief, will be dismissed—to which an exception will be taken if they desire.

Champion & Williams, Drausin Wulsin, Jordan & Jordans, and Paxton & Warrington, for plaintiff.

Ramsey, Maxwell & Ramsey, for the Queen City Electric Co.

Pottinger & Pogue, for Jones Bros. Electric Co.

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## WILLS—TRUSTS. 333

[Franklin Common Pleas, 1890.]

### †Benjamin F. Martin et al. v. Cyrus Falconer.

1. The failure of the probate court to grant permission to testamentary trustees to execute a trust, with or without a bond, as authorized by sec. 5981, of the Rev. Stat., was not a jurisdictional defect in a case brought against such trustees, and others, to contest the validity of the will, which created the trust, appointed the trustees, and excused them from giving bond.

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†This judgment was affirmed by the circuit court in Noble v. Martin; opinion 2 Circ. Dec., 598.

2. The said trustees having accepted the trust, the title to the trust fund could only be divested from them by the appointment of another trustee, or other trustees, made by the probate court pursuant to the terms of the will, or of the statutes, or by a decree rendered by a court of competent jurisdiction, or by a conveyance sanctioned or ordered by such court; and the said title not having been so divested, the trustees were necessary parties to the will case.
3. In this action, brought by the administrators of the defendant's estate for instruction touching the distribution of the money in their hands belonging to the estate, the verdict of the jury in the will case is conclusive against both the trust and the trustees.

PUGH, J.

This suit was brought by the plaintiffs, for the purpose of obtaining instruction from the court, touching the discharge of their duty. Their final account was settled by the probate court, $37,048.96 being ascertained to be in their hands; and the probate court ordered them to distribute it.

To whom shall they pay this money? They pray that the court shall advise and instruct them on this question.

Cyrus Falconer and others, heirs of Louise Deshler, deceased, and defendants, by their answer, contend that it should be paid to them. Henry C. Noble, and George M. Parsons, likewise defendants, without asking for relief, by their answer, relate the history of the execution of Louise Deshler's will of the suit instituted to set aside the will, the appeal to the district court, its appeal to the circuit court, the different trials and verdicts therein, the vacation of the will, and the final judgment of the last named court upon the last verdict. This history includes the facts that they were made parties defendant to that suit, being described "trustees for Law Library and School;" that the plaintiffs in that action alleged that they, Parsons and Noble, with many others, were devisees and legatees of said pretended will and codicil thereto; that by the fourth item of the codicil, Louise Deshler gave to them, Henry C. Noble, and George M. Parsons, in trust, $100,000.00, to establish a Law Library and School, and that they were to hold this fund and safely invest and secure the same until they performed certain duties therein enumerated, which it is not needful to mention here. Their answer also shows that they, with others, answered the plaintiffs in the will case, denying that the will and codicil were not the true last will and codicil of Louise Deshler, and denying that she was not of sound mind and memory when she executed them, and denying that she executed them under any restraint, or undue influence exercised by any person or persons. It is also averred that they employed counsel to resist the action to set aside the will, who made a defense for them throughout all the proceedings of the action. Then they aver that since the last verdict of the jury, and the judgment rendered thereon, their attention has been drawn to the statute of this state relating to the qualification of testamentary trustees; that neither of them ever appeared before the probate court of this county to be qualified as trustees; that neither of them was ever qualified or authorized to act by said probate court; that they were not, when the answer was filed, qualified as such, as the statute required.

It is further asserted in the answer that they believe and aver that they had no legal authority whatever, as trustees, under the item of the codicil named, to appear and answer in such action, nor to appeal the case, nor to do any act whatever in that suit, or elsewhere, in relation to the trust created by the codicil; that all of said acts, and all other acts in said action done by them, were wholly without authority of law, and void as to the trust created by the codicil and any future trustee thereof; that they were not the proper parties to the will case; that the trust was not represented in any manner in said action; that the verdict and judgment, rendered therein were, and each was, wholly inoperative and void against said trust and any future trustee thereof, and that the codicil still remains in full force and effect as to said trust and beneficiaries thereof. Therefore they ask the court to advise the plaintiffs; that they are not now, and were not at the time said action was begun, and the last verdict and judgment rendered therein, qualified trustees of said trust; that they had no right or authority to represent the trust in this action, and that no order of distribution can be made until a trustee, or trustees for said trust, be duly qualified according to law by the probate court, and appear herein so as to present to this court the rights due under said trust to the beneficiary or beneficiaries thereof.

This answer of Parsons and Noble, the plaintiffs and Cyrus Falconer and others who join with him in his answer, assail with a general demurrer.

What is the meaning of sec. 5981 of the Rev. Stat.? is the crucial question in this case. It declares, first, that "every trustee appointed in any will shall, before entering upon the discharge of his duty as such trustee, execute a bond, with freehold sureties, payable to the state, in the probate court, in which any such will may be admitted to probate, to the satisfaction of said court, conditioned for the faithful discharge of his duties as such trustee." It is conceded by the demurrer that Parsons and Noble never executed that bond.

Next, by a proviso of this section, which curtails the provision just quoted, it is enacted "that when by the term of any will the testator shall express a wish that his trustee may execute the trust without giving bond, the court admitting the will to probate may, at its discretion, grant permission to the trustee to execute the trust or without bond, as may seem expedient."

Is it alleged in the answer of Parsons and Noble that the testatrix did, by the terms of her will, express the wish that they might execute the trust without giving a bond? It is admitted by the demurrer that the probate court never gave them permission to execute the trust, either with or without bond; neither was done.

Is it legally true that the verdict setting aside the will is void as against the trust for the law library, because the probate court failed to give such permission to the trustees, Parson and Noble? Parsons and Noble affirm this to be true; the other parties deny it.

They were sued and made defendants in the will case as trustees; they answered; they employed attorneys to defend; a defense was made by them; they, with the executors, appealed the case to the district court; they participated in all of the three trials and proceedings of the case.

It is not essential that the trustee in a trust should accept the trust. Stone v. King, 84 American Dec., 555.

But there is no claim made here that Parsons and Noble did not accept the trust. Their own acts, frankly set out in their answer, demonstrate that they did accept it. They do not pretend that they refused to accept the trust. In the absence of contradictory averments, the presumption of law is that they did accept it. 84 American Decisions, 555.

It is obvious that the first provision, the enacting clause, of section 5981, has no sort of governing application to this case. Parsons and Noble were not obliged, in obedience to that clause, to execute a bond before they entered upon the discharge of their duties, as trustees, because the testatrix absolved them from executing the bond.

The question is not whether their failure to give the bond pursuant to that provision vitiates the verdict as against the trust. If that was the question, and the statute is mandatory, and the failure to give bond was jurisdictional, only one answer, and that an affirmative one, would be admissible. The question is whether the failure of the probate court under the proviso, to grant them permission to execute the trust, with or without bond, has that effect. It is important to observe this distinction. It was dereliction of duty committed by the probate court that causes this controversy. Must it be adjudged that the verdict in the will case is nugatory as against the trust, because the probate court was recreant to its duty?

It is probably a sound proposition that the probate court should have granted Parsons and Noble permission to execute the trust, either with or without a bond; but, not having done it, must the failure nullify the proceedings in the will case, and invalidate the verdict in favor of the trust? In conscience, in equity, there can be only one answer, and that a negative one.

The failure of a trustee to qualify in obedience to a statute does not affect the validity of the trust. 94 Am. Dec., 210.

Four propositions of law touching this case are established, either by reason, principle, analogy or authority, or by all of them.

(1) The failure of the probate court to grant Parsons and Noble permission to execute the trust, either with or without a bond, was only an irregularity; it was not a jurisdictional imperfection, either as to their acting as trustees, or as to the common pleas, district and circuit courts taking cognizance of the will case against them.

(2) That dereliction of the probate court did not divest Parsons and Noble of the legal title in respect to the trust.

(3) They did not cease to be trustees because of that distinction.

(4) They were the only persons who could be made parties defendant in the will case in relation to the trust. Until another or others were appointed in their place, the plaintiffs in that case could sue no one else in respect to the trust.

The first proposition may be proved in an analogical manner. Suppose the testatrix had not excused Parsons and Noble from giving a bond; and suppose they had failed, pursuant to the enacting clause of sec. 5981, to give such bond. That would only have been an irregularity. Authority to support this is not wanting. The case of Mitchell v. Albright, admr'x, ante page 301, is exactly like this supposed case. An administratrix was appointed. She failed to give bond. A verdict and judgment was rendered against her. She moved to set them aside upon the ground that she had never given bond. But the court justly held "that the execution of the bond was not a jurisdictional requirement, and that a failure to give it did not per se render her appointment void * * *." "There is nothing," said the court, "in the language of the statute * * * * that makes the bond jurisdictional, and, therefore, the failure to take a bond was mere irregularity, and did not invalidate the appointment and letters." If that was sound of a fiduciary to whom letters of authority could not, in strict compliance with the law, be issued till a bond was first given, a fortiori it is sound of trustees who were not required to have letters.

The case of Slagle v. Entrekin, 44 Ohio St., 637, is another analogous case. A suit was brought by John C. Entrekin, administrator de bonis non of Jacob Slagle, deceased, upon the bond of his predecessors in office, Henry and Frank Slagle and their sureties, to recover the amount due upon the settlement of their accounts. There was only one surety on Entrekin's bond. The statute expressly required no less than two sureties. The defendant denied the title of Entrekin as administrator, and his right to sue, for the reason that he had only one surety, just as Parsons and Noble here deny their title and capacity to be sued, because they had no permission to act without bond. The Supreme Court declared that the omission to give a bond with two sureties did not affect Entrekin's right to sue or his right to recover, inasmuch as letters had been issued, which remained unrevoked.

In the opinion it was said his title was voidable, but not void, and, therefore, could not be collaterally impeached. It will be observed that the court did not rest the decision upon the fact that there was only one surety. It must be inferred that the same conclusion would have been reached, if no surety had signed the bond. The essence of the case was that the statute was not obeyed by either Entrekin or the probate court. Here obedience was not paid to the statute by the probate court. Can the two cases be differentiated on principle?

The legal title to the trust, the legal estate, was vested in Parsons and Noble by the will. They were not divested of them by the fact that the probate court did not grant them permission to act, with or without bond. Their character as such trustees and their power were not created by the statute. The legal title was vested in them by the bequest to them of the fund for the trust, and by their appointment as trustees in the will.

The failure of the probate court to grant them permission to act may have excused them from performing the functions and duties of trustees; but it did not deprive them of the legal title and estate. That could not legally occur till another or more persons were appointed trustees to succeed them, either pursuant to the terms of the will or the provisions of law. The will did not anticipate such a contingency. A successor or successors could not be appointed, in virtue of the statute, till Parsons and Noble had either expressly declined to act, or by operation of law had so declined, or the other events provided for in sec. 5986, but not mentioned now, had happened. There is no claim that they declined to act; their acceptance of the trust, as has been said, was conclusively proved by their own answer.

The statute does not, either expressly or impliedly, enact that their failure to give a bond, under the enacting clause of sec. 5981, or the failure of the probate court to grant them permission to act, under the proviso, should discontinue them as trustees and extinguish the title in them as trustees. If the probate court had ordered them to execute a bond within a given time, and if they had failed to give it, they should, and would, have been removed, or would have been considered, under sec. 5983, to have declined to act, and the probate court would have been authorized and required to appoint some one or more in their stead. But these facts did not occur. If they had died, or had expressly declined to accept the trust, or had resigned, or had become incapacitated, or had been removed, in the absence of any provision in the will, it would have been the duty of the probate court to appoint some suitable person or persons to execute the trust. (Sec 5986 of Rev. Stat.). But none of these facts took place.

These are the only statutory provisions which authorized the appointment of trustees in place of Parsons and Noble. It is plain that they could only cease to

be trustees, and the title and estate of trustees could only be divested from them, upon the happening of the events and the appointment of their successor or successors, as these provisions ordained.

Instruction may be obtained on these points from the case of McArthur v. Scott, 113 U. S. Rept., 350. In that case none of the three executors and general trustees under the will was made a defendant. They were not only executors, but they were also trustees. They had resigned before suit was brought, and no successor or successors had been appointed. The court held that there should have been a defendant or defendants, representing the office of the executors, or the trust estate devised to them.

In the discussion of this subject, Judge Gray said: "By the devise in fee to these executors, their appointment by the court of probate, and their acceptance of the trust, the legal title in the real estate under the will vested in them. The subsequent acceptance by that court of their resignation of the office of executors, no doubt discharged them from the performance of the duties of executors and trustees under the will. But the legal title in the real estate vested in them, could not be divested without a conveyance, or a decree of a court of chancery, or an appointment by the court of probate of new executors and trustees in accordance with the will."

If the will was silent on the subject, the appointment would have to be made according to the provisions of the statute.

Again, Judge Gray said:

"At common law, a conveyance, sanctioned or ordered by a court of competent jurisdiction, or at least a new appointment pursuant to the instrument by which the trust was created, would be necessary to divest the title of each trustee; and no statute or decision in Ohio, establishing a different rule in this respect, has been brought to our notice. The three executors and trustees who had once accepted and acted as such, therefore, still held the legal title. In re Van Wyck, 1 Barb. Ch., 565, 570; Denry v. Natick, 10 Allen, 169, 183; Woodbridge v. Planter's Bank, 1 Sneed, 296; 2 Washburn on Real Property (4th ed.), 512, 513. And as holders of that title they were necessary parties to the suit. Adams v. Paynter, 1 Collyer, 530, 534."

The subject of the trust in that case was real estate; here it is personal estate; but that does not detract from the influence of the decision. Personal property has a title as well as real estate. The difference in the modes of transferring real and personal property, does not affect the question now under consideration. Making application of this authority, the conclusion must be that the title to the trust fund was, at the time the will case was begun, and throughout its subsequent proceedings, in Parsons and Noble. It was not divested by the fact that they were not granted permission to execute the trust by the probate court with or without bond; (1) because no decree of a court of chancery to that effect was ever rendered; (2) because no conveyance, "sanctioned or ordered by a court of competent jurisdiction," for that purpose, was ever made by the trustees; and (3) because no other trustee or trustees were ever appointed by the probate court, either in accordance with the terms of the will or the provisions of the statute. Parsons and Noble accepted the trust; they acted as trustees; and, "therefore," in the language of Judge Gray, "still held the legal title." And, again, borrowing his language "as holders of that title they were necessary parties to the suit." If they were necessary parties, the corollary is, that the verdict of the jury and judgment of the court were, and are, binding on them and the trust which they represented.

Gardner v. Brown, 21 Wallace, 36, is another analogous case. There a Tennessee statute was construed. Its language, just as peremptory as that of ours, provided that every trustee to whom property was conveyed in trust for any person "before entering upon the discharge of his duty shall give bond, etc." It was argued, as it was here, in effect, that the trustee, having failed to give bond, was not legally competent to act as trustee: that he was not a trustee; that he did not hold the legal title; that he was a useless party, and was not a proper or necessary party to the suit. But the court decided that notwithstanding the emphatic phraseology of the statute, the omission of the trustee to give bond did not divest him of the legal title once regularly conveyed to him; and that he was a necessary party to the suit touching the trust, which was in the nature of a foreclosure suit.

Again, those whom the plaintiffs in the will case were required to make parties to the case were clearly designated by the statute. (Sec. 5859 of the Rev. Stat.). They were the devisees, legatees, and heirs of Louise Deshler, deceased, her executor and administrator, and other interested persons. To ascertain who were the devisees and legatees, the plaintiffs in that action would have to inspect the will. By that inquiry they undoubtedly found that Parsons and Noble were

legatees. The action having been brought in opposition to the trust, to set aside the instrument which created it, it could be maintained without the presence of the beneficiary or beneficiaries of the trust, even if they had then been in existence. So far as the trust was concerned, or affected by the case, the trustees were the only necessary parties.

It was argued that it was the duty of the plaintiffs in that action to have had trustees appointed in place of Parsons and Noble. If Parsons and Noble had declined to accept and act, or if they had been removed, that obligation would have rested upon them. But there having been no such reasons, there was no such duty. Moreover, the conduct of Parsons and Noble, fully represented in their answer here, was such that it never would have occurred to the plaintiffs in that action, that new trustees should be appointed.

It was argued that the decision in Church v. Nelson, 35 Ohio St., 638 made it the duty of the contestants in the will case to see that the trustees were authorized by the probate court to act with or without bond. What Judge White said on page 642 in the report does not bear that construction. All the statute required was that the contestants should make the devisees and legatees under the will, the heirs and other interested parties, and the executor and administrator defendants. Noble and Parsons were legatees. The answer does not show that the cestui que trust had any being at that time. The contestants had a right to act upon what Parsons and Noble did. They saw that they were making a defense; that they were participating in the proceedings in the courts. Could they assume anything else than that the trustees had accepted the trust and had qualified? What rule required them to go to the records of the probate court and ascertain whether that court had granted the trustees permission to act with or without bond? In view of what was done by Parsons and Noble, they had a perfect right to infer that all had been done in the probate court that the law commanded. Judge White's dictum does not mean that the contestants should have done anything more than they did. They came up to the full measure of their duty.

There is still another view. By their answer here Parsons and Noble endeavor to collaterally impeach the jurisdiction of the common pleas, district and circuit courts over the will case. But they are estopped by their conduct set out in their own answer from challenging the jurisdiction of those courts; they are estopped, both as individuals and trustees.

"Whenever a person seeks the aid of a court of justice to enforce his rights, and submits his case and objections to the decision of a court and invites it to decide upon them, and makes no objection to the jurisdiction until after the court has heard and adjudicated, he is estopped from subsequently objecting to its decision and the proceedings taken thereon." 1 Herman on Estoppel, sec. 389.

In Hines & Brown v. Mullins, 25 Ga., 696, the Supreme Court of Georgia held:

"A person who has been appointed guardian by a court of Ordinary, and has taken possession of the property and otherwise acted as such guardian, is concluded from saying, when sued as such guardian, that the ward did not reside in the county, and therefore that the court had no jurisdiction to make the appointment."

To permit him to do that would be allowing him to take advantage of his own wrong, the court said.

So in Harbin, Adm'r v. Bell et al., 54 Alabama, the highest court of that state said:

"One, who has procured his own appointment as guardian, and as such received the assets of the ward and made settlement as such in the probate court, can not deny the rightfulness of his appointment, or set up its invalidity to defeat proceedings to call him to account."

An estoppel operates between the immediate parties to it and their privies, whether by blood, estate or contract. The estoppel binds not only Parsons and Noble, but also the beneficiaries of the trust, if there were any, and the trust, whom and which they represented.

The verdict in the will case was just as much binding against the trust and against the beneficiaries under it, if there were any, as it was against the trustees.

In Johnson v. Robertson, 31 Md., 476, A conveyed certain mortgaged premises to B in trust for his wife, and the mortgagee instituted suit against B to foreclose, who answering, admitted the fact to be as stated in the complaint, and consented to such decree as might be right. It was held that B was empowered by the nature of his trust to represent the interest of his cestui qui trust to this extent, and that in the absence of any injury to her estate, she ought not to be allowed to reverse or impeach the decree.

By the answer of Parsons and Noble it is shown that they were made parties defendant to the will case as trustees of the law library and school.

The best proof, the best test, of whether the conclusion reached is sound legally is that it is right morally. There is nothing whatever in the answer of Parsons and Noble to disclose that they would have made a better, a more successful, defense against the assault on the will if they had been given permission by the probate court to act with or without bond. The absence of such permission did not interfere with their retaining counsel; it did not make their answer any weaker; it had no effect upon the jury in deciding the issues submitted to it. The interests of the trust did not suffer on that account. The contestants in that case were by the vigorous and able resistance of these trustees and their co-defendants, compelled to go through a long, irksome, protracted and expensive litigation to have the will set aside. It must be assumed now that the rights of the trust were fully vindicated. Must the contestants be compelled, would it be right, would it be just, to require them to go through the litigation again just because the probate court committed the irregularity of not authorizing the trustees to act with or without bond?

There is still another consideration. If the hypothesis of Parsons and Noble should be sustained, what would be the logical and legal result? The will would be in force as to the trust mentioned; but the contestants could not sustain another suit to set the will aside as to the trust; because the statute of limitations would bar such an action. Would it be right then for a court whose duty it is to do justice, and in spite of technicalities, to place the contestants in such a situation?

The demurrers to the answer of Parsons and Noble are sustained.

Millikin, Taylor, Powell & Nash, for demurrants.

Noble, Collins & Davis, for Parsons and Noble.

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## ALIMONY. 339

[Cuyahoga Common Pleas, April Term, 1890.]

E. P. WILMOT v. ELIAS COLE, WILLIAMSON LARKWORTHY ET AL.

**The court in a county where suit was brought, had no jurisdiction to declare a lien for alimony upon, and issue an order of sale for the sale of real estate situated in another county, to the sheriff of such other county, and a sale made by such a sheriff under such order is void for that reason.**

SOLDERS, J.

This case has been argued with earnestness and considerable care and attention given it, therefore I think it is due to counsel to go into the matter at some length, January 13, 1890, the amended petition was filed alleging that on June 9, 1888, Elias Cole was the owner of an undivided one-half of the premises described, situated in Cuyahoga county. That on said date Lizzie Cole began an action for alimony in Geauga county, Ohio, where the plaintiff at the time resided, against Elias Cole, asking for alimony out of his property, describing in her petition said property so situated in Cuyahoga county, and an injunction was allowed. June 28, 1888, there was notice to the defendant, and the court adjudged that defendant pay plaintiff $250 alimony *pendente lite* on or before July 8, 1888, in default execution to issue. July 6, 1888, the defendant appeared and answered. July 19, 1888, execution was issued to the sheriff of Cuyahoga county, and July 20th, he levied upon said land in this county and made his return to the Geauga Court of Common Pleas. At the January term, 1889, of the Geauga County Common Pleas Court, the court decreed finally to plaintiff, on hearing of the alimony case, that the

defendant pay the plaintiff as alimony $300 out of his real and personal property, including said $250, which the court found still unpaid; that said $300 should be and remain a lien on said real estate to secure the same, and that in default of immediate payment, an order of sale of said real estate in this county should issue in favor of the plaintiff. On February 20, 1889, the order of sale was issued to the sheriff of Cuyahoga county from the Geauga County Common Pleas Court to sell this property, the same was seized, appraised and advertised, and on March 29, 1889, was sold to attorney Wilmot, the plaintiff, and the return of the proceedings of the sheriff of this county was made to the Geauga County Common Pleas Court.

On March 20, 1889, at the April term of said court, the sale was confirmed, and the sheriff ordered to execute a deed to Wilmot. August 19, 1889, the deed was made to plaintiff. Defendant William Larkworthy. claims some interest in said premises. This is the substance of the petition material to the question made on demurrer. It does not appear that any other land was referred to in said alimony proceedings.

To this petition, Larkworthy demurs, claiming:

1. The sale is void, as the realty was not within Geauga county, and not subject to the control of the court.

2. It was not a sale upon *fi. fa.* or *vend. ex.*

3. The order of sale is independent of the *fi. fa.*, and the only writ upon which the interest was sold. The order of sale cannot be regarded as a *fi. fa.* because it was not directed generally against defendant's goods and chattels or for want thereof, his real estate, but directed the sale of this specific real estate—nor can it be regarded as a *vend. ex.* because it does not appear to have been based upon the previous *fi. fa.* levy, and if it did, it could not be thus supported because (1) the order for alimony *pendente lite* having been merged in the final decree, the previous *fi. fa.* and levy, based thereon, thus became nugatory and extinguished and because (2) the order is for a different sum, $300, than such *fi. fa.* which was for only $250. Whereas a *vend. ex.* should be for the same amount as the *fi. fa.* on which it is predicated, citing Monaghan v. Monaghan, 25 Ohio St., 325.

4. That the legality of the order of sale depends entirely upon the fact of the court ordering the same having jurisdiction of the property, which it had not.

5. That the Geauga County Common Pleas Court could only grant relief to plaintiff by a personal judgment, enforcible by *fi. fa.* and *vend. ex.* and it does not come within the exceptions to section 5022, mentioned in sections 5023 and 5024 of the statutes, nor within sec. 5317.

6. That the court could not make a decree having by way of lien, extra territorial effect, nor enforce it when made by a judicial sale as thus attempted.

The plaintiff claims, on the other hand, under section 5690, that in alimony cases the plaintiff is forced to bring her action either in the county of her residence, or in the county where the cause of action arose; that she has no discretion in the matter, and if neither is in the county where the land is, the plaintiff can not institute the action there.

That section 5703 is broad enough to warrant the action of the court; that is, as the plaintiff can not do otherwise than indicated in the first claim, the court could proceed as it did, the same as if the action was brought in the county where the real property was situated. That in ex-

ercising the powers under said section, the court could declare a lien upon and order the sale of the real estate in Cuyahoga county.

Let us note the scope and breadth of that section 5703. "The court shall, upon satisfactory proof of any or all of the charges in the petition, make such order for the disposition, care and maintenance of the children of such marriage, if there are any, as is just and reasonable, *and give judgment in favor of the wife for such alimony out of her husband's real and personal property as is just and equitable, which may be allowed to her in real or personal property, or both, or in money payable either in gross, or in installments.* And the effect of such judgment shall be to restore to the wife all her lands, tenements, and hereditaments not previously disposed of, and to vest in her the right and power to acquire, hold, manage, and dispose of property, money, and choses in action, and to bring and maintain suits in her own behalf, free from the control or interference of her husband, unless the court, for good cause, vest such property or powers in trustees, for her use and benefit."

The part that is applicable here is, that quoted in italics.

Plaintiff's counsel refer the court to the 26 Iowa, 503, and also the Smith case, No. 32701, in this court, journal Vol. 101, page 616, where on final decree the court allowed alimony to the wife, gave her a lien upon Summit county realty, and confirmed a conveyance made before suit by defendant to plaintiff of land in said Summit county, free from defendant's curtesy, or any claim or interest.

I have seen Judge Hamilton as to this matter, and he says he has no recollection of the question being made before him in said case. His recollection is that counsel disputed about it, but that the decree, except as to the amount of alimony, was finally entered by agreement. Upon presenting to him all the facts in this case, he seemed to concur in the conclusion I have arrived at.

The principal question is, what is the proper construction of section 5703, and what power is given to the court? The material part of this section is, as I have read, that the court may allow alimony out of the husband's property.

1. In personal property.
2. In realty, or both, or
3. In money.

The Geauga county court allowed Mrs. Cole $300 in money, made it a lien upon the Cuyahoga county realty, and issued to enforce payment an order of sale to the sheriff of this county.

The question arises by reason of this action. Could the court make the allowance of $300 a lien upon and order the sale of the Cuyahoga realty?

Section 456, 1835 and 2294, of the statutes declare the jurisdiction of the common pleas court, and it is confined to the county; and in criminal cases confined to the county except in cases where larceny is committed and goods carried from one county to another. There the party may be prosecuted in any county where the thief is found with the goods, according to the King v. King, 11 Ohio, 390, 425.

Chapter five, on venue of actions, clearly shows, as to realty, that jurisdiction is limited to such realty as is within the county. The two exceptions are when property is in more than one county, action may be brought in either, but in recovery of realty this can only be done where the property is an entire tract. Sections 5022 and 5023.

Section 5317 governs foreclosure cases.

Section 5024 of our statutes provides:

"To compel specific performance or land contract, the action may be brought in the county where defendants or any of them reside." Why so? In such cases, among other reasons, the court of equity has power in such case to compel defendant to perform the decree, by process of contempt.

Under section 5372, three kinds of execution may issue. *First*, against property of judgment debtor, including orders of sale. *Second*, against the person of judgment debtor. *Third*, for delivery of possession of realty.

Under section 5375: Such lands and tenements *within the county* where the judgment is rendered, shall be bound for the satisfaction thereof from the first day of the term at which the judgment is rendered, * * * all other lands shall be bound from the time they are seized in execution.

Under section 5376: Judgment of the Supreme Court shall bind the lands and tenements of the debtor, *within the county* where the suit originated, from the time they are seized in execution.

And section 5377: The transcript of the justice shall be filed in common pleas court *of county* wherein judgment was rendered.

Section 5381: Execution to run first against personal property; in default to be levied upon realty.

Section 5398: Upon return of execution for satisfaction of which lands and tenements have been sold, the court is to confirm sale.

Section 5405: If lands and tenements levied on, or ordered to be sold, be not sold upon execution, other executions may issue.

Section 5410: If sale invalid, the purchaser subrogated to rights of judgment creditor.

Section 5421: Execution may issue to other counties.

Section 5525: Orders of attachment may issue to different counties. Lands in other counties than the one in which process issues can be subjected by statutory authority in two cases, under sec. 5372 on execution, and sec. 5525 on writs of attachment. Under the latter section successive orders of attachment may issue to other counties where the lands of the debtor in attachment are.

I simply refer to these sections to show what statutory provisions there are to seize property in other counties. These are the only two cases under the statute of this state where you can, by statutory authority, issue orders to other counties in execution or attachment and seize property there, unless this section contended by counsel, 5703, is broad enough.

In Moore v. Starks, 1 Ohio St., 369, 373, our Supreme Court held, in foreclosure: "There must be in Ohio both jurisdiction of the person and the thing." That is, the land. "These are requisites to the validity of the court's action."

From the foregoing and fundamental principles of jurisdiction, the court has no extra territorial jurisdiction, unless sec. 5703, Divorce Chapter, is broad enough to give such jurisdiction.

It is claimed that 26 Iowa, 503, is a case directly in point supporting the proposition of the plaintiff, that this sale can be supported; that the court in Geauga county had jurisdiction of land in Cuyahoga county, and is decisive. Now that is a case under a more restricted statute than we have here. That is to say, that statute, which has an analogy to our sec. 5703, simply refers to property; and it does not say that the court

may allow in three ways, out of the personalty, out of the realty, out of both, or in money; it simply uses the word "property." I have examined carefully the case in 26 Iowa, 503, Harshberger v. Harshberger. It was decided at the December term, 1868. March 4, 1868, plaintiff brought an action in Keokuk county on two notes against the defendant as maker, and had writ of attachment issue against defendant in Keokuk county. At the October term, 1868, judgment was rendered in favor of the plaintiff. The same term, October 1, 1868, Mary E. H. filed petition of intervention, stating that in December, 1867, she filed her petition in the district court of Mahaska county for divorce from said defendant, and for alimony; that service was had; that defendant was then owner of said thirty acres, and prayed that any alimony be made a lien thereon. February 21, 1868, decree of divorce was granted, and alimony of $100 made a lien thereon, and an order for special execution for the sale of said thirty acres was made. Now this special execution I find would go on the foreign execution book in the sheriff's office, the same as here, and in every county where executions are received would be notice in the chain of title. April 16, 1868, she filed a transcript thereof in the office with the clerk of said district court of Keokuk county. This case was heard, and the court found the alimony judgment should be first paid; from this action the plaintiff appealed. Chief Justice Cole says:

"Section 2532 (Iowa code) provides that the district court of the county where plaintiff resides has jurisdiction of all divorce and alimony cases."

"Section 2537. When a divorce is decreed, the court may make such order in relation to the children and property of the parties and maintenance of the wife as shall be proper."

"The district court of Mahaska county had jurisdiction of the cause; it might rightfully enforce any lien connected with the subject-matter of the action, although the real property, upon which such lien was claimed and enforced, was situated in another county. This principle has been several times applied by this court. 4 Iowa, 151; 9 Iowa, 396; 10 Iowa, 299; 12 Iowa, 521."

"The petition (divorce and alimony case) described the land, and asked that the alimony be made a lien thereon. The decree fixed the rights of the parties to the land. The attaching creditor acquired no better right than defendant in his suit had at the time of the attachment; that was the defendant's interest, subject to the lien for alimony." Notice also that when the transcript was filed, a special execution was ordered.

The 10 and 12 Iowa were cases of foreclosure, and the court permitted the same to be brought in the county where the mortgagor resided, or where the property was situated.

As the case in 26 Iowa is based upon the principle which that court had announced in prior cases, it becomes necessary to examine those cases to ascertain the foundation of this case. Without going into detail, the 4 Iowa, 151, does not present the question.

The 9 Iowa, 397, Breckinridge v. Brown, the plaintiff held a note of the defendant in Linn county, Iowa. The petition was filed in the district court of Linn county, asking judgment on the note in foreclosure. On the thirteenth of March, 1858, petition was filed. April 6, 1858, the defendant moved for change of venue to Jones county, where the property was, and because defendants resided there. April 8, 1858, the motion was overruled and exception taken. April 17, 1858, the plaintiff was

permitted to dismiss the second count of his bill praying for foreclosure, and judgment was taken by default. It was held by the Supreme Court that the note, being payable in Linn county, both causes did not belong to Jones county, even admitting second count of forclosure, belonged to Jones county, and that defendant was in default at his peril upon first count.

This case is not germain to the question. In the case in 10 Iowa, 399, it was held: Proceedings for the foreclosure of a mortgage, for judgment and general execution against the mortgagor, may be prosecuted in the county where the mortgagor resides, or in the county in which the property is situated. When the object is to foreclose equity of redemption by sale of the property only, it should be brought in the county where the property is situated. That is under the statute of Iowa.

The foreclosure of a mortgage in Iowa is a proceeding under its code, in personam as well as in rem. The service of notice upon defendant in the county where he resides, confers upon the court equal jurisdiction with that of the mortgaged premises. In this case the object of the suit was twofold, judgment to be satisfied by general execution in the event of the insufficiency of the mortgaged premises, and also the foreclosure. It was error to abate the suit because the same was not brought in the county where the property was situated. But where the object only is to sell the equity of redemption, it should be brought in the county where the property is.

In the last case, 12 Iowa, 521, the court say, that under the code of 1851, in foreclosure and for judgment, the cause may be brought in the county where the debtor resides, or where the property is situated. It will thus be seen that the 26 Iowa, 503, resting upon said prior cases, is no authority in support of plaintiff's claim, because the Iowa code distinctly gave jurisdiction in such cases. We have no such provision, and the Moore v. Starks, 1 Ohio St., 369, distinctly holds the contrary in such cases.

I am of opinion that the court must have jurisdiction of the subject out of which plaintiff seeks alimony, and then sec. 5703 applies. The court may then act directly upon the subject-matter, the land, decree it to her, or out of it a certain sum, make it a lien thereon, and order the same sold for payment, but not having jurisdiction of the land (the same being out of the county), the court can only render judgment enforcible by the ordinary process of execution, as by statute provided, and that this view is consistent and in harmony with the power of the court in alimony cases under sec. 5703. Any other view would be inconsistent with the statute and practice of the state. It follows that the demurrer must be and is sustained.

Emerson H. Eggleston, for Larkworthy.

Updegraff & Weems, for Wilmot.

## STREET ASSESSMENTS. 359

[Superior Court of Cincinnati, Special Term, April, 1890.]

### †SOPHIA STRAUSS V. CINCINNATI (CITY).

Action to enjoin two assessments for the opening and improvement of Ashland street, in the city of Cincinnati.

NOYES, J. *Held:*

1. The Board of Public Affairs, has the power under Rev. Stat., 2314*a*, to pass the assessing ordinance in condemnation cases, as well as in ordinary improvement cases. This action is general in its terms, and is a part of the assessment chapter.

2. If council, in passing the ordinance to improve, omits to fix the value of the abutting lots to be assessed, in advance, as required by Rev. Stat., 2271, such omission does not render the proceedings invalid. The requirement is not jurisdictional, and the omission is only an irregularity, the court having power, in a proper case, under the same section, to limit the assessment to one-quarter of the value as found by the court after the improvement is made.

3. The requirement of Rev. Stat., 2264 that the council shall specifically set forth in the improvement ordinance the lots and lands to be assessed, is fully complied with when the ordinance provides that the assessment shall be upon the lots and lands abutting a street named between two termini distinctly designated.

4. In case of two assessments on the same street, if it appears that both were intended to make one and the same improvement under Rev. Stat., 2284, they may be treated as one proceeding for the purpose of applying the one-fourth limit of assessment under Rev. Stat., 2271.

5. When improvements have been ordered by council, it is to be presumed that they are beneficial. A court will not interfere with the assessment where the proceedings are regular, except for fraud, malice, gross mistake or abuse of corporate power. Where an improvement results in damage to an abutting owner, his remedy is by an application under Rev. Stat., 2315. A claim for damages can not be offset against an assessment.

6. The law is settled in Ohio that where a part of one's property is taken for a street by condemnation proceedings the remainder is subject to assessment under the restrictions governing assessments.

7. Where, under Rev. Stat., 2315, a return under oath has been filed in the city clerk's office showing that an abutting owner has been personally served with a copy of the resolution, the return is *prima facie* evidence of such service, and the burden of proof is upon the abutter who denies the service.

H. D. Peck, for plaintiff.

L. M. Hadden, for the city.

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## GRADE OF STREETS. 359

[Superior Court of Cincinnati, General Term, April, 1890.]

### CINCINNATI (CITY) V. CATHERINE CORRY.

Notice of resolution to improve by change of grade, etc., should set forth in detail the extent and character of the grade, so that the abutting property owner may be informed with reasonable certainty as to the effect upon his land and improvements.

Catherine Corry, as a tax payer, for herself and other property owners, filed a petition, an amended and a supplemental petition, against the board of public affairs and other officials of the city of Cincinnati, pray-

†This judgment was affirmed by the Superior Court in general term; opinion post 24 B., 422.

ing that all proceedings of the board of public affairs to improve Vine street between Corry and Molitor streets, be suspended and enjoined for the reason, among others, that the change of grade of the street to which the contemplated improvement was to be made, was not published as required by the provisions of the statute, to-wit, the act passed April 25, 1885, commonly known as the Two Million act. It will appear that Catherine Corry did not file her claim for damages in pursuance of the alleged notice therefor in certain proceedings brought by the City of Cincinnati to assess the damage to abutting property by reason of the change of grade. The property of the defendant in error was omitted, so that the present question in fact affects her interest as an individual, rather than as a tax payer.

MOORE, J.

This is a petition in error, prosecuted by the city of Cincinnati against Catherine Corry, to reverse the judgment of this court at special term in overruling a demurrer to the defendant in error's supplemental petition.

The sufficiency of the notice to plaintiff, an abutting property owner, of the adoption of a resolution declaring it necessary to improve Vine street between Molitor and Corry streets by changing the grade, setting curbs, etc., after a grade had once been established, and the street improved in accordance therewith, is the question now presented. The board of public affairs on the fifteenth day of February, 1887, adopted a resolution declaring it necessary to improve said Vine street between the points named by constructing the necessary foundations, etc., in accordance with the plans on file in the office of the chief engineer of the Board of Public Affairs, which exhibit the necessary changes of grade on said street, and the specifications on file in the office of the board of public affairs.

Section two, of the act of the general assembly passed April 25, 1885, Ohio L. Vol. 82, page 156, provides that the board of public works shall declare by resolution the necessity of such improvement, and give notice thereof as required by Council in sec. 2304, and shall carry out and be governed by the provisions of said sec. 2304, and any duty required therein to be done or performed by council shall devolve upon said board of public works. Said board of public works shall have full and final authority in any such improvement to make such change or changes in the grade, or in the streets, avenues or highways, to be so improved as may be deemed necessary to best conform the same to such contemplated improvement. Any such change of grade shall be published with the advertisement provided for in said sec. 2304.

On or about the twenty-fifth day of February, 1887, the board of public works caused to be served upon the plaintiff a notice to the effect that a resolution declaring it necessary to improve Vine street, upon which the property of the defendant in error abutted, had been adopted by the board, the notice reciting the exact language of the resolution as adopted, and no more.

It has so often been held by our Supreme Court that a resolution declaring it necessary to improve is jurisdictional and necessary before proceeding with the work, that a question no longer exists. Section 2304 of the Rev. Stat., provides that publication shall be made of the adoption of the resolution to improve, and that abutting property owners shall, within two weeks from the publication thereof, file their claims for

damages by reason of the change of grade, and if such claims are not made as provided, the same shall be barred.

The question in the case at bar arises whether the board of public affairs has complied with the statute with that apparent strictness indicated by the language of sec. 2327, which reads as follows: "Proceedings with respect to improvements shall be liberally construed by the councils and courts to secure a speedy conclusion of the work, at reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment, and merely formal objections shall be disregarded, but the proceedings shall be strictly construed in favor of the owner of the property assessed or injured as to limitation and assessment of private property and compensation for damages sustained."

It is also well settled by numerous decisions of the Supreme Court of this state, that a change of grade affecting improvements of an abutting property owner, is as much a taking of property as the appropriation of the land and private property for the street itself, and that in such cases all proceedings and requirements to give the municipal authorities jurisdiction, should be strictly complied with, and that all statutes pertaining thereto and giving jurisdiction should be strictly construed.

Section 2293 (*a*) Rev. Stat., commonly called the Two Million act, provides for the publication of the change of grade. Reference to the notice given in the present instance, shows that the property owner is notified that a necessary change of grade will be made to accommodate an improvement, the details of which necessary change are to be found on file in the office of the chief engineer of the board of public works, thus in brief informing the property owner that better information may be obtained as to the manner in which the property is to be affected by visiting one of the city departments.

Certainly it was not the intention to charge the property owner with notice of the precise character of the improvement by providing in an ordinance for all the details of the improvement, and simply filing such details in the office of the chief engineer of the board of public works. Legal notice can not be so construed as to require a person to go, for instance, to a public office and there get the information which the law requires should be brought home to the party in terms sufficiently descriptive of the improvement intended.

As held in the case of Harbeck v. City of Toledo, 11 O. S., p. 219, the notice should contain all the material facts, and making it reasonable, specific and certain as to what the corporate authorities proposed to do, and in such a way that from the notice itself the property owner might know with definiteness and accuracy just how far above or below the existing grade the owner's lands and improvements would be after the change was made, or to what extent the ingress or egress to and from the premises would be affected by the change. The language of the court in the case cited, to-wit: "If a municipal corporation avails itself of the statute to take private property without the owners consent, it must strictly follow its provisions," sustains us in the view we take in the case at bar; that is, that the notice given to the property owners was insufficient in the description of the character and extent of the improvement and its effect upon the abutting property damaged thereby.

Judgment affirmed.

TAFT and NOYES, JJ. concur.

## 360 MUTUAL RELIEF ASSOCIATION.

[Superior Court of Cincinnati, General Term, April, 1890.]

YOUNG MEN'S MUTUAL LIFE ASS'N. v. SARAH A. HARRISON ET AL.

1. A member of an association for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members may designate his mother as the beneficiary, and cause the usual certificate to be issued in her name, and it is not essential that she be a resident of the member's family.
2. The will of a member directing "all policies of insurance" upon his life to be invested and used by his wife for the benefit of herself and their children, is not such an execution of the power of appointment as will control the fund; it appearing that the deceased had other policies of insurance, and it not appearing to be clear, by the language of the will, that there was an intention to again exercise the power of appointment by naming another beneficiary, the member having once directed payment previous to his death.

MOORE, J.

The Young Men's Mutual Life Association, a corporation under the laws of Ohio for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members, filed its petition in special term, alleging that on October 15, 1883, it issued to one Wm. H. Harrison a certificate of membership, which provided that said Harrison was a member of the third division of said association, and in the event of his death during the continuance of said membership, that his mother, Sarah A. Harrison, should be entitled to the sum of $1,000. The petition further alleges that Harrison died on or about the first day of April, 1887, and that while the said Sarah A. Harrison is the beneficiary named in the certificate, that Alice A. Harrison, who is the widow of decedent, and made a party defendant on her own motion, claims that she is entitled to the said sum of $1,000 by virtue of a will which she claims was made by said decedent, leaving the fund to herself and children; that, under the circumstances, it cannot safely pay the fund to either of said parties, but is ready to pay or dispose of the same as the court may direct.

Alice A. Harrison filed an answer, in which she averred that at the date of the issuance of the certificate, nor at any time subsequent thereto, was the said Sarah A. Harrison a resident of the family or an heir of the deceased, but that she, the said Alice A. Harrison, and her minor children, at the date of said certificate, and up to the time of her husband's death, were such. That by the last will and testament of said decedent, he devised to his wife, said Alice, "all moneys that may be received under and by virtue of any and all policies of insurance that he had upon his life, to be invested and used by her for the benefit of herself and their children."

On submission, the court at special term rendered judgment in favor of Sarah A. Harrison, the beneficiary named in the certificate of membership.

The said Alice Harrison, and the guardian of the minor children, now presented their petition in error to reverse the judgment of the special term.

The plaintiffs in error contend that they are entitled to the fund in uestion by the terms of the last will and testament of said decedent;

that under the act of incorporation of the Young Men's Mutual Benefit Association. payments of stipulated sums of money are confined to the families and heirs of the deceased members, and that the mother of said Harrison not being a member of his family, cannot be a beneficiary; that therefore the fund becomes part of the estate of the deceased member, to be disposed of for the benefit of those living with the family and as part thereof, or as his heirs, according to their construction of sec. 3630, of the Rev. Stat., which section provides as follows: "A company or association may be organized for the purpose of mutual protection and relief for its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such company or association." They further contend, if Mrs. Sarah Harrison is a legal beneficiary, that the designation of her as such was changed by the terms of said deceased member's will.

It will appear by the record that the mother of W. H. Harrison was not living with the family of the deceased at his death, and for the purposes of this controversy we do not think it necessary to refer to the question whether she was or not.

If it be true, that the mother was not a resident member of the family, and therefore not a legal beneficiary, then certainly the contract is void *ab initio*, and there is no fund to pass. If the contract is void because not made for the benefit of an heir or a member of the family circle of the deceased member, how can these claimants maintain their position or claim to a fund which was created for a person outside of the immediate family and not an heir? Although we do not deem it essential in the determination of the question of the right to the possession of this fund, yet we might very reasonably hold that the legislature did not intend that the word "family" should be used in a sense so restricted as to exclude the kindred of a member not actual members of his household; indeed we have the authority of our Supreme Court (Arthur v. Odd Fellows Beneficial Ass'n, 29 Ohio St., 557), in a matter concerning the disposition of a fund created by an association organized under the act governing the association in the case at bar, wherein it was held that "the laws and regulations adopted by a beneficial association incorporated and organized under the act of April 20, 1872, Ohio L. Vol. 69, p. 82, determine the rights of the members and the association; and a fund raised by the association in pursuance of such laws and regulations, to be paid to the family or heirs of a deceased member, in the manner herein specified, unless otherwise directed by such member in his lifetime, will, on failure of the member to give such direction, be controlled by such laws and regulations." And then the laws and regulations of the association grouped the beneficiaries under its statutory authority to pay to "families and heirs," as the widow, children, mother, sister, father or brother of a deceased member; and the court in that case recognized such persons as beneficiaries in the order named.

It is quite plain that the legislature intended that the benefits should not be extended beyond the kindred of a member, and used words of a very general signification, the term "family" covering all the persons named.

As a matter of public policy, the legislature intended to prohibit the farming out of certificates of insurance, to creditors or strangers by mutual relief associations. This view is supported by our own Supreme Court in the case of the Mutual Aid Ass'n v. Gonser, 43 Ohio St., 1, where it was held that the assured was not vested with the right to bequeath

the proceeds of a certificate of membership in such a mutual protection or relief association to a stranger or a creditor, and fairly indicating that that class of persons were the only kind excluded.

The pleadings and record in the case at bar do not show what class of persons the laws and regulations of the plaintiff's society designated as beneficiaries under the designation "families or heirs."

If we are right in assuming that Mrs. Sarah A. Harrison is a legal beneficiary, did the will of the deceased member operate as a change in favor of his widow and children? We think not, under the instruction of the Supreme Court, in Arthur v. The Odd Fellows Beneficial Ass'n, *supra*, we find that "Where by the laws and regulations of such association the fund to be paid respectively to the widow, children, mother, sister, father or brother of a deceased member, if not otherwise directed by the member previous to his death, the relatives will take the fund in the order named, unless the member in his life-time executed such power of direction and appointment, thus changing the order of payment, and the will of a member, who died seized of property real and personal, devising and bequeathing to his children 'my estate and property real, personal and mixed,' without referring to the power or the subject of it, is not such an execution of the power as will control the fund." With this ruling we have the fact in the case at bar that previous to the death of the member he directed payment to be made to his mother, and she is the only party named, and the certificate was delivered to her, and has at no time been in the hands of assured member—therefore it will be seen that the power of appointment was exercised, and cannot be changed unless it be clear that the intention is again to exercise the power of appointment and name another beneficiary. It will appear that the testator had other life insurance policies that passed under the provisions of the will, thus satisfying the words of the will without supposing an intention to change the appointment already made.

There is another reason why we think the beneficiary named in the certificate in the case at bar, is entitled to the fund, and it is with the exclusion of the theory that she was living with the "family," or is "an heir," of a member of the association.

In pursuance of the laws and regulations of the association, and upon the death of the member in question, the managers of the association levied an assessment upon its surviving members, and paid the amount called for by the certificate of membership into this court, and have expressed their intention to waive any irregularity or illegality growing out of a possible want of authority to issue the certificate in the name of Sarah A. Harrison, as mother of the member. The question of the want of power to issue the certificate is not raised by any other party. The mother is in possession of the certificate by delivery to her by the association. The association expresses its willingness to pay the fund to her as the beneficiary named in the certificate. The association has received from the member his dues or assessments as the same were called for. In fact, the contract has been executed. All authorities in like cases direct the application of the principle of estoppel, as against the association setting up a want of power to issue a certificate in the manner indicated, and we think unless the association complains no one else can.

Judgment affirmed.

NOYES and HUNT, JJ., concur.

Francis C. Ampt, for plaintiffs in error.

Healy & Brannan and R. S. Fulton, *contra*.

## DOW LAW TAX. 379

[Cuyahoga Common Pleas, 1890.]

CHARLES KUSTA v. DAVID H. KIMBERLY, TREAS. ET AL.

Where a person commences on the first day of May, in any year, the business of trafficking in spirituous, vinous, malt, or any intoxicating liquors, such person is only required under sec. 3 of the amendment of the Dow law, (85 vol. O. L. 117) to pay an amount proportionate to the remainder of the assessment year; but in no case to be less than $25.00. And in such cases, where the person so commencing business tenders to the auditor the sum of $25.00, the tender is sufficient, and he can not be charged or assessed in any amount beyond said sum of $25.00.

SOLDERS, J.

In this case the plaintiff says in his petition that on the first day of May, 1890, he commenced the sale of intoxicating liquor in this county. That on the second day of May, he tendered to the auditor a sum the proportionate amount to the remainder of the assessment year, to-wit: the sum of $25.00; that the auditor refused to accept this sum or any sum less than $50.00, and that the plaintiff has been assessed upon the tax duplicate in the sum of $50.00 with interest and penalty; that on the tenth day of May, the plaintiff made the same tender, which was refused, and he brings the tender into this court and deposits it with the clerk thereof. To this petition a demurrer is filed. The question is, what is a proportionate amount under the amendments to the Dow law? Under sec. 1, the assessment is $250.00 for the entire year. The assessment year is the year following the fourth Monday in May. This plaintiff began the first day of May, 1889; the assessment year is from the fourth Monday in May, 1889, to the fourth Monday of May, 1890. Section three says, that when such business shall be commenced in any year, after the fourth Monday of May, said assessment shall be proportionate in amount to the remainder of the assessment year, except that it shall be in no case less than $25.00. By this assessment year I take it as meant the assessment year after the fourth Monday in May, or May 27th. Said assessment shall be proportionate in amount to the remainder of the assessment year except in no case shall it be less than $25.00. In the case at bar the business was commenced the first of May, hence he should pay from the first of May, to the end of May, the time being less than one month. He should pay something less than one-twelfth of $250.00 or about $18.90 hence, his tender of $25.00, which the plaintiff had deposited with the clerk, is a sufficient sum. The demurrer is overruled. The defendants not wishing to further plead, the injunction in this case is made perpetual and the defendants are ordered to strike off the duplicate all of the assessment in excess of $25.00 on deposit with the clerk in full of the assessment.

Wilson and Sykora, for plaintiff

T. K. Dissette, for defendants.

## 392 SEWERS.

[Superior Court of Cincinnati, General Term, April, 1890.]

†CINCINNATI (CITY), FOR USE OF JONTE v. F. A. KASSELMANN ET AL.

1. If a lot is provided with local drainage at a point beyond the average depth of lots it cannot for the purpose of assessment be considered as already provided with drainage.
2. Lots are not to be deemed already provided with drainage because they reach back to a permanent water course, which will take their surface water even if the sewer empties into it. For the law will not allow fouling a water course, and because the city is violating such law is no reason for allowing citizens to do so.
3. In levying assessments for the construction of sewers, sec. 2269 Rev. Stat., which relates to improvements generally, applies, and therefore lots are to be fixed as of the average depth of lots on the improvement.

The six suits at bar, practically involving the same questions, were consolidated into one, and tried as one at special term. Further hearing and decision was reserved to general term, in consideration of the importance of the cases, and the novelty of the points made at the hearing.

The city, for the use of Jonte, undertakes to enforce an assessment for a sewer constructed in Spring Grove avenue, upon certain lots and parcels of land abutting on said avenue, and lying between Spring Grove avenue and Millcreek.

The description of said lots and lands is as follows: In the case of F. A. Kasselmann et al. the lot fronts 102.96 feet on the south side of Spring Grove ave., and extends southwardly to the center of Millcreek.

In the case of Peter Ludwig et al. the lot fronts 60.75 feet on south side of Spring Grove avenue, and extends to the center of Millcreek.

In the case of Andrew Seifert et al. the lot fronts 138.14 feet on south side of Spring Grove avenue, and extends southwardly to the north bank of Millcreek.

In the case of Robert J. McMakin one lot fronts 82½ feet on south side of Spring Grove avenue, and extends southwardly about 500 feet, to the section line, which is beyond Millcreek. Millcreek runs through the lot at about 375 feet from Spring Grove avenue.

The other lot is 17½ feet front on south side of Spring Grove avenue, by 262½ feet in depth, measuring from the center of Spring Grove avenue; it does not extend to Millcreek, but only to Knowlton's land.

In the case of S. B. Knowlton the lots in controversy are numbers 178, 179 and 180 of E. Knowlton's subdivision of Cumminsville. Together they front 64.66 feet on south side of Spring Grove avenue, and extend southwardly only 125 feet, but not to Millcreek.

In the case of Martha J. Eastman, parcel one includes lots 183 and 184, of E. Knowlton's subdivision, which together front 50 feet on south side of Spring Grove avenue, and are 125 feet, more or less, in depth.

Parcel two includes lots 187 and 188, of the same subdivision, and together front 50 feet on the south side of Spring Grove avenue, and are 125 feet, more or less, in depth.

Parcel three includes lots 190, 191, 192, 193, 194, 195, and five feet of lot 196, of the same subdivision. These lots together front 155 feet on south side Spring Grove avenue, and extend southwardly 125 feet, more or less, in depth.

† This judgment was affirmed by the Supreme Court, May 5, 1891; unreported.

None of said Eastman lots extend to Millcreek, although Mrs. Eastman owns the lands between these lots and Millcreek.

No question is raised as to the regularity of the proceedings under which the Spring Grove avenue sewer was constructed, or as to the assessment for its cost; but local drainage is set up as a defense to the assessments.

1. As to all lots in Knowlton's subdivision, which are 125 feet in depth, the certified Bill of Evidence shows that in the year 1845, there was a subdivision of lots made by E. Knowlton, which included lots 138 and 139, each of which extended from Spring Grove avenue, southwardly to Millcreek. Several years afterward, the north part of this subdivision was subdivided by Plat in Book 1, page 227, Hamilton county Records, making lots 120 feet in depth. This was a subdivision of the north part of said lots 138 and 139 leaving the south part still undivided and extending to Millcreek. In the year 1888, Ephraim Knowlton died, and by his will devised lots 178, 179, 180, 183, 184, 187 to 196, inclusive, and lots 138 and 139, to his daughter, Mrs. Eastman, calling for them by numbers, and the title to these is now in Mrs. Eastman. The other lots of the same subdivision had been sold at various times to other parties, being each time designated as lots of that subdivision, and extending southwardly 120 feet in depth.

It therefore plainly appears that these lots do not extend to Millcreek but are bounded on the south by two blocks of land known as lots 138 and 139.

2. As to the three east lots of Knowlton's subdivision, in Plat Book 1, page 227, namely lots 178, 179 and 180, Mr. Knowlton had leased the lots to his son, S. B. Knowlton, and after the lease had been made, conveyed the fee simple of the lots, subject to lease, to John Lyford, who to-day owns the fee of these three lots, subject to the lease with privilege of purchase, which is in S. B. Knowlton. Neither Lyford nor S. B. Knowlton have any interest in lot 139, which lies in the rear of these three lots.

3. As to the two McMakin lots, one of these lots is 17½ feet front by 262½ feet in depth, and does not extend to Millcreek. This lot was acquired by a separate deed from the McMakin lot adjoining on the east, and is in a different section, and McMakin does not own the land in the rear of it, extending to Millcreek.

The remaining lot of Mr. McMakin fronts 82½ feet on the avenue, and extends southwardly 500 feet, crossing Millcreek; the distance to Millcreek is about 375 feet.

As to this last mentioned lot it is contended by plaintiff's counsel, that it is not of the average depth of lots in the neighborhood, and that as the lien of the assessment could only be enforced to such average depth, the entire depth of this lot to Millcreek can not be considered in deciding whether or not it has local drainage, if Millcreek affords local drainage within the meaning of the statute; sec. 2269 Rev. Stat. is referred to as to depth of lots.

The Bill of Evidence discloses the fact that the average depth of lots in the neighborhood does not exceed 125 feet.

It is further claimed, that secs. 2379 and 2381, Rev. Stat., of the Sewerage Subdivision, provides for three modes of assessment, viz.: by the front foot, according to valuation, or in proportion to benefits; that sec. 2382 lays down the rule if the assessment is per front foot; sec. 2385, if the assessment is to be according to benefits; that in order to carry

out these modes, it is necessary to apply sec 2269, Rev. Stat., relating to improvements generally, which fixes the depths of lots; that the section has a special provision that it applies to all special assessments provided for in chapter 4, etc., which includes Sewerage Assessments, secs. 2379 and 2381 being in chapter 4, of title 12, division 7.

We see no escape from the reasoning of counsel in this regard, and are of the opinion that the average depth of lots must be considered in deciding the cases at bar; and the same argument which is urged with reference to the second of the McMakin lots, applies with equal force to the Seifert lot, which is from 280 to 375 feet in depth. It may further be said with regard to the Seifert lot, that it extends not to the middle, but only to the north bank of Millcreek.

It remains to consider the Kasselmann and Ludwig cases. While the lots in question are, in depth, somewhat in excess of the average depth of lots in the neighborhood, yet that excess is not so great as to bring them, perhaps, within the rule which governs the McMakin and Seifert lots. The Kasselmann and Seifert lots run to Millcreek and are from 167 to near 200 feet in depth.

We now come to the most important, indeed the main question involved in all the suits at bar.

It is not claimed by defendant's counsel that these lots are, any of them, provided with any artificial mode or system of local sewerage, but it is contended that under sec. 2380 of the Rev. Stat., they are so situated topographically as not to require artificial drains or sewers, inasmuch as the water which falls upon the surface of the ground finds its way by natural means, over a descending grade, into Millcreek. The Wewell case, 45 Ohio St., is cited and relied upon, to sustain defendants' claim.

The sewerage of a locality or district is required for three purposes, viz.: for the drainage of streets, for house drainage, and for surface drainage.

If nothing but surface drainage was necessary or required for the lots set forth in the cases at bar, it might be held, perhaps, under the authority of the Wewell case, that they have no need of sewers, for the reason that the several lots naturally drain themselves into a running stream.

But what is to be done with house drainage, the contents of water closets and privy vaults: Such accumulations can not be thrown into Millcreek, because it is specially prohibited by law. Section 6921, Rev. Stat., under the head of Nuisance, provides, that whoever renders unwholesome or impairs any water course, stream, or water, etc., to the injury or prejudice of others, is liable to a fine.

Section 2923 Rev. Stat., provides that whoever puts the carcass of any dead animal, etc., or the contents of any privy vault upon or into any lake, river, bay, creek, etc., or being the owner of any such place, knowningly permits the same to remain therein, to the annoyance of any citizen of this state, after notice, etc., shall be fined.

If the discharge of house drainage and privy vaults into Millcreek is prohibited by statute, can it be said that the lots in question are provided with local drainage?

It is said that the very sewer for the building of which these assessments are demanded, discharges its contents into Millcreek in the immediate vicinity of these lots. This is unfortunately true, for the time; but if the city is rendering itself liable, as for the commission of a nuisance, it seems to us, that hardly constitutes a valid excuse for all or

any citizens to violate the law. And, besides, it is a matter of public notoriety, that it has been in contemplation for years to construct a grand trunk sewer in Millcreek Valley, which shall confine and carry to the Ohio river all the waters of the creek. And this will, doubtless, be done at no distant day, when the financial condition of the city will permit; as it has been done in the Deer Creek Valley.

It is contended by defendants' counsel that Millcreek is so large a stream that the discharge of its contents of privy vaults into it does not create a nuisance.

At certain times and seasons, Millcreek is a rushing torrent, which overflows its banks, but in dry summer weather, though spread out to considerable width, its waters are shoal and meager in quantity, so that the discharge of filth into the stream must inevitably constitute a nuisance.

But aside from surface and house drainage there remains street drainage to be provided for.

When the city authorities, acting without fraud, collusion, or wantonness and recklessness which amount to fraud, establish a sewerage district, and declare the construction of sewers therein necessary for the public good, they only exercise a lawful and warranted discretion, and their judgment is conclusive. It is the duty of the city to consider, not the advantage of a single property holder merely, but the comfort, convenience and health of the entire locality. The necessity for the sewer in Spring Grove avenue was so declared. The contents of this sewer are carried eastwardly as far as Allibone street, and westwardly to the same point, this being the lowest point from both directions. Latteral sewers have been also built on Mad Anthony street, Chambers street and Dane street, running northwardly on the north side of Spring Grove avenue, and on a higher slope than that on the south side of the avenue. These latteral sewers empty their contents into the Spring Grove avenue sewer, and by way of Allibone street are discharged into Millcreek. Can it be said that the lots in question in the suits at bar, need no sewerage to protect them against the flow from the aveuue, and from the higher heights now drained by the sewers above mentioned? But for these sewers, the natural flow of house and surface drainage from the avenue, and from the property lying on the north of the avenue, would be towards and over defendants' lots, to the lower level of Millcreek.

We are of opinion that in no proper or legal sense, can these lots be regarded as having local drainage, or not needing the same.

In order to understand the Wewell case, it is necessary to examine the findings of fact and law by Judge Force, and then to note wherein the same were approved and affirmed by the Supreme Court. So examined, the decision is not at variance with our conclusion in the cases at bar.

Judge Force held that all the lots which claimed that they did not need local drainage, because the surface waters ran into the gutters, were liable for the assessment; also, that all the premises which connected with the old stone drains in East Fifth street, were liable for the assessment; but that those lots which had connection with the large Deer Creek sewer, were exempt, because the Deer Creek sewer was a part of the sewerage system of the city. And the Supreme Court affirmed this decision by Judge Force.

In the Wewell case the substance of the decision is that the Deer Creek sewer is a part of the sewerage plan, and that this Deer Creek

sewer provides parties connected with it, with local drainage. We think, as claimed, that it was an adjudication of the status of the Deer Creek sewer, and the conclusions which logically follow therefrom. We do not think that our opinion here conflicts with the Supreme Court's decision in the Wewell case.

Judgment is rendered for the plaintiff in the six suits at bar.

Drausin Wulsin, attorney for plaintiff.

Coppock & Gallagher, and J. R. McGarry, attorneys for defendants.

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## 430 STREET ASSESSMENTS.

[Superior Court of Cincinnati, General Term, 1890.]

†LARZ ANDERSON, EX'R., v. CINCINNATI (CITY).

1. The provisions of the Municipal Code of Ohio, regulating the mode of assessing private property for public improvements are not in conflict with the Fourteenth Amendment of the United States Constitution in respect to notice to property owners to be assessed, and an opportunity to be heard. Sections 2303 and 2316, Rev. Stat., provide respectively for such notice and such opportunity, without which no assessment of private property can be lawful.
2. The opening, widening or extension of a public street by a municipality is a public improvement within the meaning of sec. 2304, Rev. Stat., and a resolution declaring the necessity of such improvement, and the service of notice thereof in the manner provided in said section, and preliminary to the passage of the ordinance of appropriation, are jurisdictional requirements necessary to a valid assessment upon private property, under the municipal code revised in 1880.
3. An error in such a proceeding which is fundamental and jurisdictional, cannot be cured under curative sec. 2289, Rev. Stat.

NOYES, J.

This is an action for equitable relief, in which the plaintiffs seek to perpetually enjoin the city and county authorities from levying and collecting an assessment upon the plaintiffs' property, lying upon Undercliff avenue, in the city of Cincinnati, on account of land condemned by the city to widen Ravine street in said city.

Upon the hearing of the case in Special Term, final decree was entered as follows:

"This cause came on to be heard this day, upon the pleadings and evidence and the arguments of counsel, and was submitted to the court, on consideration whereof, the court finds that the allegations of the petition are true, and that said ordinance to condemn property for the purpose of widening Ravine street was passed without any preliminary estimate of the probable cost of said improvement; without any recommendation by the Board of Public Affairs; and without the passage of any resolution declaring the widening of Ravine street necessary.

"The court further finds that the plaintiffs were in charge of the property referred to in the petition as abutting on Undercliff avenue,

† The Supreme Court, in Caldwell v. Carthage, 49 O. S., 334, hold that the passage of a preliminary resolution declaring the necessity, is unnecessary in condemning private property for street purposes, in effect reversing that part of this opinion. For opinion in special term reversed by the judgment in general term, see *ante* 683.

before and during the enactment of the proceedings of condemnation and assessment, and though residents of said city during the whole time covered by said proceedings, that no notice of any kind was ever issued or served by or on behalf of said city upon them, or upon the heirs and owners of said property, also residents of said city during said period, notifying them or either of them of any of said proceedings to condemn or to assess, or of the city's intention so to do; and no notice of any kind was ever received by them, or either of them, or by the heirs and owners, or either of them, or on their behalf, of any of said proceedings or of any intention of the city to condemn, or to assess them as abutting owners on account of the widening of said street.

"The court further finds that the assessable frontage of the street is 11,785.31 feet; that the amount assessed in the aggregate is $2,303.84, on the entire street; and this aggregate includes interest on bonds which were not authorized to be issued in the ordinance to condemn; also includes $150.00 for advertising, which was not authorized to be assessed in said ordinance to condemn; and also includes the two per cent. of costs which the city is bound to pay.

"The court further finds that the only assessable items of cost for the entire street are the amounts awarded to the owners of the condemned property as found in the condemnation suit and the costs of said suit, to-wit: $1,656.64, less the two per cent. of cost, which the city is bound to pay, the rate of assessment upon that basis, is $0.1377568 per front foot for the entire street.

It is therefore adjudged, ordered and decreed, that the assessment of the property of the plaintiffs, for the purpose of widening, be and the same is hereby fixed, as follows:

Against N. Longworth estate, on 5,368 feet, $1,176.01.

Against Joseph Longworth estate, on 185 feet, $25.49.

The defendants are by the decree enjoined from assessing or collecting more than the sums so found due."

Plaintiffs' attorneys except to the decision in part, because it does not declare the whole assessment void, and because it does not perpetually enjoin the collection of the entire assessment.

This raises the question, pure and simple, whether or not notice of any kind at any stage of condemnation proceedings by the city for a public improvement is necessary in order to render an assessment upon property abutting on the street improved, valid and lawful.

It seems to have been the opinion of the court in special term, that the sole object of sec. 2304, Rev. Stat., in requiring a resolution of necessity to improve, is to give notice to owners who may have damage claims. But sec. 2304 seems to us to have a broader scope than this. On its face, sec. 2304 shows that it is not limited to damage claimants, inasmuch as the wording dispenses with the written notice in case of sewers, requiring only the published notice as to them. Yet, though notice is required in sewer improvements, there are no damages by reason of raising or lowering grades in laying sewers, which are the damage claims contemplated by the court below, as provided for in sec. 2304. We hold that a resolution of necessity to improve in every case is necessary and jurisdictional under sec. 2304, even in condemnation proceedings, when the intention is to assess the cost on the property holders. Welker v. Potter, 18 Ohio St., 85; Stephan v. Daniels, 27 Ohio St., 527; Starr v. Burlington, 45 Iowa, 87; Duport v. Highway Com'rs, 28 Mich., 362; Hoyt v. East Saginaw, 19 Mich., 39.

In the latter case Judge Cooley says in delivering the opinion:

"It is evident, I think, that under the charter of East Saginaw, the declaration for the necessity for the improvement is a distinct act from and precedes the order that the improvement shall be made. It is the commencement of the proceeding, and is as indispensable to give the council jurisdiction as is process, or the voluntary appearance of parties in civil actions to give jurisdiction to a court. It is the first of several steps, which, if duly and regularly taken, may result in fixing a lien upon the property of the citizen, and even in depriving him of it against his will. The step having never been taken, the whole proceeding is a nullity."

Section 2304 refers in terms to all public improvements. This section is a part of the assessment chapter in which is found sec. 2264, which is the only section in the statutes which authorizes any assessment for street construction, extention or widening, and these are therein placed on equal footing.

If the widening of a street is a public improvement, then sec. 2304 applies, and both the resolution and notice are necessary. Section 2264 authorizes assessments, but "in the manner and subject to the restrictions herein contained." Section 2264 and 2304 are in the same subdivision, the same chapter and the same title, and hence "herein" means subject to the restrictions and limitations of sec. 2304 by the terms of which a resolution of necessity to improve is necessary.

It is claimed the Krumberg case, 29 Ohio St., 69, decides that a resolution is not necessary in case of condemnations. This may be true in mere condemnations, when there is no assessment, but in all cases where there is an assessment, sec. 2264 provides certain resolutions to be observed, of which sec. 2304 is one, incidental to the assessment, and not incidental to the condemnation or appropriation of property for street purposes at public expense.

As to the power to appropriate and condemn there is no difference between the code of 1869, sec. 563, and the Rev. Stat.; but as to the assessing power there is a difference. The code of 1869 had no restriction section, as sec. 2264 has, which makes sec. 2304, the resolution section, one of the restrictions governing all assessments. And upon principle, there is no more reason why a resolution should be required in improvement cases generally, than in condemnation cases.

Section 2304 provides for notice, and sec. 2316 for a hearing. Cincinnati v. Seasongood, 46 Ohio St., 296.

But we think that, independently of any statutory requirement, no valid assessment can ever be made upon any private property without notice to the owner, and an opportunity to be heard, or to have "a day in court." The notice need not necessarily be personal and in writing; it may be by advertising, but there must be notice. To make such assessment without notice, and then to make that assessment a lien, upon which seizure and sale of the property is predicated, is taking property "without due process of law."

In Stewart v. Palmer, 74 N. Y., 183, this question was expressly decided. The court say:

"I am of opinion that the constitution sanctions no law imposing such an assessment without notice to, and a hearing, or an opportunity of a hearing, by the owner of the property to be assessed.

"The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

"The legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule, founded on the first principle of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights; and the constitutional provision that no person shall be deprived of these 'without due process of law,' has its foundation in this rule."

Cooley on Taxation, p. 265-6, says: "We should say that notice of proceedings in such cases, and an opportunity for a hearing of some description, were matters of constitutional right. It has been customary to provide for them as part of what is "due process of law" for these cases, and it is not to be assumed, that constitutional provisions, carefully framed for the protection of property, were intended, or could be construed, to sanction legislation, under which officers might secretly assess one for any amount in their discretion without giving an opportunity to contest the justice of the assessment."

In the case of Gatch v. City of DesMoines, 63 Iowa, p. 718, see p. 724. Held: "Aside from authorities which ought to be absolutely conclusive upon the question, there can be no doubt that the rule is founded upon the plainest principles of justice. The arbitrary appropriation of private property without notice, and without an opportunity for a hearing, can not be defended upon any principle of natural justice, and ought not to be tolerated and upheld by the courts."

In support of this conclusion are cited; Thomas v. Gain, 35 Mich., 155; People v. Supervisors of Saginaw, 26 Mich., 22; Paul v. Detroit, 32 Mich., 108; Power's Appeal, 29 Mich., 504; Philadelphia v. Miller, 49 Pa. St., 440; Petten v. Green, 11 Cal., 325; State v. Road Com'rs, 41 N. J., (Law) 83; County of San Matteo v. Southern Pacific R. R. Co., 13 Fed. Rep., 722, (8 Sawyer, 238); county of Santa Clara v. Southern Pacific R. R. Co., 18 Federal Reporter 385 (9 Sawyer).

In Brown v. Denver, 3 Pacific Rep., 459, the court say: "The doctrine of the authorities is, that whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding, and be offered an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property may be taken, whether administrative, judicial, summary, or otherwise, at some stage of it, and before the property is taken, or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed, must be given."

Our attention has been called to the decision of Judge Jackson, in the case of Scott v. Toledo, 36 Federal Reporter 385, where it was held that the resolution declaring necessity to improve was not sufficient, as there was no reference to any intention to assess property holders to pay the expenses of the appropriation.

The learned judge in his opinion makes no reference to sec. 2316, Rev. Stat, and we do not know whether or not it was considered.

If we are right in holding that sec. 2304, Rev. Stat., provides for notice, then at the very beginning of proceedings the property holder is advised of the intention to improve; he is put upon his guard, and by watching the succeeding steps, under sec. 2316, Rev. Stat., he may ap-

pear before the council and be heard as to the propriety of the improvement. Section 2316, Rev. Stat., provides that "at the expiration of the time limited for filing claims for damages, as provided in the last section, the council shall determine whether it will proceed with the proposed improvement or not."

While this section is in subdivision 2, under the head of "damages," yet it fixes the day of hearing and considering objections to the improvement, and for the determination whether to proceed or not. That determination is not necessarily governed by the amount of damage claims, but may be controlled by various considerations. It seems to us that one who is notified of the original resolution of necessity, and has an opportunity to appear and be heard before the improvement is finally decided upon, can hardly be said to have no notice at all.

We hold that sec. 2304, Rev. Stat., provides for notice, and sec. 2316, Rev. Stat., for opportunity to be heard.

In the cases at bar, however, the plaintiffs had no notice of any kind, at any time, by resolution of necessity to improve, of intention to assess, or otherwise, and had no knowledge of said condemnation or improvement, until nearly a year after it was all accomplished, when notified by the city comptroller to call and pay their assessments.

Our conclusion therefore is that the Ravine street assessment in the cases at bar, is wholly illegal and void *ab initio*.

1. Because there was no resolution of necessity to improve.

2. For the reason that no notice of resolution of necessity, or of assessment or otherwise was served upon plaintiffs under sec. 2304, Rev. Stat.

3. Because even if sec. 2304, Rev. Stat., does not require and provide for notice, yet the fourteenth amendment of the constitution of the United States does, and the failure to give such notice, renders the assessment invalid as to these plaintiffs.

4. The error complained of being fundamental, jurisdictional, it can not be cured under sec. 2289, Rev. Stat.

The judgment of the court in special term is reversed so far as rendered against these plaintiffs, and injunction against the city is made perpetual as to collection of said assessments against plaintiffs.

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## 433 POLICE.

[Hamilton Common Pleas, 1890.]

### LUNKENHEIMER v. HEWITT ET AL.

**The board of police commissioners have no power to employ and pay an attorney to defend the chief of police in a proceeding against him for refusing to serve warrants under a law which he claims is unconstitutional, or in a proceeding by him to test the constitutionality of the law, or to defend him in an action for an arrest.**

BUCHWALTER, J.

Hewitt was employed by the former board of Police Commissioners of Cincinnati, in 1885, as an attorney to defend chief of police Hudson in a proceeding in contempt before the police court for refusing to serve warrants for the arrest of alleged violators of the registration laws:

also in the case of Hudson v. Dogget, to test the constitutionality of the registration law; and, again, to defend Colonel Hudson in a suit for damages growing out of the arrest of one Stewart. For these services Mr. Hewitt made a charge of $400. The new board of police commissioners ordered that he be paid $200. Lunkenheimer, as a taxpayer, brought suit to enjoin payment.

The circuit court in Yaple v. Board of Police Commissioners, involving payment of attorneys' fees to Thos. McDougall and C. B. Matthews, held that the police commissioners may employ and pay out of the police fund such counsel as they select, whenever it becomes necessary to secure and preserve the fund intrusted to their control.

In the case at bar, the court holds that the above decision does not control. No fundamental question was presented as to the protection of the fund intrusted to their control. The contempt proceeding grew out of an individual burden Colonel Hudson had assumed in proceeding upon the theory that the registration laws were unconstitutional. In the damage suit it was also an individual burden he had assumed. The municipality is not liable in damages for the neglect or wrongdoing of a police officer. Moreover, it would be unreasonable to imply that funds raised by taxation for police purposes should be used in the defense of an officer prosecuted individually for neglect or misconduct.

Decree making injunction perpetual.

I. J. Miller, for plaintiff.

E. G. Hewitt, for defendant.

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## MASTER AND SERVANT. 436

[Superior Court of Cincinnati, Special Term, 1890.]

† JULIA SMITH, ADMX., v. WM. POWELL CO.

1. An employee's neglect of orders is not contributory negligence if he would have been injured even if he had obeyed. Nor will his negligence defeat a recovery if it did not contribute to the injury.

2. The risks assumed by an employee are only the ordinary risks incident to the employment, presupposing that the master has exercised ordinary care in the construction of appliances and the hiring of competent fellow workmen. All risks not necessarily inherent in the employment must be notified by the master to the employee. The employees mere knowledge of risks not inherent in the employment will not charge him with assuming such risks unless he appreciated, or ought to have done so, their nature and probable extent and consequences.

3. If the master has superior knowledge or judgment, the employee has a right to rely upon it so far as to assume that he will not be needlessly exposed to risks which ordinary precaution of the employer could prevent.

4. If the master's negligence contributed to the employee's injury it is no defense that a fellow servant's negligence also jointly contributed to it. Nor that a fellow servant might by care or caution have prevented it.

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† This case was tried three times, at the first two trials the jury disagreed. The above instructions were given at the first trial by Judge Peck, at the second trial by Judge Taft, at the third trial by Judge Noyes. It is somewhat similar in its facts to McGowan v. Mining and Smelting Works, 3 McGrary, 393.

The defendant, a corporation, was the owner of a brass foundry, and constructed furnaces in the basement of its premises. Finding that water percolated through the soil into the ash pit of the furnaces, a dry well was dug and connected with the ash pit by means of a drainpipe, to draw off the water. The evidence of the plaintiff tended to show that the foreman, in addition to his duties as such, was putting up a full day's work as a moulder; that one of the moulders, John Riley, was only an apprentice and otherwise incompetent; that Jacob Smith, the plaintiff's intestate, was a picture-frame gilder by trade, and had been employed by defendant for a very short time; that it was his duty to bail the water out of the dry well and thus keep the ash pit free from water, and to assist the moulders in taking the crucibles of molten metal out of the furnaces; that he obeyed all his instructions; that the effect of molten metal coming in contact with wet bricks or ashes is an explosion; that the furnaces and ash pit were improperly constructed and not provided with proper safeguards.

The evidence of the defendant tended to show that the foreman had plenty of time to perform all his duties; that John Riley was bright and competent; that Jacob Smith had considerable experience; that he knew the effect of molten metal coming in contact with a wet gate; that he did not bail out the dry well, and permitted water to accumulate in the ash pit; that the furnaces were properly constructed and were provided with safeguards.

John Riley, assisted by Jacob Smith, was lifting from one of the furnaces a crucible of molten metal, when it broke, dropping the metal into the ash pit. A violent explosion followed, throwing the metal over Jacob Smith, burning him to such a degree as to cause his death.

The plaintiff charged the defendant with negligence in the following particulars:

1. In placing and constructing the furnaces and ash pit.
2. In hiring John Riley.
3. In hiring an insufficient number of workmen.
4. In providing insufficient crucibles.
5. In not providing proper safeguards for the furnaces.

The case was tried before Judge Noyes, who gave the following special instructions at the request of the plaintiff:

No. 1. The jury is instructed that due care and diligence on the part of the defendant means such care and diligence as would be observed on the part of an employer of ordinary care and prudence in view of the consequences that might result from the improper placing, constructing, or maintaining the furnaces, or in hiring or keeping in its employ an incompetent fellow employee, or an insufficient number of men, or imperfect crucibles, or insufficient safeguards for the furnaces, and should be fairly and reasonably equal to and commensurate with the perils, risks, and dangers likely to be encountered, and likely to result therefrom. R. R. Co. v. McDaniels, 107 U. S., 454 (1882); Wood M. & S. Sec., sec. 345, p. 706 (2d ed.); Wood M. & S., sec. 348, p. 715; Ib. sec. 417, p. 818; Ib. sec. 418, p. 818; Ib. sec. 330, p. 687; Ib. sec. 430, p. 837; Ib. sec. 418, p. 819, note 1, (2d ed.)

No. 2. The jury is instructed that if it believes from the evidence that the defendant gave instructions to Jacob Smith, and Jacob Smith violated or did not carry out the instructions, if it appears that Jacob Smith would have been injured even if he had obeyed or carried out the instructions, said Jacob Smith cannot be charged with contributory neg-

ligence, in not obeying or carrying out such instructions. Ford v. R. R. Co., 110 Mass., 240; Reed v. R. R. Co., 33 N. W. Rep., 451; Avilla v. Nash, 117 Mass., 318; R. R. Co. v. Henderson, 37 Ohio St., 549.

No. 3. The jury is instructed that if it believes from the evidence that the negligence of the defendant, either in providing, maintaining or placing the furnaces, or in hiring or keeping in its employ an incompetent fellow employee, or keeping in use an imperfect crucible, or in hiring an insufficient number of men, or in providing safeguards, one, any, or all directly contributed to Smith's death, it is no defense that the negligence of a fellow servant jointly contributed with such negligence of the defendant to cause his death, even if such fellow servant was employed with due care by defendant. Cayzer v. Taylor, 10 Gray, (76 Mass.), 274; McMahon v. Davidson, 12 Minn., 357 (1867); Paulimer v. R. R. Co., 34 N. J. (Law), 151 (1870); Crutchfield v. R. R. Co., 76 N. C., 320 (1877); Booth v. R. R. Co., 73 N. Y., 38 (1878); Stetler v. R. R. Co., 46 Wis., 497 (1879); Cone v. R. R. Co., 81 N. Y., 206 (1880); McMahon v. Henning, 1 McCrary, 516 (1880); Boyce v. Fitzpatrick, 80 Ind., 526 (1881); R. R. Co. v. Cummings, 106 U. S., 700 (1882); R. R. Co. v. Henderson, 37 Ohio St., 549 (1882); Smith v. R. R. Co., 18 Fed. Rep., 304 (1883); Ellis v. R. R. Co., 95 N. Y., 546 (1884); Stringham v. Stewart, 100 N. Y., 516 (1885); Franklin v. R. R. Co., 34 N. W. Rep., 898 (1887); Stetler v. R. R. Co., 49 Wis., 609 (1880); Faren v. Sellers, 3 Southern Rep., 363 (1887); R. R. Co. v. Pettis, 7 S. W. Rep., 93 (1888); Sherman v. M. River L. Co., 39 N. W. Rep., 365 (1888); Griffin v R. R. Co., 19 N. E. Rep. (Mass.), 166, 167 (1889).

No. 4. The jury is instructed that if it should believe from the evidence that Jacob Smith was either slightly or grossly neligent, such slight or gross negligence will not defeat a recovery, unless the jury also believes from the evidence that such slight or gross negligence caused his death, or contributed, as a direct and proximate cause to that result. Wharton on Negligence, (2d ed.), sec. 303, 323.

No. 5. The jury is instructed that if it believes from the evidence that the defendant was negligent in any particular mentioned in the petition, and such negligence directly caused the accident, it is no defense to this action that a fellow employee of Jacob Smith might by care or caution have prevented Jacob Smith's death. And this, notwithstanding defendant may have used due diligence in the selection of such fellow employee. Cone v. R. R. Co., 81 N. Y., 206; Stringham v. Stewart, 100 N. Y., 516; see Paulimer v. R. R. Co., 34 N. J. (Law), 151.

No. 6. The jury is instructed that if it believes from the evidence that the defendant, the employer of Jacob Smith, had superior knowledge and judgment, to Jacob Smith, Jacob Smith had a right to rely on the superior knowledge and judgment of his employer so far as to assume, in the absence of direct knowledge or means of knowledge, that reasonable attention had been given by his employer to his safety, and that the defendant had taken proper precaution to guard him from danger, and that he would not be unnecessarily and needlessly exposed to risks and dangers which might have been avoided by ordinary care and precaution on the part of his employer, the defendant. Farren v. Sellars, 3 Southern Rep., 363; Boyce v. Fitzpatrick, 80 Ind., 526; Wood M. & S., sec. 366, p. 750-751 (2d ed.); Patterson v. R. R. Co., 76 Pa. St., 389 given in Wood M. & S., sec. 358, p. 736, (2d ed.)

No. 7. The jury is instructed that the fact that Jacob Smith knew that there were risks and dangers either from (1) the placing or constructing of the furnaces, (2) or the incompetency of his fellow employee John Riley, (3) or the using of defective crucibles, or (4) the hiring of an insufficient number of men, or (5) the failure to provide proper safeguards, does not charge Jacob Smith with negligence or the assumption of such risks and dangers unless said Jacob Smith also understood and appreciated, or ought in exercise of ordinary prudence to have understood and appreciated the nature and probable extent and necessary consequences of such risks and dangers. Dorsey v. R. R. Co., 42 Wis., 583; Lawless v. R. R. Co., 136 Mass., 1 (Instruction in note to case); Wuotilla v. Duluth Lumber Co., 33 N. W. Rep., 551; Faren v. Sellers, 3 Southern Rep., 363; Wood M. & S., sec. 378, p. 766, (2d ed.); Ib. sec. 387, p. 775-6; Ib. sec. 357, p. 735; Snow v. R. R. Co., 8 Allen (90 Mass.), 441.

No. 8. The jury is instructed that the rule that Jacob Smith assumed the risks of his employment means, that Jacob Smith only assumed the necessary, ordinary, inseparable and inherent risks incident to the nature of his employment and which are incident to all such employment. Wharton on Neligence, sec. 205 (2d ed.); Wood M. & S. sec., 326, p. 672, (2d ed.): Ib. sec. 326 p. 672, note (1).

This rule presupposes that the master has performed the duties of reasonable and ordinary care, diligence and vigilence which the law casts upon him, in placing, maintaining or constructing the furnaces, in providing crucibles, in hiring or keeping in its employ a competent fellow workman or sufficient number of men, or in providing proper safeguards for the furnaces, and as to the premises, appliances and machinery. Pantzar v. Tilly Foster Iron Co., 99 N. Y., 368; Stringham v. Stewart, 100 N. Y., 516; Bridges v. R. R. Co., 6 Mo. Appeals, 389; R. R Co. v. Henderson, 37 O. S., 549 at p. 552.

As to all such risks and dangers as were not necessarily ordinarily, inseparably and inheritantly incident to the nature of his employment, and which defendant knew, or ought to have known, it was the duty of defendant to have notified and warned Jacob Smith as to their nature and necessary consequences. And if said Jacob Smith did not reasonably know their nature and necessary consequences from any other source, and with ordinary prudence could not have known, and defendant, or its agents, did not notify and warn Jacob Smith as to their nature and necessary consequences, Jacob Smith cannot be charged with the assumption of such risks and dangers. Wharton on Negligence, sec. 206 (2d ed.); McGowan v. Mining & Smelting Co., 8 McCrary, 93; Paulimer v. R. R. Co., 34 N. J. (Law), 151; Dowling v. Allen, 74 Mo., 13; R. R. Co. v. Fitzpatrick, 31 O. S., 479—especially p, 487; Clark v. Holmes, 7 Hurl. & N., 937 at p, 948; R. R. Co. v. Henderson, 37 O. S., 549 at p. 552; R. R. Co. v. Watts, 64 Texas, 568; Dorsey v. R. R. Co., 42 Wis., 583; Lawless v. R. R. Co., 136 Mass., 1; Woutilla v. Duluth Lumber Co., 33 N. W. Rep., 551.

The jury returned a verdict for the plaintiff.

James & Cook, for the plaintiff.

Thornton M. Hinkle and Albert Stephan, for the defendant.

## LEGACIES—INTEREST. 438

[Muskingum Common Pleas, 1890.]

NANCY KRIGBAUM V. F. H. SOUTHARD, EXECUTOR.

1. The general rule is, that in the absence of testamentary direction, a general legacy is payable one year after the testator's death, and will bear interest thereafter until paid.
2. And the general rule is, that in the absence of testamentary direction, a bequest in trust, the income to be paid to a legatee for life, with a gift of the principal over at his death, entitles the legatee for life to interest from the testator's death.
3. But where such bequest in trust is in fulfillment of an antenuptial contract, and both the contract and the bequest by their terms contemplate the lapse of "a reasonable time," to enable the trustee to raise, out of the estate, such interest bearing fund; *Held:* The legatee for life is entitled to interest on the principal sum after one year from the testator's death, notwithstanding a diligent and faithful administration failed to produce such fund within that time.

PHILLIPS, J.

Plaintiffs claims under the will of her late husband, Henry Krigbaum. In an antenuptial contract with plaintiff, he had covenated that, within a reasonable time after his death, his executor should set apart four thousand dollars, to be invested, etc., and the proceeds thereof to be annually paid to plaintiff during her life; and she therein agreed to accept such provision in lieu of all her claims upon his estate, should she survive him. In his will he recites the said contract, and says: "I hereby ratify and confirm said contract in every respect, and I hereby authorize and direct my executor to take from the proceeds of the sale of personal property or real estate or both, the sum of four thousand dollars, as soon as the same can reasonably be done, and invest the same in stocks or bonds, or loan the same upon real estate security, and to pay over the interest or income thereof annually to my widow, Nancy M. Krigbaum, for and during her natural life. Said sum of four thousand dollars shall be held by my executor in trust for the purposes herein expressed, for and during her natural life, and after her death I will and direct that the same be divided or distributed to my then living children, share and share alike." Said testator died May 21, 1885, and plaintiff duly elected to take under his will. The defendant, as executor of said will, has paid plaintiff the said proceeds since November 21, 1887, and this action is brought to recover six per cent. on said four thousand dollars, from the death of the testator to said November 21, 1887.

The defendant answers that because of the insufficiency of the personal property, he could produce said fund only by sale of real estate; that by the said will he was authorized to sell the real estate at public or private sale, and upon a credit not to exceed three years from the death of the testator; that by the exercise of his best judgment, skill and diligence, he sold the land, and produced said fund, by the said twenty-first of November, 1887, and could not sooner do so, without detriment to the estate; and that he thereupon set apart and invested the said sum of four thousand dollars, no part of which earned or produced any interest or income prior to that date. Plaintiff demurs, and claims, *arguendo*, that she is entitled to legal interest on said sum from the date of the testator's death to the time when the fund was created and in-

vested, notwithstanding the conceded fact that the fund was produced and invested at as early a date as a diligent and faithful administration could do so. The question presented is novel in Ohio.

The general rule is, that in the absence of testamentary direction, a general legacy is to be raised and satisfied out of the testator's estate at the expiration of one year from his death, and that interest thereon will be allowed from that time until payment. State v. Crossley, 69 Ind., 203; 1 Am. Prob. Rep., 413; Welch v. Brown, 43 N. J. L., 37; 2 Am. Prob. Rep., 221; Howard v. Francis, 30 N. J. Eq., 444, 1 Am. Prob. Rep., 321; 2 Williams on Exrs., 1531.

There are some well settled exceptions to this general rule. A legacy to an infant child of the testator if intended for its support, will bear interest from the testator's death. 2 Williams on Exrs., 1532; 2 Am. Prob. Rep., 221, 232 *in notis*. A legacy to a widow in lieu of dower will, in the absence other provision for support bear interest from the husband's death. 1 Allen, 490, 106 Mass., 100; 6 Paige, 298. This exception rests upon the principle that the widow takes such legacy, not strictly as a beneficiary, but she takes it as a substitute for a legal right, the relinquishment of which is a valuable acquisition to the estate.

Where, by the terms of a will, a sum of money is to be set apart and invested, the proceeds paid to one for life, with a gift of the principal over at his death, the courts have, generally, though not with entire uniformity, held that the fund bears interest from the testator's death.

In Welsh v. Brown, *supra*, the bequest was to Miss Brown, of the interest of $2,500, to be paid to her annually, and at her death the principal to be paid to other persons. It was held that Miss Brown was entitled to interest after one year.

In Hilyard's Estate, 5 Watts & Serg., 30, the testator had directed his executor to put $10,000 out at interest, and to pay the income thereof to his sister during her life, and at her death the principal to be paid to others named. Held, that the sister was entitled to interest on the $10,000 from the testator's death.

In Eyre v. Golding, 5 Binn., 472, the testator bequeathed to his daughter the interest of four hundred pounds, to be paid to her annually during her life, and at her decease over. Held, that she was entitled to interest from the testator's death.

In Gibson v. Bott, 7 Vesey 96, the testator placed part of his property in the hands of his executors, in trust, to keep it invested, and to pay the income to his two daughters for life. It was held that they were entitled to interest thereon from the testator's death.

In Cooke v. Meeker, 36 N. Y., 15, the testator bequeathed to S. M. Meeker $3,000, in trust, to be invested and the income applied to the use of Sarah Cooke, during her life. He died in October, 1856, and in December, 1857, the said fund was paid by the executors to the trustee. It was held that the legatee was entitled to interest from the decease of the testator. Davies, C. J., after a somewhat full review of the cases, says: "The authorities would seem abundant, therefore, to sustain the doctrine that when a sum is left in trust, with a direction that the interest and income shall be applied to the use of a person, such person is entitled to the interest thereof from the date of the testator's death. Especially is this so," he adds, "when, as in the will under consideration, it appears clearly to have been the intent of the testator that the legacy should be paid by a transfer of bonds and mortgages bearing in-

terest at the time of his death." See, also, 2 Redf. on Wills, 475; 106 Pa. St., 268; 2 Eq. Cas., 456; 1 Reporter, 69.

In Kent v. Dunham, 105 Mass., 586, (where the legacy was general and drew interest after a year from the death of the testator,) these significant holdings were made.

1. The time from which interest is to be allowed on a legacy is not postponed by a testamentary provision that the legacy shall be paid "next after my lawful debts," nor by a provision that it shall be paid "as soon as the same can be conveniently done from sales and collections of my property without sacrifice."

2. Evidence offered to excuse the executors in not paying at an earlier date was properly rejected as immaterial.

3. Demand of payment is not requisite to entitle the legatee to interest.

The foregoing authorities show, I think, that a bequest in trust, to pay the income to a legatee for life, with principal over at his death, forms an exception to the general rule as to interest on legacies, and entitles the legatee for life to interest from the testator's death. Bartlett v. Slater, (Conn.), 21 Rep., 647.

The ratio of the cases seems to be, that such bequest is for the benefit of the legatee, and, in the absence of contrary provision, for his immediate benefit; that the testator is presumed to have had in mind the benefit of the legatee, rather than the benefit of the estate; and that interest follows as an accretion to the principal legacy, and is not imposed upon the estate for the neglect of the executor. A legacy carries interest, therefore, although payment be, from the condition of the estate, impracticable, and although the assets have been unproductive. 2 Williams on Ex., 1533.

This case does not fall entirely within the operation of the foregoing rule. The bequest is in fulfillment of an antenuptial contract, and both the contract and the bequest by their terms contemplate the lapse of "a reasonable time," in order to raise, out of the estate, this interest-bearing fund. This does not mean, however, such time as may, to a particular executor, seem reasonable, or such as may, in fact, be necessary. The bequest being to cut off dower, and being intended for the benefit of the legatee, must not be imperilled and impoverished by such uncertainty and indefiniteness.

These considerations entitle the plaintiff to interest, but forbid its allowance from the death of the testator. The only other rule to be drawn from analogy is, to defer interest for one year; and this rule will be applied in this case. Inasmuch as the right of plaintiff, arising from the facts stated in the petition is neither barred nor modified by the statements of the answer, the demurrer thereto, is sustained.

H. H. Greer, for plaintiff.

F. H. Southard, for defendant.

## 450 BARBERING ON SUNDAY.

[Cuyahoga Common Pleas, 1890.]

STATE OF OHIO v. CHARLES SCHULER.

1. The keeping open by a barber of his shop on Sunday, and doing the common labor of a barber therein, cannot be said, as a matter of law, to be a work of necessity, or within the purview of the Ohio Statutes.
2. Whether shaving or hair cutting on Sunday by a barber is a work of necessity or charity, within the meaning of our act prohibiting common labor on that day, depends largely upon the circumstances and facts in any given case.

HAMILTON, J.

This case comes here on petition in error from the police court of this city. The petition is filed in behalf of state, with the view of obtaining the opinion of this court upon the correctness of the holdings of the police court upon the legal questions determined by it adversely to the state and which resulted in the discharge of the defendant.

The information in substance charges "that Charles Schuler being a person over the age of fourteen years, to-wit: thirty years of age, of said city of Cleveland, on the twenty-ninth day of December, 1889, at said city and county, was unlawfully found at the Weddell House Barber Shop, at common labor, to-wit: in shaving and cutting hair of one Harry Wilson, for hire, said common labor not being a work of necessity or charity, and the said twenty-ninth day of December, 1889, being the first day of the week, commonly called Sunday, and the said Charles Schuler not being a person who conscientiously observes the seventh day of the week as the Sabbath."

A general demurrer was filed to this information and overruled, and upon hearing to the court the evidence was in substance (as disclosed in the bill of exceptions): That the defendant had long since reached the age of majority—that on Sunday, December 29, 1889, the defendant, who was one of the barbers connected with and employed in the Weddell House Barber Shop, was engaged in his employment as such, the shop being open to the general public for business, as usual, and on that occasion did cut the hair of one H. Wilson, at his request, for and at the price of 25 cents.

Wilson also testified "that the character of his business, that of keeping a cigar stand, was such that it was necessary he should have his hair frequently cut, and that to allow his hair to assume or acquire an unkept appearance would be prejudicial to his business, that it is further necessary that his hair should be cut every two weeks, and that it had been his practice for some time past to have his hair cutting done on Sunday; that his hair had been cut two weeks previous to that day; that on the day previous, Saturday, he had spoken to Schuler, anticipating that possibly there might be some trouble in having his hair cut on the Sunday following, on account of the Sunday closing ordinance, asking him (Schuler) if it would be possible for him to have his hair cut on that day, and was advised that it would be; that he was at the time in good health, and there was no necessity that he should have his hair cut on that day, except for the reason given, viz.: that it would be prejudicial to his business to present an untidy appearance."

Defendant testified that "it was necessary for him to work on Sunday, because his earnings were necessary for the support of his family;

that he received $14 per week, and that he had one-half day off during the week."

On this state of facts the police court held that the work done on that Sunday by defendant was, notwithstanding it was "common labor" in the meaning of the statute, a work of necessity, and hence did not fall within the inhibitions of the law, and "that the keeping open of barber shops and shaving and cutting hair therein on Sunday did not fall within the penalties of this statute," because of the necessity that such work be done on that day to keep mankind clean and in a decent presentable condition. It is not claimed that the necessity is absolute, for the work might be wholly omitted, or performed on some other day of the week. But so might the work of the ferryman, the landing of passengers by waterman, the travelling of emigrants, be suspended on the Sabbath, yet the statute permits all these to be done on that day. The argument is that although the statute prohibits all "common labor" on Sunday, (works of necessity or charity excepted) and by a proviso therein declares that it shall not be construed to prevent the doing of certain things on that day, and among them does not enumerate the work of the barber, yet the fact that the act does not expressly exempt the work of the barber from its operation ought not to be construed as intending to prohibit it because it fails to exempt it, for the reason that many other things which are not by name exempted in the act are nevertheless "common labor" and are conceded by every one to be necessary and not inhibited, such as cooking meals, etc., on Sunday.

The state, on the other hand, by its representative, insists that the work of the barber on Sunday is no more a necessity than that of the merchant or tailor, and that the construction of the statute by the police court in this case is unsound and unwarranted. I think it will hardly be seriously contended that there was any imminent or overwhelming necessity for a man who had his hair cut two weeks before to have it cut again on a Sunday rather than on Saturday before or the Monday following, or any other day of the week, there appearing nothing to prevent it being done on any other day as well as on Sunday; and no cause for doing it on Sunday is assigned except the rather esthetic reason that his hair should be cut at the precise interval of every fourteen days, in order that his personal appearance should not interfere with the successful prosecution of his business, to-wit, the sale of cigars.

Neither can the statement of defendant, that it was necessary for him to work at barbering on Sunday to support his family, make a case of necessity that the law can recognize. 1st. It is difficult to see how such necessity under the proof can in fact be said to exist; but if it did, it is manifest that it would be equally necessary for him to work, whatever nature of his employment, whether merchandizing, tailoring or riveting steam boilers, providing the wages were no greater in the one case than the other. But this ground of necessity, viz., to support himself and family, is not seriously claimed, and forms no basis of the decision in the police court.

The question is therefore narrowed to the single proposition, whether the work of the barber on Sunday is a necessity to the public generally, without reference to the question of exceptional cases of necessity to the individual in any given case. What then is a work of necessity in the purview of our statute?

Our statute reads as follows: Section 7033. "Whoever being over fourteen years of age, engaged in common labor on Sunday (works of

necessity and charity excepted), shall, on complaint made within ten days thereafter, be fined not more than five dollars, this section does not extend to those who conscientiously observe the seventh day of the week as the Sabbath, nor shall it be construed so as to prevent families emigrating, from travelling, waterman from landing their passengers, superintendents or keepers of toll bridges or toll gates, from attending the same, or ferry men from conveying travellers over waters."

This act was passed in 1831 in obedience to what was conceived to be an enlightened public policy, to-wit: that man and the brute creation, employed in laboring for him, should, as far as practicable, enjoy one day of rest out of seven.

I propose to briefly review the decisions of our Supreme Court upon the proper construction of this statute.

In Swisher's Lessees v. Williams' Heirs, Wright's Report, 754, two of the supreme judges on the circuit, the question being as to the validity of a deed executed on Sunday, held: "The objection that the deed was executed on Sunday will not avail you. Both parties partook equally of the sin of violating the Sabbath, and the law does not require of us to enable either party to add to the sin by breaking the faith pledged on that day and commit a fraud, out of assumed regard for the Sabbath day."

This case seems clearly to recognize that the execution of the deed on Sunday was a violation of the statute, but holds that the defendant, being in "*pari delicto*" was estopped from setting that up as a defense.

In the 15th Ohio, page 225, the Supreme Court held that "the prohibition of 'common labor' on the Sabbath in our statute embraces the business of trading, bartering, selling or buying any goods, wares or merchandise," the case being City of Cincinnati v. Jacob Rice, and was for selling goods on Sunday in violation of an ordinance of the city.

In Sellers v. Dugan, 18 Ohio, page 489, our Supreme Court, in construing the Sunday law prohibiting "common labor," held: "A sale on Sunday of four hundred bushels of corn is void, and no action for damages can be sustained for the breach of such contract." This holding was by a divided court.

In Bloom v. Richards, 2 Ohio State, page 387, the action was to compel the specific performance of a contract made on Sunday for the sale of certain lands, and the Supreme Court held that "the mere making of a contract on Sunday is not prohibited by the statute of Ohio." In the opinion given in that case, the court, among other things, said: "Numerous cases may be found in which contracts entered into upon a Sunday have been declared invalid, but it will be seen by an examination of the statutes under which the decisions were made, that they are, in every instance, much more comprehensive than the Ohio enactment. Their prohibition is not like that of the Ohio law, of common labor simply, but of any manner of worldly business, save acts of necessity or charity."

"Neither in common parlance nor in its strict philological sense, does the expression 'common labor' embrace the simple making of a bargain."

Again the court says, "It is difficult to see why the word 'business' was dropped by our legislature (from the statutes of England and other states of the union from which ours was framed) and the word 'labor' alone retained with the qualifying adjective 'common' prefixed to it, unless we suppose that by the phrase 'common labor' was meant ordinary

manual labor as contra distinguished from intellectual. The word 'labor' is usually employed to signify manual exertion of a toilsome nature. This is its ordinary popular signification, the meaning that must be given to it wherever it occurs in a statute, unless it is plainly used in a more enlarged or restricted sense. That it is not used in a more enlarged sense in our statutes is obvious. Earnest thought, long continued, may be laborious, but no one would think of punishing a man simply for thinking. To compose and write an ordinary letter of friendship is no small task to many persons, but surely it is not common labor, though it is a very common occurrence. There is a limit, then, and what better limit can be found than that furnished by the common understanding of the phrase common 'labor?' "

"It is not to be understood that because a Sunday contract may be valid, therefore business may be transacted upon that as upon other days; as, for instance, by a merchant not of the excepted class. To wait upon his customers and receive and sell his wares is the common labor of a merchant, and there is a broad distinction between pursuing this avocation and the case of a single sale out of the ordinary course of business."

This last case expressly overruled the case cited from the 18 Ohio, and also the other two *supra*, so far as they hold that a contract made on Sunday is thereby rendered invalid, and established a construction of our statute which has been recognized ever since, viz.: that the mere making of a contract on Sunday is not prohibited by the law of this state. I have cited these cases mainly to show that for a number of years this statute was held to inhibit even the making of contracts or bargains on Sunday, and that this ruling was finally overthrown because it was held that contracts were not included in the prohibition of "common labor," and hence could be lawfully made on Sunday, and not because they fall within the exceptions of "necessity or charity."

But the following cases directly pass upon what constitutes a work of necessity or charity:

In McGatrick v. Wason, 4 Ohio St., page 566, which was a case that arose in this county, the defendant Wason requested his hired man, the plaintiff, to assist him in placing certain railroad cars and trucks (which he had sold and agreed to ship from Cleveland to Toledo) on a vessel, to which it was necessary to raise them from the dock by the use of machinery and manual effort. Plaintiff consented. The work was to be done the next day, which was Sunday, November 15th, as the vessel was about to sail, and her master would not take the cars, etc., unless shipped on that day, and "it was a matter of great necessity that they should be shipped as speedily as possible, as navigation was about closing." While raising one of the trucks a part of the machinery gave way, owing to which the truck fell upon the plaintiff, breaking both his legs. To recover damages for this injury he brought suit, charging that it was owing to defendant's neglect that the machinery was insufficient.

One of the defenses relied upon was, that when the injury happened plaintiff was in the commission of an unlawful act, to-wit, doing common labor on Sunday, and so being in fault himself, could not maintain his action.

On his part, plaintiff contended that it was a work of necessity, and hence within the exceptions of the statute.

Speaking to this question, the court said: "Was the shipping of the freight under the circumstances mentioned, a work of necessity,

The defendant himself testified it was. But was it a work of necessity, within the meaning of the act?

"In answering this question, we must always keep in mind that it is no part of the object of the act to enforce the observance of a religious duty. The act does not to any extent rest upon the ground that it is immoral or irreligious to labor on the Sabbath any more than any other day. It simply prescribes a day of rest, from motives of public policy, and as a civil regulation, and as the prohibition itself is founded on principles of public policy, upon the same principles certain exceptions are made, among which are works of 'necessity' and 'charity.' In saying this I do not mean to intimate that religion prohibits works of necessity or charity on the Sabbath, but merely to show that the principles upon which our statute rests are wholly secular, and that they are none the less so because they happen to concur with the dictates of religion."

"But it is a task of much difficulty, and one that a court ought not unnecessarily to attempt, to draw a line that shall clearly distinguish works of necessity from those that are not. It is easy to say that to feed the hungry, attend the sick, rescue a fellow being from danger, and also to take care of and preserve a dumb brute, are all works of necessity and charity. The care and preservation of property, though inanimate, may also be a work of necessity. If a house should take fire on Sunday it would obviously be lawful to save it by labor. It would be equally so to save a crop from the effects of bad weather, when to omit doing so would result in its loss or material injury; or for a merchant to save his goods, a manufacturer or mechanic his wares, a seaman his vessel, or, in a word, any man his property, in danger of destruction or injury, on the Sabbath day. Nor will it do to limit the word 'necessity' to those cases of danger to life, health, or property, which are beyond human foresight or control. On the contrary, the necessity may grow out of, or be incident to, a particular trade or calling, and yet be a case of necessity within the meaning of the act. It has been held that it is lawful to keep a blast furnace at work on Sunday, because to extinguish the fires would destroy the furnace, and the necessity of keeping it going was of course foreseen when the fires were started, but the necessity, though foreseen, could not reasonably have been prevented."

And in conclusion, the court held that there was a necessity for the loading of the cars and trucks on that day, resulting from natural causes and the general course of trade and commerce. The cars were shipped on Sunday, because the vessel—the only one that could be obtained—was to sail on that day, and delay was perilous, the navigation being about to close from the severity of the weather.

In Nagle v. Brown, 37 Ohio St., 7., the court held: "It is not unlawful in this state to travel upon public highways for pleasure merely, upon the Sabbath day. In addition to common labor (works of necessity and charity only excepted) the statute makes it unlawful for any person of fourteen years or upward to be found on the first day of the week, commonly called Sunday, sporting, rioting, quarreling, hunting, fishing or shooting. Beyond these inhibitions the observance of the day is left to the conscience and religious convictions of the citizen, and in our judgment the innocent and healthful exercise of riding or driving is not within the meaning of the terms of inhibition. The only possible doubt is as to the meaning of the word 'sporting'; but whatever may be included within the meaning of that word, we do not believe that the legislature intended to inhibit the quiet, peaceful and invigorating exer-

cise of either walking or riding upon the Sabbath day, although no urgent necessity or charity may prompt the exercise."

In Hastings v. Columbus, 42 Ohio St., 585, the Supreme Court, by a majority of three to two, held that "publication of the preliminary and other ordinances with respect to a street improvement, in a newspaper, of general circulation in accordance with the terms of the statute, is a valid and legal publication, although such newspaper is published only on Sunday."

In that case the court held that the prohibition of common labor by the statute had no relation to official acts, and that it was lawful to serve process or notice on Sunday through a ministerial officer or by publication in a newspaper issued on that day, and the judge delivering the opinion said: "and the fact that the persons engaged upon the publication of that Sunday newspaper may have violated the statute against 'common labor' in preparing and circulating it, no more affects the validity of the notice than the fact that the sheriff may have committed some offense at the time he served a summons, would affect the validity of the service."

So far as I have observed, the foregoing are all the cases in which our Supreme Court have construed our statute prohibiting common labor on Sunday.

In England, and in other states of the Union, there have been decisions under like statutes, but none where the act reads exactly as ours does. Yet, so far as they undertake to define what constitutes works of "necessity and charity," they are more or less pertinent in determining what the same word means in our act. To a few of these cases I refer:

In 4 Clark & Finnelly, p. 234, the case was an appeal from the decision of the Scotch Courts to the English House of Lords, and was brought by a barber as master against his apprentice and his surety on bond of indenture for damages, because the apprentice had absented himself from his master's shop on Sunday mornings without leave, and had failed and refused to shave his master's customers on that day. The Scotch law provided that "no handy laboring or working be used on the Sunday, except the duties of 'necessity and mercy.'" The English act contained the like prohibition of work on Sunday, "works of necessity and charity only excepted."

The magistrates of Dundee gave judgment for the master, saying that "it appears very obvious that if workingmen who are not accustomed to shave were forbidden the aid of the barbers in their shops on the Sunday mornings, many decently disposed men would be prevented from frequenting places of worship, and from associating in a becoming manner with their families and friends through want of personl cleanliness, and the attempt to reduce the minor evil might lead to some more serious."

The Lord Ordinary of the Scotch courts however reversed this holding of the magistrates, and in doing so said: "This is the first instance in which a court of law has directly and positively ordained a handicraftsman without any pretense of necessity or serious urgencey to work at his handicraft on Sunday.

"The cases of apothecaries' shops being open, and of Sunday traveling, and other cases that were cited in the argument, are quite inapplicable. These exceptions have been admitted on the ground that they may frequently be requisite for the purposes of necessity and mercy, and

that it would be impracticable to investigate cases of occasional abuse. But it is ridiculous to speak of a public shaving shop as an establishment of such necessity as not to admit of interruption for a single day in the week. If the advocator had refused to shave the head of a lunatic or some one whose skull had been fractured, the cases would have been parallel."

And in this decision of the Lord Ordinary the House of Lords concurred. The Lord Chancellor saying: "If the act in question be held to come under the exception in the law of Scotland as to the observance of the Sabbath, it is impossible to say where the exceptions will stop. This is not a work of necessity, nor is it a work of mercy. It is one of mere convenience and if your lordships were to act upon this case as a precedent for other cases founded upon no more than convenience, you would, I apprehend, be laying down a rule by which this law of Scotland would be repealed."

This case was decided in 1835.

The Indiana Statute on this subject is very similar to our own, and punishes those found at "common labor" on Sunday (works of necessity and charity only excepted). Under that act of the Supreme Court of that state in 1889, (119 Ind. p. 377), held: "Whether the shaving of a customer by a barber on Sunday is a work of necessity within the meaning of the exception contained in the statute is a question of fact for the determination of the jury under proper instructions from the court." A conviction before the mayor, of a barber for shaving a customer was in that case sustained. The court said: "It is earnestly contended that the matter of shaving is a work of necessity, and hence, that no criminal prosecution will lie for peforming that work of necessity on Sunday."

"Many legal definitions of the word necessity are to be found in the authorities, but the following from the Chicago Legal News seems to give the result of all the authorities on the subject: The law contemplates that the community has a general need that all should rest on Sunday. Most of the affairs and doings on week days are less important than this need of a rest day, but some few are superior. To keep the body physically sustained by food; to provide the facilities for worship during some hours of the day, and for restful mental occupation during others, to nurse and heal the sick; to provide prompt burial of the dead, these and some other objects are superior to the need of repose. Necessary work includes all that is indispensable to be done on Sunday in order to secure attainment of whatever is more important to the community than the day of rest."

"The question in each case must be decided according to the circumstances, and is therefore more a question of fact than of law."

In 45 Arkansas, 347, the Supreme Court of the state said, "It would take judicial notice that the shaving of his customers by a barber is a worldly labor, or work done by him in his oridnary calling, and not within the exceptions of the statute."

In Common wealth v. Jacobus, 1st Pa. Leg. Gaz., 491, and in Same v. Williams, 1 Pears, 61, it was held that a barber who shaves persons in a public shop on Sunday is guilty of Sabbath breaking.

There are one or two decisions where shaving on Sunday has at least incidentally been upheld. A case in 145 Mass. p., 353, has been cited by counsel; but that case, we think, was exceptional in its facts. A shoemaker, who was a neighbor of an old man, an invalid, unable to shave himself, had for a long time shaved the old man at his request on

Sunday, and subsequently brought suit against the invalid's estate for that service, and against the objection that the work was done on Sunday, was allowed to recover compensation. I need hardly say that that case presents no similarity to the case at bar. Indeed, Massachusetts with its scores of decisions which I will not stop to enumerate, upholding with almost rigorous severity the prohibitions of labor on Sunday, can not successfully be cited as sustaining any liberality on the Sunday labor question.

I have said more that I intended, and my only apology is, my respect for the opinion of the acting police judge who decided this case below, and the great interest recently evinced in the question, especially among a large number of the barbers who keep a shop, and their employees. After a careful examination of the authorities and much thought, I can perceive no reason to declare that the facts of this case bring it within the exception of necessity or charity, within the meaning of the statute, or to hold that barbering generally on Sunday is lawful in this state.

"It was held by the court below, that a man had a right to shave himself on Sunday, and having that right he had a right to employ another to do that which he himself might lawfully do. But assuming that a man may lawfully shave himself on Sunday, it does not follow that a barber may throw open his shop to the public and barber anybody and everybody, and thus continue on Sunday the common labor of every other day. If shaving, cutting and dressing hair, etc., is common labor on a week day, we suppose it is still common labor though done on Sunday, and if barbering is a necessity on Sunday, we suppose it is equally a necessity on every other day, and so the argument would run that the work of the barber, though common labor, is always a work of necessity. It is said that the human family very early in its existence was ordained to labor; that labor is a necessity, a law of man's being. I suppose in a general sense that all labor is a necessity, and barbering just as much so and no more than a thousand other employments. I suppose it is just as necessary to have a shirt, pants and coat, and to have them cleaned when soiled as it is to have the face shaved, mustache curled, or the hair cut or dressed. And just as necessary to have stores and laundries open and in operation on Sunday to supply the former, as barber shops to provide the latter."

The truth is, as I believe, that all these things, and many others, might be, at times, a convenience on Sunday, but cannot be held to be necessities within the meaning of our statute. To hold otherwise, and allow these conveniences to annul the statute, would, in my judgment, work a practical repeal of the act, and be a case of judicial legislation.

It is also urged that society has so changed from what it was when the act was passed, that what the authors of this law might hold not to be necessary, the present generation might think was so, and hence in construing the act, we should determine what is a necessity by our standard, and not theirs. But shaving, etc., is not a modern invention, and I had supposed that in every case, if we can ascertain what the framers of a law meant by it, that meaning always controlled.

This statute means now just what it meant when it was passed in 1881, and should be enforced by the courts as it now is. Whenever the legislative power shall be of the opinion that the work of the barber, and open barber shops on Sunday, is more important than one day of rest in seven for all who do common labor, it will, doubtless, change the law,

whether prompted to do so by considerations of convenience or the changed conditions or requirements of society; but, until it does so, the courts are simply to construct it as they find it, unchanged by lapse of time or any supposed or real change in the desires or customs of society.

Again, it is said that our statute on this subject is unconstitutional, because it is class legislation, inasmuch as it exempts from its operation "those who conscientiously do observe the seventh day of the week as a day of rest," and a case cited from the Supreme Court of Texas seems to so hold. I have not examined the constitution of that state, for the reason that many of the states of the union contain the same clause in their statutes in this respect as our own, and because for nearly sixty years the present act has been recognized by all our courts as valid, and as early as the Cincinnati v. Rice, 15th Ohio, 225, our Supreme Court was asked to hold an ordinance of the city of Cincinnati unconstitutional and contrary to the policy of the state as declared by the statute, because it was supposed not to contain this very clause. But it was held that the ordinance when properly construed did exempt Jews, etc., and for that reason it was sustained. Indeed, the second syllabi of that case declares that an ordinance which did not contain such clause of exemption is invalid.

It follows that the exceptions to the holdings of the police court are sustained, and it is so ordered.

H. C. Bunts, for state.

Foran & Dawley, for defendant in error.

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455 **PLEADINGS—EVIDENCE.**

[Cuyahoga Common Pleas, April Term, 1890.]

WERTHEIMER ET AL. v. E. G. MORSE.

1. A general denial which is false in fact will be stricken off on motion as sham: such pleadings are an abuse of the privileges of the code of civil procedure.
2. The court will hear evidence in support of such a motion to determine whether the pleading was filed in good faith and is false in fact.

December 28, 1889, the plaintiffs, Wertheimer & Co., obtained judgment against E. J. Cole, in a justice court for $300 and costs. On the seventh day of January, the defendant E. G. Morse entered into an undertaking in appeal in the usual form prescribed by law. The appellant failed to file his transcript, and at the April term of the court the plaintiff appellee filed a transcript of proceedings in the court of common pleas, and April 7th judgment on appeal was entered by that court in favor of appellee, and subsequently petition was filed to recover the amount of the judgment and costs from E. G. Morse, the defendant herein, as bondsman for the judgment debtor Cole. The petition contained four allegations, (1) judgment in the justice court, (2) undertaking in appeal, (3) judgment in appeal, (4) non-payment of the judgment. As an answer to the petition, the defendant E. G. Morse filed a general denial, whereupon the plaintiff files this motion to strike the answer from the files as sham and frivolous.

In support of the motion the plaintiff took the deposition of the defendant E. G. Morse, and in answer to interrogatories the defendant

testified that he had no knowledge or information as to what allegations were in the petition; that he never at any time made any investigation as to whether the allegations of the petition were true or false; that he filed the answer to avail himself of any defense he might have. He admitted signing the bond, and admitted that he intended to make no defense to any of the allegations of the petition except the one in reference to the bond, and stated that his defense to this would be the signing of the bond without knowledge that it was a bond. The affidavit of the justice was also offered, reciting the facts of the rendering of a judgment at the date and in the amount as alleged in the petition and the execution of the bond in appeal by the defendant in the manner and form prescribed by law.

Stearns & Kelley, for the plaintiff.

1. An answer which is false in fact, filed merely for the purpose of delay and not to prevent final judgment, is a sham pleading and a misuse of the code of civil procedure. It will be stricken from the files on motion. Estee Pleadings, sec. 4472; 1 Sweeney, 525; Nash Pleadings, sec. 249; 18 Cal., 386; 29 Minn., 166; 18 N. Y., 315; 31 Minn., 267; 87 Ind., 503; 8 Abt. Pr. N. S., 343; 18 Ind., 420; 4 Oregon, 92.

2. The codes of New York, Indiana, Wisconsin, Iowa, California, Minnesota, and many other states provide for the striking out of sham pleadings, but the legislature of these states conferred no new power on the courts. The same authority to strike out sham pleadings existed at common law. I Barn and Cress, 286; Boone on Code Pleading, 252; 18 N. Y., 315.

3. This answer raises no issue. Under general denial none of the allegations of this petition can be controverted. Defenses to matters of record and of payment must be specially pleaded. An answer which raises no issue is frivolous and will be stricken off on motion. Bliss on Code Pleading, 421; 8 How. Pr., 273; Larimore v. Wells, 29 Ohio St., 13.

4. General denial for want of information and knowledge is not good pleading where allegations denied are matters of record, or written contract to which defendant is a party, or matters of which defendant might have informed himself by reasonable diligence. Boone on Code Pleading, 62; 8 Bush., 584; 46 Wis., 618; 41 Wis., 436; Bliss on Code Pleading, 326; 2 E. D. Smith Rep., 48; 12 How. Pr., 38.

SOLDERS, J.

The civil code provides that a defendant may file a general or specific denial to each material allegation of the petition controverted by the defendant, or a statement of any new matter constituting a defense. The object of the code is to simplify pleadings and to facilitate the administration of justice. The privileges of the code can only be exercised in good faith, and cannot be used merely to delay the cause. To deny matters alleged in the petition which the defendant knows to be true, or which, by the exercise of ordinary and reasonable diligence could have been known to be true, merely for the purpose of delaying final judgment and putting the plaintiff to his proof, is an abuse of the provisions of the code, and such a pleading is a sham, and an imposition on the courts. The codes of many states have a special provision for striking off on motion sham and frivolous pleadings. But this authority was also exercised at common law, and the legislature extended no new power to the courts by enacting the code provisions. Our code has no provisions

for striking off sham pleadings, and, so far as I know, the authority has not been exercised by courts in this state; but I do not regard the lack of legislative enactment as any limitation of the power of the court in this respect. The evidence here shows that the defendant filed his answer denying all the allegations of the petition, which are matters of record in judicial proceedings, without any knowledge as to whether the answer was true, and that he made no effort to ascertain whether it was false or true. All the matters denied were either matters clearly within his knowledge, or matters of record in this court, of which he could with reasonable and ordinary care, have informed himself. The hearing of evidence in support of this motion is not a trial of the issues, and in no way an abridgment of the defendant's right to have his trial by jury, but merely a determination of the question of whether there is an issue to go to the jury.

This answer is sham, and should be stricken off the files.

Motion granted.

## TITLE TO CHURCH PROPERTY—TRUSTS. 10 B. 337

[Hamilton District Court, 1883.]

† *JOHN B. MANNIX, ASSIGNEE, v. JOHN B. PURCELL ET AL.

1. By the law of Ohio it is competent to establish by parol evidence that a deed absolute on its face, is in fact a trust; but to establish the existence of said trust the evidence must be clear, certain and conclusive.

2. Where in pursuance of the decrees of the Second Plenary Council of the Roman Catholic Church held in the city of Baltimore in 1866, the title to property in this state purchased by the gifts and contributions of others for special religious and charitable purposes, is given to the bishop of the diocese, his heirs and assigns, the said bishop holds it in trust for the uses for which it was acquired, and said trust is cognizable by the courts of this state.

3. In considering the tenure by which church buildings and other property are held for ecclesiastical purposes by the Roman Catholic church in this state, the cannon law is admissible in evidence and to be entitled to the same consideration as the rules and stipulations of other voluntary associations established for benevolent and charitable purposes.

4. Where real or personal property is conveyed to one, and it is clear that those who gave and caused the property to be thus conveyed intended a trust, and that the grantee should hold the property thus conveyed in trust, the said grantee does not become the beneficial owner of said property, although the objects of said trust are too vague and uncertain to be enforced, or the trust is otherwise invalid.

5. Where the grantee in a deed purporting on its face to be a conveyance in fee simple, knows that the property therein named has been conveyed to him with the intent and expectation that he would hold it for purposes other than for his own benefit, and he accepts the deed without dissent, he holds the said property subject to said trust.

6. The several congregations worshiping in the Roman Catholic churches in this state, according to the course and discipline of said church, are not capable of taking the legal title to said churches as grantees, nor becoming the *cestui que trust* of a private trust; but where the said churches have been acquired by the contributions and gifts of individuals composing said congregations and others, and the title placed in and held by a competent trust in pursuance of the rules and regulations of said church, said churches will be protected and preserved for the uses for which they were acquired as charities.

7. A charity in a legal sense includes not only gifts for the benefit of the poor, but endowments for the advancement of learning or institutions for the encouragement of science and art, without any particular reference to the poor.

8. The courts of this state have jurisdiction over charitable trusts, independently of and not derived from the statute of 43 Elizabeth.

9. Where a Roman Catholic church in the state of Ohio, and the land on which it stands, have been bought, built and paid for by the contribution and gifts of the members of the congregation worshiping therein and others, and the title conveyed to the bishop of the diocese, his heirs, and assigns, in fee simple in compliance with the rules and regulations of the Roman Catholic church in this state requiring all property for ecclesiastical purposes to be so conveyed and held, the said bishop holds said property in trust for the uses for which it was acquired, and the same can not be sold on execution for the payment of the individual debts of the said bishop, nor does it pass by a general assignment for the benefit of his creditors to his assignee.

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* The cases pp. 817 to 828, were omitted from the places they occupy in the original volumes.

† This judgment in this case was affirmed by the supreme court; opinion 46 O S., 102. The opinion was published in a pamphlet of 86 pages, but as the Supreme Court opinion is exhaustive, is not reproduced herein.

10. But where the said bishop has made advances in buying or building, or to aid in buying or building a church, or other ecclesiastical property, which he thus holds in trust for said uses, the amount of said advances is an interest which by a proper proceeding may be subjected to the payment of his individual debt and passes by a general assignee.

11. Where a tract of land has been purchased and paid for by a Roman Catholic Bishop in this state, for the purpose of a cemetery, and the title taken to himself in fee simple, and the said tract has been platted and the larger part consecrated according to the forms of the Roman Catholic church for a cemetery, and the bishop has invited catholics to purchase burial lots therein, and has sold burial lots therin of various sizes, according to the wish of the purchaser, and given certificates of purchase reciting that the purchaser was the owner of said lot in fee simple for the purpose of sepulture only, according to the rules of the Roman Catholic church; and the said bishop has always continued in the possession and had the entire control of said cemetery fixed the price of burial lots, appointed the sexton and other officers, and received the proceeds arising from the sale of lots and burial permits to his own use, but reserved a narrow strip for the burial of those not entitled to a Catholic burial and furnished graves free for those whose friends were not able to pay, but requiring in all cases a permit from some catholic priest in the diocese before any interment could be made therein; such cemetery has not been dedicated to the public either at common law or by any statute of Ohio, and such part thereof as has not been already sold and appropriated, may be sold for the payment of his debts.

JOHNSON, J., dissents from the last.

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## 10 B. 151 INTER-MARRIAGE OF BLACKS AND WHITES.

[Toledo Police Court.]

STATE OF OHIO v. BAILEY.

Section 6987, Rev. Stat., prescribing punishment for intermarriage or illicit carnal intercourse of a person of pure white blood with one who has a visible admixture of African blood is constitutional.

LORENZ, J.

The information recited that the defendant, Bailey, having a visible admixture of African blood, did, at Toledo, O., December 20, 1883. marry Carry Haymier, a person of pure white blood.

The statute on which the charge is based, reads as follows: "Section 6987. A person of pure white blood who intermarries or has illicit carnal intercourse with any negro or person having a distinct and visible admixture of African blood, and any negro, or person having a distinct and visible admixture of African blood, who intermarries or has illicit carnal intercourse with any person of pure white blood, shall be fined not more than $100, or imprisoned not more than three months, or both."

The defense demurred to the information on the grounds that our statute was invalid and that it was obsolete. As to the first point, Judge Lorenz holds the law not to be in conflict with the 14th amendment, because this act applies to whites and negroes alike, referring to 21 O. S., 198; Barber v. Barber, 21 Howard, U. S., 532; Bishop on Mar. & Div., sec. 87, and the decisions of the U. S. Supreme Court on the Civil Rights Cases.

As to the objection that the law is obsolete, the Judge says:

"It was enacted by the General Assembly in 1861, and re-enacted in 1873, in the revision and consolidation of the general statutes of Ohio, and retained in the complete revision of 1880. We, of course, have nothing to do with the validity of the marriage: we know of no law which invalidates it. Shafer v. State, 20 Ohio, 1. We are called upon only to pass upon the offense charged in the information and fully authorized by valid laws. The demurrer will be overruled." [Editorial.

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## BAIL. 11 B. 154

[Hamilton Common Pleas.]

### STATE OF OHIO EX REL. DEVERY V. A. R. VON MARTELS.

**In a proper case a mandamus may issue to require a court of inferior jurisdiction to take bail. But where the rules of court of common pleas are that attorneys should not be received as bail bond, the court is not warranted in pointing a writ to the judge of the police court requiring him to accept an attorney as bail bond.**

ROBERTSON, J.

This is an application for a writ of mandamus to issue to the defendant, who is judge of the police court of Cincinnati, requiring him as such judge, to accept T. C. Campbell as bail bond for the relator, John Devery, who, as the petition discloses, on the fourteenth inst. was arrested and brought before the police court on the charge of robbery, and the hearing of the charge having been continued to the nineteenth inst. the accused requested the court to fix the amount of bail for his appearance before the said police court on the nineteenth inst. to answer the charge, and the court having fixed the bail to $2,000, the accused thereupon offered as surety on said bail bond T. C. Campbell, who it is conceded was, and is, the owner of real estate in Hamilton county, worth double the amount of said bond over and above all debts and liabilities, and subject to execution; but the court refused to accept said Campbell as such surety on the sole ground that he was an admitted and practicing attorney at law in Hamilton county, and remanded the accused to jail.

On notice to Judge Van Martels, that the application was about to be made, and on his appearance in court, an alternative writ issued; and a time was fixed for the hearing upon his excuse.

Mandamus is defined by the Ohio Statute to be, "a writ issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station."

It is recognized as a high prerogative writ, and generally can only issue out of the highest course, and it is only within a few years that the jurisdiction has been conferred upon courts of common pleas in Ohio.

The writ is not demandable as matter of right, but it is to be awarded in the discretion of the court; 49 Barb., 259, while, if there be a right, and no other specific remedy, the writ should not be denied. 8 Burr, 1265.

In 12 Peters, 524, it is said to be a proper remedy to compel the performance of a specific act, where the act is ministerial in its character;

and in State ex rel. v. Governor, 5 O. S., 534, the court says: "The judicial power cannot interpose and direct in regard to the performance of an official act which rests in the discretion of any officer, whether executive, legislative or judicial;" and in the same connection quotes the language of Chief Justice Marshall (1 Cranen, 170): "It is not by the officer of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus is to be determined."

What then is the nature of the case at bar, that the propriety or impropriety of granting the writ may be determined? The prisoner was entitled to bail, but it does not appear that the court refused him bail; it only refused a particular bondsman, and it nowhere appears that he could not give other bail. The judge in refusing Mr. Campbell on this bond and placing that refusal on the ground he did, namely, that he was a practicing attorney and therefore, if for no other reason, insufficient, established a rule of his court in that regard. Was not that a reasonable rule? was not its tendency to promote justice and order, and consonant with sound public policy? We think it was.

From the earliest times in the federal courts the rule has been strictly enforced that attorneys should not be received on any bond in any court proceeding.

In the court of common pleas of this county, the rule is long and well established, and while the rules in the common pleas are not binding on the police court, yet when the judge of the police court adopts a rule which already prevails in the common pleas, the right would require to be very clear to justify the common pleas in commanding the judge of the police court to abandon that rule.

In Cin. College v. LaRue, 22 O. S., 469, the court says, that the writ will not be awarded unless the existence of all the facts necessary to put the defendant in default be shown.

In order to justify the awarding of the writ in this case then, it must appear that the right clearly exists, that the act is ministerial in its character; and not discretionary, that there is no other specific remedy, and that the nature of the thing to be done is such as appeals to the discretion of the court as right and promotive of the administration of justice.

Another view of the case is, that the rule adopted by Judge Von Martels refusing attorneys as bail bond, is in the nature of an interlocutory judgment of his court. He has already determined the question, and passed judgment that the bond offered was insufficient for the reasons given; now while mandamus will lie to a subordinate court to require the court to proceed to judgment it cannot dictate the judgment to be rendered, much less can such courts be required to retrace their steps and reverse the decision already made. The People ex rel. v. The Judges of Dutchess C. P., 20 Wendell, 658, and cases there cited.

In the intermediate proceedings between the commencement and trial of a suit, the judge must exercise his discretion. If he acts oppressively, it is not ground for mandamus but for error. Ex parte Martha Bradstreet, 8 Peters N. S., 588.

Mr. Campbell is an officer of Judge Von Martel's court, and that court can control and has the right to control any of its officers with reference to any proceeding therein. The attorney is an officer in a court of justice, employed to manage the cause of his client in accordance with the forms and usages of the court in which he practices; he is

bound to be as true to the court as he is to his client, and while he practices in that court, is bound by the rules made by the court.

While in a proper case a mandamus may issue to require a court of inferior jurisdiction to take bail, even then it would not and could not dictate who that court should take as bail.

In the case at bar we are not warranted in granting the peremptory writ.

Writ refused.

Campbell, Bates & Bettman, for relator.

T. Shay, for defendant.

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## 11 B. 244 FORCIBLE ENTRY AND DETAINER.

[Franklin Common Pleas.]

J. W. Cox v. Frederick Jaeger.

**A justice of the peace has jurisdiction in forcible detainer proceedings to declare a forfeiture and oust a tenant for non-payment of rent.**

It having been, and being still, a mooted question whether a justice of the peace has the jurisdiction above mentioned in forcible detainer proceedings, and it being a fact that some justices are still from time to time ruling that they have no such jurisdiction, and from the further fact that the Supreme Court has not directly passed upon this precise question, the following case, decided not long since by Judge Bingham, in the court of common pleas of Franklin county, and the cases cited by him will be useful, which are in accordance with the weight of authority in the district courts of the state, although not in accordance with some earlier decisions in the Cincinnati superior court.

The case was originally brought before a justice of the peace to enforce a forfeiture of a lease for non-payment of rent. The justice gave judgment in javor of the plaintiff below, declaring the lease forfeited for non-payment of rent.

On petition in error to the common pleas court, it was assigned for error that the justice had no jurisdiction to declare such forfeiture, not being a court of equitable jurisdiction.—[Editorial.

Bingham, J.

The opinion of Judge Bingham relating to this point, taken in shorthand at the time, is as follows:

"As to the question of jurisdiction: on one occasion, perhaps two, a few years since, following the course of decisions in the Cincinnati superior and common pleas courts, and by a misapplication of other authorities (cited by counsel for plaintiff in error), as I am now convinced, I held that a justice of the peace had no jurisdiction in cases of forfeiture. The district court of this district has since held to the contrary in Clermont county. Besides, the clear indication by Judge White, in 26 Ohio State, is to the contrary, where the exact law is stated, viz.: courts of law enforce forfeitures and courts of equity relieve from forfeitures or the consequences thereof. The same is to be inferred from the case in 18 Ohio State, opinion by Sutliff, Judge, and in 27 Ohio State,

decided by the commission. While the plaintiff, to entitle him to recover for a forfeiture, is held to a strict compliance with the conditions, so the defendant or lessee to be excused from it must show a substantial and at law a quite exact compliance with the conditions on his part. Judgment affirmed."

The cases referred to by Judge Bingham in the above opinion in the Supreme Court are: Justice v. Lowe, 26 Ohio St., 375; McGarvey v. Puckett, 27 Ohio St., 671; Smith v. Whitbeck et al., 13 Ohio St., 471. The district court decisions referred to are the following: Neil v. Thompson, district court of Franklin county, docket S., page 284. Mary Boose v. Isaac Craig, district court of Clermont county, No. 5,877. The last named case is reported by Judge Cowan, of the common pleas court of Clermont county, as follows:

"The case came into the common pleas court before Cowan, Judge, on error from a justice of the peace, who had declared a forfeiture of a lease for non-payment of rent. Judge Cowan reversed the justice on the ground that the justice had no such jurisdiction, following the decisions in the superior court of Cincinnati. The case went to the district court of Clermont county, on the same point, where Judge Cowan was reversed, the district court holding that the justice had jurisdiction to forfeit a lease for non-payment of rent. The judges comprising the court were Judges Steele, Tarbell and Minshall."

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19 B. 821

## LIBEL.

[Auglaize Common Pleas Court.]

SETTLAGE v. KAMPF.

**Political abuse, as to print of a man that he is a political liar, traitor, official recalcitrant, nondescript, nincompoop, not of his every day character, but implying false doctrines and political unreliability, is not libel *per se*, for it does not tend to degrade or disgrace him in general esteem.**

In this case the petition alleged that the defendant did falsely, wickedly and maliciously write and publish of said plaintiff in the Democrat (having a general circulation in Auglaize county), the following false and malicious libel: "Never weary in well doing. We do and always have felt a repugnance to discussing the acts of a liar and a traitor like Settlage (meaning said H. C Settlage), plaintiff, who has not even honor, ability, or courage to fight his own battles. The truth, however, will prevail and in order to do so must be told. As long as he has two such enthusiastic defenders as the Argus and the Republican he need not complain or want for our patient consideration. And as long as they continue with their misrepresentations and innuendos to assail the Democrat for giving this official recalcitrant and political traitor his just deserts we shall hold him up to public scorn. Nothing will sooner or more certainly land him where he belongs and where his political treachery and ingratitude long ago ought to have placed him."

Whereby said plaintiff was injured in his good name and reputation to his damage $2,000.

The plaintiff for his second cause of action says that on the second day of February the defendant did falsely etc., publish the following:

A long-haired chestnut. There is strong talk here among leading Democrats of establishing a new paper in opposition to the Democrat.—Republican.

"Is that so? Well, it is about time for the annual strong talk. So far as the "leading Democrats" are concerned everybody knows who they are. But even they, traitors and kickers that they are, are not talking as "strong" as they once did. They are being gradually eliminated from the political problem. Last year's campaign convinced them that the Democrat was well able, not only to take care of itself, but, with the assistance of the loyal and true Democracy of the county, to defeat and conquer the traitors within and the enemies without the party. But, speaking of opposition, nothing would satisfy the Democrat better than to be opposed by a few more traitors, nondescripts and nincompoops like Settlage (meaning said H. C. Settlage, plaintift), the Argus and the Republican. It is just fun to drive in out of the cold that kind of cattle."

Whereby said plaintiff was injured in his good name and reputation to his damage $2,000. Therefore said plaintiff prays judgment for $4,000, his damages as aforesaid.

To this petition the plaintiff demurred on the ground that neither the facts stated in said petition, nor in the several causes of action therein set forth, constitute a cause of action against the defendant.

DAY, J.

"Two causes of action are stated. As the first cause of action it is shown that defendant printed and published an article in the Auglaize County Democrat, in which plaintiff is represented substantially as a liar, an official recalcitrant and political traitor to the injury of his good name, $2,000.

"As a second cause of action in the same manner and through the same channel plaintiff is said to be a traitor, nondescript and nincompoop to the injury of his good name, $2,000.

"The demurrer presents the question as to whether the alleged libelous publications are *per se* libelous and actionable.

"It is laid down as a rule by the Supreme Court in 37 Ohio St., volume 30, page 34, that: 'Words written or printed and published, imputing to another any act, the tendency of which is to disgrace him or deprive him of the confidence and good will of society, or lessen its esteem for him, are actionable *per se*.

"The act or conduct imputed must be such as to directly tend to disgrace and degrade him in the community in order to be *per se* actionable. It would seem that the words used to define and describe the imputed act or conduct should be entirely unequivocal in their meaning to be *per se* libelous. If the words employed are ambiguous—have more than one meaning— if the meaning is not clearly discoverable from a perusal of the text so that innuendo or colloquium is necessary to point their meaning, they would not be *per se* libelous. Such words would only become libelous when helped out and their meaning pointed and made clear by the aid of colloquium or innuendo. These are not used in the petition, and the question is, do the words charged to have been printed and published, by a fair construction of the whole text, clearly and unequivocally impute to the plaintiff acts and conduct which directly tend to disgrace and degrade him and lower him in the esteem of the community?

The objectionable words used are: "Liar," "traitor," "official recalcitrant," "nondescript" and "nincompoop."

"It may be conceded that if defendant meant that plaintiff was a liar in its worst sense—that he is a common every day, all the time, will-

ful and malicious liar, that he deliberately and designedly falsifies in material matters in all the relations of life, in his business, social, religious and political relations—the charge is *per se* a libel. But if he meant that he was unreliable in a political sense or in a particular personal matter, or that he advocated false doctrines in theology or politics, it would not be so.

"A traitor is one who violates or disregards his allegiance. It may mean a man who commits treason by betraying his country into the hands of its enemies, or one who has thrown off his allegiance to a political organization. To falsely charge the first would be a libel; while to charge the latter would, in some cases, be to exalt, glorify and popularize the person charged. Here "political traitor" is alleged in the petition.

An "official recalcitrant" is an officer who kicks backward, one who objects, shows repugnance and refuses to follow. He may be a disagreeable kind of a fellow, but not infamous.

"Nondescript," if intended to be applied to plaintiff, would indicate that he is a bewildering, indescribable kind of a person which fact would not necessarily lower him in the estimation of the public.

"Nincompoop" means a silly fellow, a blockhead. It is the opposite of a philosopher and is only one way of saying the plaintiff is not a statesman. Of course it is very annoying and inconvenient not to be a statesman, but there is nothing in it that has a tendency to disgrace and degrade.

"Upon the whole the conclusion reached is: The words employed by the defendant in his tirade against the plaintiff are very plain and vigorous English, are not at all complimentary to the plaintiff, but they are believed not to be *per se* libelous. The demurrer is therefore sustained."

F. C. & Layton, for plaintiff.

Hon. F. S. Pillars and R. L. Waters, for defendant.

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21 B. 216

## TAXATION.

[Hamilton Common Pleas.]

AMPT. v. CINCINNATI (CITY).

1. Under sec. 2690*g*, Rev. Stat., the board of tax commissioners may exercise a veto power, but they have no authority to modify, the power to levy taxes being one of the legislative functions of the common council.
2. But under sec. 2690*h*, Rev. Stat., when the common council has apportioned or distributed to the various departments the money raised by the tax levy, and that has been sent to the board of tax commissioners, they may approve, amend or reject (increase or decrease) any of the funds.

MAXWELL, J.

After the common council of Cincinnati had by ordinance apportioned and distributed the funds to be expended by the various departments for the first half of 1889, the ordinance was sent to the board of tax commissioners for their action. They increased the amount to be expended in three of the departments. The plaintiff brought this suit to test the validity of the action of the tax commissioners. The court held that under the act establishing the board of tax commissioners, 80 O. L., 124 by sec. 2690*g*, Rev. Stat., after common council has provided for the tax levy to be made and the same has been sent to the tax com-

missioners for their approval, may approve or reject the same or any separable part thereof—*i. e.*, the tax commission may exercise a veto power—but they have no power to modify the power to levy taxes being one of the legislative functions of the common council. But that under section 1, 2690*k*, Rev. Stat., when common council has apportioned or distributed to the various departments the money raised by the tax levy, and that has been sent to the board of tax commissioners, they may—in the words of the statute—approve, amend or reject, as they shall determine. In other words, they may approve, increase or decrease any of the funds, as they see fit. Hence, their action in this case was proper.

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## MUNICIPAL EXPENDITURES. 21 B. 216

[Hamilton Common Pleas.]

AMPT V. CINCINNATI (CITY).

**Common council has no authority to make expenditures from any except the contingent fund unless by concurrent action with the tax commissioners. Sec. 2690*k*, Rev. Stat.**

Where common council had by ordinance, without referring the matter to the tax commissioners, authorized the expenditure of $2,000 for repairing the wharf, the plaintiff sought to enjoin this expenditure. The court held that this action of common council was illegal under section 2690*k*, Rev. Stat., which provides that no expenditure shall be made unless by the concurrent action of the common council and the tax commissioners, except from the contingent fund, and the expenditure in this case was not from the contingent fund. The expenditure must, therefore, be enjoined.

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## ESTABLISHING GRADE OF CURB. 21 B. 216

[Hamilton Common Pleas Court.]

LIPPLEMAN V. CINCINNATI (CITY).

**Establishing a grade is one of the legislative acts of the common council and cannot be delegated to an engineer.**

MAXWELL, J.

The common council of Cincinnati had passed an ordinance fixing the grade of the north curb of Atkinson street, extending east and west between Clifton avenue and Moerlein avenue, at 1.64 in 100, and had provided that the south curb should be as near like the north curb as practicable. The city engineer established the south curb upon a different grade from the north curb, and the plaintiff complained that in consequence of the action of the engineer a heavy fill would be made against a brick house which he had built fronting on Clifton avenue, with the side extending back ninety feet along the south side of Atkinson street. The court held that the establishing of a grade was one of the legislative acts of common council and could not be delegated to an engineer. By the state law and by a general ordinance of the city, passed May 21, 1869 (Merrill's Ordinances, 480), it is necessary, where the grade is the same on both curbs, that the ordinance shall so declare, and where one curb differs from the other, a grade must be established for by each curb, both in the same ordinance. So in this case the south curb must either

be established by the engineer on the same grade as the north curb, or council must pass a new ordinance definitely fixing the grade of each curb.

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## 21 B. 244 ORDNANCES FOR STREET MPROVEMENTS.

[Hamilton Common Pleas, 1889.]

†RADEMACHER v. CINCINNATI (CITY).

1. In appropriating land for a street, a preliminary resolution notifying assessment payers is not necessary, as in making the street.
2. If a corner of a lot is cut of by appropriation to widen the street at a bend, the cost cannot be assessed lengthwise.

MAXWELL, J.

After the city had condemned a strip of ground ten feet in width, for the purpose of widening Burns street, and had assessed the cost of the land, and the cost of the condemnation proceeding upon the abutting property, the plaintiff applied for an injunction to restrain the collection of the assessment upon three grounds. First, because a portion of his property was being assessed "lengthwise," second, because 2 per cent. of the amount of the assessment had not not been deducted and charged to the city, and third, because the proceedings in reference to the assessment were irregular. The court held that the first point was well taken, as decided by the Supreme Court in the recent case of Seasongood v. Cincinnati; that the second point was well taken under sections 2273 and 2275 Rev. Stat.; but the third point was not well taken, as under sec. 2263, Rev. Stat., a distinction was made between an "appropriation or acquisition" and an "improvement," and because it had been decided in Krumberg v. Cincinnati, 29 Ohio St., 69, that in assessing the cost and expense of appropriating land it was not necessary to take the same steps, provided in sec. 2304 *et seq.*, Rev. Stat., as is required in improving or making a street.

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## 21 B. 337 HUSBAND AND WIFE.

[Hamilton Common Pleas Court.]

STATE OF OHIO v. PAYTON.

Under sec. 7284, Rev. Stat., husband or wife may testify in favor of each other in criminal cases; hence the wife may testify though no third person was present. Construction of the act of 1889. 86 O. L., 161.

BUCHWALTER, J.

The wife of the defendant was introduced as a witness to testify that Payton was in bed with her during the entire night on which the burglarly is alleged to have taken place; and, after a lengthy argument on the construction to be put on the statute, the court decided to allow Mrs. Payton to testify.

Heretofore neither husband nor wife could testify in criminal cases for or against the other, except in cases of personal violence of one to

† This judgment was affirmed by the Supreme Court April 26, 1892, on authority of Caldwell v. Carthage, 49 O. S., 354. No further report.

the other, and then one might take the stand against the other. The new law provides that the husband or wife may testify in favor of the other in a criminal case, provided that neither shall testify to any act done or word said by the other unless it was done in the known presence or hearing of a third person competent to testify, and provided that the mere presence or whereabouts of either shall not be construed to be an act under this section.

The court held that the first clause of the act opens the door for testimony of either husband or wife generally; that the second clause is a restriction on the first, and that the last is an exception to the restriction. Under this construction a husband or wife can testify to the mere whereabouts or presence of the other, even though no one else were present. Assistant prosecuting Attorney Littleford contended in his argument that it was to prevent this very thing the last clause of the statute was added. The prisoner was acquitted.

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## 21 B. 864 PROSECUTING ATTORNEYS.

[Hamilton Common Pleas.]

### STATE EX REL SCHWARTZ V. ZUMSTEIN ET AL.

**The power of the prosecuting attorney to bring suits is limited to that conferred by secs. 263, 532, 746, 1133, 1273, 1277, 4163, 4639, 6762, 6059 and 7183, Rev. Stat., none of which authorize him to bring an action to recover money illegally paid to an ex-member and a present member of the board of control for alleged expenses.**

MAXWELL, J.

In action brought in the court of common pleas of Hamilton county, in the name of the state of Ohio by the prosecuting attorney of the county, against the individuals composing the board of county commissioners and the individuals composing the board of control—except two who had opposed the action of the other members of the board—and the county auditor, to recover the sums of $500 and $400, paid respectively to an ex-member and a present member of the board of control for alleged expenses, on the ground that the payment of such sums was illegal and without authority, the court held, that even if the money was illegally paid as claimed, the prosecuting attorney had no power to maintain an action to recover, his power to bring suits being limited by statute, and found in secs. 263, 532, 746, 1133, 1278, 1277, 4163, 4639, 6762, 6059 and 7183, Rev. Stats., none of which give any power to bring such an action as the present one.

# INDEX.

ASSESSMENTS—Continued.

7. Nor is the amount of the assessment in any way affected by any sum stated in the notice given under sec. 2304 of the passage of the preliminary resolution for an improvement. Ib.

8. Failure to declare specifically in the improvement ordinance the damages which may be found by the jury, does not estop the city from including such damages in the amount of expenses so to be assessed. Ib.

9. Property owners petitioning for an improvement, will be held to have participated in the improvement, so as to estop them from denying the validity of the assessment ordinance duly passed in accordance with the terms of such petition. Ib.

10. Where a contractor agrees to take pay in assessments and not look to the city, the latter must give a legal assessment. Kirschner v. Cincinnati. 288

11. A municipal corporation in widening a street need not wait until the street is graded and improved and assess for the entire cost, but may assess separately for the cost of appropriating the ground before the street is finished. Westwood v. Dater. 763

12. It is not unconstitutional to assess back on an abutter's remaining land the cost of appropriating part of it. Ib.

13. The assessment statutes are not contrary to U. S. Const., art. 14, because sec. 2304, R. S., provides for notice to the property holder, and sec. 2316 provides for a hearing. Ib.

14. In case of two assessments on the same street, if it appears that both were intended to make one and the same improvement under sec. 2284, they may be treated as one proceeding for the purpose of applying the one-fourth limit of assessment under sec. 2271. Strauss v. Cincinnati. 783

15. Improvements having been ordered by council, it is to be presumed that they are beneficial. Ib.

16. A court will not interfere with the assessment where the proceedings are regular, except for fraud, malice, gross mistake or abuse of corporate power. Ib.

17. Where an improvement results in damage to an abutting owner, his remedy is by an application under sec. 2315. A claim for damages can not be offset against an assessment. Ib.

18. The law is settled in Ohio that where a part of one's property is taken for a street by condemnation proceedings the remainder is subject to assessment under the restrictions governing assessments. Ib.

19. Where, under sec. 2315, a return under oath has been filed in the city clerk's office showing that an abutting owner has been personally served with a copy of the resolution, the return is prima facie evidence of such service, and the burden of proof is upon the abutter who denies the service. Ib.

20. Where the council passed an ordinance condemning property to widen a street, providing that the court costs and condemnation money should be paid by an assessment upon abutting lot owners, to be collected in one installment; it was beyond the power of the board of public affairs to provide in the assessing ordinance, that the assessment should be paid in ten installments. Longworth v. Cincinnati. 683

21. Section 2304, has no application to appropriation of private property for public improvements, and refers only to improvements by construction. Ib.

22. It is not essential to the validity of an appropriating ordinance and assessment founded thereon, that the board of public affairs should have recommended the same or transmitted a preliminary estimate of the expense of such appropriation. Ib.

23. Our assessment laws having been repeatedly upheld as valid by our Supreme Court, an inferior state court should decline to consider the question whether they violate the U. S. constitution. Ib.

24. Plaintiffs' assignors tendered a bond to the city conditioned that he would pay cost and expense of appropriating land for a street, the city to levy an assessment upon abutting lot owners, to pay for appropriation and certify the same to plaintiffs' assignors. The bond was approved by board of public works pending passage of ordinance, was read in council, but not in board of aldermen. The ordinance to condemn passed all boards, and was approved. Plaintiffs' assignors paid condemnation money into city treasury and the city used it to open the street. No assessment was yet